

- : 1 :-

**IN THE HIGH COURT OF MADHYA PRADESH AT
INDORE**

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE RAJENDRA KUMAR (VERMA)

ON THE 3rd OF FEBRUARY, 2022

WRIT PETITION No. 25356 of 2018

Between:-

RAJLAKSHMI FOUNDATION THROUGH ITS SECRETARY AMIT K. UPADHYAYA PROFESSION ADVOCATE SECRETARY 201 DM TOWER 21/1 RACE COURSE ROAD NEW PALASIA INDORE (MADHYA PRADESH)

.....PETITIONER

(BY SHRI MANISH GUPTA, LEARNED COUNSEL FOR THE PETITIONER)

AND

1. THE STATE OF MADHYA PRADESH PRINCIPAL SECRETARY MINISTRY OF WOMEN AND CHILD DEVELOPMENT THROUGH ITS PRINCIPAL SECRETARY VALLABH BHAWAN BHOPAL (MADHYA PRADESH)

2. THROUGH ITS CHAIR PERSON MADHYA PRADESH STATE COMMISSION FOR PROTECTION OF CHILD RIGHTS (M.P.S.C.P.C.R.) 59, NARMADA BHAWAN ARERA HILLS, BHOPAL (MADHYA PRADESH)

3. MINISTRY OF WOMEN AND CHILD DEVELOPMENT THROUGH ITS PRINCIPAL SECRETARY UNION OF INDIA SHASTRI BHAWAN NEW DELHI (DELHI)

4. THROUGH ITS CHAIRPERSON NATIONAL COMMISSION FOR PROTECTION OF CHILD RIGHTS (N.C.P.C.R.) 5TH FLOOR CHANDERLOK BUILDING 36 JANPATH NEW DELHI (DELHI)

.....RESPONDENTS

(BY SHRI VIVEK DALAL, LEARNED ADDL. ADVOCATE GENERAL FOR THE RESPONDENT/STATE)

(BY SHRI HIMANSHU JOSHI, LEARNED COUNSEL FOR THE RESPONDENT NO.4)

(Heard through Video Conferencing)

ORDER

PER VIVEK RUSIA, J.:

The petitioner namely Rajlakshmi foundation has filed the present petition in the nature of Public Interest Litigation (PIL) highlighting the inaction of the Child Welfare Committee (in

short 'CWC') in protecting and restoring the basic rights of children under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 (which shall be referred hereinafter as JJ Act) especially under section 2(14) of the JJ Act. According to the petitioner, the CWC is not properly exercising its power in granting visitation rights to the children who are in need of care and protection as defined under section 2(14) of the JJ Act with the non-custodial parent thereby violating the fundamental right of the child under the Article 21 of the Constitution of India.

The petitioner is claiming it to be a non-governmental organization and working for various social causes for the last two years. Except for the certificate, nothing has been brought on record to demonstrate that petitioner's organization is working for various social causes related to the public interest. Not a single antecedent has been mentioned in the relevant part of the writ petition. The petitioner has not disclosed the status of its member and the nature of their activity. The by-laws of the foundations are not on record. However, the petitioner is mainly aggrieved by the judgment passed by a single bench of this court *in writ petition no.6163/2016 (Priya Yadav Vs. the State of M.P. And others) dated 23.11.2016* whereby it has been held that CWC does not confer power to give custody of child taking it from mother and give to father in the manner as done by the CWC, Indore. A note of caution has been issued that such power should not be exercised by other CWCs functioning in the State of M.P. The court has directed to circulate the order to all the CWCs of the State of M.P. directing them that visitation rights and custody as guardians should not be invoked by them assuming the jurisdiction in this regard. The para-14 of

the above-mentioned judgment is reproduced below:-

14. In view of the discussions made hereinabove, it can safely be concluded that under the provisions of Juvenile Justice(Care and Protection of Children) Act,2015 and Juvenile Justice (Care and Protection of Children) Rules, 2016, the Child Welfare Committee does not confer power to give custody of a child taking it from mother and give to the father in the manner as done by the CWC, Indore in the present case. It is seen that CWC, Indore is passing orders granting custody of the children and one such order has been brought to the notice of this court dated 25.5.2015. In the said case also the proceedings were pending before the Family Court for custody of the child but CWC usurp the jurisdiction and during the pendency of those proceedings directed custody of the child to the mother. Similar is the position in the present case wherein also as per Annx.P/2, an application for custody of the child has also been filed before the Family Court but during pendency of the said application, respondent No.5 applied to the CWC where on the order of the visitation right has been passed directing to bring the child in the office of CWC, Indore on every Friday between 10.00 am to 5.00 pm to the petitioner. In my considered opinion the aforesaid exercise of powers by the CWC, Indore is not in conformity with the Act and the Rules and also contrary to the powers conferred under the other law applicable for the time being in force, therefore the order impugned is set aside.

According to the petitioner, the aforesaid judgment is contrary to the earlier judgment passed by another court in writ petition no.2502/2018 dated 19.02.2018 in which it has been held that section 40 of the JJ Act clearly provides that custody can be handed over after determining the suitability of a person to take care of the child and the committee has also been empowered to give suitable direction in this regard. The petitioner has also placed reliance on the judgment passed by the Apex Court in ***W.P.(Crl.) No.102/2007 Re-Exploitation Of Children In Orphanages In The State Of Tamil Nadu Vs. Union of India and others 2017 (7) SCC 578***. According to the petitioner, the procedure in the family court is lengthy and complex and it takes more than a year to decide the custody of the child therefore, the power should be conferred to the CWC

to entertain the disputes between the parties in respect of custody of the child. The petitioner has placed reliance over Article 2(2), 5, 7, 1, 8, 9 and 18 of the United Nations Convention on the Rights of the Child (UNCRC) and sought the relief that a writ in the nature of mandamus be issued directing CWC to deal with the matter of child right as per the UNCRC.

After notice respondents nos.1 and 2 have filed the return submitting that by way of the petition the petitioner is virtually seeking transfer of power of the family court or court of law to the CWC but such relief cannot be granted in a writ petition in the light of the judgment passed by this Court in WP No.6163/2016 decided on 23.11.2016. The issue of guardianship with respect to the Hindus be only be decided under the provisions of the Hindu Minority and Guardianship Act,1956 and under the said Act the CWC is not the competent court to act upon. The order passed in the writ petition no.6163/2016 has been affirmed in writ appeal no.284/2017 hence, CWC cannot be allowed to supersede the power of court and the petition is misconceived and is liable to be dismissed.

The National Commission For Protection Of Child Rights (N.C.P.C.R.) has also filed the return submitting that the Family Court Act, 1984 and Guardian and Wards Act 1890 clearly states the power to grant custody of child by way of order and decree passed by the family court. Section 40 of the JJ Act explicitly states that the custody of a child can be handed over after actual determination of the suitability of a person to take due and proper care of the child. N.C.P.C.R. is a statutory body working for the protection and promotion of child rights. It is further submitted by respondent no.4 that N.C.P.C.R. is only a

review and re-commendatory body which can only review the provisions prescribed under the law and make relevant recommendations and suggestions to the government. The commission cannot step into the domain of the family court.

Conclusions

In view of the returns filed by the respondents, the petitioner is also not getting support from N.C.P.C.R. By this petition the petitioner is virtually seeking that the order passed by this Court in writ petition no.6163/2016 ***Priya Yadav(supra)*** be not implemented and that amounts to setting aside the said order whereas the coordinate Division Bench of this court has already declined to interfere with the order, therefore, this court cannot again examine the validity of the judgment and set aside it. This court in the case of ***Priya Yadav (supra)*** after considering all the provisions of law especially JJ Act, Family Court Act, Hindu Minority and Guardianship Act,1956 has held that the CWC cannot act as a Family Court in respect of custody of the child. The power authority and power lie with the Family Court under the statutes therefore, this petition is nothing but a misuse of the process of law.

Accordingly, this writ petition is dismissed with a cost of Rs 10,000.00 which shall be deposited in the High court Bar Association Indore.

(VIVEK RUSIA)
JUDGE

(RAJENDRA KUMAR (VERMA))
JUDGE

Ajit