

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE V. CHITAMBARESH  
&  
THE HONOURABLE MR. JUSTICE K. P. JYOTHINDRANATH

MONDAY, THE 18TH DAY OF JUNE 2018 / 28TH JYAISHTA, 1940

RPJJ.No. 3 of 2018

AGAINST THE ORDER IN O.P.NO.713/R/2017 OF THE CHILD WELFARE COMMITTEE, THRISSUR  
DATED 17.3.2018

REVISION PETITIONER(S)/PETITIONERS

- 1 KRISHNAKUMAR,  
S/O. VASU, 43 YEARS, EDAKKATTU METHIL HOUSE,  
THURUTHUR, PUTHENVELIKKARA VILLAGE, N PARAVUR TALUK,  
ERNAKULAM DISTRICT.
- 2 OMANA,  
W/O. KARUNAKARAN, 60 YEARS, KUMBALATH HOUSE,  
NARAYANAMANGALAM, PULLUT P.O, KODUNGALLUR TALUK - 638 003.

BY ADVS.SRI.M.SHAJU PURUSHOTHAMAN  
SRI.K.S.RAJESH

RESPONDENT(S)/RESPONDENTS:

1. STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM - 682 031.
2. CHILD WELFARE COMMITTEE,  
REP. BY THE CHAIRMAN, GOVT. CHILDREN'S HOME,  
RAMAVARMAPURAM, THRISSUR - 680 631.

BY PUBLIC PROSECUTOR SRI. K.B. RAMANAND

THIS REV.PETITION(JUVENILE JUSTICE) HAVING BEEN FINALLY HEARD ON 30-05-2018,  
THE COURT ON 18-06-2018 PASSED THE FOLLOWING:

SHG/

V. CHITAMBARESH & K.P. JYOTHINDRANATH, JJ.

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R.P.(JJ) No.3 of 2018

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Dated this the 18<sup>th</sup> day of June, 2018

**ORDER**

**Jyothindranath, J.**

The challenge in this revision petition is against the order of the Child Welfare Committee, Thrissur (hereinafter referred to as the "Committee") dated 17.3.2018 in O.P.No.713/R/2017. A child aged 13 years was found as a child in need of care and protection by the Committee. An application for release of the child by the father and the grandmother was dismissed by the Committee by the impugned order. Alleging that the said order is illegal and perverse, the revision petitioners/father and grandmother of the child filed this revision petition. The impugned minuscule order is as follows:

“ XXX എന്ന കുട്ടിയെ സംരക്ഷിക്കുന്നതിനുള്ള കഴിവ് അമ്മുമ്മയായ XXX ഉള്ളതായി കമ്മറ്റിക്ക് ബോധ്യപ്പെട്ടിട്ടില്ലാത്തതിനാലും ടിയാളെ പീഡനത്തിന് വിധേയയാക്കിയ കേസിലെ പ്രതിയായ അനന്തു എന്നയാൾക്ക് കുട്ടിയെ കാണുന്നതിന് അവസരമുണ്ടാകുമെന്നതുകൊണ്ടും ടിയാരോടൊപ്പം കുട്ടിയെ വിടുന്നത് ഉചിതമല്ല. കൂടാതെ പിതാവായ XXX രണ്ടാനമ്മയായ XXX കുട്ടിയുടെ സംരക്ഷണകാര്യത്തിൽ

ഉപേക്ഷ വരുത്തിയിട്ടുള്ളതിനാലും കുട്ടിയുടെ സംരക്ഷണം ഉറപ്പുവരുത്തുന്നതിന് ക്രിയാത്മകമായ ഇടപെടലുകൾ നടത്തുവാൻ പര്യാപ്തരല്ലാത്തതിനാലും കുട്ടി അവരോടൊപ്പം സുരക്ഷിതയായിരിക്കില്ല എന്ന് കമ്മിറ്റി വിലയിരുത്തുന്നു.

ആയതിനാൽ ഇപ്പോൾ പാലക്കാട് നിർഭയ ഷെൽട്ടർ ഹോമിൽ വളരെ സമാധാനപരമായി താമസിച്ചു വരുന്ന XXX തങ്ങളോടൊപ്പം വിട്ടയക്കണമെന്ന് ആവശ്യപ്പെട്ടുകൊണ്ടുള്ള കുട്ടിയുടെ പിതാവായ XXX, അമ്മുമ്മയായ XXXനേറയും അപേക്ഷകൾ നിരാകരിച്ചുകൊണ്ട് ഇതിനാൽ ഉത്തരവാകുന്നു.”

As this is a revision under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') the records were called for.

2. The facts are as follows:

The juvenile lost her mother while she was aged only 10 years. Thereafter, her father married again and she was staying with her father, stepmother and her younger sister. It appears that she shifted her residence to the house of her maternal grandmother. While so, on 28.11.2017 she was seen missing. When she was found out, a crime was registered under the POCSO Act against one Anandu. As per the order of the Judicial Magistrate, she was produced before the Committee. Even though the second petitioner approached the Committee on 4.12.2017 she was not

released or given the custody to the second petitioner. Thereafter on 6.12.2017 she again absconded from the Mahila Mandiram, where she was stationed. A crime was registered in this regard at the police station. Thereafter she was again admitted in the Mahila Mandiram on 22.12.2017. Again on 29.12.2017 she disappeared from the said Mahila Mandiram against which also a crime was registered. She was detected on 3.1.2018. It is also evident from the records that the second petitioner sought permission to see the child on so many occasions and also visited her. It is the case of the petitioners that the petitions filed for the release and custody of the child by the first petitioner as well as by the second petitioner was rejected as per the impugned order.

3. A perusal of the impugned order will reveal that the ground on which the petition was dismissed is that the second petitioner was found incapable of looking-after the child as well as there is possibility of meeting the child by the accused in the POCSO case where victim is the juvenile. The prayer of the first petitioner was rejected on the ground

of negligence as well as lack of effective intervention in looking-after the child. The child was treated as a child in need of care and protection by the Committee. The definition of such a child is given under Section 2 (14) of the Act. The relevant portion of Section 2 (14) of the Act reads as follows:

(14) "child in need of care and protection" means a child-

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(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

4. While appreciating the materials before us, it will be only pertinent to highlight Section 3 of the Act, in which the general principles to be followed in the administration of the Act is given. Section 3 of the Act states as follows:

**3. General principles to be followed in administration of Act.-** 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) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

(iii) Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child.

(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) Principle of non-stigmatising semantics: Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(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) Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(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) Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) Principle of diversion: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(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.

5. The child was produced before this Court. We interacted with the juvenile. She expressed her desire to go with her grandmother or with the father as the court orders. She further submitted that her grandmother is financially capable to look-after her.

6. A perusal of the records reveals that as per the

order dated 29.11.2017 of the Kodungallur Judicial First Class Magistrate, the girl was produced before the Committee and as per the order of the Committee, the girl was admitted in the Mahila Mandiram, Ramavarmapuram. The production of the child before the Committee can be only considered as a production under Section 31 of the Act. When a child who appears to be in need of care and protection is produced, an inquiry under Section 36 of the Act has to follow. Section 36 of the Act says that "the Committee shall hold an inquiry in such manner as may be prescribed".

7. Section 110 of the Act reads as follows:

**110. Power to make rules.**-(1) The State Government shall, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government is required to make rules and where any such model rules have been framed in respect of any such matter, they shall apply to the State mutatis mutandis until the rules in respect of that matter are made by the State Government and while making any such rules, they conform to such model rules.

So far, only model rules framed by the Central Government is available. Chapter V of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 deals with



procedure in relation to a child in need of care and protection.

8. Rule 19 (5) states as follows:

“The inquiry shall satisfy the basic principles of natural justice and shall ensure the informed participation of the child and parent or guardian. The child shall be given an opportunity to be heard and his opinion shall be taken into consideration with due regard to his age and level of maturity. The orders of the Committee shall be in writing and contain reasons.”

9. Now, let us consider Section 40 of the Act, where the powers of the Committee in respect of restoration is dealt with, if not released under Section 37 of the Act.

10. Section 40 (3) of the Act states as follows:

The Committee shall have the powers to restore any child in need of care and protection to his parents, guardian or fit person, as the case may be, after determining the suitability of the parents or guardian or fit person to take care of the child, and give them suitable directions.

11. In this case, admittedly, the father and grandmother approached the Committee for restoration of their child. A perusal of the file reveals that there is nothing to show that any statement of the revision petitioners herein was taken at any point of time. The inquiry contemplated under Section 36 of the Act was not

conducted in the presence of the father or the 2<sup>nd</sup> petitioner with whom earlier the child was staying. The Committee got no case that the second petitioner not approached the Committee or not came to see the child. When the Committee itself got a case that 2<sup>nd</sup> petitioner/grandmother had visited earlier, at least her statement should have been recorded, even though in the inquiry, only a summary procedure need be followed. A perusal of the records reveals that practically no inquiry conducted as contemplated under the Act and Rules. There is no report from the District Child Welfare Officer before coming to the conclusion that the child herein is in need of care and protection. The report available in the file is a report submitted after the issue of an order to transfer the child to Palakkad district. There is nothing on record to show that any social investigation as contemplated under Section 36 (2) or Rule 19 (3) was conducted in this case. Only the statement of the juvenile recorded. There is nothing to show that her option regarding the residence of choice was obtained and considered.

12. It is also relevant to note that she was transferred to a shelter home in Palakkad district. It appears that the Committee took a decision to transfer the child to Palakkad district. Naturally, thereafter the Committee available in that district has to seisin the matter. But, thereafter, while the child was in Palakkad district, the impugned order was passed. **When a child is found in need of care and protection, before putting the child in Children's Home, there should be application of mind by the Committee; Committee shall take into account the investigation report by the Child Welfare Officer as well as child's wishes. This aspect is crystal clear from Section 37 of the Act viewed in the light of Section 3 of the Act.** In this case, child is aged 13 years. Her wishes should have been given due consideration. Surely, if there is cogent and forcing reasons, the Committee will be justified to pass an order to put the juvenile in Children's Home even against her wishes and rejecting the request of the family members for custody. But, it should be strictly followed by an inquiry as

contemplated in the Act and Rules with a speaking order.

13. Considering the totality of the case in hand, it can be only said that the impugned order is illegal and not in accordance with law. While considering a custody/restoration application when the girl is stationed in Children's Home, which will come under Section 40 of the Act, the Committee shall evaluate suitability of the person to whom custody to be given guided by the fundamental principles envisaged in Section 3 of the Act. Section 40 was not considered in its true spirit in this case. As this court held in **Jose Maveli v. State of Kerala and Anr. [2007 (2) KHC 545]**, poverty cannot be a ground for declining the custody/restoration of the child. A victim/juvenile cannot be stationed in a Children's Home or in any other such shelter on the ground that there is possibility of access of the accused to the victim. It is the duty of the investigating agency or the prosecution, as the case may be, to take steps to see that such a situation is not therein. The victim shall not be the sufferer.

14. There is nothing to show that the opinion of the

juvenile was considered by the Committee in this case. As the fact reveals, twice she jumped from the Shelter Home. There is no case that she committed any offence. The said acts only reveal that how she is reacting to the order to put her in a Shelter Home. Her opinion/desire is to go with the petitioners. The said wish is considered by this Court on the basis of the fundamental principles envisaged in Section 3 of the Act. She was staying with the 2<sup>nd</sup> petitioner before she left her home.

Thus, considering all aspects, revision petition is allowed and the child is directed to be released to the second petitioner, who is the grandmother forthwith and it is also directed that she will be under the supervision of the District Welfare Officer, Thrissur.

SD/-

**V. CHITAMBARESH  
JUDGE**

SD/-

**K.P. JYOTHINDRANATH  
JUDGE**