

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.M.A. No.195 of 2025
With
CAN 1 of 2024
CAN 2 of 2024**

**Sony Bagchi
Vs.
Farida Bibi**

For the appellant	:	Mr. Kushal Chatterjee, Mr. Oishik Chatterjee
For the respondent	:	Mr. Partha Pratim Roy, Mr. Anirban Das, Mr. Debrup Choudhury
Heard on	:	04.03.2025
Hearing concluded on	:	26.03.2025
Judgment on	:	02.04.2025

Sabyasachi Bhattacharyya, J.:-

1. The facts of the case are rather poignant. The appellant was returning from work when she found a lady on the streets, writhing in pain and her amniotic fluid flowing from her body. Coming closer, the appellant found that the lady was mentally deranged. The appellant immediately took the lady to the nearby Narayanpur Police Station but the police

allegedly refused to take any step. Finally, the appellant took the lady to the R.G. Kar Medical College and Hospital and on the self-same date, that is, on August 28, 2021, twin male babies were born to the lady. The mother and brother of the lady visited her in the hospital but allegedly expressed their poor financial condition and resulting inability to take care of the newborns.

2. The appellant raised the said two minor boys and named them. The boys are now aged about three and a half years and are studying in an English medium school by the name of Rathtala Park Side School.
3. The mother of the two children has subsequently gone missing and has not yet been traced out.
4. In the above backdrop, the appellant applied for guardianship and custody of the two minors under Sections 7, 12 and 25 of the Guardians and Wards Act, 1890 (for short, “the 1890 Act”). By the impugned judgment and order dated August 30, 2024, the learned Additional District & Sessions Judge, Second Court at Barrackpore, District – North 24 Parganas dismissed the said application, bearing Miscellaneous Case No.181 of 2024, on the ground that the application under the 1890 Act was not maintainable since the children come within the definition of “abandoned child” under Section 2(14), Clauses (v) and (vi) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as “the JJ Act”). The children were directed to be handed over to the Child Welfare Committee (CWC),

North 24 Parganas. Being thus aggrieved, the present appeal has been preferred.

5. The mother of the lady, that is, the maternal grandmother of the two minors, namely Ohila Bibi, has sworn affidavits both before this court and the court of first instance to the effect that considering her poor financial condition, she has no objection if the custody and guardianship of the children be handed over to the appellant.
6. The said maternal grandmother Ohila Bibi is represented through counsel before us and supports the contentions of the appellant. Written notes of arguments have also been filed by the appellant, supported by the said Ohila Bibi.
7. The appellant argues that both the minors are Muslims and in view of their mother being mentally unsound and having gone missing, in her absence, as per the governing Mohammedan Law, their maternal grandmother, namely Ohila Bibi, is entitled to their custody. Learned counsel submits that in terms of the Mohammedan personal law, custody (*Hizanat*) of minors, in case they do not have any parent, vests with the female relatives, among whom the first preference is the mother's mother, who becomes a *de facto* guardian having custody of the minors.
8. Learned counsel relies on the concept of *Kafalah*, based on alternative family care options for children outside parental care. Learned counsel places reliance on an "Introduction to *Kafalah*", issued by the UNICEF, as per which, *Kafalah* is a commitment by an individual or a family

(*Kafil*) to voluntarily take responsibility for the daily care, education, safety and the protection of children (*Makful*) deprived of family care, in the same way a parent would do for their biological child. *Kafalah* has its origins in Islamic Law (*Sharia*) under which, usually, a child is placed in a family that is as closely related to their parents as possible. Unlike adoption, which is prohibited under *Sharia*, a child taken into a family under *Kafalah* continues to keep the birth parent's name and ties, and their right to inheritance from their birth parents.

9. It is argued that the concept of *Kafalah* is recognized by the United Nations Convention on the Rights of the Child (UNCRC), the Guidelines for Alternative Care of Children, and the 1996 Hague Convention. India is a signatory to the UNCRC and Article 20 thereof recognizes *Kafalah*. *Kafalah* can be both intra-family and outside the family.
10. Learned counsel for the appellant next relies on *Laxmi Kant Pandey v. Union of India*, reported at (1984) 2 SCC 244, which dealt with the provisions of the 1890 Act. It is contended that the Supreme Court held therein that powers are vested in the court under the 1890 Act to ensure the well-being of minors and under Section 26 of the said Act, the court has the power to impose conditions upon the appointed guardian from removing the minors from its jurisdiction. The Supreme Court had held, it is submitted, that guardianship may be granted even to foreign parents under the 1890 Act, upon which such parents can take in adoption the minors in accordance with the law of their country.

- 11.** Learned counsel contends that under Section 2(31) of the JJ Act, “guardian” means 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 recognized by the Committee or as the case may be, the Board as a guardian in the course of proceedings. It is submitted that a conjoint reading of the provisions of the JJ Act does not confer any power on the CWC to appoint a guardian but only vest it with powers of taking care of the child who is in need of care and protection and finally rehabilitating the child and giving the child in adoption.
- 12.** It is contended that in the present case the *de facto* guardian Ohila Bibi has neither surrendered the minors nor abandoned them; rather, she has taken ostensible support or means of the appellant. Thus, the appellant is to take care of the minor at present. Also, the children have not been deserted and/or abandoned within the contemplation of the JJ Act. “Unfitness of parent” has been defined in the Black’s Law Dictionary as the parent’s failure to exhibit reasonable concern for, interest in or responsibility of a child’s welfare and the term “incapacitated person” has been defined as a person who is impaired by an intoxicant, of mental illness or deficiency or by physical illness or disability to the extent that personal decision-making is impossible.
- 13.** Since Ohila Bibi, being in financial distress, has expressed her desire in the best interest of the children for the custody of the children and guardianship to be given to the appellant, which decision has been

taken in sound mind by the said *de facto* guardian, there cannot be any embargo on the court to exercise its powers under the provisions of the 1890 Act and give such custody to the appellant.

14. Looking from the perspective of the financial condition and age of the appellant, it is argued that the 1890 Act permits the children to be given in guardianship and custody of the appellant. In the present case, it is argued the children do not come within the definition of “child in need of care and protection”, for which purpose, the appellant places reliance on the judgment of a learned Single Judge of the Madras High Court in the matter of *R. Arivazghagun vs. The secretary to government of Tamil Nadu, Social Welfare Department (Social Defence) and Others*, reported at (2009) 0 Supreme (Mad) 1352.
15. Thus, it is submitted that the learned Trial Judge erred in law in rejecting the application of the appellant as not maintainable.
16. The appellant submits that appropriate safeguards can be imposed on the appellant upon giving such custody under the 1890 Act, by directing bi-monthly or quarterly reports regarding the progress of the child with the court or the jurisdictional police station till the minors attain majority, and/or also the removal of the guardian by the court on its own motion if it is found that the guardian is not in a position to perform her duties.
17. Hence, there cannot be any embargo in granting custody and guardianship of the children to the appellant.

18. Having heard learned counsel, it cannot but be observed that the instant case presents not only important legal questions but also involves sensitive issues having an overwhelming human context.
19. Whereas the children have, since their birth, been with the appellant for three and a half years and are apparently doing well under her care, having been admitted in an English medium school of the locality, it is also evident, in view of the affidavits filed by the maternal grandmother of the minors before both the courts, that she is not in a financial position to look after the children and has no objection to give the children in custody to the appellant.
20. On the other hand, the court, acting in its capacity as *parens patriae*, also has to ensure against abuse of the provisions of law with a special focus on the paramount consideration of welfare of the children.
21. Mere sentiment cannot be a guiding factor, although important, since unbridled sensitivity without the guidance of legal provisions would lead to arbitrariness which might create a precedent to be abused in future against the vested interests of children.
22. The first argument made by the appellant cannot be accepted. The parties cannot be governed either by Hindu or Mohammedan personal law for the simple reason that the appellant is a Hindu whereas the two minor children come from a Muslim family.
23. The concept of *Kafalah* is obviously not attracted, since the appellant is not a Muslim governed by Mohammedan Law and as the concept itself

presupposes that a child is to be placed in a family that is as closely related to their parents as possible, if not intra-family.

- 24.** On the other hand, the Hindu personal law in that regard is obviously not applicable, as the children admittedly hail from a Muslim family.
- 25.** The reliance placed by the appellant on *Laxmi Kant Pandey (supra)* is also misplaced. The said judgment is a landmark case in several regards and was delivered in the context of rampant malpractices prevalent then (and even now) in the name of inter-country adoptions. The guidelines issued in the said judgment were the first of their kind and designed to check trafficking of children in the name of adoption, primarily by foreigners. Although the primary focus of the said judgment was to put in place norms and guidance in that regard, subsequently, the law in that regard has since been codified in the form of the Juvenile Justice (Care and Protection of Children) Act, 2000, which subsequently made way for the JJ Act, 2015, the latter being the governing provision in the instant case. Hence, the context in which *Laxmi Kant Pandey (supra)* was delivered has altered and the JJ Act is now the governing statute in the field covered by it.
- 26.** Chapter VI of the JJ Act deals with “Children in need of care and protection”.
- 27.** The Act operates primarily in respect of two categories of children/juveniles - those in conflict with law, which is primarily covered by Chapter IV, and those in need of care and protection as stated above.

28. A “child in need of care and protection” has been defined in Section 2(14) of the JJ Act, which is quoted below:

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

...

(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 reasonably 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 of 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 legal 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 miscarriage before attaining the age of marriage and whose parents, family members, guardian and any other person are likely to be responsible for solemnisation of such marriage;”

- 29.** We have to keep in mind that the JJ Act is an umbrella statute which is personal law-neutral.
- 30.** The closest definitions of child in need care and protection, as given in sub-section (14) of Section 2, which come close to match the situation of the present two minors, is found in Clauses (v), (vi) and (vii) of the said sub-section.
- 31.** Examined in the context of Clause (v), the present children have a parent who is found to be unfit or incapacitated (since she is mentally challenged and missing) to care for and protect the safety and well-being of the children. Also, the children have at least one parent who has abandoned them.
- 32.** However, for sub-clause (v) to apply, it has to be found by the Committee or the Board (in the present case, the CWC) to be so unfit or incapacitated, which stage has not been arrived.
- 33.** For Clause (vi) to apply, the children have either to have no parents and no one willing to care of them, which is not the present case, or whose parents have abandoned or surrendered them.
- 34.** Clause (vii) can be attracted here, since the children's parents cannot be found; however, such fact has to be established only after making reasonable inquiry "in such manner as may be prescribed", which does not yet apply to them.
- 35.** Certain other important definitions in the Act are also to be looked into for the purpose of assessing the status of the children vis-à-vis the Act.

- 36.** Under 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.
- 37.** Section 2(60) defines “surrendered child” as a child who is relinquished by the parent or guardian to the CWC on account of physical, emotional, and social factors beyond their control, and declared as such by the CWC.
- 38.** To come within the purview of both the terms, there has to be a declaration by the CWC in that regard, which stage has not yet arrived in the present case.
- 39.** Moreover, to be considered as an “abandoned child”, a child has to be ‘deserted’ by his biological or adoptive parents or guardians; whereas, to be called a “surrendered child”, he has to be ‘relinquished’ by the parent or guardian on account of the specific parameters of physical, emotional and social factors beyond their control. It is to be noted, that in both such cases, a conscious act of the parent or guardian is involved.
- 40.** However, the definition of “orphan” under Section 2(42) of the JJ Act, is independent of such declaration by the CWC. Sub-clause (i) of sub-section (42) provides that orphan means a child who is without biological or adoptive parents or legal guardian whereas sub-clause (ii) says that an orphan is a child whose legal guardian is not willing to take, or capable of taking care of the child. Unlike an “abandoned child”

or a “surrendered child”, no declaration by the CWC is required for a child to be classified as an “orphan” under the Act.

- 41.** Section 31 of the JJ Act provides for production of any child in need of care and protection of before the CWC. However, apart from the officials mentioned therein, a “public spirited citizen” can also produce the child. In the present case, in view of the personal involvement and attachment of the appellant, despite her being obviously public spirited in view of the fact that she saved the children from imminent premature death, we cannot categorize the appellant merely as a “public spirited citizen”, which term has an element of dispassion and neutrality about it. The appellant’s personal bond with the children brings an element of personal interest and as such, the said phrase may not be apt to define her in the context of the JJ Act.
- 42.** Section 32(1) of the JJ Act mandates any individual or other functionary as mention therein who finds and takes charge of or is handed over a child who appears or claims to be abandoned or lost, or a child who appears or claims to be an orphan without family support, to give information to the Child Line Services or the nearest police station or a CWC or to the District Child Protection Unit, or hand over the child to a Child Care Institution registered under the JJ Act, as the case may be.
- 43.** Upon a perusal of the above provisions, we find three shades or rather degrees of the status of a child in need of care and protection vis-à-vis their parents/guardian, depending on the circumstances in which the

transition took place for the children to pass from a normal family life under the custody and protection of their parents/guardian to becoming a “child in need of care and protection”.

- 44.** The first such circumstances is a “surrender”, which, as the term suggests, involves the conscious relinquishment by the parent or guardian of the child on account of the specific parameters of physical, emotional or social factors beyond their control.
- 45.** In the present case, we cannot say at the present juncture that Ohila Bibi, the maternal grandmother of the children, has automatically become the guardian of the children. At best she could be described as their *de facto* custodian. Yet, since the mother of the children has not been reported to have met her demise but is merely missing and in a mentally challenged condition, it is the said mother who is to be treated to be the parent. There cannot, therefore, arise any question of surrender of the children, since the mother is not in a position to take a conscious decision in that regard, both due to her mental unsoundness as well as her going missing.
- 46.** The next degree of transition is in case of an “abandoned” child. Unlike a conscious surrender for the welfare of the child under specific parameters of physical, emotional and social factors beyond the control of the parents, in case of abandonment, the child is deserted by his or her biological or adoptive parents or guardians.
- 47.** Although both desertion and abandonment are merely acts of the parents/guardians washing off their hands and not consciously

surrendering the child, in such cases as well, a conscious decision of the parent/guardian is involved. Whereas in case of surrender, there is a positive assertion of such decision by handing over the child to the appropriate authority for the child's welfare, in case of abandonment or desertion, there is a negative assertion of responsibility to take further care of the child. However, the commonality between 'surrender' on the one hand and 'abandonment' or 'desertion' on the other is a conscious decision taken by the parent, which is not possible in the instant case due to the mental incapacity and absence of the mother.

- 48.** The third degree of transition of a child living in his/her own family to one in need of care and protection comes under the definition of "orphan" in Section 2(42) of the JJ Act. Sub-clause (i) is not applicable here, since the children-in-question are not without biological parents or legal guardian. However, sub-clause (ii) is applicable insofar as the second limb thereof contemplates that a child whose legal guardian is "not capable" of taking care of the child, he or she automatically becomes an orphan within the definition of the Act.
- 49.** Hence, on a comprehensive assessment of the situation of the minor children concerned in the present case, they cannot but be said to be "orphans" under Section 2 (42) (ii) of the JJ Act.
- 50.** Thus, the argument of the appellant that personal laws and/or the 1890 Act apply is not tenable, in view of the JJ Act being fully attracted in the present case.

- 51.** The next question which arises is the modality by which the children-in-question are to be dealt with in their peculiar circumstances.
- 52.** Although Section 32(1) mandates even an individual finding or taking charge of an orphan without family support to take the child to a Child Care Institution registered under the Act and to inform the same to the authorities mentioned, the key ingredient is the expression “orphan without family support” used in sub-section (1) of Section 32. Since we have already discussed that the children here are not abandoned or lost, which are the other two scenarios in which Section 32(1) applies, but ‘orphans’, we have to consider whether the orphans are without family support.
- 53.** Conspicuously, the expression “family” has not been defined within the four corners of the JJ Act. Since the Act is for the welfare of the children and one of the declared principles applicable to the Act (which we will be coming to soon) is that institutionalisation should be the last resort as a measure, we are required to give an expansive meaning to the expression “family support” in order to minimize the prospect of institutionalization.
- 54.** Thus, the word “family”, in such context, cannot be confined to the own family of the child concerned; since, if there was support from such quarter, the child would not become an orphan in the first place as Section 2(42)(ii) envisages only children whose legal guardian is not willing to take or capable of taking care of the child as an orphan.

- 55.** Thus, proceeding on such premise, there cannot be any reason why the present minor children cannot be said to be already in family support, although otherwise “orphans” within the contemplation of Section 2 (42) (ii) of the JJ Act.
- 56.** The appellant has pleaded (which has been supported by the maternal grandmother of the children) that she has already taken care of the children from their birth till the present, for over three and a half years. The children have been admitted to an English medium school as per the means of the appellant, which itself indicates that they are *prima facie* being taken care of adequately by the appellant. The word “family” is not restricted to a multi-member family but can also comprise of an individual. Hence, the appellant can, within the contemplation of Section 32(1), comprise of a family unit for the purpose of giving “family support” to the children, who are orphans under the statute. Thus, the requirement of the appellant to report the children or hand over the children to a Child Care Institution does not acquire a mandatory character, as the children are not orphans “without family support”. Conspicuously, the expression “orphan without family support” in Section 32(1) is not circumscribed by any rider, unlike the expressions “abandoned” and “surrender”, for the CWC to declare them as such.
- 57.** In order to find out the best way forward for the children-in-question, we are to look to the general principles to be followed in administration of the JJ Act, as specifically enumerated in Section 3 thereof.

- 58.** Four Clauses of the said Section, as discussed below, acquire relevance in the context.
- 59.** Sub-section (iv) of Section 3 enumerates the “principle of best interest” to the effect that all decisions regarding a 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.
- 60.** Clause (v) of the said Section is also relevant, which incorporates the “principle of safety” that is, all measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or male treatment while in contact with the care and protection system and thereafter.
- 61.** Clause (vii) of Section 3 speaks about “positive measures” which posits that all resources are to be mobilized, 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 the children and the need for intervention under the Act.
- 62.** The most important principle, however, is embodied in Clause (xii) of Section 3, which is the “principle of institutionalization as a measure of last resort” and provides that a child shall be placed in institutional care as a step of last resort after making reasonable inquiry.
- 63.** If Chapter VI of the Act is read in the context of the above principles embodying the underlying theme of the JJ Act, we find that the next logical step forward is for an inquiry under Section 36 of the Act to be

undertaken by the CWC. Importantly, Section 32 does not mandate handing over of the children to the CWC but merely information being given to the said authority. Handing over the child to a Child Care Institution, as per the principle embodied in Section 3 (xii), is to be a measure of last resort.

- 64.** The proviso to sub-section (1) of Section 36 stipulates that all children below six years of age, who are orphans, surrendered or appear to be abandoned, shall be placed in a Specialized Adoption Agency (SAA), where available.
- 65.** However, the mandate of the proviso cannot be construed to be absolute or set in stone because of the very fact that in places where such an agency is not available, the proviso can be given a go-bye, which presupposes that there can be situations where the mandate to institutionalize such children at the threshold may be diluted. Hence, the expression “shall” in the proviso has to be read in the context of the main provision in sub-section (1) which provides that on production of a child or receipt of a report under Section 31, the CWC shall hold an inquiry as prescribed and, on its own or on the reports from any person or agency, may pass an order to send the child to the children’s home or a shelter home or a fit facility or *fit person* and for speedy social investigation by a social worker or Child Welfare Officer or Child Welfare Police Officer.
- 66.** Hence, discretion lies with the CWC, during the inquiry, to pass an order to send the child, among other institutions, to a “fit person”.

- 67.** Taking a cue from Section 3(xii), the option to give the child to a fit person should come first, having preference over handing over a child to an institution. The subsequent sub-sections of Section 36 provide for the procedure to be adopted and the timelines for the social investigation. Under sub-section (3) of the Section 36, after the completion of the inquiry, if the CWC is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection, it may be send him/her to an SAA if the child is below six years of age.
- 68.** Section 37 of the JJ Act deals with orders which can be passed regarding a child in need of care and protection. Section 37(1)(d) contemplates placement of the child with a fit person for long-term or temporary care, Section 37(1)(e) speaks about foster care orders under Section 44 and Section 37(1)(f) about sponsorship orders under Section 45.
- 69.** Section 38 is the next step ahead, which speaks about the CWC, only upon it being established despite all efforts for tracing the parents, on completion of such inquiry, that the child is an orphan having no one to take care or abandoned, to declare the child legally free for adoption, after which the child goes to the pool of adoption which as per the present CARA (Central Adoption Resource Agency) Guidelines is a cross-country exercise.
- 70.** In the interregnum, before such adoption actually happens, if at all, the child remains in an institution.

- 71.** In the present case, taking into consideration the peculiar circumstances of the children-in-question, they cannot be labelled as orphans “having no one to take care of”, which is a mandatory precondition, apart from in case of abandoned children, under Section 38(1) of the JJ Act for the children to be declared legally free for adoption and thereafter given in adoption.
- 72.** As of today, from the *prima facie* case made out by the appellant, the children indeed have someone to take care of, with whom they obviously have developed a filial bond within the span of three and a half years of their lives. The appellant, till now, is the only person in the little lives of the children whom they know as their parent/guardian and the entire world of both the children and the appellant, which revolve around each other, would be destroyed in a flash in the event the children are handed over to institutionalised care, which would not only be detrimental to their well-being but also be contrary to the principles as laid down in Section 3 of the Act, which have been spelt out hereinabove.
- 73.** Thus, the conundrum which has arisen can very well be resolved if the CWC is intimated about the predicament of the children and they commence an inquiry immediately within the contemplation of Section 36 of the JJ Act and thereafter come to a decision as to the next course of action to be taken regarding the children.
- 74.** However, in doing so, taking into account the peculiar circumstances of the children, a right of hearing has to be given first to the appellant by

the CWC to ascertain whether the children can be placed with her by considering her to be a fit person, preferably for a long term or, in the alternative, for a temporary period under Clause (d) of Section 37(1) of the Act.

- 75.** At least, foster care and sponsorship scenarios in respect of the appellant vis-à-vis the children can be looked at by the CWC as well.
- 76.** In the light of the above discussions, we are of the opinion that although technically the learned Trial Judge was justified in holding that the 1890 Act is not applicable and the application under the said Act was not maintainable, the said order ought to be modified by taking into account the sensitivity and human emotions involved, particularly the welfare of the children, as laid down hereinbelow.
- 77.** Accordingly, F.M.A. No.195 of 2025 is partially allowed, thereby modifying the impugned judgment and order dated August 30, 2024 passed by the learned Additional District and Sessions Judge, Second Court at Barrackpore, District: North 24 Parganas in Miscellaneous Case No.181 of 2024 to the following effect:
 - (i) A copy of this order shall be forwarded to the CWC, District: North 24 Parganas at the earliest, by Special Messenger at the cost of the appellant, to be deposited within a week from date.
 - (ii) The concerned CWC shall, thereafter, commence an inquiry under Section 36 of the JJ Act at the earliest; while doing so, the CWC shall ascertain *prima facie* whether the appellant is a “fit person” within the contemplation of Section 36(1) and, if so, she

may be permitted to retain the custody of the children during the period of inquiry by the CWC.

- (iii) Upon the conclusion of such inquiry, in the event the CWC is of the opinion that the children can be placed with the appellant by construing the appellant to be a “fit person” within the contemplation of Section 37(1)(d) of the JJ Act, for long-term or temporary care, the children may be so placed under the care and custody of the appellant. If not, the CWC will consider whether the appellant is entitled to foster care orders in her favour vis-à-vis the children as envisaged under Section 37(1)(e), read with Section 44 of the JJ Act. In the event such option is also not considered feasible, the CWC shall consider granting sponsorship orders under Section 37(1)(f) read with Section 45 in favour of the appellant. The above chronology of options shall be explored by the CWC while undertaking such consideration.
- (iv) In the event it is found that any of the above options can be exercised, particularly if the children can be placed with the appellant as a fit person for a long term and/or placed under her foster care for a period to be decided by the CWC, the CWC shall next proceed to consider whether the children concerned are “orphans having no one to take care”, keeping in view particularly the circumstances under which the children are being taken care of by the appellant. In the event it is found that sufficient care of the two children-in-question is being taken by the appellant in

the opinion of the CWC, the children shall not be placed for adoption under Section 38 of the JJ Act and, in such event, the CWC may consider continuance of the placement of the child with the appellant as a fit person for a long term, which may extend even to the attainment of their majority.

- (v) It is made clear that while undertaking the above exercise, the CWC shall be guided by the principles as embodied in Section 3 of the JJ Act and in particular Clause (xii) of Section 3, which mandates the placement of the children in institutional care to be the step of last resort, after making such reasonable inquiry as required.
- (vi) It is further clarified that in the event the children are placed with the appellant as a “fit person”, whether for a long term or for temporary care, and/or under her foster care and/or sponsorship, the CWC shall keep a constant monitoring over the children and their welfare under the appellant as mandated by the relevant provisions of the JJ Act.
- (vii) Nothing in this order shall be construed to be a direction on the CWC to mandatorily place the children with the appellant and/or not to declare the children free for adoption and the CWC shall, only upon conduct of a proper inquiry in accordance with law and in the light of the above observations and upon giving an opportunity of hearing to the appellant, take its own decisions

within the contemplation of the JJ Act, taking the above riders merely to be in the nature of guidelines while doing so.

78. There will be no order as to costs.

79. CAN 1 of 2024 and CAN 2 of 2024 are accordingly disposed of as well.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)