

Court No. - 39

Case :- WRIT - C No. - 36406 of 2023

Petitioner :- Smt. Meena

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Vipin Chandra Pal, Yatindra

Counsel for Respondent :- C.S.C, Pooja Agarwal

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Manjive Shukla, J.

1. Heard Sri Yatindra and Sri Vipin Chandra Pal, learned counsel for the petitioner and Sri Mukul Tripathi, learned Standing Counsel for the State.

2. Ms. Shruti Teneja holding brief of Ms. Pooja Agarwal, learned counsel for private respondent No. 5 states, in view of the DNA test report of the child and said respondent and his wife not matching, the private respondent has no say in the matter. Ms. Taneja seeks to withdraw from the proceedings. Permission granted.

3. The present writ petition had been filed by the petitioner to assail the order dated 13.12.2021 passed by the Child Welfare Committee, Fatehgarh, Farrukhabad (hereinafter referred to as 'CWC'), whereby custody of the child (X) had been deprived to the petitioner. Further challenge has been raised to the order dated 06.3.2023 passed by the said CWC rejecting the petitioner's application for grant of foster care of X.

4. Facts that are not in dispute may be noted first. The child X is

disclosed to have been handed over to the petitioner on 28.11.2014 when it was a few days old by a person belonging to the third gender, namely, Arjun alias Anjali. The petitioner who had four grown up children of her own (three of whom are married and have children) took care of the child without any objection either by any State authority or by any third person till 11.10.2021. On that date, according to the petitioner, X was abducted by the said Arjun alias Anjali. At that stage, the petitioner made an application before the CWC. On such complaint, X was rescued on 21.11.2021. Counseling was offered to the child. A self speaking counseling report of that date reads as below:

"पत्रांक: 0198 /चांलांकां- 1098/परामर्श/फर्रुखाबाद दिनांक: 21 नवम्बर 2021

काउंसलिंग रिपोर्ट

चाइल्ड लाइन द्वारा रेस्क्यू के माध्यम से मुक्त कराई गई बालिका X पुत्री अरमान खान मां श्रीमती मीना निवासी नगला किशन लाल हाथरस रोड, टेडी बगिया कुबेरपुर, आगरा उ०प्र० की परामर्श आख्या।

दिनांक 21.11.2021 को समय करीब 06:45 पी०एम० को उपरोक्त बालिका X पुत्री अरमान खान मां श्रीमती मीना निवासी नगला किशन लाल हाथरस रोड , टेडी बगिया कुबेरपुर, आगरा उ०प्र० जो कि रेस्क्यू के माध्यम से मुक्त कराई गई है की काउंसलिंग की गई व पाया गया कि बालिका X सम्पूर्ण घटनाक्रम से बेहद डरी व सहमी है तथा अर्जुन उर्फ अंजली किन्नर द्वारा शारीरिक व मानसिक रूप से प्रताड़ित करने, डराने, धमकाने व उसके माता-पिता के मर जाने की झूठी सूचना देने से अत्यन्त आहत एवं पूरी तरह टूट चुकी है। किसी भी बात का बताते व तथ्यों को उजागर करने में उसके होंठ व पूरा बदन बुरी तरह से कांप रहा है। बालिका उपस्थित महिला मीना पत्नी अरमान खान को अपनी अम्मी (मां) बता रही है तथा किसी भी प्रकार अपनी मां से अलग नहीं होना चाहती, मां को अलग करने पर बालिका चितकार कर करुणकृन्दन करने लगती है। बालिका का अपनी मां से भावनात्मक एवं आत्मिक गहरा लगाव प्रतीत हो रहा है। बालिका बार -बार कह रही है कि अम्मी वह तो कहती थी कि तुम मर गई हो अब मैं ही तुम्हारी अम्मी हूँ। अम्मी तुम कहा चली गई थी, तुम नहीं थी तो उसने मुझे नांचने के लिये बहुत मारा। बालिका X मानसिक रूप से अवसाद से ग्रसित प्रतीत हो रही है। वह किसी भी प्रकार से अपनी मां से अलग नहीं

होना चाहती और बार-बार अपने बाबू जी (पिता) तथा परिवार के विषय में कौतूहलवश पूछती है। उपस्थित अपने मामा-मामी को देखकर बेहद खुश है बालिका की स्थिति यह है कि वह अपनी मां व अपने परिवार के मिलने से अतिप्रसन्न है तथा भय भरे माहौल में रहने के कारण अपनी प्रसन्नता को पूर्ण रूप से व्यक्त नहीं कर पा रही है।

सलाह: बालिका को लम्बे समय तक खुशनुमा माहौल एवं अपने परिजनों के साथ रहने की अत्यन्त आवश्यकता है। घटनाक्रम से बालिका के मन मस्तिष्क पर गहरा आघात हुआ है किसी भी प्रकार से मां से अलग करने पर बालिका गम्भीर रोग अथवा मानसिक अवसाद से ग्रसित हो सकती है मेरी सलाह में बालिका को मां के साथ खुशनुमा माहौल में रखा जाना ही उसके सर्वोत्तम मानसिक एवं शारीरिक स्वास्थ्य के लिये सर्वोत्तम होगा।

काउंसलिंग दिनांक: 21.11.2021

काउंसलिंग समय: 06:45 सायं

उपस्थित सहयोगी कर्मी: मणी मिश्रा, टीम मेम्बर

काउंसलिंग स्थान: चाइल्डलाइन इकाई कार्यालय फर्रुखाबाद उत्तर प्रदेश"

(emphasis supplied)

5. In such circumstances, the child was returned to the custody of the petitioner on 22.12.2021. While the petitioner may not have applied for formal adoption, it is nobody's case that any further complaint was received either by the CWC or the District Probation Officer with respect to the care being offered by the petitioner to X. Yet, on 20.10.2022, the District Probation Officer submitted the following report to the District Magistrate, Agra with respect to X:

"पत्रांक: C-1568/जि०प्रो०का०/बा०वि०/2022-23 दिनांक: 20 अक्टूबर, 2022

विषय- बालिका X से सम्बन्धित प्रकरण में आख्या का प्रेषण।

महोदय,

उपरोक्त क्रम में सादर अवगत कराना है कि श्रीमती मीना पत्नी अरमान खान निवासी किशन लाल टेढ़ी बगिया, एत्मादौला जिला आगरा के प्रार्थना पत्र दिनांक 08-09-2022 के क्रम में अध्यक्ष बाल कल्याण समिति, आगरा के पत्र संख्या 727/सी.डब्ल्यू.सी., दिनांक 14-

09-2022 द्वारा यह उल्लेख किया गया है कि श्रीमती मीना पत्नी अरमान खान व अंजली किन्नर के मध्य बालिका X की अच्छी शिक्षा व सही ढंग से पालन -पोषण को लेकर संदेह होने की वजह से दिनांक 17-08-2022 को अग्रिम पालन-पोषण में दिये गये आदेश को किशोर न्याय बालको की देखरेख व संरक्षण अधिनियम 2021 के नियम 104 के अधीन अग्रिम आदेश तक संशोधित करते हुये बालिका को राजकीय बाल गृह (शिशु), आगरा में आश्रय प्रदान कराया गया है। श्रीमती मीना पत्नी अरमान खान यदि फोस्टर केयर हेतु इच्छुक है, तो उसके लिये नियमानुसार आवेदन करें।

अतः उक्त प्रकरण में श्रीमती मीना पत्नी अरमान खान प्रथम दृष्टया बालिका X के जैविक अभिभावक नहीं है। इसलिए बालिका का राजकीय संस्था में रहना बालहित में उचित है। इसके साथ ही श्रीमती मीना पत्नी अरमान खान यदि बालिका का पालन -पोषण करना चाहती हैं, तो नियमानुसार फोस्टर केयर में आवेदन की कार्यवाही कर सकते है।

अतः उक्तानुसार आख्या सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित है।"

6. Acting on that report, the petitioner has been deprived the custody and care of X. Since then, X is residing at the Rajkiya Balika Grih, a government facility at Agra

7. Upon the present petition being filed, we passed the below quoted order on 20.11.2023:

"1. Matter pertains to custody of the child.

2. The Child (X) is neither a biological child of the petitioner nor the child has been formally adopted by the petitioner. In fact, it is the own case of the petitioner that the child was given over in her care by a third person on 28th November, 2014, when the child was about a day old. Since then, till 21st November, 2021, the child remained in the custody of the petitioner. At about 7 years of age, the said third person forcibly took away the child from the petitioner leading to certain complaints made by the petitioner. The child was recovered. Relying on the counselling report dated 21st November, 2021, it is further claimed that the child identified the petitioner as her mother and desired to stay in her care.

3. Initially on 13th December, 2021, the child was sent to a government shelter. Later, on 21st December, 2021 the custody of the child was given over to the petitioner upon an order made by the Child Welfare Committee.

4. Now about one year later, another *ex parte* order came to be passed on 6th March, 2023 by the Child Welfare Committee requiring the custody of the child to be disturbed, while allowing the petitioner to claim right of foster care. The above approach adopted by the Child Welfare Committee does not appear to be in the interest of the child. Even if the foster care was to be allowed to the petitioner, *prima facie*, there appears no need to disturb the custody of the child, pending such application.

5. It has also been disclosed that the biological parents of the child have not been traced out and no one other than the petitioner is claiming the custody of the child.

6. In such facts, it is of less consequence that the petitioner had filed an appeal against the order dated 6th March, 2023 before the District Magistrate, Agra. That appeal appears to have remained pending since June, 2023.

7. Considering the non-negotiable primacy attached to the child's welfare, we are inclined to waive the normal rule as to to existence and availment of alternative remedy, at this stage.

8. At the first instance, let written instructions be obtained by the learned Standing Counsel within two days.

9. Put up this case on 23rd November, 2023 as fresh before appropriate Bench at top ten cases.

10. Let a copy of this order be supplied to Mr. Mukul Tripathi, learned Standing Counsel by tomorrow i.e. 21st November, 2023."

8. The matter remained pending for some time. Meanwhile, respondent No.5 appeared in these proceedings and raised concern about the parentage of X. Unfortunately, the new born child of responding No.5 was abducted around the time X first came to the custody of the petitioner. Therefore, under certain earlier orders passed by the CWC, DNA test report was called to ascertain the parentage of X viz-a-viz private respondent No.5. Report of the Forensic Science Laboratory, Agra was called. At that stage,

learned Standing Counsel had prayed for time to ensure that such report is prepared and submitted before this Court. Accordingly, on 08.12.2023, we had passed the below quoted order:

- "1. Affidavit of compliance filed on behalf of the petitioner is taken on record.*
- 2. Heard Mr. Yatindra, learned counsel for the petitioner, Mr. Mukul Tripathi, learned Standing Counsel for the State-respondents and Ms. Pooja Agarwal, learned counsel for private respondent.*
- 3. On two opportunities granted, Mr. Mukul Tripathi, learned Standing Counsel states that he has spoken to Ashok Kumar, Deputy Director, Forensic Science Laboratory (for short "FSL"), Agra. He has informed that he would require six weeks' time to submit DNA test report vis-a-vis the minor child. It is further informed, such time is required by the FSL for reason of two-three cases, wherein immediate report has been called by the High Court and about four cases, pending before the district courts again seeking early report.*
- 4. In such circumstances, he has prayed and therefore, is granted six weeks' time to submit DNA test report.*
- 5. In view of the above, put up this case on 29th January, 2024, as fresh case.*
- 6. Since the custody of the minor child and his life is involved, failing the report, the Director, FSL, Agra shall remain present in Court to explain to the Court the exact reason for the delay and the details of all cases in which urgent report may have been called, as on date.*
- 7. Let a copy of this order be made available to the learned Standing Counsel by Monday i.e. 11th December, 2023 for onward communication to the Director, FSL, Agra for necessary compliance.*
- 8. The said authority is also requested to make best efforts to upgrade its facilities, amongst others, specifically with respect to the DNA test so that unreasonably long period of time may not be consumed either to comply the orders of the Courts or to carry out forensic test, otherwise.*
- 9. Interim order providing for the visitation rights to operate in the meanwhile."*
- 9. Today, Sri Mukul Tripathi, learned Standing Counsel, on the*

strength of written instructions received by him stated that DNA report was sought of blood samples of X, respondent No.5 and his wife. He further states the three DNA test reports do not match in as much as on the strength of such report, it cannot be said that respondent No.5 and his wife are the biological parents of X. No other claim has been made by any person to claim parentage or custody of X.

10. In view of such facts, this Court in exercise of its *parens patriae* jurisdiction has to remain committed to the best interest of the child. In ideal conditions, all children may grow up in the care and love of their biological parents. However, from times immemorial foster care and adoption are established practices in all human societies. Taking a child by way of adoption or by way of foster care is neither contrary to practices prevailing in societies nor it is a behavioral practice to be looked down upon. In fact it is consistent to goodness of human nature.

11. At present, we have also interacted with the petitioner who is present in Court. Under earlier orders she has been visiting X at CWC. Her only complaint appears to be is that she has not been granted enough time with the child and has been prevented from holding the child during the interactions offered. All her words and gestures only disclosed to the Court her earnest desire to revive her company with X. As to her current status, professional/financial and family, the petitioner has not made any wrong statement. She has truly disclosed that four children were born to her. Two male children are grown up and married and have families of their own while one of the girl child born to her is also married and living separately. Her husband is disclosed to be earning by running an orchestra under the name of 'Kamal Jagran Party'.

12. As to the care being taken by her, in paragraph 14 of the writ petition, it has been disclosed that prior to her custody being taken over, X had studied at 'Smt. Kantho Devi Purva Madhyamik Vidyalaya, Divya Nagar, Gulab Nagar Road, Narayach, Agra since 05.4.2018. Later, she was admitted to K.S. Public School, Nandlalpur, Hathras Road, Agra in academic session 2021-22 in UKG standard.

13. As to professional and other status the petitioner describes herself as a homemaker. In paragraph 9, she has disclosed ownership of house ad-measuring 65 square yards at Tajganj, Agra and a plot ad-measuring 60 square yards at M.G. Residency, Near Nandlalpur Mauja, Narayach, Tehsil Atmadpur, district Agra.

14. In view of such facts, in the first place we find that the child was found abandoned prior to enforcement of Act No.2 of 16. Further, she remained in the foster care of the petitioner prior to enforcement of that Act on 16.01.2016. As to the proceedings under the Act, the counseling report dated 21.11.2021 is self speaking of the care offered by the petitioner to X till before her abduction on 11.10.2021 and also as to the purity of the bond that exists between the petitioner and X as may arise and exist only between a mother and her child. Clearly, it reflects that X had grown up in the knowledge that the petitioner was her mother. In absence of any adverse circumstance or report, that fact may have been enough to allow for foster care to have been allowed in favour of the petitioner. Considering the trauma being faced by X (at that stage) CWC had rightly restored the custody over X to the petitioner.

15. What may have transpired thereafter as may have led to the custody of X being disturbed and foster care claimed by the

petitioner being denied is not before us. Suffice to note that the report of the District Probation Officer dated 20.10.2022 is wholly vague and in context of the facts noted above, extraneous. Only generalized observations have been made made to consider the eligibility of the petitioner. We would have been satisfied in the context of the facts, if the District Probation Officer had delved deeper to assess the needs and paramount interests of the child that were required to be fearlessly guarded. Only upon that appraisal, a wise recommendation ought to have been made, considering the lack of availability for adoption.

16. Unfortunately, the District Probation Officer has mechanically made his report perhaps being swayed by the fact that the petitioner has four children born to her. Therefore, in the opinion of the District Probation Officer, the petitioner may have been ineligible in law to take X in adoption. While the law could not prevent the petitioner from giving birth to another child, it has been relied to deprive the petitioner from bringing up another child as her own. To take away X from the petitioner is the easiest part in law but it is not possible for law to find another set of parents X may identify as its own. Therefore, law must yield to justice that otherwise commends that the child X must remain in the care of those it perceives to be its parents, especially the petitioner in whom it has found its mother.

17. The litigation forced on X has unwittingly and cruelly destroyed the permissible deception that may otherwise have been practiced by not letting X know the fact of adoption till it would have grown up enough to deal with the psychological trauma that may otherwise arise from such knowledge. Ignorance would have been bliss for X. However, that umbrella is now destroyed and it stands exposed prematurely to hard realities of life, at a tender age

of 9.

18. While we are not in a position to undo what law and the law enforcement agencies have unknowingly let X suffer, at the same time, in the best interest of X, we allow the writ petition with the following directions:

1) Subject to the petitioner applying for the adoption of X, which she undertakes to apply for within a period of one week from today, let custody of X be given over to the petitioner forthwith i.e. not later than an hour when she reaches the CWC with a copy of this order.

2) At the same time, subject to such compliance made by the petitioner, the District Probation Officer may remain within his jurisdiction to submit periodical reports with respect to development of X initially on a monthly basis for the period of first six months and thereafter as and when required by law.

3) Adoption application that may be made by the petitioner may be considered in accordance with law. At the same time, the observations made in this order would govern the peculiar facts of this case as may not allow law to defeat the ends of justice that far outweigh the concerns of law.

19. The petitioner may file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by her alongwith a self attested identity proof mentioning the mobile number before the concerned Authority/Official.

20. The concerned Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such

verification in writing.

Order Date :- 29.1.2024
Madhurima

(Manjive Shukla, J.) (S.D. Singh, J.)