IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.HARILAL

&

THE HONOURABLE MRS. JUSTICE ANNIE JOHN

THURSDAY, THE 28TH DAY OF MARCH 2019 / 7TH CHAITHRA, 1941

RPJJ.No. 2 of 2019

(Against the order dated 14.01.2019 in case No.CWC/TVPM/858/18 of Child Welfare Committee, Thiruvananthapuram District)

REVISION PETITIONER :

SELVI MICHEL,
AGED 42 YEARS,
W/O.PASKAN MICHEL, T.C.44/499(4),
SANDRA COTTAGE, VALIYATHURA,
VALLAKADAVU.P.O,
THIRUVANANTHAPURAM - 695 008.

BY ADV. SRI.S.MOHAMMED AL RAFI

RESPONDENTS :

CHILD WELFARE COMMITTEE,
GOVERNMENT CHILDREN'S HOME,
POOJAPPURA, THIRUVANANTHAPURAM,
REPRESENTED BY ITS CHAIRMAN.

BY GOVERNMENT PLEADER SRI.K.B.RAMANAND

THIS REV. PETITION(JUVENILE JUSTICE) HAVING BEEN FINALLY HEARD ON 19.03.2018, THE COURT ON 28.03.2019 PASSED THE FOLLOWING :

ORDER

Annie John, J.

The revision petitioner is the mother of the victim child, aged 5 years, who was ordered by the respondent to be kept in the SOS Model Home, Mudavanmugal, Thiruvananthapuram as per the impugned order dated 21.12.2018 in CWC/TVPM/858/18. Date of birth of the child is 05.03.2014. Without following the procedures provided in Juvenile Justice (Care and Protection of Children) Act and Rules, the impugned order was issued keeping the custody of the child in SOS Model Home, Mudavanmugal, Thiruvananthapuram. There is gross violation of the procedures contemplated in Sections 31(2) and 36 of the J.J.Act and Rule 18 & 19 of the Rules. The interest and welfare of the child was never taken into consideration by the Committee. As the child is now studying at UKG Standard in Holy Angles' Convent School, impugned order adversely affects her studies. Now the

child is not taken to school after 21.12.2018. Process for admission into 1st standard already commenced. Due to the custody of child, her studies affected. Hence, this revision petition has been filed.

2. The revision petition is the mother of the victim child, aged 5 years, who was ordered by the respondent to be a child in need of care and protection and further directed to be kept in the SOS Model Home, Mudavanmugal, Thiruvananthapuram. The husband of the petitioner, Paskan Michel is employed abroad in Saudi Arabia for years. Both of them are childless couples who underwent several medical treatments. At last, when the revision petitioner went for medical treatment for her illness in a nearby hospital, St. Francis Hospital, Airport, Sankumugam, an unknown lady, after delivery of a girl child, abandoned her. Nobody came forward to protect and to take care of the child. At that time, the revision petitioner came across the child and witnessing the sad plight of the new born child, the revision petitioner after consulting with her husband took care of the child and took

her to her home. Both revision petitioner and her husband treated and cared the child as their own. In the birth certificate issued by the Thiruvananthapuram Corporation, the petitioner and her husband were shown as parents. In the Aadhar Card also, the petitioner and her husband were shown as parents. The child was given all the medical treatment and all immunity vaccinations to be given to the new born child. The child was given best pre-school nursery education. Then the child was admitted in Holy Angels' Convent School, Thiruvananthapuram. She is presently studying at UKG.

3. The petitioner is residing in a three storied residential building. She has rented out second floor to a tenant. One Vishnu, aged 15, who is the son of the tenant, enticed the child of the petitioner and sexually abused and molested her in a secret manner. The child disclosed this factum of sexual harrassment to her class teacher. The school authorities intimated this to the respondent and police. In this respect, Valiyathura police registered Crime No.2175/2018 against the above said Vishnu alleging

commission of offences punishable under the Indian Penal Code and Protection of Children from Sexual Offences Act. But the respondent, immediately on the production of child before it, passed the order No.CWC/TVPM/858/18 dated 21.12.2018 keeping the child in SOS Model Home, Mudavanmugal, Thiruvananthapuram until further orders in gross violation of the provisions contained in the J.J.Act. The said order was issued without considering the paramount interest and welfare of the child. The petitioner challenged the said order before this Court in R.P.(JJ) No.1/2019 and this Court disposed of revision petition permitting the petitioner to approach the respondent seeking temporary custody of the minor child, pending conduct of the enquiry contemplated under Sec.36 of the J.J.Act and further directing the respondent to consider and dispose such application through a speaking order after affording an opportunity of hearing to the petitioner, at the earliest, within a period of five days from the date of receipt of a copy of such petition.

4. Pursuant to the directions issued in the above revision petition, the petitioner filed an application on 11.01.2019 before the respondent praying to hand over the child to the petitioner and also sought permission to see the child. But the respondent denied the permission to the petitioner to see the child. On 12.01.2019 and 13.01.2019, the respondent made no arrangements for the revision petitioner to see the child. On 14.01.2019, the petitioner again went to the office of the respondent and waited there to see the child and she was directed to sign some papers endorsing that she had seen the child. After that, she was taken inside the office where the child was brought from Mudavanmugal. As soon as the child saw the revision petitioner, the child run over to her and embraced her and demanded the petitioner to take her to home. The child refused to let her go and insisted the petitioner to take her along with the petitioner. The staff of the respondent forcefully separated the child from the petitioner, which created a tense situation. The respondent did not enquire

any matter with the petitioner and did not hear the petitioner during the time she was present in the office of the respondent. At 6.00 p.m., the respondent handed over impugned order stating that the child is declared to be a child in need of care and protection under Section 37(1)(a) of the J.J.Act and further, the petitioner was incapacitated as unfit person to ensure care, protection, safety orders to continue the child at SOS Model Home, Mudavanmugal until further order. The respondent did not care to consider the application filed by the petitioner for temporary custody. The respondent filed a complaint before the police against the petitioner and she therefore filed BA.No.154/2019 for anticipatory bail before this Court. The respondent passed the impugned order without following the provisions contained in J.J.Act and Model rules. In the above circumstances, the revision petitioner prefers this RP under Section 102 of the J.J.Act.

5. According to the revision petitioner, Section 37 of the J.J.Act has not been complied by the respondent. Section 37 of the J.J.Act mandates that while passing order

under Section 37 of the J.J.Act, the respondent shall take into account the child's wishes in case the child is sufficiently mature to take a view.

6. The learned counsel for the revision petitioner cited a ruling held in ***Krishnakumar v.State of Kerala [2018(3) KHC 485]*** wherein this Court has held that "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, the committee shall take into account the investigation report by the Child Welfare Officer as well as Child's wishes".

7. The petitioner's counsel has also argued that the procedure contemplated under Rule 19 of Model Rules was not followed. Rule 19(5) of the Model Rules mandates that inquiry shall satisfy the basic principles of natural justice and shall ensure the informed participation of the child and the parent or guardian. Rule 19(6) says that the Committee shall interview the child sensitively and in a child friendly manner. But the grievance of the revision petitioner is that the respondent did not hear the petitioner

as well as did not ascertain the wishes of the child. According to the revision petitioner, no report contemplated under S.31(2) of the J.J.Act was obtained before issuing impugned order. No inquiry was also conducted under Section 36 of the J.J.Act before issuing the impugned order and no speedy social investigation was ordered to be conducted as per Section 36 of the J.J.Act. According to the revision petitioner, she is the fit person to get custody of the child.

8. The learned Public Prosecutor has strenuously argued that the child was in the custody of the revision petitioner without any documents and she has not taken any adoption procedure to adopt the child in accordance with law. So the respondent has reluctant to hand over the custody of the child to the revision petitioner. The learned Public Prosecutor has informed that FIR was registered against the revision petitioner under Section 344, 465, 468 read with Section 34 of the Indian Penal Code and Section 45 (5) of the J.J.Act, 2000. The main allegation against the revision petitioner is that without adopting the child,

she herself and her husband has kept the child for about 5 years. So, she is not fit enough to receive the custody of the minor child. The revision petitioner admitted that she has not adopted the child and she has received the child from St. Francis Hospital, Airport, Sankumugam since she was found abandoned by her mother immediately after the birth. According to her, she is preparing papers to adopt the child. It is an admitted fact that the revision petitioner had given the second floor to the tenant and his son has sexually abused the child and this fact has not been brought to the notice of the revision petitioner and the child has given this statement before the teacher. Accordingly, this matter was taken up by the child line staff and had taken the child to the SOS Children Home for the purpose of giving counseling under Section 39(3) of the J.J.Act. Even though the revision petitioner has approached the Child Welfare Committee, they have not considered the request of the revision petitioner and the revision petitioner has permitted to visit the child once in a month if the child is willing to see the revision petitioner.

9. Heard the learned counsel for the petitioner as well as the Government Pleader appeared for the Child Welfare Committee.

10. The learned counsel for the revision petitioner strenuously argued before us that the wishes of the child has not been considered by the Child Welfare Committee and they have straight away stationed her in the institution, finding that, she is not safe at her residence. According to the respondents victim is a child in need, care and protection under Section 2(14)(iii)(a) of the JJ Act.

11. In this connection it is worth quoting Section 2(14)(iii)(a) of Juvenile Justice Act, wherein it is defined who is a “child in need of care and protection”, if any child is residing with a person (whether a guardian of the child or not) and if such person has injured, exploited, abused or neglected the child, the child would be 'a child in need of care and protection'.

12. Further Section 2(14)(v), reads as follows:-

> "even if a child has a parent or guardian, when such parent or guardian is found to be unfit or incapacitated by the authority concerned to care for and protect the safety and well being of the child, then the child would be 'a child in need of care and protection'.

13. It cannot be said by any stretch of imagination that the revision petitioner has injured, exploited, abused or neglected the child in order to define the child as a person in "need of care and protection". According to the counsel for the revision petitioner, the stray incident of sexual abuse outside the control of revision petitioner cannot lead to such a logical conclusion. The learned counsel has also further argued that the respondents while issuing Annexure A9 Order completely ignored the mandate under Section 3 of the Juvenile Justice Act. In this context, it is pertinent to peruse the importance of Section 3 of the Juvenile Justice Act envisaged as follows:

"3. The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:–

(i) *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.

14. At present, the revision petitioner has filed petition under Section 102 of the of the Juvenile Justice (Care and Protection of Children) Act, 2015. It is important to quote Section 102 of the above said Act. Section 102 is envisaged as follows:

"102. The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to

the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

15. Virtually the finding entered by the Child Welfare Committee is that the revision petitioner is incapacitated in looking after the child and there is possibility of contacting the child by the accused who is involved in POCSO case. Further it has held by the committee that the victim was treated as 'child in need of care and protection' by the committee and accordingly, the provision under Section 2(14) (v) of the Act was invoked by the Child Welfare Committee.

16. Section 2(14)(v) of the Act reads as follows:

"2(14) "child in need of care and protection" means a child-

(v) who has a parent or guaradian 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"

Before invoking Section 2(14)(v) of the JJ Act the authority has to look into the general principles under Section 3 of the JJ Act. Section 3 of the JJ Act would state certain general principles which is to be followed in the administration of the Act. I have already mentioned Section 3 of the JJ Act in the earlier paragraphs.

17. Now, the question to be considered is whether the Child Welfare Committee has considered request of the petitioner as well as the wishes of the child.

18. Now let us come to the merits of the case. As per the impugned order, the victim was produced before the Child Welfare Committee as per Section 31 of the Act. When the child who appears to be in need of care and protection is produced and it is mandate to conduct inquiry under Section 36 of the Act.

19. The Section 36 of the Act is dealt with inquiry. It says that the Committee shall hold an inquiry in such a manner as may be prescribed and the committee, on its own or on report from any persons or agency as

specified in Subsection 2 of Section 31, may pass an order to send a child to the Children's Home or a fit facility and or fit person, and for speedy social investigation by a social worker or Child Welfare Officer or Child Welfare Police Officer.

20. In this connection it is pertinent to go through the relevant provision regarding regulating making of rules. Section 110 deals with the power of the Child Welfare Committee to make rules. It says that :

> "110. (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."

21. Related to the above Central Government has framed model rules which is stated in chapter 5 of the JJ Act model Rules 2016 which deals with the procedure in

relation of the child in need of care and protection.

22. At this stage we may quote Section 19 of the Juvenile Justice (Care and Protection of Child) Act. Section 19 deals with procedure for enquiry.

> "(i). The Committee shall enquire into the circumstances under which the child is produced and accordingly declared such child to be a child in need of care and protection.
>
> (ii). The Committee shall prima facie determines the age of child in order to ascertain its jurisdiction pending further enquiry as per Section 94 of the Act, if need be.
>
> (iii). When the child is brought before the Committee, the Committee shall assign the case to a social worker or case worker or a child welfare officer or to any recognized non- Governmental organisation for conducting social investigation under sub section 2 of section 36 of the Act through an order.
>
> (iv). xxxxx
>
> (v). 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 contained reasons."

23. Now we shall discuss whether the Child Welfare Committee has power to restore the child. In this

connection we shall quote Section 40 of the JJ Act. Section 40 is dealt with restriction of child in need of care and protection and Section 43(3) says that 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. Section 40 explanation says that for the purposes of the section "restoration and protection of a child" means restoration to;

(a) Parents
(b) Adoptive parents
(c) Foster parents
(d) Guardian
(e) Fit person

24. The learned counsel for the respondents has argued that the petitioner will not come within any of the categories as mentioned above. It is evident that the petitioner has taken the victim child immediately after her birth without any documents. There is clear violation of the rules related to the Adoption Act. It is true that the

revision petitioner was keeping the child without adopting her, and according to the learned counsel for the revision petitioner, she started proceedings to adopt the child; but the respondents were reluctant to accept her application as such. According to her, she was taking care of the victim child from her birth onwards. She is giving high education to the child also. Therefore, the learned counsel for the revision petitioner submitted that she will come under the category of 'fit person' and she is entitled to get the custody of the child. It is true that when the child was in her custody, her tenant's son has sexually assaulted her without the knowledge of the revision petitioner. She came to know only when the Child Line Authorities informed her.

25. The learned counsel for the petitioner has cited the ruling in ***Krishna Kumar V. State of Kerala [2018 (3) KHC 485***, whereby the Division Bench of this Court has highlighted the need for adhering to the fundamental principles mentioned under Section 3 of the Act while taking a decision regarding the care and custody

of the child. It was further directed that the Committee shall pay special attention to the principles mentioned above and also hear the child and interact with him before passing any Order.

26. In this connection, we have gone through the order passed by the Child Welfare Committee and found that nowhere it is stated that they have given a chance to interact with the child, except by recording her statement and had not given any special attention especially about her wishes. Section 3 of the JJ Act emphasises that victim as well as her relatives should be heard before taking a decisions. From the records it is quite clear that respondents have violated the mandates as prescribed under Section 3 of the JJ Act. Considering the above, we are of the opinion that the respondents have completely ignored the dictum laid down under Section 3 of the Act.

27. Virtually the inquiry contemplated under Section 36 of the Act was not conducted in the presence of the father and mother of the child. It has also come out that the mother and other family members were permitted

to see the child. The Committee has not recorded the statement of the revision petitioner and on going through the impugned order, it would reveal that practically, no inquiry was conducted as contemplated under the Juvenile Justice Act and Rules. Nowhere it is stated that they have given option of the child regarding the residence of choice was obtained and considered. It is very important to note that when the child needs the care and protection before putting the child in Children Home, there should be application of mind by the committee and the committee shall take into account the investigation report of the Child Welfare Committee as well as the child wishes. On a reading of Section 37 of the Act read with Section 3 of the Act, it is crystal clear that the Child Welfare Committee has to consider the wishes of the child also. The child is about 5 years old and her wishes should have been given due consideration. Of course, the Child Welfare Committee has taken such a decision to keep her in the Children Home for the reasons as aforesaid and the committee is justified in passing such an order to put the child in Children Home

even against her wishes and rejecting the request of her family members on her custody.

28. The impugned order does not show that the opinion and wishes of the victim child was considered by the Committee in this case. At present, her opinion/desire is to go along with the petitioner and we have considered the matter in detail on the basis of the fundamental principles as envisaged Section 3 of the Act.

29. The alleged incident was occurred outside the purview of the revision petitioner. If the child is keeping in SOS Model Home, Mudavanmugal, definitely her future will be affected. It is true that she is not an adopted parent; but she can have the custody of the child by including her in the category of a 'fit person'. Therefore, we are convinced by the argument of the learned counsel for the petitioner that she can have the custody of the victim child as she comes under the category of fit person. Therefore, we are inclined to grant custody of the child to the revision petitioner.

30. In the result, the revision petition is allowed and order of the Child Welfare Committee is set aside. The Superintendent of the SOS Model Home, Mudavanmugal, Thiruvananthapuram is directed to release the child forthwith to the mother, who is the revision petitioner herein.

It is directed that victim child be under the supervision of District Welfare Officer, Thiruvananthapuram.

Sd/-
K.HARILAL, JUDGE

Sd/-
ANNIE JOHN, JUDGE

RKM

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE-A	COPY OF THE MEDICAL RECORD OF THE CHILD "ANNA SANDRA MICHEL" REVEALING THE DETAILS OF HER VACCINATION.
ANNEXURE-B	COPY OF THE IDENTITY CARD ISSUED TO THE CHILD "ANNA SANDRA MICHEL" BY HOLY ANGELS' CONVENT SCHOOL.
ANNEXURE-C	COPY OF THE ORDER DATED 21.12.2018 NO.CWC/TVPM/858/18 ISSUED BY THE RESPONDENT
ANNEXURE-D	COPY OF THE ORDER IN R.P.(J.J)1/2019 DATED 4/1/2019
ANNEXURE-E	COPY OF THE APPLICATION FOR TEMPORARY CUSTODY SUBMITTED BY THE PETITIONER ON 11/1/2019
ANNEXURE-F	COPY OF THE LIST AND ADMISSION NOTICE ISSUED BY HOLY ANGEL'S SCHOOL, THIRUVANANTHAPURAM.