

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

2023:PHHC:083313-DB

CRWP-820-2020

RESERVED ON: FEBRUARY 1, 2023

PRONOUNCED ON: MAY 29, 2023

RICHA GUPTA

.....PETITIONER

VERSUS

UNION OF INDIA AND OTHERS

.....RESPONDENTS

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH.
HON'BLE MR. JUSTICE SANDEEP MOUDGIL.**

Present: Petitioner in person.

Mr. Satya Pal Jain, Additional Solicitor General of India with
Mr. Dheeraj Jain, Senior Panel Counsel and
Mr. Arvind Seth, Mr. Sahil Garg and Ms. Shivani Khareedi,
Advocates, for respondent No.1-UOI.

Mr. Chetan Mittal, Senior Advocate with
Mr. Kunal Mulwani, Mr. Chanderhas Yadav and
Ms. Shifali Goyal, Advocates
for respondent No.7.

Mr. Arjun Sheoran, Deputy Advocate General, Punjab.

SANDEEP MOUDGIL, J

(1) The jurisdiction of this Court under Article 226 of the Constitution of India was invoked by the petitioner for the issuance of a writ in the nature of habeas corpus for the release of her son, Advait Gupta, who was stated to be in illegal and unlawful custody of respondents No.5 to 9, specifically respondent No.7-Minakshi Gupta, who claims to have legally adopted the child, with the consent of her husband, Sai Kiran (who is not party to the *lis*).

(2) Before advertng to the legal question involved in the instant

petition, facts in brief as have been unfolded before this Court are that the marriage of the petitioner was solemnized with Adesh Gupta on 27.05.2017 and out of the said wedlock, one son, namely, Advait Gupta was born on 01.06.2019. The husband of the petitioner unfortunately, expired on 22.07.2019 and thereafter, as per averments made in the petition, having been treated with disrespect and meted out with harassment, was forced to leave the matrimonial home, by respondents No.5 & 6 (petitioner's in-laws), leaving behind her son namely Advait Gupta. At that time, the petitioner was introduced, by her in-laws, with respondents No. 8 and 9 (Ashwani Jain and Manisha Gupta), who are sister and brother of respondent No.7-Minakshi Gupta along-with respondent No.10-Jenender Gupta, who is a common friend/relative of respondent No.7 and respondents No.5 and 6.

(3) It is the assertion of the petitioner that she was given assurance by her in-laws that her son would be legally adopted and that she would be called to meet the adoptive parents and only upon her being satisfied, adoption will take place. It is the allegation of the petitioner that just few days back prior to the filing of present petition, she came to know that illegal adoption is being executed and she was not called for the same and as such, she is not aware about the whereabouts of her son. Even her in-laws refused to tell her about her son, when she rang them up. It came to her knowledge that adoption had already taken place and the child had been given to respondent No.7, who would take the child out of India by the last week of January, 2020. The petitioner immediately moved representations to the Social Welfare Child & Women Development Department, Chandigarh as well as Senior Superintendent of Police, Chandigarh on 18.12.2019 (Annexure P-2 collectively). Respondents No.5 and 6 were summoned by the Station House

Officer, Police Station Sector 34, Chandigarh and the petitioner was also called wherein a statement was made by respondents No.5 and 6 that they will hand over the child to the petitioner on 13.01.2020. However, the child was not handed over to her, nor any action was taken by the police authorities, thereafter, it was in this eventuality a criminal writ petition came to be filed before learned Single Judge seeking issuance of a writ in the nature of Habeas Corpus praying for appointment of Warrant Officer to raid the premises of respondents No.5 to 9 or any other place pointed out by the petitioner to secure the release of the detenu namely Advait Gupta alleging the detenu child to be in illegal custody of respondents No.5 to 9.

(4) The learned Single Judge after having reached the conclusion by returning a finding that the adoption deed dated 03.12.2019 was more than just prima-facie a highly suspicious document as regards its authenticity and intention to give child in adoption being at a time when the petitioner cannot be said to be in a stable mental and emotional state, due to the recent death of her husband, custody of the child was directed to be returned immediately to the petitioner by respondent No.7 and disagreeing with the judgment relied upon by the respondents in CWP No. 10555 of 2019 titled as **“Jasmine Kaur vs. Union of India”** decided on 28.07.2020 held that it is not mandatory to invoke the provisions of Juvenile Justice Act, 2015 and referred the matter for adjudication to a larger Bench on the following question:-

“As to whether in terms of sub sections (6), (34), (37) and (38) of Section 2, read with what is contained in Sections 60 and 68 and other provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, as also the Adoption Regulations framed under the provisions of Sections 68 (c) and 2 (3) of that Act, would respondent no.7 require a certificate from the authority

constituted under Section 68 of the Act, before adopting a child from India, with respondent no.7 being a non-resident Indian as defined in Section 2(38) of the said Act?”

(5) Before referring the issue to a larger Bench, learned Single Judge of this Court also recorded in the facts of the instant case Juvenile Justice Act of 2015 will apply and not the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as 'HAMA'). Before parting with the afore-said finding the learned Single Judge reasoned it with the observation that obviously the provisions of Act of 2015 are to ensure that the child is well protected and looked after even subsequent to his exit from India to a foreign country, because prior to Central Adoption Resource Authority (hereinafter referred to as 'CARA') granting any certificate for care and adoption by a person living outside India (for more than one year), necessarily has to obtain a study report, even from the authority constituted for such purpose in the country, to which the child is to be taken, i.e. the 'authorised foreign adoption agency' defined in sub-section 6 of Section 2 of the Act of 2015. Accordingly, it was held therein, that all such adoptions must be approved by the authority constituted under Section 68 of the said Act i.e. CARA, after which only, an adoption even by Indian parents living outside India for more than one year, can be legally and validly made.

(6) Minakshi Gupta-respondent No.7 assailed the afore-said order passed by learned Single Judge in Special Leave to Appeal (Crl.) No(s). 5294/2020, wherein, considering the issue, following interim order was passed on 05.11.2020:-

“Applications for exemption from filing c/c of the impugned judgment and official translation are allowed.

We have heard learned senior counsel for the petitioner and

perused the impugned order. The purport of the impugned order, it is apparent from the concluding para 112, is that the judgment of the learned Single Judge is contra to a judgment of a co-ordinate Bench of that Court and thus, the learned Judge has deemed it appropriate to refer the matter to a Larger Bench on the interplay of the Acts involved [The Central Adoption Resource Authority (CARA) and The Juvenile Justice (Care and Protection of Children) Act, 2015]. To this extent, there can be no grievance.

The question whether as to where and how the validity of the adoption deed will be determined would be an aspect to be addressed by the Larger Bench.

However, while doing so the learned Single Judge has deemed it appropriate in a Habeas Corpus petition to pass orders qua the custody of the child alleged to have been given in adoption who is stated to be at presently in custody of the petitioner. Prima facie, we are of the view that as to what should be the interim arrangement is best to be arrived at by the Bench to which this matter would be referred rather than by the impugned order.

We thus, issue notice limited to the aforesaid extent returnable in three weeks.

In the meantime, the direction to hand over the custody of the child is stayed.”

(7) A reading of the afore-said interim order makes it crystal clear that the notice was issued to the limited extent that the question whether as to where and how the validity of the adoption deed will be determined would be an aspect to be addressed by the Larger Bench. However, the direction of handing over the custody of the minor child to the petitioner was stayed by the Apex Court.

(8) Subsequently, an interim application No.124615 of 2020 came to be filed by the appellant before the Apex Court once the leave was granted,

with the prayer that she may be allowed to take the minor child along-with her

to US for the reasons mentioned therein, which was objected to, by the respondent therein, who is the petitioner before this Court. However, the Apex Court finally permitted the appellant-Minakshi Gupta, who is respondent No.7 herein, in the instant petition, to take the child to US subject to furnishing an undertaking to bring the child to India before 31.03.2021 along-with an unconditional bank guarantee in the name of Registrar, Supreme Court of India for a sum of Rs.1 Crore, in case there is any breach of this condition. Finally the said application was allowed in the afore-said terms leaving it open for the Larger Bench, to whom the matter was referred to deal with the arrangements in respect of minor child after 31.03.2021 and also disposed of the main appeal vide order of even date (Annexure R-7/5). The said order reads as under:-

“ We have heard learned counsel for parties. The aspect which persuaded us to issue notice was that despite the matter being referred to a Larger Bench as per the concluding paragraph 112, in view of a contra view taken by another Bench earlier, the learned Single Judge in a Habeas Corpus petition had passed an order qua the custody of the child alleged to have been given in adoption who was and is presently in custody of the appellant. We had passed an interim order staying the handing over of the custody of the child while observing that prima facie we were of the view that what should be the interim arrangement is best arrived at by the Bench to which the matter will be referred being the larger Bench rather than by the impugned order.

We are of the view that the appeal can still be disposed of with this direction as the final direction so that the custody arrangements are dealt with by the Larger Bench.

Ordered accordingly.

The observations in the impugned order on merits while referring to the matter to a Larger Bench are consequently set aside. The appeal accordingly stands disposed of.

IA No.124615/2020

The only other aspect which we have to consider arises from the application No.124615/2020 filed for appropriate directions.

Issue notice which is accepted by learned counsel for the respondents.

We have heard learned counsel for parties.

The submission of learned counsel for the appellant is that the appellant has remained in India for the benefit of the child though her husband has been residing in the US during this period of time. Both the appellant and her husband have been residents of US since 2014 and the appellant's husband is on a H1B work visa while the appellant is on a H4 visa (dependent visa) sponsored by the employer company of the appellant's husband. The visa is stated to have initially expired on 30.09.2016 and was renewed till July, 2019 and thereafter till 04.03.2021. The appellant had come to India on 22.11.2019 and was supposed to go back to the US in December, 2019 but in view of the present proceedings, had stayed back. The process for extension of visa is stated to require an initiation at least 3 to 4 months prior to its expiry and the details for the same have been set out in para 5 of the application. It has been averred that the company where the appellant's husband is working has already sent various reminders to the appellant's husband for initiating the process for extension of visa and thus, to avoid repatriation of the appellant and her husband, their 3 presence in US is necessary for extension of visa. The flight is stated to be booked now for 16.12.2020.

The closeness of the child to the appellant has been mentioned and the child is of a young age less than a year and a half now and has been staying with the appellant. The appellant wants to take the child to the US for 2-3 months with an undertaking that she will return back to India with the minor child immediately after receipt of the visa extension papers.

Learned counsel for the respondent opposed the request and specially expresses a concern about the possibility of the

appellant and the child not returning to India.

On our query as to what is the security which the appellant is going to furnish, learned senior counsel for the appellant, on instructions, states that the appellant undertakes to return back on or before the 31st March, 2021 to India and to secure the presence of the appellant and the child both in India by that date and is willing to give a bank guarantee in the name of the Registrar of this Court for a sum of Rs.1 crore.

On a consideration of the matter and looking to the peculiar facts of the case, we are inclined to permit the appellant to take the child to the US subject to furnishing an undertaking before this Court to return with the child to India on or before 31st March, 2021.

In addition, the appellant will furnish an unconditional bank guarantee in the name of the Registrar of this Court for a sum of Rs.1 crore, in case there is any breach of this condition.

Subject to the aforesaid, we allow the application including for the appellant to carry Advait Gupta with her. As to what should be the further arrangements in respect of this child form the subject matter of our main order and thus, after 31st March, 2021 those aspects will be dealt with by the Larger Bench to whom the matter has been referred in terms of the impugned order and in terms of the orders passed by us today.

The application also accordingly stands disposed of.”

(9) The hearing in the instant reference proceeded on various dates and lastly on 01.02.2023, when the order in the case was kept reserved.

(10) The primary and utmost reason for the learned Single Judge to make a reference for a Larger Bench arose in this case due to a judgment of another single Bench in Jasmine Kaur's case (supra) wherein, it was held that Act of 2015 will not apply along-with its Adoption Regulation, 2017 to such children who are given in adoption directly by the biological parents under

HAMA, 1956.

(11) Ms. Richa Gupta-petitioner, who is present in person has contended that she is the biological mother of the alleged detenu namely Advait Gupta who was born on 01.06.2019. The alleged detenu is stated to be in illegally custody of respondents No. 5 to 9, specifically respondent No.7- Minakshi Gupta, who claims to have illegally adopted the child, with the consent of her husband, Sai Karan (who is not the party to the *lis*).

(12) She further contends that she had been assured that her son would be legally adopted and that she would be called to meet the adoptive parents and only upon her being satisfied, would the adoption take place. It is the contention of the petitioner that she came to know that an illegal adoption was being executed and in fact she was never called for the same and when she rung her in-laws they refused to disclose her the whereabouts of her son, apart from the fact that they had already given him in adoption to respondent No.7, who would be taking the child out of India by the last week of January, 2020. Thereafter, she made representations to the Department of Social Welfare, Child & Women's Development, Union Territory, Chandigarh, as also to the Senior Superintendent of Police, Chandigarh and respondents No.5 and 6 were summoned by the police, where they made a statement that the child would be handed over to the petitioner on 13.01.2020. However, the child was not handed over to her, nor any action was taken by the police authorities.

(13) It is submitted by the petitioner that the child was born to her on 31.05.2019 at Chandigarh and the respondents have managed to get the false date of birth certificate of the child from Rohini Zone, Zone of North Delhi Municipal Corporation, wherein, the particulars of the child is mentioned as Aariket Madhavan, Place of birth- A-2/145, Sec-18, Rohini, Delhi.

Contention of respondent No.1-Union of India

(14) Mr. Satya Pal Jain, Additional Solicitor General of India, at the outset, set out the statutory provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. He submitted that the JJ Act came into force on 15-1-2016. Therefore, from 15-1-2016 onwards, all inter-country adoptions, regardless of the religion/guardianship Act, etc., are to be done only as per the provisions of the JJ Act, 2015. The other Acts governing Adoption (i.e. HAMA, Guardians & Wards Act) would not be applicable for any inter-country adoption, even if the parties fulfill the other conditions under the said Acts. Therefore, even if an alleged inter-country adoption otherwise, fulfills all the requirements laid down under HAMA or Guardians & Wards Act and thus is claimed to be a 'valid' adoption under HAMA or GWA Act, it would still be no adoption in the eyes of law as after 15-01-2016, all inter-country adoptions would be possible only under the JJ Act & Regulations. The said alleged adoption would need to be verified/ratified by CARA under process laid down in the JJ Act/Regulations, for it to become a valid adoption under the Law.

(15) It is further urged that the JJ Act/Regulations provide for background checks, home study, etc. of both biological and adoptive parents, etc. to be done by the Central Agencies of both countries to ensure that an independent assessment is made whether the proposed adoption would be safe for the child and in the interest of the child. Therefore, the verification/ratification of the proposed/alleged adoption under the JJ Act/Regulations is of utmost importance for the interest of the child and is a must before giving it a legal validity. Thus, any inter-country adoption, even though fulfilling the requirements of HAMA & GWA, would not and should

not have legal force unless verified under the JJ Act & Regulations. Thus, in view of Section 56(4) of the JJ Act, all intercountry adoptions can be done only under the JJ Act and that too without the verification/ratification under the JJ Act/Regulations, any intercountry adoption deed under any other act will not have any legal sanction.

(16) Mr. Jain further contended that since the alleged Adoption Deed was executed on 3-12-2019, i.e. after JJ Act, 2015 came into force on 15-1-2016, therefore, in view of the Section 56(4) of the JJ Act, this intercountry adoption could be done only under the provisions of the JJ Act, 2015 and no other Act. Hence, the alleged adoption in the present case is in itself an invalid adoption in the eyes of law, as the same is said to have admittedly not done under the JJ Act.

(17) Learned ASG further asserted that in addition to the provisions of the domestic laws for all inter-country adoptions, the Central Adoption and Resource Authority (authority constituted under the JJ Act, 2015), which is an authority designated to deal with inter-country adoptions, has to ensure compliance of the specific provisions the Hague Convention as well, as India is a signatory to the said International Convention which is to ensure that the prospective adoptive parents of the child can ensure the child's residence in a proper and authorised manner in the receiving State and to ensure that the parents are in the best possible position to look after the needs of the child. Reliance has been placed on Delhi High Court judgment in WP(C) 279 of 2019 'R.K. & Anr. vs. Central Adoption Resource Authority & Ors.' decided on 31.08.2021 to submit that the JJ Act 2015 does not apply in respect of HAMA adoptions. The Delhi High Court also observed that there is a need to

vest the said jurisdiction with CARA itself and that whenever any inter-country adoption takes place under HAMA and a NOC is required for any purpose, including for issuance of a passport or VISA, upon an application being filed before CARA, a special Committee would be appointed to verify the following particulars:-

- a. The background and antecedents of the biological parents or Family background report and source verification of the child (or CWC certificate).*
- b. Verify the consent of the biological parents and that of the child, if needed based upon the age and maturity, for the adoption;*
- c. Details of any religious ceremony conducted;*
- d. Details of the adoption deed and its genuinity/validity;*
- e. Court order, if any, recognizing the adoption;*
- f. Home Study Report of the prospective adoptive parents with support documents;*
- g. Permission letter from receiving country or permission letter from Embassy of the receiving country in case of OCI/Foreigner.*

(18) It is averred that pursuant to the above judgment, the Government of India vide Notification dated 17-9-2021 notified the Adoption (Amendment) Regulations) 2021, amending the Adoption Regulations, 2017 issued under the JJ Act and inserted Chapter IV-A and Regulation 22A thereof, provides that Chapter IV-A covers all adoption cases under the Hindu Adoptions and Maintenance Act, 1956 by prospective adoptive parents or adoptive parents residing outside the country and that CARA shall register applications for inter-country adoptions concluded under the HAMA.

Likewise, Regulation 22B which covers all the cases of adoption under

HAMA done before the commencement of the 21 Amendment and provides for procedure in the case of registered adoption deed. The same reads as under:-

22B. Procedure in the case of registered adoption deed.- (1) In the cases where the adoption deed has already been executed in pursuance of adoption under the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), before the commencement of the Adoption (Amendment) Regulations, 2021, the requisite documents supporting the facts of the adoption deed shall be duly verified and recommended by the District Magistrate in the format as provided in Schedule XXXII.

(2) On receipt of the verification of documents as per Schedule XXXIII, the Central Adoption Resource Authority shall comply with the provisions of Articles 5 or 17 from the receiving country as provided in the Hague Adoption Convention.

(3) Upon receiving such certificate, the Central Adoption Resource Authority shall issue no objection certificate for Hague ratified countries and in cases of countries outside the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, a letter accepting the said adoption from the Government department concerned of the receiving country shall be sought by the Central Adoption Resource Authority in order to issue the final support letter from the Central Adoption Resource Authority."

(19) Learned Senior counsel for the Union of India averred that

5718 of 2015 titled as 'PKH vs. Central Adoption Resource Authority' and WP(C) No. 6759 of 2016 titled as 'Master Divyash Arora vs. Union of India &Ors.' in these cases, the adoption was done before enactment of the JJ Act, 2015 and therefore the provisions of the JJ Act, 2015 would not apply in the said cases. In The Delhi High Court 'PKH vs. Central Adoption Resource Authority' also observed that:-

“Since arguments were advanced with regard to the scope and interpretation of Act, 2015, this Court clarifies that though there is some ambiguity as to whether the Act, 2015, applies to inter-country direct adoptions, yet it is of the opinion that the scope of Section 60 of the Act, 2015, should be expanded to cover all forms of inter-country direct adoptions. This interpretation would advance the best interest of the child whose family wishes to give him/her in adoption and also ensure that the sanctity of the adoption process is respected and the best interest of the child is scrupulously safeguarded. This Court may mention that in exercise of its writ jurisdiction, it has the power to expansively interpret a provision of a statute in order to achieve the objects and reasons which the law seeks to achieve and to reach injustice wherever it is found. [See Dwarka Nath vs. ITO, (1965) SCR 536.”

(20) It is further the averments of learned ASG that the learned Single Judge, in his judgment dated 12-10-2020 has observed on the similar lines of the analysis laid down in **PKH Vs. Central Adoption Resource Authority'**.

It was held that all inter-country adoptions, even by those who are otherwise

Section 56 (3) can only be read to mean, that where the adoption is not of abandoned/orphaned/surrendered child, and is not an inter-country adoption an of any child, then it would be the HAMA that would apply and not the JJ Act. But if it is an inter-country adoption, or an adoption even within India in the case of an orphaned or abandoned child (as per Section 58), it would necessarily be the JJ Act that would be applicable. Therefore, it would be the JJ Act and not HAMA, as would apply to the present case. All such adoptions must first be approved by CARA after which only, an adoption even by Indian parents living outside India for more than one year can be legally and validly made. He further asserted that learned Single Judge, upon careful perusal of the facts, concluded that adoption deed dated 3-12-2019 is a highly suspicious document as regards its authenticity as well as that the intention to give the child in adoption being at a time when the petitioner cannot be said to be in a stable mental and emotional state, due to the recent death of her husband (and therefore it not being a valid adoption) and as such the adoption does not seem to be valid, even under the provisions of the HAMA in view of the fact that the affidavit dated 05.09.2019 giving authority to sister of adoptive mother to further hand over the child to adoptive mother is not registered in terms of Section 17(3) of the Registration Act, 1908 and that the presence of the petitioner on 03.12.2019 in Patiala is highly doubtful and hence is a very questionable deed. Further, learned Single Judge was of the opinion that it would be the JJ Act, as would apply for an inter country adoption, the adoptive mother and her husband admittedly being Indian citizens residing abroad for more than one year and consequently a certificate from CARA would be essential to validate any such adoption.

(21)

Mr. Jain further vehemently pleaded that as per definition of

relative provided in Section 2(52) of the JJ Act, 2015, the Respondent No. 7 is not a near relative of the child as is evident from the written statement filed by Respondent No. 7, wherein, the Respondent No. 7 states a relation with the paternal grandmother of the child, but not the relation with the child itself which is otherwise affirmed by the learned Single Judge that respondent No.7 is neither a paternal or maternal aunt to the child, nor obviously his grandmother, and consequently, she cannot be adopting the child in such capacity of a relative.

(22) It is contended that on a bare reading of the written statements filed by the Respondent No. 7 as well as Respondent No. 6, it can be found that contradicting facts are being put before the Court since as per Annexure R-5/2 annexed along with the written Statement filed by Respondent Nos. 5 and 6 being the Statement given by Respondent No. 5 and 6 before the police, it is specifically stated that the document was signed by the petitioner on 05-09-2019 (and not 03-12-2019) and petitioner refused to come to Patiala on 03-12-2019. It is evident that the verification in written statement of Respondent No. 7 is wrong as it is stated to be done on knowledge but the fact is that the respondent No. 7 was not even present in India when the child was given on 5-9-2019. This has also been specifically observed by the Single Judge in his judgment and has also observed that and the presence of the petitioner on 03-12-2019 in Patiala was also highly doubtful. It is thus evident that the the adoption ceremony is not complete as provided under the HAMA, 1956. Under HAMA, the giving and taking of the child has to take place between the biological parents and the adoptive parents. In the present case, the biological mother of the child, i.e., the petitioner is seen giving the child to the sister of Respondent No. 7 which is not in compliance with the Act. This

fact is admitted by the Respondent No. 7 in her written statement at Para 1 of her Reply on Merits. She has further annexed pictures showing child being given to adoptive mothers sister and not to her. Further, he drew attention of this Court to the fact that the Respondent No. 7 also got the name and place of birth of the adoptive child changed and created a bogus/false birth certificate. She further got a passport issued for the child on the basis of this false birth certificate. Consequently, the Passport Authorities directed the Respondent No. 7 to surrender the passport so got issued to the adoptive child and FIR No. 80 dated 13-5-2022 u/s 420, 120B IPC P.S. South Sector, Chandigarh has also been registered against the Respondent No. 7 and her husband, on the complaint of the petitioner.

(23) Learned Addl.Solicitor General of India also highlighted the report submitted by the Amicus Curie appointed by learned Single Judge regarding the point of reference encapsulating the arguments of the present Respondent No. 1. The Amicus Curiae in his report, inter alia, submitted that the adoption deed dated 3-12-2019 was not in compliance of provisions of HAMA and that the custody of the adoptive child be restored to the petitioner. There can be no valid reason for the respondent No.7, who is clearly avoiding the verification and checks laid down by the authorities in pursuance to Hague Contention and the statutory provisions coupled with the judgment by the courts of law and has refused to follow the process under the 2021 Regulations which only ensures the well being of the child. Lastly, it is submitted that all the inter country adoptions including those proposed/done under HAMA or GWA, can be done only under the provisions and regulations of JJ Act.

(24) Learned counsel for the respondent No.7 averred that the present habeas corpus petition itself is not maintainable in the present form as the minor child is not in illegal custody of the respondent No.7 and as such, the petitioner has got alternative efficacious remedy available to approach the Guardian Court/Civil Court to get the custody of the minor child. It is urged that the petitioner herself handed over the custody of the minor the respondent No.7 firstly furnishing by her own affidavit and thereafter, executing the deed of adoption in the presence of the witnesses duly signed by the petitioner as well as by her father and the adoption ceremonies was held in the presence of at least 20 relatives of both sides. Therefore, once it has been established that the petitioner gave the custody of the minor child out of her free will and consent and with the consent of her parents/parents-in-law, the order of learned Single Judge deserves to be set aside.

(25) It is further averred on behalf of respondent No.7 that on the reference of respondent No.10, respondent No.7 to 9 who were already searching a child in adoption in the families because the respondent No.7 who is residing in USA (California) for the last about 6-7 years along with her husband and doing job there, are childless parents and despite every treatment surrogacy there was not result and as such on the suggestion of respondent No.10, the parents and parents-in-law, on 05.09.2019, in a gathering of about 20 people, the sister of respondent No.7, namely, Manisha Gupta – respondent No.9, her brother Ashwani Gupta – respondent NO.8 visited at Patiala in the house of in-laws of petitioner where Rajni Garg, Rajender Garg along with respondents No.5 & 6 were present along with petitioner herself and her parents and real brother and other and there, the petitioner handed over the minor child to Manisha on behalf of respondent No.7 as is evident from the

photographs dated nil (Annexure R-7/1 & R-7/2). At the same time, in the presence of the above said persons, the petitioner herself furnished an affidavit duly signed by her and witnessed by her brother Karan Aggarwal and got attested from Notary (Annexure R7/3). From 05.09.2019, the minor child was looked after by Manisha and on 22.11.2019, the respondent No.7 came back to India and took the custody of minor child. Thereafter, on 03.12.2019, all again gathered at the house of Rajni Gupta sister of respondent No.10 at Patiala where the respondent NO.7 and her husband were also present. There, a deed of adoption was reduced into writing on a stamp paper purchased on 05.09.2019 when the affidavit (Annexure R-7/3) was executed. The said deed was notarised at Patiala. The petitioner also handed over her Aadhar Card and birth certificate of the minor to respondent No.7.

(26) Mr. Chetan Mittal, learned senior counsel submitted that the actual grievance of the petitioner as regards the custody of her son is with respondents No.7 to 9 with the custody of the minor child, who is stated to have been born on 31.05.2019, being with respondent No.7 i.e. adoptive mother. He further submitted as per Section 2 of the Hindu Adoption and Maintenance Act, 1956, the explanation thereto extends the ambit of the Act to Children under various conditions whose parents or a single parent is a Hindu, Buddhist, Jaina or Sikh etc. subject to the conditions set out therein. Chapter II deals with adoption, which, in order to be valid, must satisfy the conditions contained in Chapter II and the adopted child would then be deemed to be the child of the adoptive parents.

(27) Learned counsel for respondent No.7 urged that as per provisions contained in Chapter II and Sections 15 & 16, the adoption would be valid

Section 15 of HAMA so long as it is signed by the person giving the child in adoption and the person taking the child in adoption. Proviso to Section 11 makes it clear that performance of *datta homam*, a religious ceremonies, which is performed to ensure valid and legal adoption where “the biological parent voluntarily surrender and handover the child to the recipient, is not compulsory for a valid adoption. Reference is made to a decision of Delhi High Court in *JS & Anr. V. CARA & Anr. [W.P.(C). 3187/2021]* decided on 26.07.2021 wherein the learned Single Judge, observed that “the relationship of the biological family to the child given in adoption extinguishes when this ceremony is conducted. However, this right to adopt has been brought under the Hindu Adoptions and Maintenance Act, 1956 which lays down certain limitations on who can adopt and who can be adopted Sections 7,8,9 and 10 and what are the other conditions for a valid adoption. Therefore, even under the HAMA the giving and taking of the child must actually occur, even if the "datta homam" is not performed. A registered document purporting to record an adoption made and signed by the person giving and the person taking is to be presumed to have been in compliance with the requirements of HAMA unless disproved.

(28) It is further urged that prior to 2000, when JJ Act was introduced, there was no law, which was governing the adoption by foreign parents and the foreign parents were made to apply under the GWA to received a legal document to take the child offshore, regarding which the various High Courts had laid down various procedural rules. Though there was no procedure for adoption of abandoned, destitute and relinquished child, however, the Apex Court in *Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244*, put light on the matter and stated that it would be wiser to give the abandoned,

orphaned or surrendered child for inter-country adoption rather than condemning them to a life in an orphanage or an institution without any family support. The Apex Court dealt with inter-country adoptions and laid down elaborate guidelines to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency ('CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

(29) Mr. Mittal, further urged that in stark contrast to the provisions of the JJ Act as we see today or as was introduced in 2000, the Juvenile Justice Act, 1986 dealt with only "neglected" and "delinquent juveniles". While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a 'neglected juvenile' is custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head 'Rehabilitation and Social Reintegration' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child

to an after-care organization. Section 41 of the JJ Act contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation. He, however, highlighted the fact that the JJ Act, 2000, did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof, came to be expressed in the following terms:-

“2(aa)-"adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship”

(30) It is further submitted that Section 41 of the JJ Act, 2000 was substantially amended in 2006 and in exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. As per Section 33(5) thereof, the ‘court’ was defined to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. Chapter V of the said Rules deals with rehabilitation and social reintegration. Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organisation. Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide

measures for post adoption follow up and maintenance of data of adoptions.

(31) Learned senior counsel further urged on the point of adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015. He submitted that from a reading of Section 1(4) of the JJ Act, 2015, it would be clear that the Act provides for the adoption of children in need of care and protection and children in conflict with law and lays down various standards and conditions under which their welfare, including adoption, is regulated. Insofar as direct adoptions are concerned, direct adoptions from the biological parents of the child are permitted under Section 56(2) of the JJ Act, 2015.

(32) It has been argued that the objects and reasons of the Juvenile Justice, Act 2015 itself makes it clear that it is an Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection. There is a specific definition of "conflict with law" and "children in need of care and protection" under the JJ Act, Section 2(13) and 2(14) and the scope of such terms cannot be extended beyond the definition provided. The child in the present case cannot be said to be either in conflict with law or in need for care and protection. Further, Chapter VIII of the Juvenile Justice Act, 2015 deals with the Adoptions. Section 56(1) clearly states that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.

(33) Learned counsel for respondent No.7 has placed reliance upon the judgements of Delhi High Court in **R.K. v. Central Adoption Resource Authority 2021(5) AD(Delhi) 436** and of Kerala High Court in **Sivarama K.**

by this Court in *Jasmine Kaur v. Union of India 2020(3) R.C.R.(Civil) 528* to state that a bare perusal of Section 56 of the JJ Act, 2015 shows that the same clearly applies only in respect of orphans, abandoned and surrendered children. And moreover, HAMA and the JJ Act are central enactments occupying their respective fields. The former statute deals with adoption and maintenance among Hindus, and the latter statute is an Act to consolidate and amend the law relating to children found in conflict with law and children in need of care and protection. On a scrutiny of the two statutes, there is no repugnancy between the two legislations.

(34) As regards the argument raised on behalf of CARA/UOI that the Juvenile Justice Act, 2015 is not only applicable to special category of children but to all children, it is pointed out by learned counsel for respondent No.7 that a child who is being taken to a far off country by way of adoption, is definitely a child who needs to be protected and cared for, which is why inter country adoptions are one category of adoptions that must adhere to the provisions of the Act of 2015 and the Adoption Regulations framed thereunder, with CARA being the authority that is required to go into the question of the appropriateness of any couple/person living abroad, to adopt a child from India. The Statement of Objects and Reasons for enactment of the said Act, which only refers to adoption of orphaned or surrendered children. Moreover, even the preamble of the Act states that the Act is intended to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection. There is a specific meaning assigned to "children in conflict with law" and the "children in need of care and protection", referred to above.

adoptions under the JJ Act pertains only to special category of children i.e., orphan, abandoned and surrendered children and any adoptions beyond that in outside the purview of JJ Act. And that section 56(3) starts with a non-obstante clause and it has been specifically mentioned in section 56(3) that nothing in the JJ Act will apply to adoptions made under Hindu Adoption and Maintenance Act, 1956. In the present case the adoption was made under HAMA therefore provisions of JJ Act are wholly inapplicable.

(36) It has been argued on behalf of Respondent No.7 that Section 5 of the Hindu Adoption and Maintenance Act, 1956 makes it clear that any adoptions made to or by a Hindu is to be governed only by HAMA and Section 5 is not qualified by domestic or inter-country. In the present case both the parties i.e., biological parents, adoptive parents as well as the child are Hindu. Any adoptions to be made by a Hindu (as permissible under the provisions of HAMA) if not done as per the provisions of HAMA, will be void.

(37) In view of the clear wording of Section 56(3), learned counsel for the respondent No.7 urged that the adoptions under HAMA would not be governed by the JJ Act, 2015 and thus, Section 56(4) would not be applicable for adoptions under HAMA. The term "Nothing in this Act" would take within its ambit Section 56(4) as also Section 60 of the JJ Act 2015 and exclude their applicability qua adoptions under HAMA. Thus insofar as adoptions under HAMA are concerned, whether domestic inter-country, direct or indirect, the JJ Act, 2015 and the Adoption Regulations, 2017 would not be applicable.

(38) The further argument of learned counsel for respondent No.7 is

that the registration of adoption deed is not required. Adoption deed is not

required to be compulsorily registered although unregistered, if proved, by oral evidence, the same shall be valid as has been held by the Supreme Court in *Mst. Param Pal Singh through father vs. M/s National Insurance Co. & Anr. Civil Appeal No.9084 of 2012* decided on 14.12.2012. He further submits that as per HAMA, no particular form of adoption has been prescribed. The adoption can be done simply by putting the child in the lap of adopting parents by the natural parents. Moreover, the burden of proof is on the person who alleges fraud while execution of adoption. Reliance has been placed on a decision of this Court in *Ajay Kumar vs. Rishalo Devi RSA No.4188 of 2008 decided on 18.09.2018* and of the Allahabad High Court in *Sushil Chandra vs. Bhoop Kunwar & Ors. Second Appeal No.1885 of 1967 decided on 18.04.1977.*

(39) Concluding his arguments, Mr. Jain submitted that the adoptions by a relative as provided under section 56(2) are to facilitate adoptions by persons to whom HAMA is not applicable, i.e. they are neither Hindu, Buddhist, Jain or Sikh, as the case may be or is not Muslim, Christian, Parsi or Jew by religion, although it does not bar and in a way gives option even to a Hindu, Sikh, Jaina etc. to apply under this Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. The genesis of the Act and its provisions is to enable a prospective parent irrespective of religion to adopt a child which was did not exist prior to the enactment of Juvenile Justice Act. For instance in the case of Muslims, there was no law which permitted the a prospective parent to adopt a child under personal law and such adoptions were for the first time facilitated for such persons under Juvenile Justice Act. Reliance has been placed upon Apex Court decision in

Shabnam Hashmi vs. Union of India & Ors. WP(C) No. 470 of 2005. It is further urged that any regulations which have come into force in 2021 will have only prospective operation and can not retrospectively apply to adoptions that have been carried out under Hindu Adoption and Maintenance Act, 1956.

(40) Lastly, learned counsel for respondent No.7 submitted that without making any amendment in section 5 of the Hindu Adoption and Maintenance Act, 1956 which in unequivocal terms states that any adoptions by or to a Hindu outside the purview of this is void. Therefore, the validity of these regulations without carrying out an amendment in Section 5 of HAMA is itself doubtful, however, that is not the subject matter of dispute before this court. The provisions of Juvenile Justice Act, 2015 will have no applicability in case the adoption is carried out under the HAMA. However, if the adoptive parents had exercised a choice to be governed by the provisions of JJ, Act 2015 instead of HAMA, then it would have been applicable.

(41) Respondent No.7 has also filed affidavit dated 23.01.2023 wherein she deposed that all the findings on facts returned by learned Single Judge were set aside by the Hon'ble Supreme Court vide order dated 14.12.2020 leaving a very limited aspect to be considered by this Court. The relevant portion of the order passed by the Hon'ble Supreme Court reads as under:-

We are of the view that the appeal can still be disposed of with this direction as the final direction so that the custody arrangements are dealt with by the Larger Bench. Ordered accordingly. The observations in the impugned order on merits while referring to the matter to a Larger Bench are consequently set aside.

“We have heard learned counsel for parties. The aspect which persuaded us to issue notice was that despite the matter being referred to a Larger Bench as per the concluding paragraph 112, in view of a contra view taken by another Bench earlier, the learned Single Judge in a Habeas Corpus petition had passed an order qua the custody of the child alleged to have been given in adoption who was and is presently in custody of the appellant. We had passed an interim order staying the handing over of the custody of the child while observing that prima facie we were of the view that what should be the interim arrangement is best arrived at by the Bench to which the matter will be referred being the larger Bench rather than by the impugned order.”

(42) The respondent No.7 further deposed that the child in question was given in adoption voluntarily by the mother – the petitioner. The child was given in adoption free of consent and without any pressure and for the reasons best known to the petitioner and the allegations levelled against her are false. The affidavit has been filed to show that respondent No.7 is taking care of the child and his welfare who is in her custody since 22.11.2019. The child is getting love and affection from whole family of respondent NO.7 and is going to school also as is evident from identity card (Annexure R3). She further averred that petitioner was not inclined to keep the child with her after the death of her husband as she was young and wanted to re-marry and since talks of re-marriage of the petitioner were going, she hurriedly gave away the child for adoption. The petitioner even planned to send the child to some orphanage because the prospective husband of the petitioner was not accepting the child. It is due to insistence and undue haste created by the

petitioner herself, the petitioner could not wait for the respondent NO.7 to return from USA and take the child and as such respondent No.7 relegated the ceremony of give and take to her sister.

Analysis of the report of Amicus Curiae

(43) In his report, Mr. Anil Malhotra, Advocate – *amicus curiae*, framed various issues that arose for consideration of the learned Single Judge. As regards the question whether the alleged deed of adoption dated 03.12.2019 conforms to the requirements of a valid adoption, learned amicus curiae concluded that there is no compliance of Section 11(vi) of HAMA, as the child to be adopted has not been actually given and taken in adoption by the petitioner and respondent No.7 and her husband Sai Krishna, who were not present. There is violation of Section 7 & 8 of HAMA as there is no consent by the husband of respondent No.7 as well as there is no registered deed of adoption as required under Section 16 of HAMA. It was thus concluded that the alleged deed of adoption dated 03.12.2019 is not in compliance with the provisions of HAMA, hence void and having no validity in the eyes of law as there is no registered deed of adoption and no presumption of adoption.

(44) It was further observed by learned amicus curiae that Section 361 IPC is applicable in the present case since there is a clear element of taking away the minor child from the lawful guardianship of the petitioner. Further, considering the fact that the petitioner has asserted that the minor child has been retained by respondent No.7 against the consent of the petitioner and since the custody of the minor who is below 5 years of age, shall ordinarily with the mother – the petitioner, the petitioner is entitled to custody of minor

(45) Learned amicus also observed that in the facts and circumstances of the case, the writ of habeas corpus is maintainable in view of the *parens patriae* jurisdiction exercised by this Court to restore the lawful custody of the minor child to the petitioner/mother. Since no rights are conferred on respondent No.7 on account of an invalid and void deed of adoption dated 03.12.2019, no rights accrue to respondent No.7 and per se, the custody of the minor child with the respondent No.7 is illegal.

(46) We have given a thoughtful consideration to the submissions raised by learned counsel for the parties and with their able assistance, we have gone through the case laws on the moot point involved in this reference which cynosures around the adoption of a minor child.

(47) It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because

after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution.

(48) Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956.

When the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness.

(49) As regards the inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child and great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country.

The Hindu Adoptions and Maintenance Act, 1956

(50) The Hindu Adoptions and Maintenance Act, 1956 was enacted by Parliament "*to amend and codify the law relating to adoptions and maintenance among Hindus*". Section 4 gives overriding force and effect to

the Act over any text, rule or interpretation of Hindu law or any custom or usage prevalent before the commencement of the Act and over any other law in force immediately before the commencement of the Act insofar as it was inconsistent with the provisions of the legislation. Section 5 stipulates that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in the Chapter. Any adoption made in contravention of the provisions is void. Consequently, under sub-section (2) of Section 5, any adoption which is void, does not create any right in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption. The requisites of a valid adoption are specified in Section 6. Among them is the requirement that the person adopting must have the capacity and the right to take in adoption while the person adopted must be capable of being taken in adoption. Sub-section (4) of Section 9 contains a reference to children who have been abandoned by providing that in such a case the guardian of the child is empowered to give the child in adoption with the previous permission of the Court to any person including the guardian himself. As per Section 9(5) of HAMA, before granting permission to a guardian to give the child in adoption, the court must be satisfied that the adoption is for the welfare of the child. For a person to be adopted, Section 10 provides that (i) the person should be a Hindu; (ii) the person should not already have been adopted; (iii) the person should not have been married unless there is a custom or usage to the contrary; (iv) the person should not have completed the age of fifteen, unless there is a custom or usage to the contrary. Section 11 provides that in every adoption certain conditions must be complied with. Clauses (i) and (ii) of Section 11 read as under:-

"(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."

(51) Section 15 of HAMA provides that 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. Further, Section 16 deals with presumption as to registered documents relating to adoption and 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.

(52) A perusal of HAMA, 1956 shows that it regulates adoption by Hindus, Buddhist, Jains and Sikhs by religion and lays down certain strict conditions for adoption. Those, who do not fall under the definition of Hindu are barred from adopting under this Act.

Constitutional provisions

(53) Article 15 of the Constitution empowers the State, in Clause (3), to make special provisions for women and children. Article 39 is part of the Directive Principles of State policy. Clause (e) of Article 39 directs the State in framing its policies to secure that the tender age of children is not abused.

In clause (f), the State has to ensure that children are given opportunities and

facilities to develop in a healthy manner and in conditions of freedom and

dignity so as to ensure that childhood and youth are protected against exploitation and against moral and material abandonment. By Article 45, the State has to make an endeavour to provide early childhood care and education for all children until they complete the age of six. Article 47 requires the State to raise levels of nutrition. Under Article 51-A, it is the fundamental duty of every citizen who is a parent or guardian to provide opportunities for education to his or her child or, as the case may be, ward between the age of six and fourteen.

(54) These provisions are part of a sensitive vision of the founding fathers. The human tragedy of the exploitation of children, of child abuse and of malnutrition among children was in contemplation as these provisions were drafted. Those provisions are a composite part of our constitutional ethos which places freedom and dignity as one of the foremost values of governance in civil society.

The Hague Convention

(55) The Hague Convention was signed by India on 09th January, 2003, ratified on 06th June, 2003 and came into effect in India from 01st October, 2003. The import of the Hague Convention is that the transfer of a child to a receiving State can only be carried out if the requirement of Article 17 of the Hague Convention is satisfied. Articles 5 and 17 of the Hague Convention are reproduced hereinbelow:-

A. ARTICLE 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State -

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorised to enter and reside permanently in that State.

B. ARTICLE 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if -

a) the Central Authority of that State has ensured that the prospective adoptive parents agree;

b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;

c) the Central Authorities of both States have agreed that the adoption may proceed; and

d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State."

(56) The Central Authority of India, as mandated by the Hague Convention, is CARA and it must certify that the child is adoptable. The receiving State under the Hague Convention would not accept the adoption as valid if the same is not certified by CARA. The JJ Act, 2015 had come into force on 15th January, 2016 and its Section 56(4) mandates that all inter-country adoptions shall be done only as per its provisions and the Adoption Regulations framed by CARA. The definition of '*inter-country adoption*' in Section 2(34) is all inclusive and does not exclude the cases of direct adoption of Indian children involving NRIs/PIOs/Foreigners. Inter-country adoption is a category in itself and all inter-country adoptions have to be certified by CARA in accordance with Section 68 of the Act, 2015, without

which the receiving State would not accept the same as a valid adoption in terms of the Hague Convention.

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

(57) Until the year 2000, adoptions were being considered and approved under the Guardians and Wards Act, 1890. The JJ Act, 2000 was then enacted, as per which, the process of adoptions was sought to be streamlined. This Act was limited in its application to children who were orphans, abandoned, neglected or abused children and a mechanism was put in place for enabling the adoption of such children. The same was to be monitored by the Child Welfare Committee (hereinafter, 'CWC') constituted under Section 29. Upon the CWC declaring the child as free for adoption, the same was duly approved. However, the JJ Act, 2000 did not have any provision relating to inter-country adoptions. The regulations of 2006, which were framed under the JJ Act, 2000, also did not provide for inter-country adoptions. However, in view of various incidents of abuse of children in institutions and other surrounding circumstances, as also the ratification of the Hague Convention, the JJ Act, 2015 was enacted. With regard to only the 'child in need of care and protection' and/or the 'child found to be in conflict with law', that the rehabilitation process under the Act, 2000 or Act, 2015 has to be followed. The rehabilitation of the child under the aforesaid Act via adoption does not include an adoption of a child directly from the natural parents under the Hindu Adoptions and Maintenance Act, 1956. The giving and taking of the child comes within the ambit of the personal laws of the Hindus and is commonly known as the *Datta Homam* ceremony which is prevalent since time immemorial.

initially enacted in the year 2000. Subsequently, to re-enact a comprehensive legislation, the Juvenile Justice (Care and Protection of Children) Act, 2015 was re-enacted. The Statement of Objects of the Act, 2015 explicitly lays down the purpose of the provisions and rules framed under the Act, 2015 which reads as under:-

"An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto."

XXXXXXXX XXXXXXXX

"AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile WP(Crl.).No.439 OF 2019 Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments."

(59) The JJ Act, 2015 identifies three categories of child which are as below:-

Section 2(1): *"abandoned child"* means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry;

XXX XXX XXX

Section 2(42): "*orphan*" means a child—

(i) who is without biological or adoptive parents or legal guardian; or

(ii) whose legal guardian is not willing to take, or capable of taking care of the child;

XXX XXX XXX

Section 2(60): "*surrendered child*" means a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee.

(60) Section 1(4) of the JJ Act, 2015 provides that notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including--

(i) *apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;*

(ii) *procedures and decisions or orders relating to rehabilitation, adoption, re-integration and restoration of children in need of care and protection.*

(61) Section 2(6) defines “authorized foreign adoption agency” to mean a foreign social or child welfare agency that is authorised by the Central Adoption Resource Authority on the recommendation of their Central Authority or Government department of that country for sponsoring the application of non-resident Indian or overseas citizen of India or persons of Indian origin or foreign prospective adoptive parents for adoption of a child from India. Section 2(13) defines "*child in conflict with law*" means a child

who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

Section 2(14) defines "*Child in need of care and protection*" means a child –

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person –

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;"

(62) A perusal of the above provision would show that as per Clause (v) & (vi) of Section 2(14), a child in need of care and protection is a child who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child and that also those child who do not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him. Likewise, Section 2(52) defines "relative" to mean "in relation to a child for the purpose of adoption under this Act, means a paternal uncle or aunt, or a maternal uncle or aunt, or paternal grandparent or maternal grandparent". "Special home" is define in Section 2(56) to mean that an institution established by a State Government or by a voluntary or non-governmental organisation, registered under section 48, for housing and providing rehabilitative services to children in conflict with law, who are found, through inquiry, to have committed an offence and are sent to such institution by an order of the Board.

(63) The first category of children who are in need of care and protection are those who do not have parents or guardians and have no home,

settled place of abode or means of subsistence, who are found indulging in begging, living on the streets who are vulnerable and likely to be inducted into drug abuse or trafficking, who are victims of armed conflict, civil unrest or natural calamities etc. The second category of children who are in need of care and protection are those who either have parents or guardians but are covered by Sections 2 (14) (iii), (iv), (v), (vi), (vii) or (xii). All these sub-sections relate to children who reside with their parents or guardians, who have physically or mentally abused the child or children with parents or guardians who are unfit to take care of them, are incapacitated, who have abandoned or surrendered the child or parents who cannot be found after reasonable inquiry. This category can be collectively referred to as 'abused children'. The terms "abandoned child", "surrendered child" and "orphan" are defined under Sections 2(1), 2(60) and 2(42), respectively. Under Section 2(13) of the JJ Act, 2015, a "child in conflict with law" is a minor who has or is alleged to have committed an offence.

(64) The JJ Act, 2015, Chapter VIII deals with adoption. Section 56 sub-section (1) provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Act, the rules made thereunder and the adoption regulations framed by the authority. Section 57 deals with eligibility of prospective adoptive parents, which is as follows:-

57. Eligibility of prospective adoptive parents.—

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority

(65) Section 58 deals with procedure for adoption by Indian prospective adoptive parents living in India, which is to the following effect:-

58. Procedure for adoption by Indian prospective adoptive parents living in India.—

(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority. (4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents. (5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the

Authority.

(66) The next provision, which needs to be noticed is [Section 59](#), which provides for procedure for inter- country adoption of an orphan or abandoned or surrendered child, which is as follows:-

59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child.—

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children. (3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor

their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in

consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

(67) Section 68 of Chapter VIII says that the Central Adoption Resource Agency existing before the commencement of this Act, shall be deemed to have been constituted as the Central Adoption Resource Authority under the JJ Act, 2015 to perform the following functions:-

(a) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency;

(b) to regulate inter-country adoptions;

(c) to frame regulations on adoption and related matters from time to time as may be necessary;

(d) to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption;

(e) any other function as may be prescribed.

(68) Chapter IX of the JJ Act, 2015 provides for other offences against the children. Its Section 80 dealing with “**punitive measures for adoption without following prescribed procedures**”, reads under:-

“If any person or organisation offers or gives or receives, any orphan, abandoned or surrendered child, for the purpose of adoption without following the provisions or procedures as provided in this Act, such person or organisation shall be punishable with imprisonment of either description for a term which may extend upto three years, or with fine of one lakh

rupees, or with both:

Provided in case where the offence is committed by a recognised adoption agency, in addition to the above punishment awarded to the persons in-charge of, and responsible for the conduct of the day-to-day affairs of the adoption agency, the registration of such agency under section 41 and its recognition under section 65 shall also be withdrawn for a minimum period of one year.”

(69) The Adoption Regulations, 2017, which were framed under the provisions of the JJ Act, 2015 provide a detailed procedure for adoptions, both, in respect of orphans, abandoned or surrendered children, as also children of relatives under Section 2(52) and children of a spouse from an earlier marriage who have been surrendered by the biological parents for adoption by the step-parent. Regulation 5 prescribes the eligibility criteria for prospective adoptive parents. In Chapter II, Regulations 6 and 7 deal with adoptions relating to orphans, abandoned or surrendered children. Chapter III deals with the adoption procedure for resident Indians. Chapter IV deals with the adoption procedure for non-resident Indian, OCI and foreign prospective adoptive parents. Regulation 14 specifically provides that non-resident Indian prospective adoptive parents would be treated at par with Indians living in India for adoption of orphaned, abandoned or surrendered children. Regulation 20 specifically provides for adoption by OCI cardholders or foreign nationals who reside in a convention country i.e., a country which has ratified the Hague Convention.

(70) A perusal of the above-reproduced provisions of JJ Act, 2015 in conjunction with HAMA would show that the former is a special provision for a limited class of children, viz. “those who are in conflict with law”, and those in need of care and protection, orphaned, surrendered or abandoned”.

In the present case, the minor child is neither an orphaned nor surrendered nor in conflict with the law. Thus, the JJ Act 2015 does not apply for adoption of the particular child in question. A bare perusal of [Section 56\(4\)](#) shows that in case of adoption relating to inter-country, i.e. when the parents adopting the child belong to or citizens of another country, the said adoption shall be as per the provisions of the JJ Act, 2015. Sub-section (3) of [Section 56](#) will not apply in case the adoption of the children is made under the provisions of the Hindu Adoption and [Maintenance Act](#), 1956 and that Section 60 of the JJ Act, 2015 has to be read in conjunction with Section 56 of the JJ Act, 2015 which is an inbuilt of the Hindu Adoption and [Maintenance Act](#), 1956 and is an adoption code in itself and, therefore, the supremacy of [Section 56\(3\)](#) over-rides the remaining provisions of Section 56 of the JJ Act, 2015. It is thus not understandable as to how an Act, which is applicable to a special class of children, namely, orphans, abandoned, surrendered and in conflict with the law, be also applied in the case of the minor child.

(71) It is thus established that both the HAMA and the JJ Act are central enactments occupying their respective fields. The former statute deals with adoption and maintenance among Hindus whereas the JJ Act, 2015 consolidates and amends the law relating to children found in conflict with law and children in need of care and protection. On a close scrutiny of the two statutes, we do not find any repugnancy between the two legislations. The Legislature has specifically included Section 56(3) in the JJ Act, 2015, which substantiates that adoptions carried out under the HAMA are saved, and that the HAMA is not repugnant with the JJ Act. Our view is fortified by the decision of the Supreme Court in [*Shabnam Hashmi vs Union of India* \[AIR](#)

[*2014 SC 1281*\]](#) which held that:-

"11. The J.J Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA Guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he WP(Crl.).No.439 OF 2019 comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Art.44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date".

(72) Heard learned counsel for the respective parties.

Analysis

(73) Before this Court proceed to consider and examine the submissions made before this Court, it is to be borne in mind that the sole question for answer has been referred by the Single Bench reads as under:-

"As to whether in terms of sub sections (6), (34), (37) and (38) of Section 2, read with what is contained in Sections 60 and 68 and other provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, as also the Adoption Regulations framed under the provisions of Sections 68 (c) and 2 (3) of that Act, would

respondent no.7 require a certificate from the authority constituted under Section 68 of the Act, before adopting a child from India, with respondent no.7 being a non-resident Indian as defined in Section 2(38) of the said Act?”

(74) It would be totally improper to adjudicate on the referred question until or unless the intent, observation followed by legal examination exercised by the Single Bench are re-looked at least the relevant part beginning from para 66 of that order, which reads as under:-

“66. All arguments having been noticed as above, in the light of the pleadings and the arguments addressed, what first needs to be crystalised are the essential questions to be determined in this petition; which are:-

- i) The maintainability of a petition under Article 226 of the Constitution, seeking a writ in the nature of habeas corpus, to restore the custody of a child to its natural mother, in the face of what is contended (by respondents no.7 to 10), to be a valid adoption deed;*
- ii) Whether the adoption of the child, i.e. the boy Advait, can be accepted to be valid, for the purpose of granting his custody to the petitioner, either under the provisions of HAMA or the JJ Act?;*
- iii) Whether it would be actually HAMA 1956 or the JJ Act 2015 that would apply to such adoption, with the adoptive parents, admittedly, presently being residents of the USA for more than one year and therefore they not being resident Indians, though they are Indian citizens?*

67. Before going on to considering those questions, the issue raised by Mr. Kanwaljit Singh on the effect of non-filing of a replication to the written statement, needs to be dealt with.

According to the learned Senior Counsel, with no replication having been filed by the petitioner to the written statements filed by respondents no.5 and 6 and respondents no.7 to 10 respectively, the contents of the said written statements are deemed to have been admitted by her and consequently, no argument refuting the contents thereof can be accepted, in terms of Order 8 Rules 3, 4 and 5 of the CPC.

*However, that is an argument which is to be rejected as per law settled on the issue, with only one judgment of the Supreme Court needed to be referred to in that context, i.e. **K. Laxmanan v. Thekkayil Padmini and others** (2009) 1 SCC 354, wherein their Lordships, after considering the issue, held that the word “Pleadings” is defined under the provisions of Rule 1 or Order 6 of the CPC, which consists of a plaint and a written statement; and therefore a plaintiff can file a replication in respect of any plea raised in the written statement, and if allowed by the court do so, such replication would*

become a part of the pleadings but “Mere non-filing of a replication does not and could not mean that there has been admission of the facts pleaded in the written statement”. (Reference paragraph 29 of that judgment, SCC Edition).

In fact, even Order 8 of the said Code (as has been referred to by Mr. Singh), only deals with the written statement, set off and counter claim to be filed in a suit, with no reference to a replication. Prior to that, Order 7 refers to a plaint, again with no reference to a replication.

Learned Senior Counsel specifically referred to Rules 2, 3 and 4 of the Order 8, to submit that facts must be specifically pleaded or denied and that an evasive denial would not be a sufficient denial.

However, these provisions obviously pertain only to a written statement and not to a replication and consequently, specifically read with the judgment of the Supreme Court in Laxmanan, the said provisions cannot be held applicable to a replication, as Order 8 itself applies only to a written statement in reply to a plaint/petition.

Hence, in view of the above, simply because the petitioner in the present case did not file a replication to any of the written statements filed by the respondents in this case, that would not mean that she accepted the pleadings in those written statements, or that she has no right to argue against the contents thereof.

68. *Coming then to the first question framed hereinabove, i.e. the maintainability of a petition under Article 226 of the Constitution, seeking issuance of a writ in the nature of habeas corpus to restore the custody of a child to its natural mother, in the aforesaid circumstances.*

*On that question, as already noticed in paragraph 40 hereinabove, Mr. Malhotra had relied upon a judgment of the Supreme Court in **Ruchi Majoo vs. Sanjeev Majoo** AIR 2011 SC 1952, from which he specifically pointed to paragraphs 3, 4, 14, 36 and 37.*

Essentially, what is eventually held in paragraph 37, is with regard to the first question out of the three framed in paragraph 4 by the Supreme Court; that question being:-

“i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court had no jurisdiction to entertain the same;”

69. *That was a case where a tussle for custody of the child was between the natural mother and father, with the father being a resident of the USA and the mother having come to India with the child, the child otherwise being an American citizen by birth, who at the relevant time was aged about 11 years.*

In fact, the father in that case had approached a court in the USA, alleging that the child had been abducted by the mother, and eventually even a red corner notice was issued (at the instance of the American court), with the mother, however, having taken shelter of the order passed on April 04, 2019 by the Additional District Judge, Delhi, under the provisions of the

Guardians and Wards Act, by which interim custody of the child was given to her.

Aggrieved of that order, the father approached the Delhi High Court by filing a petition under the provisions of Article 226 of the Constitution, with that petition having been allowed, thereby setting aside the order of the learned Additional District Judge and holding that the court at Delhi had no jurisdiction to entertain the petition filed by the mother because the minor was not actually ordinarily residing at Delhi and that all issues relating to the custody of the child needed to be agitated before a competent court in America, not only because that court had already passed an order in favour of the father, but also because the parents as well as the minor were actually American citizens.

The Delhi High Court had also based its decision on the principle of comity of courts.

70. *In that background, after discussing the entire case law on the issue, including the earlier judgments of the Supreme Court in **Shilpa Aggarwal v. Aviral Mittal and another** (2010) 1 SCC 591, **Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and another** (1984) 3 SCC 698 and **Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and another** (1987) 1 SCC 42, it was held by their Lordships as follows:-*

“.....Proceedings in the nature of Habeas Corpus are summary in nature, where the legality of the detention of the alleged detainee is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extra ordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the court views the rival claims, if any, to such custody. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran's & Shilpa Agarwal's cases (supra) or refuse to do so as was the position in Sarita Sharma's case (supra). What is important is that so long as the alleged detainee is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detainee is within its territorial jurisdiction.”

71. *Consequently, in the opinion of this court, with it having been held as above, the law enunciated in Ruchi Majoos' case (supra), would be wholly applicable to the present case, even though the battle for custody of the child in the present case is not between the natural mother and father of the child but between the natural mother and the lady who on the basis of an adoption deed (contended by her to be a valid one), states that she is the adoptive mother.*

Nonetheless, the tussle is one for custody of the child and hence I would see no reason to hold that a writ petition seeking such custody is not maintainable.

*In fact, that is what has also been held by a Division Bench of this court in **Manohar Lal & another v. State of Punjab & others** (LPA no.476 of 2020, decided on 05.08.2020), though of course it was held therein that where there are competing claims between parties who purport to have an authority to retain/claim custody of a child, that may require evidence to be led and a "full scale inquiry."*

Yet, obviously the judgment in Ruchi Majoos' case was not brought to the notice of their Lordships of the Division Bench and consequently, once it has been held in Ruchi Majoo that despite proceedings in a petition seeking issuance of a writ in the nature of habeas corpus being summary in nature, the High Court can still embark upon a detailed enquiry for the welfare of the minor in question and can invoke its extraordinary jurisdiction to determine the validity of the detention and to even direct repatriation of a minor child to the country from where he or she may have been removed by a parent or some other person, therefore I see no ground to hold that the present petition is not maintainable, even though the enquiry in the present case involves the validity of the adoption.

72. *Having held so, then comes the all important question of whether or not the petition deserves to succeed, or must be dismissed on the merits of it.*

In the opinion of this court, in terms of the provisions of both, the Act of 1956 as also the Act of 2015, the custody of the child needs to be returned to its natural mother, for the reasons as are enumerated hereinafter:

73. *Looking therefore at the second question framed in paragraph 66 hereinabove, as to whether the adoption in question can be considered to be valid (for the purpose of granting custody of the child), either under the provisions of the Act of 1956, or of the Act of 2015.*

First, the relevant provisions of the Act of 1956 would need to be looked at in detail, the first of those being that in terms of Section 2 thereof, the Act is applicable to any Hindu by religion (as defined in the Act), and consequently would apply, on that criterion, to both, the petitioner as also respondent no.7 and her husband.

74. *Sections 4, 5 and 6 of the Act of 1956 need to be seen in detail, which read as follows:-*

“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.*

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.”*

Since respondent no.7 is a lady who sought to take the child in adoption, Section 8 of the said Act is also essential to be seen and is reproduced as follows:-

“8. Capacity of a female Hindu to take in adoption- *Any female Hindu-*

- (a) who is of sound mind,*
- (b) who is not a minor, and*
- (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or 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, has the capacity to take a son or daughter in adoption.”*

It is necessary to mention here that Section 7 of the Act of 1956 refers to the capacity of a male Hindu to take a child in adoption, which provision is essentially to the same effect (conversely), as Section 8.

Section 9 (1) stipulates that no person other than the father, mother or guardian of a child would have the capacity to give him/her in adoption, though both would have an equal right to do so, but only with the consent of the other, unless one of them has renounced the word or has ceased to be a Hindu or is of unsound mind [reference sub-sections (1) and (2) and the proviso thereto].

Sub-sections (4) and (5) would have no application in the present case.

What may be necessary to refer to however, is the first explanation to Section 9, which states that the term 'father' and 'mother' do not include an 'adopted father and an 'adopted mother', meaning thereby obviously that a child once adopted cannot be given in adoption again.

Section 10 of the Act of 1956 stipulates that a Hindu who has not already been adopted and is not married (subject to custom or usage) and has not completed the age of 15 years (again subject to custom or usage), may be adopted.

75. *Section 11 stipulates the other conditions for a valid adoption and therefore is very significant, with it being reproduced hereinbelow:-*

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

- (i) if any 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 homan, shall not be essential to the validity of an adoption.”

76. *The relevant part of Section 12, as applicable to the present case, states that a child once adopted, shall be deemed to be the child of the adoptive mother or father for all purposes, with effect from the date of the adoption and that from such date, the child would be deemed to have severed all ties with the family of his birth.*

Sections 14 and 15 of the HAMA read as follows:-

“14. Determination of adoptive mother in certain cases- (1) *Where a Hindu who has a wife living adopts a child she shall be deemed to be the adoptive mother.*

(2) Where an adoption has been made with the consent of more than one wife, the senior most in marriage among them shall be deemed to be the adoptive mother and the others to be stepmothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the stepmother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the stepfather of the adopted child.

15. Valid adoption not to be cancelled- *No adoption which had 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.”*
Section 16 postulates to the following effect:-

“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.”

77. The last relevant provision of the Act of 1956 is Section 17, which is being noticed in view of the fact that it is averred in paragraph 4 of the preliminary objections raised in the reply of respondents no.5 and 6 (i.e. the in-laws of the petitioner), that she herself had given the child in adoption without any pressure or coercion, and that the whole story given in the petition is only an afterthought to extort money from the respondents, with everything having been settled between the families on 05.09.2019, and with the petitioners' own affidavit also executed on that date.

It is to be again noticed that the said argument, though contained in the said reply, was never raised during arguments by any counsel for the respondents and in fact, even in the reply filed by respondents no.7, i.e. the mother who is claiming a valid adoption, no such allegation has been made, the allegation (contained in paragraph 4 in the reply on merits by respondents no.7 to 10), being that the petitioner has now made up a concocted story, with an intention to back out from her affidavit and the adoption deed.

Hence, in the opinion of this court, actually Section 17 would not be applicable at all to the present case but since that allegation has been made by respondents no.5 and 6 in their reply, though not by respondent no.7, the said provision is also being reproduced below:-

“17. Prohibition of certain payments-

(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both. (3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorized by the State Government in this behalf.”

78. In the light of the aforesaid provisions, first of course it is to be observed that there is no legal bar under the Act of 1956, on either the petitioner giving her son in adoption, nor is there any prohibiting respondent no.7 and her husband to take the child in adoption, even though respondent no.7 is 52 year old.

Though learned Amicus Curiae had argued that the age of the said respondent and her husband would be an issue in terms of the JJ Act of 2015 and the rules framed therein, however as regards the Act of 1956, there is no bar on them adopting the child, [the bar regarding age only being the one contained in clauses (iii)

& (iv) of Section 11, stipulating that for adoption of a child of the opposite sex, there must be a minimum age gap of 21 years between the child and such adoptive parent].

79. That having been said, Sections 6 and 11 of the Act of 1956 now need to be looked at carefully, as to whether the conditions of a valid adoption would seem to be fulfilled even for the purpose of determining whether the custody of the child should be returned to the petitioner, i.e. his natural mother, or not.

Having already noticed that as regards the capacity of giving and taking the child is concerned, the petitioner and respondent no.7 (and her husband), are not found to be barred, as obviously clauses (i) (ii) and (iii) of Section 6 (as reproduced herein above in paragraph 74), are not seen to be violated.

As regards clause (iv) of Section 6, stipulating that an adoption must be made in compliance also with the other conditions mentioned in Chapter 2 of the said Act, the said Chapter is one that encompasses Sections 5 to 17 (both inclusive).

80. First of all it needs to be observed here that registration of an adoption, or more correctly, registration of a deed of adoption, is not found to be compulsory in terms of Section 16 of the Act of 1956 (reproduced herein above).

However, sub-section (3) of Section 17 of the Registration Act, 1908, reads as follows:-

“17. Documents of which registration is compulsory.—

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.”

The question therefore is whether sub-section (3) would read to mean that adoption of son, or any deed of adoption of a son, executed after January 1, 1872, is compulsorily registerable?

Though at first blush that may appear to be so, however, what the said provision stipulates is that an authority executed to adopt a son after that date (if that authority is not conferred by a will), must be registered.

In other words, if a father or a mother or a guardian was giving/granting authority to any person to give a son in adoption after that date, other than by way of a will, such document granting such authority would be compulsorily registerable. Obviously, the said provision is existent in the Act of 1908 almost 48 years prior to the enactment of the Hindu Adoption and Maintenance Act, 1956.

In this context, clause (vi) of Section 11 needs to be again read very carefully, wherein it is stipulated that the child to be adopted must be actually given and taken in adoption by the parent or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption.

Thus, the child can be given in adoption even under authority bestowed in that regard by the natural parent or guardian, and to that extent therefore, it would seem in the context of this petition, that the petitioner had given her child to respondent

no. 9 on 05.09.2019, further giving her authority to give the child to respondent no. 7 upon her arrival in India.

Yet, what cannot be ignored, in the opinion of this court, is subsection (3) of Section 17 of the Registration Act, 1908, which, as seen hereinabove, stipulates that if a son is to be given in adoption by way of authority (other than by a will), then such document granting such authority, must necessarily be registered.

It may be observed here that, as seen now, the Supreme Court, in **MasterParam Pal Singh v. M/s National Insurance Company and others**, 2013 (2) RCR (Civil) 480, has in fact briefly drawn that distinction between a deed of adoption and an authority given for adoption (Reference paragraph 12, Law Finder edition).

Though as to why that should apply only to a son and not also to a daughter, in terms of Article 14 of the Constitution, would be subject matter of debate in appropriate proceedings, the said provision being one incorporated in an Act which came into effect about 48 years before the commencement of the Constitution of India. However, for the purpose of this petition, the child being a boy, I would hold that any such authority, even given by way of the affidavit executed by the petitioner on 05.09.2019, would be necessary to have been registered and therefore, once a compulsorily registerable document is not registered, the consequences thereof would naturally flow.

(In the present context, it would also be need to be seen that, the petitioner thereafter obviously changed her mind to give the child in adoption and therefore, in all probability, did not actually sign the adoption deed on 03.12.2019, which issue shall be discussed further ahead in this judgment).

81. Presently coming then to the other conditions that are required to be complied with in respect of a valid adoption, in terms of clause (iv) of Section 6 of the Act of 1956, (with such other conditions being contained in Section 11 reproduced herein above).

All learned counsel appearing on both sides, as also learned Amicus Curiae, had specifically brought attention to clause (vi) of Section 11, giving their own interpretations thereof. As per the learned Amicus Curiae and counsel for the petitioner (echoing the argument in that respect of learned Amicus), since a child is required to be necessarily given in adoption by the parents or guardian concerned to the adoptive parents, and the child in the present case having only been given to the sister of the adoptive mother by his natural mother, it cannot be held to be a valid adoption, even though datta homam is not an essential ceremony to be performed.

In that context, learned Amicus had laid specific stress on a recent judgment of the Supreme Court in **M. Vanaja v. M. Sarla Devi**, AIR 2020 SC 1293, from which he referred to paragraphs 12 and 13, which read as follows:-

“12. A plain reading of the above provisions would make it clear that compliance of the conditions in Chapter I of the Act of 1956 is mandatory for an adoption to be treated as valid. The two important conditions as mentioned in Sections 7 and 11 of the Act of 1956 are the consent of the wife before a male Hindu adopts

a child and proof of the ceremony of actual giving and taking in adoption. The Appellant admitted in her evidence that she does not have the proof of the ceremony of giving and taking of her in adoption. Admittedly, there is no pleading in the plaint regarding the adoption being in accordance with the provisions of the Act. That apart, the Respondent who is the adoptive mother has categorically stated in her evidence that the Appellant was never adopted though she was merely brought up by her and her husband. Even the grandmother of the Appellant who appeared before the Court as PW-3 deposed that the Appellant who lost her parents in her childhood was given to the Respondent and her husband to be brought up. PW 3 also stated in her evidence that the Appellant was not adopted by the Respondent and her husband. Therefore, the Appellant had failed to prove that she has been adopted by the Respondent and her husband Narasimhulu Naidu.

13. The Appellant relied upon a judgment of this Court in L. Debi Prasad (Dead) by Lrs. (supra) to submit that abundant evidence submitted by her before Court would point to the fact that she was brought up as the daughter of the Respondent and her husband (Late) Narasimhulu Naidu. Such evidence can be taken into account to draw inference that she was adopted by them. The facts in For Subsequent orders see CRM-W-744-2021 52 of 88 ::: Downloaded From Local Server on - 19-06-2023 11:50:20 ::: CRWP No.820 of 2020 -52- L. Debi Prasad (Dead) by Lrs. (supra) case are similar to those in the instant case. In that case, Shyam Behari Lal was adopted by Gopal Das in the year 1892 when he was an infant. Shyam Behari Lal was unable to establish the actual adoption but has produced considerable documentary evidence to show that he was treated as the son of Gopal Das for a quarter of century. This Court accepted the submission of Shyam Behari Lal and held that there was sufficient evidence on record to infer a valid adoption. Though the facts are similar, we are unable to apply the law laid down in L. Debi Prasad (Dead) by Lrs. (supra) to the instant case. L. Debi Prasad (Dead) by Lrs. (supra) case pertains to adoption that took place in the year 1892 and we are concerned with an adoption that has taken place after the Act of 1956 has come into force. Though the Appellant has produced evidence to show that she was treated as a daughter by (Late) Narasimhulu Naidu and the Defendant, she has not been able to establish her adoption. The mandate of the Act of 1956 is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the Act of 1956. The two essential conditions i.e. the consent of the wife and the actual ceremony of adoption have not been established. This Court by its judgment in Ghisalal v. Dhapubai (Dead) by Lrs. & Ors, (2011)2 SCC 298 held that the consent of the wife is mandatory for proving adoption.” (All emphasis provided in this judgment only, in terms of the stress laid on those lines by the learned Amicus).

82. Mr. Kanwaljit Singh, learned Senior Counsel appearing for respondents no.7 to 10, on the other hand had argued that even the bare provision of clause (vi) of Section 11 stipulates that a child can be given in adoption by either of his parents or the

guardian “or under their authority” with **intent** to transfer the child from the family of his birth to the family of his adoption and no datta homam ceremony being mandatory, therefore, the handing over of the child by the petitioner to respondent no.9, i.e. the sister of respondent no.7, on 05.09.2019, shows that she had intended the child to be given away, under her authority, by respondent no.9 to respondent no.7, (with the child actually thereafter handed over to respondent no.7 by respondent no. 9).

Learned Senior Counsel appearing for the adoptive mother, had relied upon a judgment of the Supreme Court in Master Param Pal Singh (supra), wherein the Supreme Court held as follows:-

“15. Conspectus consideration of the deed of adoption and the oral evidence led on behalf of the appellant, we find that there was a simple ceremony though not a mantra ceremony held in which the deceased participated wherein it was expressed that the deceased being a bachelor thought it fit to take the appellant in adoption for which the biological parents of the appellant were also willing to give him in adoption. In the Adoption Deed it was specifically mentioned that the process of adoption was carried out in the presence of respected persons of the Panchayat in a ceremony where goods and sweets were distributed in commemoration of the function of adoption. It has come in evidence that the Adoption Deed was written by Gurbux Singh on 15.02.1999 who was the Sarpanch of the village at that point of time. The left thumb impression of the deceased was found affixed in the Adoption Deed which was signed both by the biological parents apart from three witnesses, namely, Nishan Singh s/o Dayal Singh of village Chhina Retwala, Tarsem Singh s/o Bawa Singh r/o Dhariwalkalan and Karnail Singh Nambardar of village Kallu Soha. It was stated that about 15 to 20 persons apart from women folk were present at the time when the adoption ceremony was held. The suggestion, that the deed was written later on, was duly denied by the witnesses. It was also stated that the appellant was just three years old at the time when the adoption took place. Further Exhibits AW1/5 and AW1/6 are the copies of ration cards in which it is mentioned that the father of the appellant is Ajit Singh.

16. All the above factors which are born out by records as well as in the oral version of the witnesses, examined on behalf of the appellant, in our considered opinion conclusively proved that the appellant was the adopted son of the deceased having been adopted as early as on 15.02.1999 i.e. long before the death of the deceased, namely, 17.07.2002. Unfortunately, the learned Judge in the impugned judgment has completely misled himself by rejecting the claim of adoption by holding that the document was not registered with the Tahsildar, that no ceremony was held, that the adoptive father was not present, that there was no giving and taking of the adopted son and, therefore, the adoption of the appellant by the deceased not proved. On the contrary, as stated above, we find that everyone of the prescription required for a valid adoption were very much present in the form of both oral and documentary evidence on record and consequently the conclusion of the learned

Judge in having held that the appellant was not the adopted son of the deceased cannot be sustained and the same is set aside. Having reached the above conclusion, we proceed to deal with the claim of the appellant on merits.”

(Emphasis again applied as per stress laid by learned senior counsel, in this judgment only).

83. *It is of course to be noticed that the circumstances of both the cases (the one relied upon by the learned Amicus and other by the learned Senior Counsel for the adoptive mother and others), were different, inasmuch as the child in that case was actually handed over to the adoptive father (and not to a relative); but nevertheless, the judgments having been cited in each case and what has been reproduced from each having been held as it is (though in the circumstances of each case), what is to be now seen is as to whether the ratio of either judgment would apply in the present case.*

Looking at what has been held in Param Pals' case, it would seem that once giving of the child by the petitioner to respondent no.9 on 05.09.2019, is obviously admitted, then seen with the fact that it is the intent behind such giving that is to be seen, it would appear that the adoption would be valid, by way of handing over of the child by the natural mother to the immediate family of the adoptive mother, for the onward handing over of the child to the adoptive mother, once she came to India.

As a matter of fact, on a plain reading of clause (vi) of Section 11, I would tend to agree with learned Senior Counsel appearing for respondents no.7 to 10, because what would seem to flow from the said provision is that the natural mother/father/guardian should intend to transfer custody of the child, from them to the family of adoption.

Hence, at least on 05.09.2019 very obviously the petitioner did hand over the child to respondent no.9 for further handing him over to respondent no.7, i.e. her sister and the adoptive mother, upon the adoptive mother reaching India from the USA.

Whether or not the petitioner handed over the child to respondent no. 9 on that date, with a tearful face (as contended by counsel for the petitioner), or with a smiling face, would not be commented upon by this court on the basis of only a photocopy of a picture that has been uploaded, though learned counsel for the petitioner has stated that it was obviously a sad face; yet, that would not really change the fact that the child was admittedly given to respondent no. 9 on that date and a natural mother may in any case have become emotional, even if she was giving the child away willingly.

However, as already discussed in paragraph 80 herein above, in view of the fact that she did not execute a registered document granting authority to respondent no. 9 to further hand over the child to respondent no. 7 [in terms of sub-section (3) of Section 17 of the Registration Act], and thereafter, at least in the opinion of this court at this stage more than prima facie (though not

ex facie), she did not sign the document dated 03.12.2019 in the presence of and along with respondent no. 7 (as would be discussed further ahead), though she is purported (by respondents no.7 to 10) to have done so, naturally the document becomes wholly 'suspect'.

84. Even holding so, what obviously this court cannot ignore is that though the affidavit dated 05.09.2019 is a document not signed by respondent no.7, it is one signed by the petitioner and witnessed by her brother and one Rajinder Kumar and another person (Seema). Therefore, can it be held that the said document alone suffices as proof of adoption given?

In my opinion, though otherwise it may have, even though it is not a formal adoption deed but an affidavit showing the intent of the petitioner who also handed over of the child to the sister of the adoptive mother, yet, it cannot be held to constitute a valid adoption, for three reasons.

85. The first reason, as discussed hereinabove, is that the said affidavit is not a registered document even though it is one effectively conferring authority on respondent no. 9 to further hand over the child to respondent no. 7

As already discussed, sub-section (3) of Section 17 of the Registration Act, would require compulsory registration of such a document, conferring such authority.

86. The 2nd reason to not hold that the adoption may not be valid, is one based on circumstance, which however would need to be proved by way of evidence led before a civil court in appropriate proceedings.

Although respondents no.7 to 10 in the affidavit have stated that “all again assembled on 03.12.2019” at Patiala (though not at the house of respondents no.5 and 6), it is nowhere stated in either that written statement, nor in the written statement of respondents no.5 and 6, that the petitioner was actually present there, though respondents no.7 to 10 tend to imply that.

This is despite the fact that otherwise, in the written statement of respondents no. 5 and 6, as also in terms of the arguments made by their counsel, they are very clear that the child had been given by the petitioner to respondent no.9 on 05.09.2019, as per her own will and they have even stated that respondent no.5, i.e. Arun Gupta, father-in-law of the petitioner, in his statement (vide email to the SSP on 13.01.2020, copy a part of Annexure R-5/2 with the reply of the said respondent), had said that:-

“....then Sai Kiran and his wife namely Minakshi Gupta came to India from USA and made a call to me that they are coming to Patiala on 03.12.2019 for execution of Adoption deed and Richa Gupta be also called for this purpose, on which my wife Sunita Gupta made a telephonic call to Richa Gupta to come to Patiala as Sai Kiran and Minakshi Gupta are coming to Patiala to execute the Adoption deed, but Richa Gupta refused to come to Patiala and then my wife Sunita Gupta made call to cousin brother of Richa Gupta namely Dharampal also who also shirked to get into the matter, and then the entire things were communicated to Neelam Gupta wife of Jenender Gupta, but still Sai Kiran and his wife namely Minakshi Gupta along with Jenender Gupta and Ashwani

Gupta came from Delhi to Patiala on 03.12.2019 and it was told to them to talk to Richa Gupta directly but they said we will see matter on our own level and after some time they left our place.”

Also, earlier in the said statement itself, respondent no.5 stated as follows:-

“...all the person concerned and present satisfied themselves with regard to future of child and then it was finalized that since Sai Kiran and his wife namely Minakshi Gupta were at USA at that time thus the necessary documentation may be got ready so that the adoption of child may be given effect legally and thus a deed of adoption was got prepared by Jeneder Gupta, Manisha Gupta and Ashwani Gupta in consultation with Sai Kiran and his wife name; y Minakshi Gupta and their own lawyer of Delhi and the same was handed over to Richa Gupta and her father babu Ram to agree with the same or not and after going through with the said Adoption deed Richa Gupta consented voluntarily with the said Adoption deed and the said adoption deed was signed by Rich Gupta and Babu Ram in presence of all the persons and said minor Advait was handed over by Richa Gupta to Manisha Gupta on 05.09.2019. However since Richa Gupta was going back to her parents house at Chandigarh forever thus all the matter with regard to her marital rights were also settled.” (All emphasis applied in this judgment only)

87. Thus, with respondent no.5 having specifically stated in his statement to the police, (which statement he and respondent no.6 have annexed with their own reply and have in fact stated in paragraph 8 thereof that it should be read as a part of the reply), that the adoption deed itself was signed by the petitioner on 05.09.2019, and with the stamp paper also admittedly purchased on 05.09.2019 even as per the adoptive mother in her reply (in paragraph 1, at page no.7 of the reply), it would be very difficult for this court to accept that the date given on the adoption deed, i.e. 03.12.2019, which is a rubber stamped date, is actually the date on which the petitioner signed the document.

Though the impression given in the said paragraph of the reply of respondent no.7 is that the reference to the registration was after the adoption deed was signed on 03.12.2019, however, seen with the stand taken by respondents no.5 and 6, to the effect that in fact the petitioner had refused to come to Patiala to sign the adoption deed, and that it was also signed on 05.09.2019, it would seem very obvious that actually it was not signed by her on 03.12.2019 but on 05.09.2019, as has already been admitted by respondents no.5 and 6, with the petitioner also having actually stated to that effect in her complaint to the Department of Women and Child Development and Social Welfare, Chandigarh (copy Annexure P-2 with the petition); though subsequently in her statement before the police, (Annexure R-3/1, with the reply of the SHO, Police Station Sector-34, Chandigarh), she stated that she had not signed it and was being forced to sign it.

88. Thus, even though Mr. Kanwaljit Singhs' contention that the font on the affidavit dated 05.09.2019 is different to that on the deed shown to be dated 03.12.2019 is one good argument to be

considered, however, seen with the fact that the petitioners' in-laws (respondents no.5 and 6) also stated that in fact the adoption deeds were signed by the petitioner (and therefore seemingly by her father) on 05.09.2019, and with respondents no.7 to 10 also having admitted that the stamp papers were purchased on that date (though that of course could be so even if the deeds were to be signed later), and the petitioner also in her statement made to the police and in her complaint to the Social Welfare Department, has stated that all deeds were got signed on 05.09.2019 itself, and further, because even as per her in-laws she did not actually come to Patiala after that, simply the font on the affidavit and on the adoption deed being different, would not negate the other statements made, with regard to it having actually been signed by her on 05.09.2019 (and not on 03.12.2019).

89. *One important aspect that needs to be considered however, is the contention of the learned Senior Counsel with regard to concealment of facts by the petitioner, which obviously is not entirely incorrect, inasmuch as, in the body of her petition, she has not even referred to the affidavit signed by her on 05.09.2019, nor has she stated that she had actually signed the adoption deed on 05.09.2019, though that deed is shown to be one dated 03.12.2019 by the said respondent.*

Yet, firstly, in a petition in which the custody of a child is involved, such petition cannot be thrown out on the ground of any concealment by the child's mother; and secondly, it is seen that in the representation of the petitioner made to the Social Welfare Department, she has stated that on 05.09.2019 she was forced to sign the adoption papers at home under suspicious circumstances, with the (adoptive) couple itself not present and therefore she "handed over my son to the sibling... of said couple".

The said representation has been annexed as Annexure P-2 with her petition itself and consequently it cannot be taken to be a complete concealment of facts, though of course, as said, in the main body of the petition, she has not referred to the adoption deed or even the affidavit executed by her on 05.09.2019.

However, as already said, with her having stated as above in the representation Annexure P-2, and it in any case being a petition seeking custody of a child, the interest of the child (or even of the other parties involved), cannot be negated by this court due to the fact that the said document has not been referred to in the main petition.

90. *Therefore, considering all factors as have been discussed in paragraphs 86 to 88 hereinabove, I would accept that she actually signed the adoption deed on 05.09.2019, i.e. the date on which she executed the affidavit, but she did not sign it on 03.12.2019 in the presence of respondent no.7 and her husband and other witnesses, with her father also having seemingly signed that deed on 05.09.2019, which is why the photograph of the petitioner, her father and respondent no.10, Jenender Gupta, would appear to be one that was taken on 05.09.2019 in the house of respondents no.5 and 6 (as contended).*

Hence, once a document, even if signed by the

petitioner on 08.09.2019, is however shown to be subsequently signed by her in the presence of respondent no.7 on 03.12.2019, it cannot be accepted to be an authentic document, with the petitioner seemingly not present at Patiala on that date and therefore, she obviously having decided after 05.09.2019, not to give the child in adoption to respondent no.7, whom she had not even met till then, it cannot be, in the opinion of this court, held to be a valid adoption, seen especially with the fact that the petitioner on 05.09.2019 was seemingly still under the shock of having been widowed at a very young age, only 1 ½ months earlier, with her whole life in front of her.

91. *Even having observed herein above to the effect that the adoption deed dated 03.12.2019 would not seem to be a valid adoption deed, yet, I would not actually hold so as a final opinion (as regards it having been signed in the presence of all parties as it purports to show), in the absence of any extensive evidence led on oath before this court and consequently, would leave that to be a matter of trial in appropriate proceeding before a competent court where evidence can be led in extenso (if any of the parties institute any such proceedings), by proving the presence/non-presence of the petitioner at Patiala on 03.12.2019, either by phone call details or otherwise.*

Even so, for the purpose of this petition, by which the petitioner seeks custody of her natural born son, I would still hold that the adoption deed dated 03.12.2019 being very suspicious as regards its authenticity of having been signed in the presence by both parties, on 03.12.2019, and with the petitioner being under mental pressure and therefore not having signed it (even on 05.09.2019) in a balanced state of mind and the adoption therefore not being valid, hence even in terms of the Act of 1956 I would not hesitate in directing that custody of the child be handed over back to the petitioner at this stage, subject to any proceedings being instituted before a competent 'trial' court, with extensive evidence to be taken by that court, as may be led by each party.

92. *In fact, the third reason for holding that the adoption would not be valid, with therefore the petitioner entitled to the custody of her child, is that in such adverse circumstances of her having become widowed at a young age with an infant in her arms and with (possibly) advice coming from her parents-in-law (as alleged by her though she has termed it as “pressure” and not “advice”), her confused state of mind can be easily understood.*

Further, with respondent no.7 in her reply (reference paragraph 4 thereof), having admitted that after execution of the deed, the petitioner as well as her parents assured that it would be registered to make it more authentic and legal, and that it would take some time for the petitioner to reconcile to that fact, it becomes all the more obvious that the petitioner was not fully reconciled to actually giving her child in adoption even on 05.09.2019 and was doing it under emotional and mental pressure.

Next, to repeat, with her in-laws also stating that she had refused to come to Patiala to sign the document, very obviously she had already changed her mind about giving the child in

adoption.

Hence, all other things apart, the giving of the child in the circumstances of her being under emotional stress of losing her husband one and a half months earlier, with a three month old baby in her hands, the adoption cannot be held to be of her free will in a sound emotional and mental state.

On that ground alone, in my opinion, the adoption cannot be held to be a valid one, she thereafter having approached even the police and the Social Welfare Department in the middle of December 2019.

93. In view of the aforesaid discussion, even if the JJ Act of 2015 were to be held to be not applicable in the present case, with only the Act of 1956 to be applicable, this court would still hold that the petitioner is entitled to the custody of her child, with his adoption by respondent no.7 being highly questionable for the detailed reasons given hereinabove in paragraphs 84 and 86 to 91; and it not being a valid deed in any case, for the reasons given in paragraph 92.

In a nutshell:-

Firstly, keeping in view the ratio of the judgment of the Supreme Court in **Ruchi Majoo's** case (*supra*), this court would be within its jurisdiction in such a petition to go into the issue in depth;

2nd, it is held, more than just *prima facie* at least, that the adoption deed dated 03.12.2019 would not seem to be an authentic deed signed by both parties on that date;

3rd, the authority given to respondent no.9 by the petitioner, cannot be held to be proved in the absence of the registration of any document conferring such authority, as per the requirement of Section 17(3) of the Registration Act;

4th, in any case the giving of the baby to respondent no.9 not being in a sound emotional and fit mental state by the petitioner, it cannot be held to be a valid adoption, and therefore with the petitioner having changed her mind thereafter with regard to giving the child given in adoption before an authentic adoption deed was signed by both parties in each others' presence with the natural mother handing over the child to the adoptive mother/father, the custody of the child needs to be handed over to the petitioner.

94. Coming then to the third question framed in para 66 *supra*, of whether actually it is the Act of 1956 or the Act of 2015 that would be applicable in the case of an adoption of the child by respondent no.7 and her husband.

In the opinion of this court, in fact, it would be the Act of 2015 that would be applicable and not the Act of 1956, in view of the fact that the petitioner and her husband are presently (and admittedly), ordinarily residents of the USA and not of India, for more than one year even on the date that they decided to take the child in adoption. (Further discussion on that is in para 100 ahead).

In that context, the relevant provisions of the Act of 2015, are reproduced hereinbelow, in *extenso*.

95. Firstly, it is to be noticed that the said Act is applicable to the whole of India and was brought into effect w.e.f. 15.01.2016,

vide a notification issued to that effect.

The preamble to the Act reads as follows:-

“THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinafter and for matters connected therewith or incidental thereto. WHEREAS, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that their basic human rights are fully protected; AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child; AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), and other related international instruments.

Be it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:”

Sub section (4) of Section 1 of the said Act, 2015, reads as follows:-

Short title, extent, commencement and application

“1. (1) This Act may be called the Juvenile Justice (Care and Protection of Children) Act, 2015.

(2) x

(3) x

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including —

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

Definitions.2. In this Act, unless the context otherwise requires,—

(1) “abandoned child” means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry;

(2) “adoption” means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child;

(3) “adoption regulations” means the regulations framed by the Authority and notified by the Central Government in respect of adoption;

(4) x

(5) x

(6) “authorised foreign adoption agency” means a foreign social or child welfare agency that is authorised by the Central Adoption Resource Authority on the recommendation of their Central Authority or Government department of that country for sponsoring the application of non-resident Indian or overseas citizen of India or persons of Indian origin or foreign prospective adoptive parents for adoption of a child from India;

(7) “Authority” means the Central Adoption Resource Authority constituted under section 68;

(8) x

(9) “best interest of child” means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;

(10) x

(11) “Central Authority” means the Government department recognised as such under the Hague Convention on Protection of Children and Cooperation in Inter-country Adoption (1993);

(12) “child” means a person who has not completed eighteen years of age;

(13) x

(14) “child in need of care and protection” means a child—

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person—

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that

person; or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;

(15) “child friendly” means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child;

(16) “child legally free for adoption” means a child declared as such by the Committee after making due inquiry under section 38;

(17) to (27) x x x x x x x x x x x x x x x x x x x

(28) “fit person” means any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognised as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child;

(29) x x x x x x x x x x x x x x x x x x x

(30) x x x x x x x x x x x x x x x x x x x

(31) “guardian” in relation to a child, means his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceedings; (32) x

(33) x x x x x x x x x x x x x x x x x x x

(34) “inter-country adoption” means adoption of a child from India by nonresident Indian or by a person of Indian origin or by a foreigner;

(35) x x x x x x x x x x x x x x x x x x x

- (36) xxxxxxxxxxxxxxxxxxxxxxxxxxx
- (37) “no objection certificate” for inter-country adoption means a certificate issued by the Central Adoption Resource Authority for the said purpose;
- (38) “non-resident Indian” means a person who holds an Indian passport and is presently residing abroad for more than one year;
- (39) to (42) xxxxxxxxxxxxxxxxxxxxxxxxxxx
- (43) “overseas citizen of India” means a person registered as such under the Citizenship Act, 1955;
- (44) “person of Indian origin” means a person, any of whose lineal ancestors is or was an Indian national, and who is presently holding a Person of Indian Origin Card issued by the Central Government;
- (45) to (48) xxxxxxxxxxxxxxxxxxxxxxxxxxx
- (49) “prospective adoptive parents” means a person or persons eligible to adopt a child as per the provisions of section 57;
- (50) & (51) xxxxxxxxxxxxxxxxxxxxxxxxxxx
- (52) “relative”, in relation to a child for the purpose of adoption under this Act, means a paternal uncle or aunt, or a maternal uncle or aunt, or paternal grandparent or maternal grandparent;
- (53) “State Agency” means the State Adoption Resource Agency set up by the State Government for dealing with adoption and related matters under section 67;
- (54) to (59) xxxxxxxxxxxxxxxxxxxxxxxxxxx
- (60) “surrendered child” means a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee;
- (61) all words and expressions used but not defined in this Act and defined in other Acts shall have the meanings respectively assigned to them in those Acts.

CHAPTER II
GENERAL PRINCIPLES OF CARE AND PROTECTION OF CHILDREN

3. The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:—
- (i) to (iii). xxxxxxxxxxxxxxxxxxxxxxxxxxx
 - (iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.
 - (v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.
 - (vi) Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.
 - (vii) Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being,

facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) x x x x x x x x x x x x x x x x x x

(ix) Principle of non-waiver of rights: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) x x x x x x x x x x x x x x x x x x

(xi) Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) to (xv) x x x x x x x x x x x x x x x x x x

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

CHAPTER VIII ADOPTION

56. (1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.

(2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.

(3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.

(4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.

(5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.

57. (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child. (5) Any other criteria that may be specified in the adoption regulations framed by the Authority.

58. x x x x x x x x x x x x x x x x x x

Procedure for inter-country adoption of an orphan or abandoned or surrendered child.

59. (1) to (11) xxxxxxxxxxxxxxxxx

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

60. (1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

(3) *The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.* 62.

(1) The documentation and other procedural requirements, not expressly provided in this Act with regard to the adoption of an orphan, abandoned and surrendered child by Indian prospective adoptive parents living in India, or by non-resident Indian or overseas citizen of India or person of Indian origin or foreigner prospective adoptive parents, shall be as per the adoption regulations framed by the Authority.

(2) The specialised adoption agency shall ensure that the adoption case of prospective adoptive parents is disposed of within four months from the date of receipt of application and the authorised foreign adoption agency, Authority and State Agency shall track the progress of the adoption case and intervene wherever necessary, so as to ensure that the time line is adhered to.

63. A child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family:

Provided that any property which has vested in the adopted child immediately before the date on which the adoption order takes effect shall continue to vest in the adopted child subject to the obligations, if any, attached to the ownership of such property including the obligations, if any, to maintain the relatives in the biological family.

64. *Notwithstanding anything contained in any other law for the time being in force, information regarding all adoption orders issued by the concerned courts, shall be forwarded to Authority on monthly basis in the manner as provided in the adoption regulations framed by the Authority, so as to enable*

Authority to maintain the data on adoption.

(65 to 67) x x x x x x x x x x x x x x x x x x .

68. The Central Adoption Resource Agency existing before the commencement of this Act, shall be deemed to have been constituted as the Central Adoption Resource Authority under this Act to perform the following functions, namely:—

(a) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency;

(b) to regulate inter-country adoptions;

(c) to frame regulations on adoption and related matters from time to time as may be necessary;

(d) to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption;

(e) any other function as may be prescribed. (All emphasis applied in this judgment only).

96. Of the aforesaid provisions as have been reproduced, first of all sub sections (3) and (4) of Section 56 need to be referred to, the first of which postulates that the Act of 2015 shall not apply to any adoption of children made under the provisions of the Act of 1956.

Immediately thereafter however, sub section (4) stipulates that all inter-country adoptions shall be done only under the provisions of the Act of 2015, and the adoption regulations framed by the authority. (Authority has been defined in Section 2(7) to mean the CARA, constituted under Section 68 of the Act).

What is very essential to notice is that despite sub section (3) of Section 56 stipulating that the Act of 2015 would not be operative in the case of an adoption to which the Act of 1956 applies, however, sub section (4) still goes on to say that all inter-country adoptions would be governed by the Act of 2015.

*Learned senior counsel appearing for respondents no.7 to 10 had laid stress on what has been held by a co-ordinate bench in **Jasmine Kaurs'** case (supra), to the effect that the question of an inter-country adoption applying to an adoption that takes place in respect of a Hindu “giving party” and “adoptive party” would not arise, as the Act of 2015 applies only to the adoption of orphaned, abandoned and surrendered children.*

Thus, it was held that where the natural parents and the adoptive parent are both Hindus (or Budhists, Jains or Sikhs), who have mutually agreed to give and take (respectively) a child, with that adoption conforming to the conditions stipulated in the Act of 1956, then even in terms of Section 56(3) of the Act of 2015, it would be the Act of 1956 that would prevail and not the JJ Act, 2015. This was held to be so even in a case where the adoptive parents are foreign citizens (as was the case in that petition).

97. In brief, in that case the natural mother was giving her child in adoption to her sister who was a British citizen, with the adoption deed duly registered and there being no conflict between the natural and adoptive parents as regards either the validity of the adoption deed or the custody of the child.

The problem arose because, after the deed had been

registered and the child had been taken in adoption, the adoptive parents applied for an Indian passport for the child, which was refused by the concerned passport authority, on the ground that no certificate had been obtained from CARA though the adoption was an international adoption.

Such refusal by the passport authority was challenged by the adoptive parents and eventually it was held by this court (co-ordinate Bench), that in fact there was no need for obtaining such a certificate from CARA. Yet, to facilitate the smooth transition of the child from one family to another and one country to another, CARA was directed to issue that certificate.

The Union of India opposed that petition, and in fact, I have been informed that CARA has appealed against the said decision before a Division Bench of this court, with that appeal (LPA No.517 of 2020) to be finally adjudicated upon as yet.

98. It has been held in the penultimate paragraph of that judgment (Jasmine Kaur) that:-

“...it is not mandatory to invoke the JJ Act, 2015, in the facts of the present case, where the adoption is a direct adoption by the parents of the non-adoptive parents/relatives under HAMA. As per Section 5.2 of X of the Passport Manual of 2016, and in view of Part-I of For Subsequent orders see CRM-W-744-2021 72 of 88 ::: Downloaded From Local Server on - 19-06-2023 13:57:11 ::: CRWP No.820 of 2020 -72- Schedule-III under Rule 5 of the Passport Rules of 1980, NOC from CARA, is required only by a foreign parents and not by Indian parents.”

Though it has been stated in the aforesaid paragraph that it was not mandatory to invoke the JJ Act, 2015, in the facts of that case, yet, a reading of the entire judgment shows that the ratio thereof is to the effect that even when Indian parents/parents of Indian Origin are living abroad but are those as would be governed by the provisions of the Act of 1956, adopt a child from Hindu parents in India, especially in the case of relatives, the Act of 2015 would have no application at all, even in terms of sub section (3) of Section 56 thereof.

In fact it is to be noticed that Mr. Anil Malhotra, who assisted as amicus curiae in the present case, was also appointed as amicus in that case, and it was his stand there, that in fact the JJ Act may not apply in view of Section 56 (3). That, in fact, is what he had also initially argued before this Bench (in the present petition) but subsequently he had also submitted that the JJ Act would still apply in view of the fact that the said Act is a beneficial legislation in ratification of the Hague Convention (on the Rights of the Child), adopted by the General Assembly of the United Nations, on December 11, 1992, and therefore, the Act would apply to all such international adoptions.

99. With the utmost respect to what has been held by the hon'ble coordinate bench, I am in agreement with that argument of Mr. Malhotra, for the reasons set out hereinafter.

100. In that context, first of all, the definition of “inter-country adoption” as given in sub section (34) of Section 2 of the Act of 2015, is that it means adoption of a child from India by a

Non-resident Indian or by a person of Indian origin or by a foreigner.

Thereafter, sub section (38) of Section 2 defines a “Non-resident Indian” to be a person who holds an Indian passport and is presently residing abroad for more than one year.

In the present case, admittedly, respondent no.7 and her husband are residing in the USA since 2014, and therefore, as on the date shown in the 'adoption deed' (which has already been held hereinabove to be a very questionable one), they had been residing abroad for about 5 years.

Hence, they are Non-resident Indians for the purposes of the Act of 2015.

101. Coming then to what has also been held in Jasmine Kaurs' case (supra), to the effect that the Act of 2015 is an Act actually enacted to take care of either juveniles in conflict with law, or for the purpose of adoption of those children who are abandoned, orphaned or surrendered (to the Committee constituted under Section 27 of that Act), with sub-section (60) of Section 2 defining a surrendered child).

(a) Though that may seem to be so from a reading of the Statement of Objects and Reasons for enactment of the said Act, paragraph 5 of which only refers to adoption of orphaned or surrendered children; however, firstly, the Preamble to the Act states that it is one to consolidate and amend the law “relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic need through proper care and protection, development, treatment, social reintegration, by adopting a child friendly approach in the adjudication and disposal of matters....”.

Thus, it does not restrict itself to the care of only abandoned/orphaned/surrendered children, or those in conflict with law, but extends its wings to protect all children who are in need of care and protection.

Hence, in my opinion, a child who is being taken to a far off country by way of adoption, is definitely a child who needs to be protected and cared for, which is why inter country adoptions are one category of adoptions that must adhere to the provisions of the Act of 2015 and the Adoption Regulations framed thereunder, with CARA being the authority that is required to go into the question of the appropriateness of any couple/person living abroad, to adopt a child from India.

It also cannot be forgotten that the need for protection of children being taken to a foreign country becomes all the more necessary with there having been too many unfortunate cases of child abuse in the past (sexually or for purposes of labouring in houses etc.)

Hence, background checks by CARA and its equivalent authority in a foreign country becomes imperative in the case of an inter country adoption.

For that purpose, CARA is necessarily required to be in communication with the equivalent authority set up in the other country, with that authority to furnish a Home Study Report, in

terms of Rule 1 of Regulation 15 of the said Adoption Regulations (as would be discussed further ahead also in paragraph 108).

(b) The next reason on account of which I find myself (again with due respect to the learned co-ordinate Bench which painstakingly has passed a detailed judgment in that case), unable to agree with that view point, is the fact that sub section (1) of Section 60 of the Act of 2015 postulates as follows:-

“60. (1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority. (2) The Authority shall on receipt of the order under sub-section For Subsequent orders see CRM-W-744-2021 75 of 88 :::: Downloaded From Local Server on - 19-06-2023 13:57:11 :::: CRWP No.820 of 2020 -75- (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child. (3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.”

102. Hence sub section (1) of Section 60 obviously visualises a situation where a relative living abroad would adopt a child from a relative living in India.

Equally obviously, if a child is being adopted from a relative in India, i.e from his/her natural parents in India, that child cannot be described to be either orphaned or abandoned or surrendered.

103. However, Section 62 of the Act of 2015 again requires to be looked at, with sub-section (1) thereof reading as follows:-

*“62. **Additional procedural requirements and documentation.**-- (1) The documentation and other procedural requirements, not expressly provided in this Act with regard to the adoption of an orphan, abandoned and surrendered child by Indian prospective adoptive parents living in India, or by non-resident Indian or overseas citizen of India or person of Indian origin or foreigner prospective adoptive parents, shall be as per the adoption regulations framed by the Authority.”*

One interpretation of Section 62 (1) could be that the said provision would apply only to adoption of orphaned/abandoned/surrendered children in India, by either a person living in India or by a person living in another country [whether that person be a foreign citizen or an Oversees Citizen of India (OCI) or a Non-Resident Indian (NRI)].

The other interpretation could be that it applies not only to adoption of abandoned/orphaned/surrendered children by Indian adoptive parents, but also to all adoptions of children in India, by foreign citizens, Oversees Citizens of India and Non-Resident Indians [as defined in Section 2(38)].

However, even if the first interpretation is to be accepted, still in any case, with sub-section (1) of Section 60 specifically referring to adoption of a child by a relative living

abroad, from his relative in India, then, as already observed said hereinabove, that child would, naturally, not be an orphaned/abandoned/surrendered child.

104. Hence, though undoubtedly the Statement of Objects and Reasons for enacting the Act does not specifically talk of inter country adoptions, and refers mainly to children who are juveniles in conflict with law or are abandoned/orphaned/surrendered, yet the Preamble to the Act, as already seen, states that the Act is one relating to children in conflict with law and children in need of care and protection, by catering to their basic needs of proper care and protection etc.

Further, even clause 5 of the Statement of Objects and Reasons states that reenactment of the old Act was necessary to bring about a comprehensive legislation to “...provide for general principles of care and protection of children and for procedure in the case of children who are in need of such care and protection and children in conflict with law.....adoption of orphaned/abandoned/surrendered children...”

(All emphasis applied here only)

Thus, though again adoption is spoken of only in relation to orphaned/abandoned/surrendered children, the objective of the new Act was to provide for general principles of care and protection of all children.

Hence, with there also being a provision in the Act, i.e. Section 60, specifically talking of adoption of a child from a relative in India (thereby obviously not being an abandoned/orphaned/surrendered child), it cannot be said, in the opinion of this court, that it would be an Act only applicable to the adoption of abandoned/orphaned/surrendered children. This is to be further seen again with the fact that though as per Section 56 (3), the Act of 2015 is not to apply where the Act of 1956 is applicable, however, sub-section (4) immediately thereafter holds that all inter country adoptions must be in terms of the provisions of the Act of 2015.

105. Again, it also cannot be lost sight of that an inter country adoption is specifically defined in the Act of 2015; and the said Act being one that was enacted in pursuance to 'ratification' of India being a signatory to the Hague Convention of 1992, then simply because the preamble to the Act has 'missed out' specifically mentioning inter country adoptions, it would not be possible to ignore the substantive provision as has been discussed hereinabove, i.e. what is contained in Section 60, (with sub-section (1) thereof obviously not applying to abandoned/surrendered/orphaned children as already said), also with sub sections (34) & (38) of Section 2 defining an inter-country adoption and a non-resident Indian, as they do, respectively. Therefore, sub-section (4) of Section 56 would mean that all inter-country adoptions would be governed by the Act of 2015.

106. Though nothing extra can be read into a statute as per law well settled, equally obviously, a substantive provision contained in a statute cannot be ignored and therefore, to achieve

the aims and objective of the Act, not only what is contained in its Statement of Objects and Reasons and Preamble is to be looked at, but the substantive provisions contained therein also have to be read in entirety, with the substantive provision naturally taking precedence over the preamble, even if a particular substantive provision does not find a reference in the preamble.

Ignoring such a substantive provision would render it completely otiose, which cannot be so, because the said provision has been actually incorporated in the Act, consciously.

Hence, in my opinion, the Act of 2015, as regards its application to adoption of children, does not apply only to orphaned, abandoned and surrendered children, but also to all children who are being adopted from India by non-resident Indians or foreign citizens.

107. Having observed as above, it is of course to be noticed that Sections 58, 59 and 60 are applicable to procedure for inter-country adoptions by prospective adoptive parents living in India, for inter-country adoptions of an orphaned/abandoned/surrendered child, and for inter-country adoptions by a relative (respectively), with there seemingly being no specific provision [other than Section 62 (1)], catering to an inter-country adoption from a person other than a relative.

That would not, in the opinion of this court, obviate the need for approval by CARA, of such adoption by adoptive parents living abroad, as regards a child being adopted from India.

In fact the implication would seem to be that no person living abroad for more than one year, can adopt a child from India unless the child is that of her/his relative, or is an orphaned/abandoned/surrendered child.

In fact, the term “relative” has also been defined in Section 2(52) of the Act, to mean a paternal or a maternal aunt or uncle, or a paternal or maternal grandparent.

Admittedly, though respondent no.7 is stated to be in some distant relation to respondent no.6 (i.e. the mother-in-law of the petitioner), she is neither a paternal or maternal aunt to the child, nor obviously his grand-mother, and consequently, she cannot be adopting the child in such capacity of a relative. 108.

Of course, if an orphaned/abandoned/surrendered child is to be adopted, then even a non-resident Indian or a foreign national can adopt such a child from India, subject to approval of CARA, which is an authority set up in India under Section 68 of the Act of 2015, with sub section (a) to (e) thereof stating that the authority is specifically to promote and frame regulations etc. for inter-country adoptions.

In this context, of the provisions of the Adoption Regulations, 2017, as have been enumerated in detail by learned amicus curiae in his supplementary report, Regulation 15 needs to be referred to, which lays down the procedure for inter-country adoption from India. Rules 1 and 2 of Regulation 15 are reproduced hereinbelow:-

“15. Registration and Home Study Report for prospective adoptive parents for inter-country adoption.-(1) Any Non-Resident Indian,

Overseas Citizen of India or foreign prospective adoptive parents, living in a country which is a signatory to the Hague Adoption convention and wishing to adopt an Indian child, can approach the Authorised Foreign Adoption Agency or the Central Authority concerned, as the case may be, for preparation of their Home Study Report and for their registration in Child Adoption Resource Information and Guidance System.”

(2) In case, there is no Authorised Foreign Adoption Agency or Central Authority in their country of habitual residence, then the prospective adoptive parents shall approach the Government department or Indian diplomatic mission concerned in that country for the purpose.

(3) to (16) xxxxx xxxxx xxxxx

(Emphasis applied here only).

(The remaining rules of the said regulation are not being reproduced in extenso as they only enumerate the process of registration and the procedure for CARA to follow, in the case of adoption of a child from India).

109. Hence, a perusal of the said regulation and others contained in Chapter IV of the Adoption Regulations, would show that in fact non-resident Indians living abroad can only adopt by the said procedure, and obviously only through CARA. It would also indicate that since non-resident Indians etc. cannot adopt any child from India except through CARA, that would mean that they can adopt only orphaned/abandoned/surrendered children, unless such adoption is from a relative (as defined in Section 2 (52), in which case the procedure stipulated in Section 60 of the Act of 2015 would need to be followed.

*110. As regards the judgment cited by Mr. Kanwaljit Singh in Shabnam Hashmis' case (supra), though undoubtedly in paragraph 11 thereof (Law Finder edition), it has been stated that the JJ Act of 2000 does not mandate any compulsory action for any prospective parent, thereby leaving such person with the liberty of 'accessing the provisions of the Act' if he so desires; however, firstly, that judgment describes in detail the background of enactment of that Act, i.e. it being for the welfare of the children and in paragraph 3 it also states that it deals with inter country adoptions for which elaborate guidelines had been laid down by the Supreme Court in *Laxmi Kant Pandey v. Union of India*, with a regulatory body, i.e. CARA, having been created by the Central Government thereafter.*

Secondly, that judgment refers to the JJ Act 2000 and not the subsequent Act of 2015, the judgment itself having been pronounced on 19.02.2014.

Thus, even though the Act of 2000 otherwise may be largely pari materia to the Act of 2015, however, obviously Section 60 of the Act of 2015 could not have been taken into consideration in that judgment, wherein procedure for adoption of children in India from a relative has been stipulated.

*Hence, in my opinion a single reference in *Shabnam Hashmi* to the Act of 2000 being an optional Act to be resorted to by anybody who wishes to do so, cannot be relied upon by the learned*

Senior Counsel for respondents no.7 to 10 herein to persuade this court to hold that the Act of 2015 would not mandatorily apply to all inter country adoptions, with it again to be noticed that even in the said judgment, the objectives of enactment of the Act of 2000 were extensively referred to, i.e. it is for the benefit and welfare of children.

This is to be seen with the fact that thereafter the new Act of 2015 has come into existence repealing the old Act, with, naturally, each provision of the new Act to be looked at to arrive at a conclusion with regard to its applicability.

111. *Consequently, I would hold that for all inter-country adoptions, even by those who are otherwise governed by the Act of 1956, i.e. Hindus, Budhists, Jains or Sikhs by religion and those who are not Muslims, Christians, Parsis or Jews, it would be the JJ Act of 2015 that would apply and therefore, sub-section (3) of Section 56 can only be read to mean (in the opinion of this court), that where the adoption is not of an abandoned/orphaned/surrendered child, and is not an inter-country adoption of any child, then it would be the Act of 1956 that would apply (in the case of Hindus, Sikhs, Jains and Budhists) and not the Act of 2015.*

But if it is an inter-country adoption, or an adoption even within India in the case of an orphaned or abandoned child (as per Section 58), it would necessarily be the Act of 2015 that would be applicable, with all the safeguards and procedures provided therein to be necessarily followed.

Therefore, it would be the Act of 2015 and not that of 1956, as would apply to the present case.

Obviously, the above provisions of the Act are to ensure that the child is well protected and looked after even after his exit from India to a foreign country, because prior to CARA granting any certificate for care and adoption by a person living outside India (for more than one year), necessarily has to obtain a study report even from the authority constituted for such purpose in the country to which the child is to be taken, i.e. the “authorised foreign adoption agency” defined in sub section (6) of Section 2 of the Act of 2015.

Hence, all such adoptions must first be approved by the authority constituted under Section 68 of the said Act, i.e. CARA, after which only, an adoption even by Indian parents living outside India for more than one year, can be legally and validly made.

112. *However, since the conclusion arrived at by this bench, on the application of the Act of 2015, is contrary to what has been held by a co-ordinate bench in Jasmine Kaur's case (supra), the matter needs to be referred to a larger bench on the following question formulated by this court:-*

“As to whether in terms of sub sections (6), (34), (37) and (38) of Section 2, read with what is contained in Sections 60 and 68 and other provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, as also the Adoption Regulations framed under the provisions of Sections 68 (c) and 2 (3) of that Act, would respondent no.7 require a certificate from the authority constituted

under Section 68 of the Act, before adopting a child from India, with respondent no.7 being a non-resident Indian as defined in Section 2(38) of the said Act?”

Since a Division Bench is already seized of the issue in LPA No. 517 of 2020, this matter, as regards that question, be placed before their Lordships of the Division Bench, after obtaining necessary orders from hon'ble the Chief Justice.

113. *Yet, firstly, in view of the fact that this court has formed an opinion, more than just prima facie (though not ex facie in the absence of any detailed evidence led), that the adoption deed shown to be executed on 03.12.2019 is a highly suspicious document as regards its authenticity; and secondly, the intention to give the child in adoption being at a time when the petitioner cannot be said to be in a stable mental and emotional state, due to the recent death of her husband (and therefore it not being a valid adoption), custody of the child is directed to be returned immediately to the petitioner by respondent no.7, even pending further adjudication on the issue either by the Division Bench as regards the applicability of the JJ Act, 2015 and the consequences of not having obtained a necessary certificate from CARA by respondent no.7.*

114. *As regards whether it would be in the interest of the child to be left, even in the interregnum, with respondent no.7 as his adoptive mother, or with the petitioner who is his natural mother, though undoubtedly it would seem that, looking at the financial aspect at least, it would be respondent no.7 and her husband who are better off than the petitioner, yet, as has also been held by the Supreme Court in **Mausami Moltra Ganguli v. Jayant Ganguli** 2008(4) RCR (Civil) 551, it is not just a single factor of financial betterment, nor even of natural love etc. alone, that is to weigh with the court while granting custody to any particular person, but the overall benefit of the child and the entire circumstances of the case.*

In the present case obviously, if the petitioner had not decided (in a not fully fit emotional and mental state), to give the child in adoption at all, his custody would have continued with her, she being his natural mother, and the question of being given away in adoption would not have arisen in the first place.

[Of course, it may also be noticed here that counsel for the petitioner had submitted that the petitioners would always continue to receive support from her father and brother, and in any case, she being an educated person, would be able to secure a job too].

Albeit, once this court has held that the validity of the adoption itself is highly questionable and not valid even in terms of the Act of 1956, (for all the reasons given, especially in paras 91 and 92), then naturally, whether or not the child enjoys a better future anywhere else, his natural guardian would be the petitioner, i.e. his natural mother, even in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, which lays down that the natural guardian of a boy and an unmarried girl is the father, and after him the mother, with the custody of a child who has not completed 5 years of age to be ordinarily with the mother.

Therefore, with the child being now about 1 year and 3

months old, and his father having already died on July 22, 2019, it would be his natural mother who would be his natural guardian, i.e. the petitioner, once the adoption by respondent no.7 is held to be questionable and not valid.

Further, what this court also cannot overlook, is the fact that respondent no.7 is 52 years old, with her husband being 43 years old, and though, as already said, there is no legal bar under the Act of 1956 on her adopting a child at that age, yet, in the opinion of this court their age also would be a factor to be gone into as regards the upbringing and welfare of the child.

115. To sum up, the conclusions reached in this judgment with regard to the three questions framed in paragraph 66 hereinabove, are as follows:-

(i) That this petition is maintainable (in view of what has been discussed in paragraphs 68 to 71, *supra*);

(ii) That the adoption does not seem to be valid (as regards (b) below, and in any case not valid as per

(a) and (c) below), even under the provisions of the Act of 1956, in view of the fact that:- (a) the giving of the child by the petitioner to respondent no.9, though is backed by her affidavit dated 05.09.2019, that affidavit being only an authority to respondent no.9 to further hand over the child to respondent no.7, such document of authority is required to be compulsorily registered in terms of sub section (3) of Section 17 of the Registration Act, 1908 (as discussed in paragraphs 80, the last part of para 83, and para 85 *supra*);

(b) the adoption deed dated 03.12.2019, would not seem to be a valid document as it purports to show that the petitioner signed it on that date in the presence of respondent no.7 and her husband, whereas even as per respondents no. 5 and 6 that document was signed by the petitioner on 05.09.2019 (and not 03.12.2019) and therefore, the presence of the petitioner on 03.12.2019 in Patiala as the document purports to show, is highly doubtful thereby making it a very questionable deed (as discussed in paragraphs 86 to 90 *supra*);

(c) that even otherwise the adoption deed cannot be said to be valid in view of the fact that the petitioner was not in a fully stable mental condition and was under mental stress of having lost her husband only 1½ months earlier, and with her holding a 3 month old baby and further, she therefore having changed her mind as regards the adoption subsequently and not having come to Patiala, to sign the document on 03.12.2019 (as discussed in paragraphs 91 and 92 *supra*);

(iii) That in any case, in the opinion of this court, it would be the JJ Act of 2015, as would apply for an inter-country adoption, the adoptive mother and her husband admittedly being Indian citizens residing abroad for more than one year; and consequently a certificate from CARA would be essential to validate any such adoption (as discussed in paragraphs 94 and 96 to 111 *supra*).

116. Thus, for the sake of repetition, it is again stated that for the reasons already discussed in detail, this court having firstly reached a finding that the said adoption is not legally valid even in

terms of the Act of 1956, the custody of the child needs to be returned immediately to the natural mother, i.e. the petitioner.

It needs to be observed here that though the issue of applicability of the Act of 2015 is being referred to a larger bench, however, even so, with the opinion expressed on the adoption being highly questionable as regards the authenticity of its proposed date of signing and presence of all parties together; and in any case it being not valid even under the Act of 1956, because of the mental condition of the petitioner, the custody of the child needs to be returned to the mother (as regards the outcome of this petition, which is one seeking such custody).

117. It further needs to be observed that any person would understand that respondent no.7 would obviously have developed an attachment to the child in the past about nine months that she has had his custody (stated to be since 22.11.2019), which would also reflect from her willingness to transfer her entire savings of Rs. 50 lakhs to him. However, her sentiments are to be weighed against the sentiments of the petitioner who is the natural mother of the child, who legally would be entitled to his custody in view of what has been held in extenso hereinabove; and who nurtured him for nine months in her womb and thereafter even held him for more than three months, and consequently, her natural attachment to her own borne child, and her sentiments towards him, obviously cannot be undermined, once she is held to be legally entitled to his custody.

Therefore, it would be highly appreciated if respondent no.7, who, to repeat, obviously would have developed attachment to the child, ensures that the transition of the child from her custody to that of the petitioner is made absolutely 'easy', with the child being firstly familiarised with his natural mother again.

It would in fact be appropriate in the interest of the child if respondent no.7 hands over the child by first familiarising him with his natural mother.

The needful be done over a period of two weeks.

118. The petition is allowed as aforesaid, as regards the custody of the child being handed over to the petitioner, even pending consideration of the legal question referred to the hon'ble Division Bench hereinabove, as would eventually be considered and adjudicated upon by their Lordships”

(75) Let us firstly, go to the observations made by the Apex Court in its order dated 31.03.2021 as far as it relates to the issue of interim arrangement with regard to the custody of minor child is concerned, we are of the firm view that without adjudicating the validity of alleged adoption, it will be unfair to order any interim arrangement at this juncture wherein the child is in the company of alleged adopted parents since 13.01.2020, the day on which

the disputed adoption deed seems to be executed and by now might have adjusted himself in their company. Disturbing the custody for a temporary purpose may not be in the larger interest of the minor child and this Court is otherwise also answering the reference finally.

(76) Though all relevant provisions relating to the statutes under examination have already been reproduced before this Court, however, Sections (2) (6) (34) (37) and (38), Sections 60 and 68 along-with Adoption Regulations framed under JJ Act, 2015, as categorically referred by learned Single Judge needs fresh reference.

“37. Orders passed regarding a child in need of care and protection.

The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely

- (a) declaration that a child is in need of care and protection;*
- (b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;*
- (c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;*
- (d) placement of the child with fit person for long term or temporary care;*
- (e) foster care orders under section 44;*
- (f) sponsorship orders under section 45;*
- (g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training. legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;*
- (h) declaration that the child is legally free for adoption under section 38;*
- (2) The Committee may also pass orders for----*
 - (i) declaration of fit persons for foster care;*
 - (ii) getting after care support under section 46 of the Act; or*
 - (iii) any other order related to any other function as may be*

prescribed.

38. Procedure for declaring a child legally free for adoption.

(1) In case of orphan and abandoned child, the Committee shall make all efforts for tracing the parents or guardians of the child and on completion of such inquiry, if it is established that the child is either an orphan having no one to take care, or abandoned, the Committee shall declare the child legally free for adoption:

Provided that such declaration shall be made within a period of two months from the date of production of the child, for children who are up to two years of age and within four months for children above two years of age:

Provided further that notwithstanding anything contained in this regard in any other law for the time being in force, no first information report shall be registered against any biological parent in the process of inquiry relating to an abandoned or surrendered child under this Act

(2) In case of surrendered child, the institution where the child has been placed by the Committee on an application for surrender, shall bring the case before the Committee immediately on completion of the period specified in section 35, for declaring the child legally free for adoption.

(3) Notwithstanding anything contained in any other law for the time being in force, a child of a mentally retarded parents or a unwanted child of victim of sexual assault, such child may be declared free for adoption by the Committee, by following the procedure under this Act.

(4) The decision to declare an orphan, abandoned or surrendered child as legally free for adoption shall be taken by at least three members of the Committee.

(5) The Committee shall inform the State Agency and the Authority regarding the number of children declared as legally free for adoption and number of cases pending for decision in the manner as may be prescribed, every month.

60. Procedure for inter-country relative adoption.-

(1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

(3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.

68. Central Adoption Resource Authority. *The Central Adoption Resource Agency existing before the commencement of this Act, shall*

be deemed to have been constituted as the Central Adoption Resource Authority under this Act to perform the following functions, namely:-

- (a) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency;*
- (b) to regulate inter-country adoptions;*
- (c) to frame regulations on adoption and related matters from time to time as may be necessary;*
- (d) to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption;*
- (e) any other function as may be prescribed.*

(77) After mechanical and judicious examination of the statutes as well as the material placed before this Court, we proceed to observe that the procedure for inter-country adoption, which is prescribed under Section 59 of the JJ Act, 2015, is elaborated in the Adoption Regulations, 2017 under Regulations 12, 15, 16, 17, 18 and 19. The procedure involves prospective adoptive parents getting a Home Study Report prepared in their country of habitual residence and getting registered on the Child Adoption Resource Information and Guidance System (CARINGS). The foreign adoption agency/central authority/government department prepares the Home Study Report and on finding the prospective adoptive parents eligible, sponsors their application to CARA for adoption from India. CARA scrutinizes the Home Study Report and determines the prospective adoptive parents' eligibility. Profiles of two children are sent to the prospective adoptive parents who can finalize one within 96 hours. A Child Study Report and Medical Examination Report are prepared and signed by the prospective adoptive parents. These documents are scrutinized by various authorities, both in India and in the receiving country. Within 10 days from receipt of acceptance of child by the prospective adoptive parents, CARA issues an NOC and letter of approval or permission of the receiving country. Within 10 days of receiving the NOC from CARA, the Specialised Adoption Agency files an application in the Court having jurisdiction and a passport is issued for the child within 3 days

from the date of receipt of the adoption order. The prospective adoptive parents receive the child in person from the Specialised Adoption Agency as soon as the passport and visa are issued to the child and within 2 months from the adoption order. Post- adoption, the authorized foreign adoption agency/central authority/government department ensures the submission of progress reports of the child for 2 years from date of arrival of child in the receiving country, on a quarterly basis during the 1st year and 6-monthly basis in the 2nd year. An undertaking is given by the prospective adoptive parents that they would allow personal visits by the representatives of the authorized foreign adoption agency/central authority/government department.

(78) In inter-country direct adoption amongst relatives under Section 60 of the JJ Act, 2015, there is no need for declaration of the child as legally free for adoption. A relative living abroad, who intends to adopt a child from his relative in India is required to obtain an order from Court and then apply for an NOC from CARA. On receipt of such court order and an application from the biological or adoptive parents, CARA will issue an NOC under intimation to the immigration authority of India and of the receiving country of the child. After receiving the NOC, the adoptive parents shall receive the child from the biological parents. Akin to the conditions for adoptions under HAMA, while issuing an order for adoption, the concerned Court is to ensure that the adoption is for the welfare of the child, due consideration is given to the wishes of the child, having regard to the age and understanding of the child and that there is no monetary exchange involved in the adoption. Regulations 53 to 55 of the Adoption Regulations, 2017 provide more detailed guidelines for inter-country direct adoptions by relatives, which is to be looked into.

“53. Other options for rehabilitation of children.

(1) *The Authority with the approval of its Steering Committee, may make additional efforts for adoption of hard to place children, through foster care on the Designated Portal.*

(2) *The children who are not being adopted after being declared legally free for adoption may be eligible for foster care by suitable foster parents under rule 44 of the rules and the **Schedule XVI** of the Regulations.*

(3) *The hard to place children shall be eligible for foster care and list of such children along with other categories of children as stipulated in rule 44 of the rules shall be accessible to District Child Protection Unit and the State Adoption Resource Agency through the Designated Portal.*

(4) *The Authority shall provide links between the Specialised Adoption Agency and the Child Care Institution for the purpose of adoption of children who are in foster care in the manner it has established links for the purpose of adoption.*

(5) *The foster families willing to adopt such children shall register themselves on the said Designated Portal.*

(6) *The prospective foster parents shall be physically, mentally, emotionally and financially capable and shall not have any life threatening medical condition and they should not have been convicted in any criminal act or accused in any case of child rights violation.*

54. In country relative adoptions.

(1) *The prospective adoptive parents shall register on the Designated Portal with the required documents as specified in the **Schedule VI**.*

(2) *Consent of biological parents or permission of the Child Welfare Committee, as the case may be, shall be required as provided in the **Schedule XIX** or **Schedule XXII** respectively.*

(3) *The consent of the child shall be obtained, if they are five years of age or above.*

(4) *Affidavit of adoptive parents is required in cases of in-country relative adoptions in support of their financial and social status as specified in the **Schedule XXIV**.*

(5) *The prospective adoptive parents shall receive due verification by the District Child Protection unit.*

(6) *The State Adoption Resource Agency shall further refer the case to the Authority for necessary approval following which pre-approval certificate shall be issued by the State Adoption Resource Agency as provided in the **Schedule XXV**.*

(7) *If the prospective adoptive parents have a foreign passport, the case shall be referred to the Authority for expert advice.*

(8) *After scrutiny of the application, the District Child Protection Unit shall file the application as provided in the **Schedule XXX** before the District Magistrate of the district where the child is habitually residing.*

(9) *The District Child Protection Unit shall obtain a certified copy of the adoption order from the District Magistrate concerned and furnish a copy of the same online to the Authority and the adoptive parents through the Designated Portal.*

55. Adoption by step parent.

*(1) The couple (step-parent and one of the biological parents) shall register on the Designated Portal with the required documents as specified in the **Schedule VI**.*

*(2) Consent of the biological parents and the step-parent adopting the child or children shall be as provided in the **Schedule XX**.*

(3) In case the custody of the child is under litigation, the adoption process shall be initiated only after the finalization of the case by the court concerned.

(4) The step-parent or the couple shall receive due verification by the District Child Protection Unit.

*(5) The State Adoption Resource Agency shall further refer the case to the Authority for necessary approval following which pre-approval certificate shall be issued by the State Adoption Resource Agency as provided in the **Schedule XXV**.*

(6) If the prospective adoptive parents have a foreign passport, the case shall be referred to the Authority for expert advice.

*(7) The biological parent and the step-parent shall file an application with the District Magistrate of the district through the District Child Protection Unit where the child is habitually residing, as per format provided in the **Schedule XXXII**, after due verification from the District Child Protection Unit and approval by State Adoption Resource Agency.*

(8) The District Child Protection Unit shall obtain a certified copy of the adoption order from the District Magistrate concerned and furnish a copy of the same online to the Authority and the adoptive parents through the Designated Portal.

*(9) In case of inter-country adoption by step parent, the process has to be followed as outlined in Inter- country relative adoption and requisite consent form has to be signed before the Child Welfare Committee as provided in the **Schedule XX** and further Family Background Report has to be completed as provided in the **Schedule XXI**."*

(79) The procedure involves preparation of a Home Study Report in the country of habitual residence of the prospective adoptive parents, getting registered on the Child Adoption Resource Information and Guidance System (CARINGS), preparation of a family background report and obtaining an adoption order from the competent court.

(80) The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. In the absence of a law providing for adoption

of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child who is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country.

(81) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to

bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organizations or individuals activating themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually.

(82) It is essential to prove and establish that the giving and taking ceremony in accordance with Section 11(iv) of HAMA is mandatory failing which adoption would be invalid under law. Reference can be made to **L. Debi Prasad (D) by LRs vs. Smt. Tribeni Devi & Ors. AIR 1970 SC 1286**, wherein the Supreme Court held that although no particular form is prescribed for the ceremony, the law requires that the natural parent should hand over the adoptive boy and the adoptive parent must receive him, the nature of the ceremony varying according to the circumstances. It further held that the giving and receiving are absolutely necessary to the validity of an adoption; they are the operative part of the ceremony, being that part of it which transfers the boy from one family to another; but the Hindu law does not

require that there shall be any particular form so far as giving and acceptance are concerned; for a valid, adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, and that the boy shall be handed over and taken for this purpose.

(83) In *Anokha vs. The State of Rajasthan & Ors., (2004) 1 SCC 382*, the Supreme Court reiterated the position that procedural safeguards would not apply in the case of inter-country direct adoptions i.e. adoptions from the biological parents to the adoptive parents. The Supreme Court held that:-

“In our view, the High Court and the District Judge erred in not considering the material produced by respondents no. 2 and 3 in support of their application and in rejecting the application under the Guardians and Wards Act, 1890 solely on the basis of the guidelines. The background in which the guidelines were issued was a number of decisions of this Court, the first of which is Lakshmi Kant Pandey v. Union of India [AIR 1984 SC 469 : (1984) 2 SCC 244]. This is borne out from the stated object of the guidelines as set out in paragraph 1.1. thereof which "is to provide a sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court of India in the series of judgments delivered in L.K. Pandey V. Union of India and Others between 1984 and 1991". The original decision of the Court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of mal-practices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed not only by the Indian Council of Social Welfare but also by Foreign Organisations and Indian Organisations which were engaged in offering and placing Indian children for adoption by foreign parents. The

decision has referred to three classes of children: (i) children who are orphaned and destitute or whose biological parents cannot be traced; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents"1. The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she was satisfied that it would be in the best interest of the child. That is the greatest safeguard."

(84) This Court in **Jasmine Kaur vs. Union of India CWP No.10555 of 2019** decided on 28.07.2020, dealt with a case involving a child who was given away in adoption by her biological parents to her massi. The adoption was conducted as per Sikh rites and ceremonies, in accordance with HAMA. This Court framed various issues and analysed the same on the touchstone of JJ Act vis-à-vis HAMA and held that:-

"A perusal of the J.J. Act, 2015 shows that it is a special provision for a limited class of children, those who are in conflict with law, in need of care and protection, orphaned, surrendered or abandoned. In the present case the adoptive parents are Sikhs. The child is being given over by the biological parents of sound mental health. The biological mother is the real sister of the adopted mother. The child is neither an orphaned nor surrendered nor in conflict with the law. Thus, the J.J. Act 2015 does not apply for adoption of the particular child in question.

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The argument of learned Additional Solicitor General of India, Mr.Satya Pal Jain, that the judgment pertains to a period before the amendment of the J.J. Act, 2000 and is before the enactment

of J.J. Act, 2015, came into operation is correct but the same does not help in any manner as the applicability of the Act under the Juvenile Justice (Care and [Protection of Children](#)) Act, 2000 and the Juvenile Justice (Care and [Protection of Children](#)) Act, 2015 remains the same. In fact, its application under J.J. Act, 2015 is even more specific to only special children.

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Further, the aim and object of the J.J. Act, 2015 was formulated for protection of such children who are found to be in conflict with law or 9 of 26 required rehabilitation. Thus, [Section 56\(4\)](#) and (5) of the J.J. Act, 2015 is only for such children. Sub Section (2) of Section 56 of the J.J. Act, 2015, which talks of adoption of a child by a relative from another relative, is an option/remedy provided to those to whom HAMA, 1956 will not apply, i.e. they are neither Hindu, Buddhist, Jain or Sikh, as the case may be or is not Muslim, Christian, Parsi or Jew by religion, although it does not bar and in a way gives option even to a Hindu, Sikh, Jaina etc. to apply under this Act. Therefore, it also does not mean that those religions covered under the definition of a 'Hindu' as per the HAMA, 1956 cannot apply under the J.J. Act, 2015. Here, it needs to be emphasized that J.J. Act, 2015 is a secular Act and rather gives choice to even those covered under the HAMA, 1956 to apply for adoption under the J.J. Act, 2015, as also clarified by the Apex Court in the case of [Shabnam Hashmi vs Union of India and others](#) 2014(1) RCR (Civil) 1052 holding that Juvenile Justice (Care and [Protection of Children](#)) Act, 2000 has been enacted for adoption of children irrespective of their religion/caste and the said Act cannot be negated by any other personal law and the individuals are free to either submit to their personal law or adopt children under the provisions of the Juvenile Justice (Care and [Protection of Children](#)) Act, 2000. Para 11 of the said judgment reads thus:

"11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of

adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, 10 of 26 instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date."

(85) This Court is in agreement with the observations made in the impugned reference order. Learned Single Judge has relied upon **Richu Majoo vs. Sanjeev Majoo AIR 2011 SC 1952**, to hold that the law enunciated would be wholly applicable to the present case and that the writ petition seeking custody of child would be very much maintainable despite proceedings in a habeas corpus petition being summary in nature, this Court can embark upon detailed enquiry for the welfare of the minor in question and can invoke extraordinary writ jurisdiction to determine the validity of the detention and also to direct repatriation of the minor child to its biological mother.

(86) As regards the second question regarding validity of the adoption, it is worthwhile to mention that the in the preliminary objections raised in the reply of respondents no.5 and 6 (i.e. the in-laws of the petitioner), that the petitioner herself had given the child in adoption without any pressure or coercion, and that the whole story given in the petition is only an afterthought to extort money from the respondents, with everything having been settled between the families on 05.09.2019, and with the petitioners' own affidavit also executed on that date. Such an argument, though contained in the said reply, was never raised during arguments by any counsel for the respondents before the learned Single Judge or before this Court and in fact, even in the reply filed by respondents no.7, i.e. the mother who is claiming a valid adoption, no such allegation, that the petitioner has now made up a concocted story, with an intention to back out from her affidavit and the adoption deed, was made. It is needs to be emphasized that the adoption must be made in compliance to other conditions mentioned in Chapter 2 of the 1956 Act which encompasses Sections 5 to 17. Learned Single Judge has aptly taken through the provisions of 1956 Act in terms whereof, the petitioner and respondent No.7 are not found to be barred.

(87) Notwithstanding the fact that the petitioner, in the body of her petition, has not even referred to the affidavit signed by her on 05.09.2019 (though she has annexed the same as Annexure P2), nor has she stated that she had actually signed the adoption deed on 05.09.2019, though that deed is shown to be one dated 03.12.2019 by the said respondent yet in the petitioner's representation to the Social Welfare Department, she has clearly stated that on 05.09.2019 she was forced to sign the adoption papers at home under suspicious circumstances, with the (adoptive) couple itself not present

and therefore she "handed over my son to the sibling... of said couple". Although, the petitioner actually signed the adoption deed on 05.09.2019, i.e. the date on which she executed the affidavit, but she did not sign it on 03.12.2019 in the presence of respondent no.7 and her husband and other witnesses, with her father also having seemingly signed that deed on 05.09.2019, which is why the photograph of the petitioner, her father and respondent No. 10, Jenender Gupta, would appear to be one that was taken on 05.09.2019 in the house of respondents no.5 and 6 (as contended). Learned Single Judge rightly that once a document, even if signed by the petitioner on 08.09.2019, is however shown to be subsequently signed by her in the presence of respondent no.7 on 03.12.2019, the same cannot be accepted to be an authentic document. The way the stamp papers were purchased on 05.09.2019 when the adoptive parents were not at the station coupled with the fact that the petitioner seemingly was not present at Patiala on that date and therefore, she obviously having decided after 05.09.2019, not to give the child in adoption to respondent no.7, whom she had not even met till then, the adoption was held to be not a valid adoption, especially in view of the fact that the petitioner on 05.09.2019 was apparently still under the shock of having been widowed at a very young age, only 1½ months earlier, with her whole life in front of her as also the photographs taken at the time of giving and taking ceremony cast a serious doubt on the intention of the adoptive parents.

(88) On a microscopic and critical analysis of the affidavit, it bears out that stamp paper for deed of adoption was purchased on 05.09.2019 by Sartaj Singh Sodhi, Stamp Vendor for a sum of Rs.500/-. The said affidavit was notarized on 03.12.2019 by Notary Public, Patiala. Another affidavit (Annexure R-5/1) dated 05.09.2019 was given by the petitioner to the effect

that she intends to remarry after her husband's death and is willing to give her son to respondent No.7. The said affidavit which was purchased on or before 05.09.2019 was also notarized by some other Notary Public on 06.01.2020. The photographs (Annexure R7/1) showing Manisha (real sister of respondent No.7) taking the minor child from the wailing mother coupled with the photographs imbibed on the top of the affidavit of deed of adoption, in no uncertain terms, proves that the petitioner was giving her child reluctantly or under coercion, which can be very well gauged by the filing of the present petition seeking custody.

(89) Clause (vi) of Section 11 of the 1956 Act stipulates that the child to be adopted must be actually given and taken in adoption by the parent or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. Thus, the child can be given in adoption even under authority bestowed in that regard by the natural parent or guardian. No authentic or registered document is coming forth to suggest that the respondent No.7 and/or her husband had given permission/authority to respondent No.9 to accept the child on their behalf.

(90) Another aspect which has drawn attention of this Court is with regard to birth certificate given by the petitioner vis-à-vis the birth certificate which seems to have been manipulated by respondent No.5 inasmuch as the birth certificate dated 01.06.2019 has been issued by the Govt. of Chandigarh, Dept of Health Services, GMCH, Sector 32, Chandigarh in respect of a male child born on 31.05.2019 wherein the address of parents at the time of birth of the child is mentioned that of Patiala with Registration No. D-2019-4-90004-002259 dated 01.06.2019.

(91) The copy of birth certificate handed over by Mr. Jain is of dated

25.03.2021 issued by Govt. of NCT, Delhi, North Delhi Municipal Corporation which certifies that the information has been taken from original record of birth from Register of Rohini Zone in terms whereof, the name of the child is Aariket Madhavan with date of birth as 31.05.2019 specifically mentioning the place of birth of the child as "A-2/145, Sector 18, Rohini, Delhi". The certificate also certifies that the name of the mother of the child is "Minakshi Gupta" (respondent No.7).

(92) It goes without saying that the certificate made prior in time mentioning the same date of birth of the minor child but with different issuance date and authority, also casts serious doubt on the intention of respondent No.7 as the certificate appended by the petitioner is prior in time and issued by the same authority of which the petitioner is resident i.e. Patiala. But the certificate sought to be relied upon by respondent No.7 has been issued by a different authority mentioning a different place of birth but with common date of birth in comparison of the birth certificate relied upon by the petitioner. That too is a matter of concern which goes in favour of the petitioner as the certificate relied upon by the respondent No.7 on the face of it, seems to have been manoeuvred. Accordingly, there is no gainsaying in holding that the adoption deed dated 03.12.2019 being very suspicious as regards its authenticity of having been signed in the presence by both parties, on 03.12.2019, and with the petitioner being under mental pressure and therefore not having signed it (even on 05.09.2019) in a balanced state of mind and the adoption therefore not being valid, hence even in terms of the Act of 1956, the custody of the child is liable to be handed over back to the petitioner.

(93) That apart, the adverse circumstances in which the petitioner

became widowed at a young age with an infant in her arms and with advice coming forth from her parents-in-law, this Court can very well assess the confused state of mind of the petitioner. Learned Single Judge has further rightly observed that the petitioner did not fully reconcile to actually give her child in adoption even on 05.09.2019 and was doing it under emotional and mental pressure in the light of the fact that respondent no.7 in her reply admitted that after execution of the deed, the petitioner as well as her parents assured that it would be registered to make it more authentic and legal, and that it would take some time for the petitioner to reconcile to that fact. Moreover, her in-laws also stated that the petitioner had refused to come to Patiala to sign the document very obviously she had already changed her mind about giving the child in adoption. Hence, all other things apart, the giving of the child in the circumstances of her being under emotional stress of losing her husband one and a half months earlier, with a three month old baby in her hands, the adoption cannot be held to be of her free-will in a sound emotional and mental state. As such the adoption cannot be held to be a valid one.

Applicability of JJ Act, 2015 or HAMA

(94) The aim and object of the JJ Act, 2015 is for protection of such children who are found to be in 'conflict with law' or 'required rehabilitation'. Section 56(4) and (5) of the JJ Act, 2015 is only for such children. Sub Section (2) of Section 56 of JJ Act, 2015, which talks of adoption of a child by a relative from another relative, is an option/remedy provided to those to whom HAMA, 1956 will not apply, i.e. they are neither Hindu, Buddhist, Jain or Sikh, as the case may be or, is not Muslim, Christian, Parsi or Jew by religion, although it does not bar and in a way gives option even to a Hindu, Sikh, Jain etc. to apply under this Act. Therefore, it also does not mean that

those religions covered under the definition of a 'Hindu' as per the HAMA, 1956 cannot apply under the JJ Act, 2015. JJ Act, 2015 is a secular Act and gives choice to even those covered under the HAMA, 1956 to apply for adoption under the JJ Act, 2015, as also clarified by the Apex Court in the case of Shabnam Hashmi's case (supra) holding that Juvenile Justice (Care and Protection of Children) Act, 2000 has been enacted for adoption of children irrespective of their religion/caste and the said Act cannot be negated by any other personal law and the individuals are free to either submit to their personal law or adopt children under the provisions of the JJ Act of 2000.

(95) Further Section 1(4) of the JJ Act, 2015, as discussed above applies only to special children. Thus, the other provisions of the said Act including the Rules framed under it or the Adoption Regulations issued by the Ministry of Women and Child Development which are specifically notified in exercise of the powers conferred by Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and are also framed under the Juvenile Justice (Care and Protection of Children) Act, 2015 will have to be read alongwith the applicability of the said Act, which is only to children specified under Section 1(4) of the JJ Act, 2015. Once the applicability is only of the special children, it is incomprehensible to forcibly apply the same to other children being directly given by the parents to adoptive parents within or outside the country. Had the legislature's intentment been to apply the said Act even to such children who were given directly in adoption, the necessary amendment would have followed in the JJ Act, 2015 especially when the old Act of 2000 was replaced by the JJ Act, 2015. In fact, while replacing Juvenile Justice (Care and Protection of Children) Act, 2000 by the JJ Act, 2015, the same was passed by the Parliament of India with the following aims

and objects.

"An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

WHEREAS, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that their basic human rights are fully protected;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child;

AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), and other related international instruments."

(96) The JJ Act, 2015 has introduced the concepts of adoption of child from the Hague Convention on Protection of Children and Co- peration in

Respect of Intercountry Adoption (1993) which were missing in the previous Act of 2000. The amended Act also made the adoption process of orphaned, abandoned and surrendered children only. Thereafter, Central Adoption Resource Authority (CARA) respondent No.3, which is a statutory Authority too was established only under Section 68 of the JJ Act, 2015, which is applicable to special children.

(97) Thereafter, the adoption Regulations 2017 were framed by the Ministry of Women and Child Development vide notification dated 04.01.2017 and that too was once again in exercise of the powers under Section 68 read with Clause (3) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act 2015 and as stated above, the JJ Act, 2015 pertains only to special Children as mentioned in Section 1(4) of the JJ Act, 2015 and not to children being directly adopted. The fact that the said Act is not applicable even to the inter-country adoption of children adopted directly, from biological parents is also evident from the judgment rendered by the Supreme Court in the case of Lakshmi Kant Pandey's case (supra) wherein it the Supreme Court held that the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare.

(98) On the other hand, The Hindu Adoptions and Maintenance Act, 1956 regulates adoptions by or to a Hindu. The Act spells out requisites of valid adoptions, defines capacities for men and women professing the Hindu religion to take in adoption and to give in adoption, for persons who may be

adopted and the conditions for adoption. The Act enunciates consequences or effects of a valid adoption in law. The Act establishes rules of general applicability to Hindus in specific areas of family law - adoption and maintenance. The Juvenile Justice (Care and Protection of Children) Act, 2000 is beneficent secular legislation. The Act makes special provisions for a limited sub class of children - those juveniles in conflict with law and children in need of care and protection. Adoption under the Act of 2000 is an instrument of legislative policy to rehabilitate and provide social integration to children who are in need of care and protection. The Preamble to the Act emphasizes that the legislation was enacted to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection. Rehabilitation and social integration of orphaned, abandoned and surrendered children is a matter of legislative regulation by the Juvenile Justice Act. Adoption is a technique contemplated by the law in order to facilitate rehabilitation and reintegration of children of a particular class governed by Chapter IV. The mission of the law is to provide special rules to govern the adoption of a narrow sub class of children namely, those who are orphaned, surrendered or abandoned. In construing the provisions of the Juvenile Justice Act, the effort of the Court must be to ensure that the beneficent object with which the legislation was enacted must be facilitated and furthered. Beneficial legislation, it is a trite principle of interpretation, must be construed liberally.

(99) In the present case, admittedly, the biological mother of the child (the petitioner), the child and the adoptive parents are Hindu by religion according to section 2(1)(a) of HAMA and, therefore, the provisions of HAMA are applicable to all of them. According to section 7 of HAMA, the

respondent No.7 being a female Hindu of sound mind and a major is capable to take the child in adoption. According to Section 9(1) of HAMA, the biological parents of the child are capable to give the child in adoption. As per record, the biological parents, the adopting parent and the child are mentally fit. Date of birth of the child is 31.05.2019 as such, on the date of institution of the present petition, the age of the child was below 15 years. According to section 10 of HAMA, the child must not have completed the age of 15 years at the time of adoption, otherwise, the child is not capable of being taken in adoption. It is not the case of the respondent NO.7 or the biological mother that there is a custom or usage applicable to them which permit the child who has not completed the age of 15 years being taken in adoption.

(100) Now we proceed to examine as to whether the child is qualified to be adopted under JJ Act or not.

(101) The JJ Act, 2015 has introduced the concept of adoption of the child from the Hague Convention on protection of Children and Cooperative in respect of inter country Adoption, 1993, which were missing in the JJ Act of 2000. JJ Act also made the adoption process of orphaned, abandoned and surrendered children only. The aim and object of the JJ Act is to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinafter and for matters connected therewith or incidental thereto. As such, JJ Act is an enabling legislation that gives a prospective parent the option of adopting an

eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. As per Section 1(4) of the JJ Act, 2015 and the above cited judgments, the provisions of JJ Act, 2015 applies only to special children as mentioned therein. As such, JJ Act provides special provisions for a limited class of children, those who are in conflict with law' and in need of care and protection', 'orphaned', 'surrendered' or 'abandoned'.

(102) Section 2 (13) of the JJ Act defines child in conflict with law means a child who is alleged or found to have committed an offence and has not completed 18 years of age on the date of commission of such offence. Admittedly, in the present case, the child does not fall in the said category. Section 2 (14) of JJ Act defines the child in need of care and protection. It is nowhere the case of respondent No.7 nor it is revealed from the record that the child in question is the child in need of care and protection as defined therein. In fact, it is the own case of the petitioner that child was given without her will and she is having love and affection to her child. As such, the child does not fall in those categories of, 'those who are in conflict with law' or 'in need of care and protection' or 'orphan', or 'surrendered' or 'abandoned'. Since, the biological mother of the child is alive and wants to take care and give love and affection to the child, hence, the child is neither an orphan nor an abandoned child.

(103) Lastly the only left out angle is whether the child would come within the ambit Section 2(60) of JJ Act, to term him as a surrendered child for which the essential ingredients are that a child must be relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee, which should be constituted under Section 27 of the said Act, which defines it

as Child Welfare Committee vide Section 2 (22) of JJ Act.

(104) Prima-facie, it is noticeable on perusal of the record that the child does not falls in any of the categories for which the JJ Act could be attracted which prescribes for a procedure/ mechanism for adoption of the surrendered children by adoptive parents from the stage of surrendering of the child by the biological/natural parents, production of the child before the child welfare committee, application by adoptive parents for adoption of the surrendered child and giving the child to adoptive parents in adoption after following due process of law.

(105) We are comprehensively convinced that the biological mother of the child is alive and she and the child are Hindu by religion and covered by the provisions of HAMA. The adoptive parents are also Hindu. In fact, the JJ Act will not apply in view of Section 56 (3) the said Act being a beneficial legislation in ratification of the Hague Convention (on the Rights of the Child), adopted by the General Assembly of the United Nations, on December 11, 1992, and therefore, the Act would apply to all such international adoptions.

(106) Once as per report of Mr. Anil Malhotra, learned Amicus Curiae appointed by learned Single Judge, it was revealed that respondent No.7 and her husband Sai Karan were not US residents and in fact they are Indian citizens residing in Los Angeles, California and they have been issued an H-1B and an H-IV Visa respectively which was valid till 04.03.2021, the requirement of certificate from CARA before adopting a child from India does not arise. As such, the views taken by the learned Single Judge Jasmine Kaur does not tinker with the opinion formed by the learned Single Judge in the present case. Therefore, the reference is answered in negative to the extent

held above.

(107) In view of the foregoing discussions, it can be held that the child in question does not fall in the class of children as mentioned in section 1 (4) of JJ Act and is therefore, not qualified to be a 'child' for the purpose of adoption under JJ Act, 2015. Since the JJ Act, 2015 is held to be not applicable for adoption in the present case in affirmation to the views taken by learned Single Judge in the present case, therefore, the child cannot be subjected to the adoption as provided under JJ Act. Consequently, the JJ Act does not apply for adoption of the child in question.

(108) That being so, once the minor child in the present case is neither an orphan nor a child in conflict with law or abandon or surrender or a child in need of care and protection added with the aspect that as per report of Mr. Anil Malhotra, learned Amicus Curiae which goes un rebutted, respondent No.7 and her husband are not US resident and are in fact Indian citizen on the date of alleged adoption i.e. 13.01.2020 who have H-1-B and H-IV Viza which was valid till 04.03.2021, particularly in the light of the facts where the biological mother is fighting hard from the very initial stage of alleged adoption deed, to get back custody of her son the JJ Act, 2015 will not apply and accordingly, the question referred by the learned Single Judge is answered in the affirmative.

(109) This Court is also conscious of the extra ordinary peculiar facts and the circumstances involved therein, where the welfare is of paramount consideration for the child which can be judiciously taken care of once the validity of adoption is adjudicated.

(110) In the instant case, the documents in support of claim and counter claim by both the parties relied upon are not trustworthy. The photographs

Annexure R-7/1 only depicts handing over the child by the biological mother-petitioner to the sister of respondent No.7 and no one else is present there. The affidavit alleged to be given by the petitioner is on a stamp paper purchased on 05.09.2019 but was got signed and notarized on 06.01.2020 i.e. much later to the adoption deed. Once the adoption deed dated 03.12.2019 stands executed where there was no occasion to have an affidavit executed subsequent to that date on 06.01.2020 showing the purchase of stamp paper from Happy, Stamp Vendor despite the fact that the alleged adoption deed stands registered on 03.01.2019 though it was also on a stamp paper purchased on 05.09.2019 itself but from a different stamp vendor namely Sartaj Singh Sodhi.. Even further the date of birth certificate produced by both the parties are totally distinct and contrary as one date of birth certificate relied upon by the petitioner shows place of birth as Government Medical College and Hospital, Chandigarh with date of birth 31.05.2019 showing permanent address as 52, Bharpur Garden, Patiala, Punjab, issued on 01.06.2019 by the Sub Registrar (Birth and Death), GMCH, Sector 32, Chandigarh whereas, respondent No.7 puts reliance upon a date of birth certificate issued by Government of NCT, Delhi, India, North Delhi Municipal Corporation dated 21.01.2020 and date of issue as 25.03.2021 with place of birth A-2/145, Sector 18, Rohini, Delhi, which seems to be actually used misleading the passport authority with the sole purpose of taking the child abroad by wrongful means having got a passport issued on 22.01.2020 with the expiry date to be 21.01.2025 (Annexure R-7/8). Once the afore-said circumstances are raising serious doubts and suspicion before this Court, the execution of alleged deed by no stretch of imagination could be termed to be without any pressure fear or coercion, meaning thereby, the issue involved

disputed facts which cannot be adjudicated by this Court while exercising writ jurisdiction that too, for a limited purpose for issuing writ of habeas corpus, wherein, the utmost and essential element needs to be proven by either of the parties demonstrating that the custody of the child is illegal or legal.

(111) We, therefore, in the light of discussions made hereinabove, answer the reference made by the learned Single Judge in the affirmative to be specific that JJ Act, 2015 does not apply to the facts of the instant case for the purpose of adoption of minor child.

(112) However, the petitioner is at liberty to dispute the validity of alleged adoption deed before the appropriate forum of law and in case any such petition is preferred by the petitioner or through the authorized person of the petitioner, the concerned court shall decide the same expeditiously, preferably within six months from the date of filing of the said petition. This view of ours also derive strength from the Apex Court judgment while exercising criminal appellate jurisdiction in **Criminal Appeal No. 838 of 2019** *“Tejaswini Gaud and others vs. Shekhar Jagdish Parsad Tiwari and others”* wherein, it was held that in child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act, or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardian and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the inquiry under the Guardian and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the

Court is of the view that a detailed inquiry is required the Court may decline to exercise the extra ordinary jurisdiction and direct the parties to approach the Civil Court.

(113) The instant reference is accordingly, disposed of in the afore-said terms.

(SANDEEP MOUDGIL)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

May 29, 2023
sham

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>