

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2487 OF 2024

Leelendra Deju Shetty & Anr. .. Petitioners

Versus

The State of Maharashtra & Ors. .. Respondents

WITH

CRIMINAL WRIT PETITION (ST) NO.11398 OF 2024

Azharuddin Naushad Shaikh & Anr. .. Petitioners

Versus

The State of Maharashtra & Ors. .. Respondents

WITH

CRIMINAL WRIT PETITION (ST) NO.10984 OF 2024

NVS Rajesh s/o N.V.Nageshara Roa & Anr. .. Petitioners

Versus

The State of Maharashtra & Anr. .. Respondents

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Mr.Yash Tiwari with Ms.Heena Mistry for the Petitioners in WP/2487/24.

Mr.Saurabh Mehta with Mr.Arshil Shah, Mr.Rashesh Shah and Ms.Pratiksha Koshe for the Petitioners in WPST/10984/24 and WPST/11398/24.

Ms.Ankita Singhania with Mr.Ranjit Shetty, Ms.Risha Alva and Mr.Arjun Amin i/b Argus Partners for the Respondent No.3 in WP/2487/24, WPST/10984/24 and WPST/11398/24.

Mr.S.V.Gavand, A.P.P. for the State/Respondent in WP/2487/24.

Ms.M.M.Deshmukh, A.P.P. for the State/Respondent in WPST/10984/24 and WPST/11398/24.

API Mr.Dinesh Shelar attached to DCB-CID, Unit-II, Mumbai.

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**CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
DATED : 22nd JULY, 2024**

JUDGMENT :- (Per Bharati Dangre, J.)

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally.

2. On 27/04/2024, C.R.No.206 of 2024 was registered with Vikhroli Police Station, which invoked Section 370 read with Section 34 of the Indian Penal Code (for short, “**IPC**”) alongwith Sections 75, 81 and 83 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, “**Act of 2015**”).

The above C.R. came to be registered at the instance of one Sunil Tukaram Harad, Police Constable, who reported that information was received in the police station from a secret informant that one lady, by name Kanta Pednekar, aged 39 years, resident of Ashirwad Chawl, Bhimdongari, Nalasopara, has sold her son through one Sheetal Ware unauthorisedly, without complying the legal provisions in that regard.

Upon the information received, the police team proceeded in search of Sheetal Ware and upon her search, when inquiries were made with her, she disclosed that she has sold her son to one Sanjay Ganpat Pawar and Savita Sanjay

Pawar, residents of Ratnagiri on 13/12/2022 for a sum of Rs.2,00,000/- through an agent, Sharad Maruti Devar and Dr.Sanjay Khandare, Nileshwari Clinic, Diva, Thane with the help of one Vandana Amit Pawar. She also disclosed that she has received a sum of Rs.20,000/- of the amount agreed. On her information, Sharad Devar was also traced out and he disclosed that he was working as agent of Dhanshree Fertility Agency Doner and, therefore, came in contact with Dr.Sanjay Khandare and through him, he came to know that Vandana was in search of a boy for her relative and, therefore, he completed the transaction of selling the boy to the relatives of Vandana, who were residents of Ratnagiri for which, he received Rs.50,000/-. Even Vandana was traced out and she confirmed about the transaction.

In the wake of the aforesaid narration, for the sale of Kanta Pednekar's one year old child through Sharad Maruti Devar, Dr.Sanjay Khandare, Vandana and Sheetal Ware for a sum of Rs.2,00,000/-, without following any procedure to Sanjay Ganpat Pawar and Savita Sanjay Pawar, and since the boy was found in their custody, the F.I.R.was registered.

3. The three Petitions filed before us arise out of the above C.R. and the Petitioners before us are the persons, who claim to be either guardian of the child/infant or they claim to be adopted parents.

As far as Cri.Writ Petition No.2487 of 2024 is concerned, it is filed by one Leelendra Deju Shetty and Smt.Shashiprabha Leelendra Shetty, who claim to have adopted a two and half

years old child, Kartika by an Adoption Deed, which was notarized on 09/03/2023, from her biological mother Karishma Shinde. These Petitioners have already filed proceedings before the competent court under the Hindu Adoptions and Maintenance Act, 1956 and the Petition is accompanied by an Adoption Deed dated 09/03/2023, signed by the Shettys and the biological mother of the child.

Writ Petition (St) No.11398 of 2024 is filed by Azharuddin Naushad Shaikh and his wife, who were blessed with baby girl in 2019, but since they desired to have a second child and on account of health complications suffered by the mother, they came in contact with the biological mother of Master Ayaan, who was available for adoption and by reimbursing the hospital delivery and medical charges, they brought the infant, who was barely six days old to their home and nurtured him as their own son. They claim that the child is in their custody, being adopted from the biological mother, but no Adoption Deed is placed on record.

The third Petition, being Cri.Writ Petition (at) No.10984 of 2024 is filed by NVS Rajesh, resident of Hyderabad and one Pooja Laxmi Kameshwar, a married couple and, since, Petitioner No.2 suffered three miscarriages through the period of four years, in the month of September 2023, the maternal aunt of Petitioner No.2 introduced them to the parents of infant girl, as being her biological parents, who was ready to give the child in adoption. This resulted in execution of Deed of Adoption on 23/09/2023 and the custody of six days old Rehanika was handed over to them. They took all necessary steps to vaccinate her and included her as a part of their

family. Rehanika is under their care for a period of seven months, when all of a sudden, in the wake of registration of the F.I.R., she was removed from their custody unauthorisedly and the custody of the child is handed over to an institution, which is impleaded as Respondent No.3-Baal Asha Trust in the Petition.

4. The common thread running through the three Petitions before us, are the minor children being placed in the custody of the Petitioners, by their biological parents or by the person, projecting as a biological parent. The children continued to be in their care and protection from the date of the alleged Adoption Deeds and form part and parcel of their families.

Due to the registration of the subject F.I.R. with Vikhroli Police Station, to which we have made a reference in the opening paragraph, the children were separated from them, despite the fact that they had showered all their love and affection upon them and were emotionally attached to them. The children, on removing from their custody, were produced before the Child Welfare Committee (CWC), which in turn, housed them in specialised care centre for young children, being Baal Asha Trust, Anand Niketan, Mahalaxmi, Mumbai, Respondent No.3, in all the three Petitions on the pretext that the Adoption Deeds or the manner in which the custody of the children were handed over to the Petitioners was not a legitimate way, as it was suspected that there is some child trafficking racket which is involved and since, the F.I.R. was registered and it is under investigation.

In each of the case, the Petitioners have categorically made a statement that they are financially sound and are in position to take care of the needs of the child and would ensure proper education to be imparted and assure to provide good atmosphere, so as to bring up the child as a good human being and citizen of this country.

5. All the three Petitions seek issuance of writ in the nature of habeas corpus, directing the Child Welfare Committee and in turn, Baal Asha Trust, Mahalaxmi to produce the child, as it is the case of each of the Petitioner that the detention of the child in Baal Asha Trsut by Child Welfare Committee is illegal and unauthorised in law. It is, therefore, prayed that the custody of the child should be handed over by the Child Welfare Committee and Baal Asha Trust to them, so that the child is not deprived of protection and care, which the Petitioners are ready to offer.

6. We have heard Mr.Yash Tiwari for the Petitioners in WP/2487/24, Mr.Saurabh Mehta for the Petitioners in WPST/10984/24 and WPST/11398/24, Mr.S.V.Gavand, A.P.P. for the State/Respondent in WP/2487/24 and Ms.M.M.Deshmukh, A.P.P. for the State/Respondent in WPST/10984/24 and WPST/11398/24.

Ms.Ankita Singhania, representing Respondent No.3- Baal Asha Trust, made herself clear on the first date of hearing of the proceedings that Respondent No.3 is not an interested party, but since it is an institution devoted to care for young

children and, since, the custody of the three children was handed to it by Child Welfare Committee, it is not taking any adversarial stand. We, therefore, requested Ms.Singhanian to render assistance to us as Amicus Curiae in the proceedings, to which she readily agreed and has assisted the Court purely on the legal aspect, by placing on record various statutes governing the manner in which the child can be given in adoption or being put in the case of an institution like Baal Asha Trust through Child Welfare Committee.

7. At the outset, we must examine the tenability of the Petitions, seeking writ in the nature of habeas corpus by the Petitioners, who are not the biological parents of the child, but are either the guardians or the adopted parents and we must at the outset make it clear that in none of the cases, the custody of the child is given to the Petitioners by adopting a legally acceptable procedure. Therefore, when a contest is raised before us as to the maintainability of the Writ Petitions, we must deal with this aspect.

Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued, where in the circumstances of a particular case, ordinary remedy provided by the law is either not available or is ineffective. By issuance of writ of habeas corpus, the process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention can be attained. In case of *Gohar Begum Vs. Suggi alias Nazma Begum & Ors.*¹, the conspectus of writ of habeas corpus was highlighted in the following words :-

1 AIR 1960 SC 93

“13. It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. In *R. v. Greenhill*, (1836) 4 Ad and El 624 at p. 640 : 111 ER 922 at p. 927 Lord Denman C.J. said :

“when an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody.”

See also (1857) 7 El. and Bl, 186 : 119 ER 1217. In Halsbury's Laws of England, Vol. IX, Article 1201 at page 702 it is said :

“Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person.”

Section 491 is expressly concerned with directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under Section 491 in a fit case that the custody of an infant be delivered to the applicant; see *Rama Iyer v. Naatraja Iyer*, AIR 1948 Madras 294, *Zara Bibi v. Abdul Razzak*, 12 Bom LR 891 and *Subbaswami Goundan v. Kamakshi Ammal*, ILR 53 Madras 72. If the courts did not have this power the remedy under Section 491 would in the case infants often become infructuous.”

8. It is a well accepted proposition in law that a writ of the nature of habeas corpus, a prerogative writ is an extraordinary remedy, and shall be granted only in exceptional cases, where the ordinary remedy provided by law is either unavailable or is ineffective. Exercise of power by the Writ Court, being summary in nature, where in view of the Court, a detailed inquiry is warranted, it may direct the parties to approach Civil Court. But, when a writ is sought for protection or for resuming custody of child, the writ of habeas corpus, is maintainable if it is proved that the detention of the minor child by the parents or others, was illegal and without any authority by law and this writ would also extend its

influence to restore the custody of minor to his guardian, when wrongfully deprived of.

In *Tejaswini Gaud & Ors. Vs. Shekhar Jagdish Prasad Tewari & Ors.*², the Apex Court focused its attention upon the question of deciding custody of minor, by declaring that the welfare of the minor is of paramount importance. The observations made in paragraphs 13 and 14, after gainfully reproducing the observations in *Gohar Begum*, deserve reproduction and we deem it appropriate to reproduce the same :-

“13. Countering this contention, the learned counsel for the Respondent 1 submitted that in the given facts of the case, the High Court has the extraordinary power to exercise the jurisdiction under Article 226 of the Constitution of India and the High Court was right in allowing the habeas corpus petition. The learned counsel has placed reliance on *Gohar Begam* and *Manju Malini Seshachalam*. Contention of respondent 1 is that as per Section 6 of the Hindu Minority and Guardianship Act, Respondent 1, being the father, is the natural guardian and the appellants have no authority to retain the custody of the child and the refusal to hand over the custody amounts to illegal detention of the child and, therefore, the writ of habeas corpus was the proper remedy available to him to seek redressal.

14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.”

9. Referring to a decision in case of *Rajiv Bhatia Vs. STATE (NCT of Delhi)*³, where habeas corpus writ petition is filed by the mother of the girl, alleging that the girl was in illegal

² (2019) 7 SCC 42

³ (1999) 8 SCC 525

custody of her husband's elder brother, who relied upon Adoption Deed, which was alleged to be a fraudulent document, the Apex Court held that High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child.

However, the decision focused upon the facts to be taken into consideration for determining the welfare of the child and this was so spelt out in the following words :-

“34. As observed in *Rosy Jacob* earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.”

10. We have examined the facts in all the three Petitions before us in light of the above exposition of law pertaining to the permissibility of issuance of writ in nature of habeas corpus, when it is alleged that the custody of the infants and

minor children with Respondent No.3 at the instance of CWC is illegal and, therefore, the exceptional remedy is availed seeking an exceptional relief of issuance of the writ, for their production.

As regards a child is concerned, who for the purpose of the Guardians & Wards Act, 1890 and the Hindu Adoptions and Maintenance Act, 1956 and also the Juvenile Justice (Care and Protection of Children) Act, 2015 is a person, who is below 18 years of age and he can be described either as 'minor' or 'child'.

Under the Guardians and Wards Act, 1890, a 'guardian' is defined under Section 4(2) to mean a person having the care of the person of a minor or of his property, or of both is person and property. Under the said Act of colonial era, it is the power of the Court to make order as to guardianship, when the Court is satisfied that it is in the welfare of minor that an order should be made; appointing a person or declaring a person to be such guardian.

It is only upon an application being preferred before the Court, the power is permitted to be exercised.

11. As far as the Hindu Adoptions and Maintenance Act, 1956 (for short, "**HAMA**") is concerned, it is a law relating to adoptions and applies to the restricted category of persons following the prescribed religion as per Section 2 of the Act and it has set out the requisites of valid adoption and the rights conferred on a child upon adoption.

12. Another important enactment, is a law relating to children and has been brought on statute book to deal with the two classes of children; i.e. children 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 their best interest, which include an entire structured process for their rehabilitation and it is by taking recourse to its provisions, the Child Welfare Committee has stepped in and by removing the children from the custody of the Petitioners and forming an opinion that it is illegal, have handed it over to Respondent No.3.

13. Though we have attempted to ascertain whether the Petitioners acquired the custody of these children, by adopting the procedure prescribed in law, unfortunately we must note that by execution an Adoption Deed, which is either not registered or merely being notarized, definitely do not amount to a valid adoption, as the protocols for adoption prescribed by the Central Adoption Resource Authority (CARA), constituted under the Ministry of Woman and Child Development, Government of India, which has now received the statutory recognition under the Juvenile Justice (Care and Protection of Children) Act, 2015 has not been at all adhered to. The traditional Hindu Adoptions and Maintenance Act (HAMA), which has its own limitations, as it is available only for to particular religion and the Guardians and Wards Act, which only provide for guardianship but not for adoption, which are

otherwise deficient in its application and this issue is now taken care by CARA, which primarily deal with adoption or orphaned, abandoned and surrendered children through the recognized adoption agencies.

14. As we were taken through the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 by Ms.Singhania, we have focused upon the type of children, which would be brought within the ambit of its provisions.

The Act intends to offer protection to two categories of children, i.e. children in conflict with law and children in need of care and protection, ofcourse with the broad principles being enumerated in the statute about the care and protection of children in Section 3.

Chapter III of the Act provides for constitution of Juvenile Justice Board (JJB) for exercising the powers and discharging the functions relating to children in conflict with law under the Act. The procedure to be followed by the Board alongwith its powers, functions and responsibilities are specifically enumerated.

Chapter IV, prescribe the procedure in relation to the children in conflict with law and the term, 'child in conflict with law', is defined under Section 2(13) as below :-

“(13) “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.”

15. Chapter VI of the Act, on the other hand, has set out the procedure in relation to the children in need of care and

protection and Section 2(14) define the term, 'child in need of care and protection' as under :-

“(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 the provisions of this Act or 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 and protect or who is abandoned or surrendered;

(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 has been or is being or 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.”

16. Since the production before the Board of a child, alleged to be ‘in conflict with law’ contemplate an inquiry by the Board and in case of the former category, a preliminary assessment into the heinousness of the offence, so that necessary orders can be passed under Section 18 of the Act, as regards a child, who has committed an offence either petty in nature or serious offence and, based upon the nature of offence, the Board may pass appropriate orders, which may include a counselling activity, admonition of the child, payment of fine, release of the child on probation of good conduct, by placing him under the care of any parent, guardian or fit person etc.

17. The Child Welfare Committee constituted under Chapter V of the Act is empowered to exercise the powers and discharge the duties conferred in relation to the child in need of care and protection and the functions and responsibilities of the Committee include to take cognizance of and receive the children produced before it and conduct an inquiry on all the issue regarding the safety and well-being of the child. It is pertinent to note that the Child Welfare Committee would exercise its power only in relation to the children in need of care and protection, as defined in Section 2(14).

Under Chapter VI, when such a child is produced before the Committee (CWC), by any person, including any police officer or special juvenile police unit, public servant, Childline Services or any voluntary or NGO or a Child Welfare Officer or Probation Officer, any social worker or by the child himself, the procedure prescribed therein shall be adopted.

Upon production of the child or receipt of the report, the Committee shall hold inquiry and pass an appropriate order sending the child to children's home or fit facility or fit person, and for speedy social investigation by a social worker or Child Welfare Officer or Child Welfare Police Officer, with a proviso that all children below six years of age, who are orphan, surrendered or appear to be abandoned shall be placed in a Specialised Adoption Agency, where available.

18. Upon production of such a child, on completion of inquiry, if the Committee is of the opinion that the child has no family or ostensible support or is in continued need of care and protection, it may send the child to a Specialised Adoption Agency, if the child is below six years of age, children's home or to a fit facility or person or foster family, till suitable means of rehabilitation are found for the child, as may be prescribed, or till the child attains the age of eighteen years. Undisputedly, it is permissible to take review of the situation by the Committee in the prescribed manner.

19. Under Section 37 of the Act, the Child Welfare Committee is empowered to pass orders on conclusion of the inquiry in respect of the child, who is in need of care and protection and taking into account the child's wishes, if the child is sufficiently mature to take a view, by declaring that the child is in need of care and protection and also for restoration of the child to the parents or guardian or family with or without supervision of Child Welfare Officer or designated social

worker. Another order which the Child Welfare Committee is empowered to pass is, of placing a 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.

Pertinent to note that Section 37 also contemplate that the Child Welfare Committee may issue directions to persons or institutions or facilities under 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, skill training, legal aid, educational services etc.

The Child Welfare Committee is also empowered to declare that the child is legally free for adoption under Section 38 and thereupon, on following the procedure prescribed, an orphan and abandoned child, may be given in adoption.

In order to cater to best interest of the child, the proviso appended to sub-section (1) of Section 38 prescribe 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.

The second proviso to the very same sub-section further prescribe 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 the Act.

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.

20. From reading of the above, it is evident that only an orphan or abandoned or surrendered child, can be given in adoption under the Act of 2015.

Chapter VIII of the Act include the provisions pertaining to adoption and this includes the agency like Central Adoption Resource Authority (CARA), which is cast with the function of permitting in country adoption and facilitating the inter-state adoption, in co-ordination with the State Agency and for regulation of inter-country adoptions.

21. From reading of the scheme of the enactment, which we have highlighted above, it is evident that the category of children, who can be given in adoption, must be the one who are in need of care and protection and this term has a definite connotation. The sub-categorisation in this larger category is the children, who are orphan or abandoned and the legislature had deemed it fit to even define these terms.

An 'abandoned child' is defined in Section 2(1) as a child deserted by his biological or adoptive parents or guardians,

and who has been declared as abandoned by the Committee after due inquiry.

Similarly, the 'orphan' is also defined in Section 2 (42) to mean 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. Section 2(60) defines 'surrendered child' to mean 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.

22. With this categorisation being in place, it is to be ascertained as to whether the children for whose production the Petitioners have approached this Court for issuance of writ in the nature of habeas corpus, would fall within the category of 'children in need of care and protection'.

Learned Amicus Curiae Ms.Singhania, apart from submitting that the children are being placed in the custody of Baal Asha Trust, as per the directions of Child Welfare Committee, has urged that the three children involved, would fall within the category of 'abandoned' or 'orphan' children and this inference is drawn by her, by submitting that the biological parents of the respective child have refused to take their care and in a sense, when the natural parents have sold them for a consideration, which is the accusation in the FIR or given them in adoption, without following the appropriate procedure, have deserted them, and, therefore, they are the children who would fall within the scope of 'children in need of care and protection'.

23. We are unable to subscribe to the view expressed as above, as we have noticed that the Act of 2015 has defined the term 'abandoned child' as the one who is deserted either by his biological parents or adoptive parents or guardians and when a child is given by the biological parents in the custody either of adoptive parents or guardians, definitely the child is not 'abandoned'. Further, 'orphan' is a child, who is without biological or adoptive parents or legal guardian or whose legal guardian is not willing to take, or capable of taking care of the child, but all the three children, in respect of whom the writ of habeas corpus is filed would not even come within the fold of this term. In addition, 'surrendered child' is the one who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and definitely, parting with a child, though for a consideration paid to a third party or through some middleman, also would not bring the child within the purview of 'surrendered child'.

24. Ms.Singhania has placed reliance upon a decision of the Division Bench of this Court in case of ***Kripal Amrik Singh & Anr. Vs. State of Maharashtra & Ors.***⁴, which in our opinion, do not assist her in persuading us to record a finding, that the children involved in the three Petitions are either 'abandoned' or 'orphan'.

In case of ***Kripal Amrik Singh*** (supra), the Petitioners claim to have adopted a child of about two weeks old from Respondent No.3-biological mother and the argument was the

4 2021 SCC OnLine Bom 406

biological mother of the child was not willing to take care of her and an intimation was given to the NGO through the Child Line. Pursuant thereto, CWC constituted under the Act of 2015, took cognizance of the matter and directed the biological mother to come before it with the girl child once in a month. However, on 22/01/2019, she signed an Adoption Deed, purportedly giving the child in adoption to the Petitioners for a consideration, who took her to Punjab. Pursuant to this, CWC directed the NGO Child Line to report the matter to the police and, therefore, FIR was registered at Amboli Police Station and the girl child was produced before CWC, where even biological mother appeared and admitted to have received the amount for handing over of the child.

It is in this background, CWC directed the girl child to be handed over to Vatsalya Trust, a special Adoptive Agency.

The biological mother filed an application for custody of the girl child and even the Petitioner No. 1 filed application for meeting her and celebrating her birthday.

In the writ petition, filed by the petitioners for writ of habeas corpus and a direction to CWC to hand over the custody of the girl child to them, they relied upon the notarized Adoption Deed executed by the biological mother and it was claimed that the continued custody of the girl child, at the direction of CWC with the Adoption Agency, amount to illegal detention.

25. It is in the peculiar facts of this case, the Court specifically noted that the biological mother, after giving birth

to the girl child, informed the NGO and that is how the matter was reported to CWC.

The report sought by CWC from the NGO brought on record, the unwillingness of the biological mother to care for her and, therefore, it was recorded that the child was clearly a child in need of care and protection and, hence, CWC assumed jurisdiction in the context of the girl child.

It is in these peculiar facts, the notarized document, purported to be an Adoption Deed, was scrutinized and the conclusion was drawn that it was not a valid adoption, as per the provisions of HAMA and merely by executing the notarized Adoption Deed, the Petitioners cannot claim that they have right to hold the custody of the girl child and what was specifically noted by the Division Bench is the distinguishing factor, to be taken note of :-

“This is particularly in the backdrop of the fact that respondent No.3 i.e. the biological mother of the girl-child herself specifically conceded, firstly before the representatives of the NGO when they visited her home on the instructions of respondent No.2-CWC that she had given away the girl-child and received Rs.20,000/- and secondly, when she appeared before respondent No.2-CWC and stated that she had received Rs.40,000/- from the petitioners and given away the girl-child.”

It is in these peculiar facts, since it was held that the girl child was in need of care and protection, the action of CWC was found to be in accordance with law and it was held that, she is not in illegal or improper custody, when she is in custody of CWC.

26. However, in the present Petitions before us, since we have concluded that the children involved do not fall in the

category of 'children in need of care and protection', the custody being handed over to Respondent No.3 by CWC cannot be justified, as CWC itself does not get any power to deal with these children, who are neither 'abandoned' nor 'orphans'.

In addition, one important factor, which must be borne in mind is that the Petitioners, though without adhering to the procedure formulated in law, were handed over the custody of the minor children by the biological mothers and there is no application by the biological mothers or biological parents, seeking custody of their children. Worth it to note that the FIR has not arraigned the Petitioners as accused and at this stage, we need not go into the legality or otherwise of the Adoption Deeds, as we have already noted that the said documents do not satisfy the compliance of HAMA in totality, but like in the case of Shettys, biological mother is dead, whereas in one of the case, the biological mother is arrested.

Since we are restricting ourselves, at this stage, only for consideration of prayer for issuance of writ of habeas corpus, as it is contention of the Petitioners that the custody of the minor children, has been handed to Respondent No.3 by the CWC, by assuming jurisdiction over the said children merely on the pretext that an FIR was registered, wherein the Petitioners are not arraigned as accused, but is based on an allegation that there is some racket, which is operating for trafficking of the children.

One most important aspect, which we must consider is the offence, which has been invoked in the subject FIR i.e. Section 370 read with Section 34 of IPC. *Prima facie* Section 370 would be attracted in case of trafficking of a person, as it

contemplate that whoever for the purpose of exploitation transfers or receives a person by using threat or by using force or any form of coercion or by abduction or by practicing fraud or deception or by any inducement, the offence of trafficking is said to be committed.

Explanation appended to the said Section clearly spell out that the expression 'exploitation', shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Prima facie, at this stage, we do not find that the prosecution alleges that the children are either transferred or received by any of the mode specified under Section 370 and it is for the purpose of exploitation, as understood in the said Section.

Similarly, as far as Sections 81 and 83 of the Act of 2015 are concerned, Section 81 punishes an act of a person, who sells or buys a child for any purpose, but the proviso clarify that such offence is committed by a person having actual charge of the child, including employees of hospital or nursing home or maternity home and this, therefore, would not cover a biological mother/parents or any person acting on their behalf. Similarly, Section 83 of the Act of 2015 is also invoked and we fail to find any justification in invoking this Section, which prescribe the punishment for use of a child by militant group or its outfit declared by the Central Government.

Though the learned A.P.P. Ms.Deshmukh would invoke sub-section (2) of Section 83, according to us, it is not the case

of the prosecution in the FIR that the children were used for illegal activities, either individually or as a gang.

Very fairly, the prosecution has dropped Section 85, though it was initially invoked.

27. The learned counsel Mr.Arshil Shah has placed reliance upon various orders passed by this Court and we have taken note of these orders, where in the backdrop of an FIR registered in a similar fashion, by way of interim order, keeping the welfare of the child in mind, the petitioners, who approached the Court for issuance of habeas corpus, were permitted to take temporary custody of the child and this was in the case of *Harishbhai C. Limbachiya & Anr. Vs. State of Maharashtra & Ors. (Writ Petition No.1489 of 2017)* and also in case of *Petrik francis Rodrigues & Anr. Vs. State of Maharashtra & Ors. (Writ Petition No.334 of 2017)*.

In addition, a decision from Telangana High Court, which has thrown light on this aspect, is also placed before us, being in the case of *Kommuri Srinivas & Anr. Vs. The State of Telangana, through Principal Secretary, Women Development and Child Welfare, Secretariat, Hyderabad & Ors. (Writ Petition No.9591 of 2020)*.

The petitioner before the Court assailed the action of the second respondent-Child Development Project Officer, in taking forcible custody of the child and sending to Shishu Gruha, Sangareddy as illegal and arbitrary and seeking direction to release the child to the care and protection of the petitioners, who was adopted by them, by performing the rituals of 'Datta Homam'.

The second respondent, on marking appearance, stake its case that the officials received information that respondent Nos.5 and 6 have sold the child for money to the petitioners and they were counselled to keep the child, but on home inquiry, it was revealed that respondent Nos.5 and 6, on account of their poverty, sold the child to the petitioners through a middleman for Rs.Three Lakhs. The ICDS staff rescued the child and admitted in Shishy Gruha, Sangareddy and FIR came to be registered under the provisions of the J.J.Act.

The biological parents of the child adopted a stand that they had agreed to give the child in adoption to the petitioner before the child was delivered and in presence of all the family members and the relatives, the baby was handed over and was taken care of. It is in this background, reference was made to the decision in the case of *Lakshmi Kant Pandey Vs. Union of India*⁵, to submit that the issue is no longer *res integra* and the law is well settled to the effect that the adoptions made under HAMA Act are outside the purview of the Juvenile Justice Act and CARA regulations.

The CARA guidelines as well as the definitions of the ‘abandoned’ and ‘orphan’ child were specifically reproduced alongwith the adoption procedure to be adopted in the backdrop of the definition of the term ‘child in conflict with law’.

On having a conspectus of whole scheme and the CARA guidelines, the following observations resulted in handing over the child to the petitioners (adoptive parents) and the observation reads to the following effect :-

“.....In the light of the clear analysis and categorical declaration of law by the Supreme Court as well as the High Court of Delhi, High court of Kerala

5 AIR 1984 SC 469

and the High Court of Punjab and Haryana, in the absence of there being unimpeachable and absolute material for the respondent authorities to say that the adoption claimed by the petitioners to be sham and not acceptable, is totally unreasonable and arbitrary and without there being any basis. The understanding of the authorities that 2017 Regulations would apply with respect to every adoption and the adoptions can be made only under the 2017 Regulations is only on account of misinterpreting the provisions and on account of the improper understanding of the width and scope of the Juvenile Justice Act and Regulations vis-à-vis provisions of HAMA.

Yet another contention of the learned counsel for the respondent No.4 that the adoption deed claimed by the petitioners is not registered and thus the same would have no validity is also liable to be rejected. What all Section 16 of the HAMA Act declares is the effect of registration of adoption deed, and the weight that is required to be given to the same when the same is legally challenged. A close scrutiny of the provisions of HAMA Act does not disclose there being any set procedure, or a ritual or a necessity of a written deed for a valid adoption to come into existence. These aspects of the matter are also no longer *res integra* and it is not necessary for this Court to reproduce the same, as the same are available in various legal journals.

The restrictive scope of Juvenile Justice Act, and inapplicability of the same to the adoptions made under the HAMA Act were noticed and elaborately dealt by a Division Bench of Kerala High Court and the Punjab and Haryana High Court, apart from the clear and ample guidance provided in the judgment of the Supreme Court in **M/s Shabnam Hashmi v. Union of India**. Further the Delhi High court in **PKH v. Central Adoption Resource Authority** in categorical terms held that a Hindu child who is offered and accepted in adoption under Hindu Adoptions and Maintenance Act, 1956, by no stretch of imagination, can be termed as a surrendered child.

In those circumstances, this writ petition is allowed and the respondent no.2 is directed to handover the child to the petitioners (adoptive parents) in the presence of respondents 5 and 6 (biological parents). No costs. Miscellaneous petitions, if any pending, shall stand closed."

28. We are fortified by the aforesaid observations in concluding that since all the three children before us cannot be termed as 'orphan' or 'abandoned' and, they do not fall in the category of the children in need of care and protection, as defined in Section 2(14) of the Act of 2015, the orders passed by CWC handing over their custody to Respondent No.3 is illegal, as CWC was not competent to exercise jurisdiction over the said children and transfer the children to Respondent No.3-Baal Asha Trust.

Since the biological parents are not coming forward to claim custody of these children and on the other hand, since we have noticed that the Petitioners were having custody of these children and, particularly, the Petitioner -NVS Rajesh and the Petitioner- Azharuddin Naushad Shaikh allegedly adopted the girl and boy child respectively aged, six days old and they have taken them in their embrace and, since then the infants have been part of their family.

29. We leave it open to the Petitioners to adopt the prescribed procedure for continuing the custody of the child with them, by having validly executed Adoption Deeds or by following any other legal procedure, which would allow them to retain their custody forever.

In any case, if the children are put in the care of Respondent No.3, and in case if they are below two years of age, then it is imperative for the CWC to declare them free for adoption and, therefore, taking into consideration the paramount interest of the children, who are presently in custody of the respective Petitioners, we are satisfied that the case is made out by the Petitioners in all the three Petitions for issuance of writ in the nature of habeas corpus, for directing Respondent No.2-Child Welfare Committee and Respondent No.3-Baal Asha Trust, Mahalaxmi to hand over the custody of the children to the respective Petitioners within a period of 24 hours of uploading of this judgment and order.

By making the Rule absolute, we allow the Petitions, by directing Respondent No.2-Child Welfare Committee and Respondent No.3-Baal Asha Trust to act as under :-

(a) To hand over the custody of child, Ms.Kartika to the Petitioners, Mr.Leelendra Deju Shetty and Smt.Shashiprabha Leelendra Shetty in Writ Petition No.2487 of 2024.

(b) To hand over the custody of child, Master Ayaan to the Petitioners, Mr.Azharuddin Naushad Shaikh and Smt.Sabanaz Azharuddin Shaikh in Writ Petition (St)No.11398 of 2024.

(c) To hand over the custody of child, Ms.Rehanika to the Petitioners, Mr.NVS Rajesh and Smt.M.V.Puja Laxmi Kameshwari in Writ Petition (St)No.10984 of 2024.

30. We would like to place on record our appreciation for Ms.Singhania, who upon our request has acted as Amicus Curiae and has rendered effective assistance to us in coming to the conclusion that we have reached. We appreciate her impartiality and fairness, which she has exhibited while rendering her assistance in the proceedings before us.

(MANJUSHA DESHPANDE,J.) (BHARATI DANGRE, J.)