

Put-up ③ Action - points
urgently Take 26.08.2021
ಕರ್ನಾಟಕ ಸರ್ಕಾರ
GOVERNMENT OF KARNATAKA

FAX: 080-22867522
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ಕ್ರಮಾಂಕ

No.

P.D. :
PM (SARA)

ಅಡ್ವೋಕೇಟ್ ಜನರಲ್ ರವರ ಕಛೇರಿ

ಉಚ್ಚ ನ್ಯಾಯಾಲಯದ ಕಟ್ಟಡ

ಬೆಂಗಳೂರು - 560 001

OFFICE OF THE ADVOCATE GENERAL
HIGH COURT BUILDING
BENGALURU - 560 001

1. The Principal Secretary to Government,
Women & Child Welfare, Specially Disabled
& Senior Citizens Welfare Department,
M.S. Building,
Bengaluru-560 001.

2. The Director,
Directorate of Child Protection,
(Integrated Child Protection Scheme),
Vishweshwaraiah Mini Tower,
Dr. Ambedkar Veedhi, Bengaluru-560 001.

3. The Deputy Director,
Women & Child Welfare, Specially Disabled
& Senior Citizens Welfare Department,
1st Floor, Shtri Shakthi Bhavan,
Krishnadevaraya Circle,
Vijayanagara, Mysuru-570 017.

4. The Chairman,
Child Welfare Committee,
Government Girls Home,
Lalitha Mahal Road, Mysuru - 570 017.

5. The Executive Director,
Jeevana Jyothi Trust,
Sri Mahadeshwara College Road,
Post Box No.20, Kolegal,
Chamarajanagar District.

BY E-MAIL

SUB: W.P.No.10092/2021 (GMR-RES-PIL) on
the file of the High Court of Karnataka, Bengaluru



XXX
8.2518
23.08.2021

- Letlzkrit Foundations (R) /VS/ The State of
Karnataka & others.

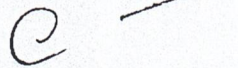
In the above Writ Petition, the Petitioner has sought for a writ of mandamus directing the 2nd Respondents to ensure that the child abandoned by its parents are restored to them so as to protect the rights of the child and for such other reliefs.

The above Writ Petition (PIL) was listed before the Hon'ble Division Bench, the bench was headed by the Hon'ble Chief Justice on 19-08-2021. The Hon'ble Court has heard the matter at length and issued interim directions to the State Government to frame the Rules under Section 101 in so far as surrender of the child under Sections 35 & 36 of the Juvenile Justice (Care & Protection of Children) Act 2015.

I request you to kindly download today's order from the official website of the Hon'ble High Court of Karnataka and frame the Rules as directed by the Hon'ble Court and make available the said Rules before the Hon'ble Court on the next date of hearing.

The Hon'ble Court has issued directions to the State Government (Principal Secretary to Government, Women & Child Development Department) to communicate today's order to all the CWCs. The Hon'ble Court has also directed Jeevan Jyothi Trust to file further progress report about the status of the child, its adoption, etc in a sealed cover on the next date of hearing. The above matter is ordered to be listed before the Hon'ble Court on **28-09-2021**. Please treat this matter as extremely urgent.

Yours faithfully,


(VIJAYAKUMAR A. PATIL)
ADDL. GOVT. ADVOCATE
MOB: 9448243006

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CHIEF JUSTICE AND N S SANJAY GOWDA	WP 10092/2021	19/08/2021

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By filing this writ petition under Article 226 of the Constitution of India in public interest, the petitioner has invited the attention of this Court to an article which appeared in the newspaper, a copy of which is annexed as Annexure-A. The newspaper reported that an unwilling living-in couple has handed over their twelve-days old baby to the Child Welfare Committee (for short 'CWC') having jurisdiction over a particular district. The report records that the CWC and the local police were alerted by a neighbour that the couple having a living-in-relationship was trying to abandon the child.

2. When the petition was filed, the petitioner was unaware of the orders passed by CWC. Therefore, a prayer was made in the petition directing the second respondent (the Director, Department of Women and Child Development) to ensure that the child abandoned by the biological parents is restored to them.

3. After a notice was issued, it was revealed that CWC, Mysore had entertained an application made by the parents of the child under Sub Section (1) of Section 35 the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the JJ Act") and had passed an order dated 19th May 2021 in exercise of powers under Sub-Sections (1) and (2) of Section 35 of the JJ Act..

4. Thereafter, the petition was heard in-camera by the earlier Bench. What transpired on 5th July, 2021 is recorded in the order dated 5th July, 2021. Shri.Vijaykumar A.Patil, the learned Additional Government Advocate and the learned counsel appointed as an Amicus Curiae had a long interaction with the parents of the child both individually and collectively. An order was passed on 26th July, 2021 after considering the report submitted by Jeevan Jyothi Trust which is taking care of the child under the orders of CWC.

5. After passing an order in terms of Sub Section (2) of Section 35 of the JJ Act, CWC, Mysore had placed the abandoned child in the custody of Jeevan Jyothi Trust for care and protection as well as to follow the adoption procedure under the JJ Act. The report dated 22nd July, 2021 records that the child is being taken care of by a trained care taker and the child is normal, healthy and active. The photographs as well as the medical reports of the child have been annexed to the same. A copy of the order of the State Government dated 11th September, 2018 granting licence to Jeevan Jyothi Trust along with a copy of the certificate are also a part of the report.

6. One more report is placed on the record of Jeevan Jyothi Trust of 16th August 2021 (wrongly mentioned as 16th July, 2021). Along with the said report, a certificate declaring the said child as legally fit for adoption by CWC issued on 13th August, 2021 is produced on record. There are two copies of the original certificates. One copy be handed over to the learned Additional Government Advocate who in turn shall return the same to Jeevan Jyothi Trust. Both the reports shall remain on record in a sealed cover.

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7. The record of the application made by the biological parents of the child under Section 35 of JJ Act has been perused both by the learned Amicus Curiae and the learned Additional Government Advocate.

8. In this petition, the order passed by CWC and the actions of CWC are not being questioned. In the light of the apprehensions expressed by the learned counsel appearing for the petitioner, the learned Amicus Curiae and in the light of the submissions made by the learned Additional Government Advocate, it may be necessary to lay down the guidelines for dealing with the applications made under sub Section (1) of Section 35 of the JJ Act.

9. The learned counsel appearing for the petitioner has also submitted a memo incorporating the guidelines. He has relied upon various Articles adopted by the General Assembly Resolution 22 of 25 and in particular, Articles 7 and 16 thereof. The suggestions incorporated by the learned counsel are very wide in support of his contention that considering the rights of the children, necessary steps must be taken to ensure that the children are not abandoned by the biological parents. At this stage, we are not entering into such a wider issue. We are dealing with Section 35 of the JJ Act.

10. The learned counsel appearing for the petitioner also relied upon a decision of the Bombay High Court in the case of Balvikas Sansthachalak VA Karmachari Sanghatna Vs. State of Maharashtra .

11. Our attention is also invited to a decision of the Punjab and Haryana High Court in the case of Jasmine Kaur Vs. Union of India and Others . Our attention is also invited to the Adoption Regulations, 2017 framed in exercise of powers under Clause (c) of Section 68 read with Sub-Section (3) of Section 2 of the JJ Act. At this stage, we are not dealing with the said Regulations.

12. Section 35 of the JJ Act reads thus;

“35. Surrender of children

(1) A parent or guardian, who for physical, emotional and social factors beyond their control, wishes to surrender a child, shall produce the child before the Committee.

(2) If, after prescribed process of inquiry and counseling, the Committee satisfied, a surrender deed shall be executed by the parent or guardian, as the case may be, before the Committee.

(3) The parents or guardian who surrendered the child, shall be given two months time to reconsider their decision and in the intervening period the Committee shall either allow, after due inquiry, the child to be with the parents or guardian under supervision, or place the child in a Specialised Adoption Agency, if he or she is below six years age, or a children's home if

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he is above six years”

13. A plain reading of Section 35 of the JJ Act shows that the question of surrendering a child arises when the parents or the guardians of a child, for physical, emotional and social factors beyond their control, wish to surrender a child. In such a case, the law requires them to produce the child before CWC. Sub Section (2) of Section 35 of the JJ Act incorporates the requirement of CWC following the prescribed process of inquiry and counseling of the parents or the guardians. It refers to a prescribed process. Sub Section (47) of Section 2 of the JJ Act defines the word ‘prescribed’. It means the Rules made under the JJ Act. Under Section 110 of the JJ Act, the rule making powers have been conferred on the State Government. The proviso to Sub Section (1) of Section 110 of the JJ Act provides for the Central Government framing Model Rules in respect of the matters with respect to which the State Government is required to make the Rules.

14. We may note here that the State Government has not exercised the Rule making power under Section 110 of the JJ Act. However, the Juvenile Justice (Care and Protection of Children) Model Rules, 2015 (for short “the Model Rules”) have been framed by the Central Government. In the absence of the Rules framed by the State Government, in view of the provisions of Sub Section (1) of Section 110 of JJ Act, CWC is under an obligation to follow the Model Rules. As far as the Rule making power under Section 110 of the JJ Act is concerned, in the context of Sub Rule (2) of Section 35 of the JJ Act, there is one relevant clause in sub section (2) of Section 110 of the JJ Act. Clause (xviii) thereof enables the State Government to frame the Rules laying down the manner of holding an enquiry by CWC under Sub Section (1) of Section 35 of the JJ Act.

15. As stated earlier, the State Government has not at all exercised the rule making power. As far as the Model Rules are concerned, we find that there is no Rule made thereunder laying down the process of enquiry contemplated under Sub Section (2) of Section 35 of the JJ Act. There are only two Sub Rules namely Sub Rules 22 and 23 in Rule 19 of the Model Rules which have some relevance to Section 35 of the JJ Act. Sub Rules 22 and 23 of Rule 19 of the Model Rules reads thus;

“19. Procedure for inquiry

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(22) When a parent or guardian, wishes to surrender a child under sub-section(1) of section 35 of the Act, such parent or guardian shall make an application to the Committee in Form 23. Where such parent or guardian is unable to make an application due to illiteracy or any other reason, the Committee shall facilitate the same through the Legal Aid Counsel provided

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by the Legal Services Authority, the deed of surrender shall be executed as per Form 24.

(23) The inquiry under sub-section(3) of section 35 of the Act shall be concluded by the Committee expeditiously and the Committee shall declare the surrendered child as legally free for adoption after the expiry of sixty days from the date of surrender."

16. In the present case, the surrender deed has been executed by the biological parents of the child in Form No.24 as provided in Sub-Rule 22 of Rule 19. Thus, the process of inquiry contemplated under Sub-Section (2) of Section 35 of the JJ Act is required to be prescribed by the State Government by framing rules, as stated earlier, by exercising the power under Clause (xviii) of Sub Rule (2) of Section 110 of the JJ Act.

Rule Making (1)

17. It is a well settled position of law that a writ of mandamus cannot be issued against the Legislature to legislate in a particular manner. A well recognized exception to the said Rule is that if it is found that a particular statute becomes unworkable in the absence of exercise of the Rule making power under the said statute, a Writ Court can always issue a writ of mandamus enjoining the Rule making authority to make the Rules. This is a case which falls in the well recognized exception. Therefore, we propose to direct the State Government to exercise the Rule making power within the time stipulated in this order.

18. Sub Section (2) of Section 35 of the JJ Act refers to "process of inquiry and counseling". It is but natural that the Rules must provide for a procedure for counseling as contemplated under Sub Section (2) of Section 36 of the JJ Act as well. We hope and trust that the Rule making authority will ensure that a provision is made in the Rules enabling CWC to take assistance of Child Psychologists and other experts for conduct of an effective counseling process.

19. In the absence of the Rules, the question is, what procedure should be followed by CWC for making an inquiry under Sub Section (2) of Section 35 of the JJ Act. As can be seen from a conjoint reading of Sub Sections (1) and (2), the first inquiry has to be about the identity of the parents or the guardians of the child who make an application for surrender. An inquiry is also necessary to ascertain whether the parent or parents who apply for surrender under Sub Section (1) of Section 35 of the JJ Act are the biological parents of the child. When an application is made by a guardian, an inquiry is contemplated to ascertain whether the applicant is really a guardian.

20. The second inquiry will be whether the physical, emotional or social factors pleaded by the parents or the guardians really exist and are really beyond their control which compel them to surrender the child. What can be the physical, emotional and social factors cannot be laid down as a straight-

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jacket formula. The factors may differ from case to case. It is also the duty of the CWC to satisfy itself that the decision of the parents or guardians to surrender a child is not vitiated by force, fraud or undue influence.

21. The action of the parents of surrender of their child is a very serious action which offends the rights of the child and therefore, an in-depth enquiry is required to be made by CWC.

22. Needless to add that CWC will have to interact with the applicants individually as well as collectively. If for holding a proper inquiry as contemplated under Sub Section (2) of Section 35 of the JJ Act, CWC is of the view that it is necessary to examine any person on oath, it is free to do so.

23. On a plain reading of Sub Section (2) of Section 35 of the JJ Act, the satisfaction of CWC cannot be recorded only on the basis of what is found in the inquiry. The applicants are required to undergo counseling before CWC records the satisfaction. In a given case, CWC can always take the assistance of a Child Psychologist or an expert Counsellor working with any Government Institutions or Government Medical Colleges having expertise in the field. Before recording satisfaction, CWC must look into the report of the counsellor.

24. The satisfaction in terms of Sub Section (2) of Section 35 of the JJ Act can be recorded by CWC only after completing the process of inquiry and the process of counseling.

25. At this stage, we may make a note of the submissions made across the Bar about the role which can be played by certain unscrupulous agencies which are dealing with adoptions. This is very important in the context of Sub Section (3) of Section 35 of the JJ Act. As could be seen from Sub Section (3) of Section 35 of the JJ Act, after the deed of surrender is executed in terms of Sub Section (2) of Section 35 of the JJ Act in Form No.24, a minimum time of two months is required to be given by CWC to the applicants/parents/ guardians to re-consider their decision of surrender of the child. After the expiry of the period of two months, it is the duty of CWC to enquire with the parents or guardians whether they want to re-consider the decision of surrendering the child. Even Sub Section (3) of Section 35 of JJ Act contemplates due inquiry to be made. During the said period of two months, CWC can allow child to be with the parents or guardians under supervision, or place the child in a Specialized Adoption Agency, if the child is below six years age, or in a Children's Home if the child is above the age of six years. In the entire process, the members of CWC must remember that the welfare of the child is the paramount consideration.

26. The members of CWC are very well aware that some adoption agencies are indulging in large scale illegalities. Therefore, while making an inquiry, CWC will have to also bear in mind whether the application for surrender is genuine or whether it is made at the instance of adoption agencies who are indulging in all sorts of illegalities.

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27. Apart from what observed above on the scope of the inquiry and the manner of inquiry under Sub Sections (2) and (3) of Section 35 of JJ Act, we hope and trust that the members of all CWCs will act with great deal of sensitivity keeping in mind that orders made under Sub Sections (2) and (3) of Section 35 of the JJ Act have the effect of depriving a child of the company of natural parents and it will affect the rights of the child. The State Government shall circulate the copies of this order to all the CWCs in the State.

28. We may also note here that while passing an order under Sub Section (3) of Section 35 of the JJ Act, of placing the child under the care of a Specialized Adoption Agency, it is necessary for CWC to verify the certificate of registration of the Specialized Adoption Agency and in a given case, to examine even the credentials of the said Agency.

Communication to CWCs (2)

29. The communication issued by the State Government to all CWCs in terms of this order shall be placed on record within a period of one month from today. We direct the State Government to exercise the Rule making power under Clause (xviii) of Sub Section (2) of Section 110 of the JJ Act providing for the procedure of inquiry and counseling as contemplated by Section 35, as expeditiously as possible and in any event, within a period of four months from today.

30. Considering the apprehensions expressed in the petition, till the time the child subject manner of this is validly adopted, this Court will have to keep the petition pending and ensure that proper care of the child is taken.

(3) Detailed report from JJ Trust

31. We direct that this petition shall be listed on 28th September, 2021. The State Government shall call for a detailed report from the Jeevan Jyothi Trust about the condition of the child and about the steps taken for giving the child in adoption. The report shall be placed on record before the next date.

32. List the petition on 28th September, 2021.