

W.P.(C).No.35211/24

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2024:KER:79513

'CR'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

FRIDAY, THE 25TH DAY OF OCTOBER 2024 / 3RD KARTHIKA, 1946

WP(C) NO. 35211 OF 2024

CRIME NO.820/2024 OF KUMILY POLICE STATION, IDUKKI

PETITIONER:

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BY ADVS.
BHANU THILAK
S.R.PRASANTH
VISHNU.R

RESPONDENTS:

- 1 STATE OF KERALA
REPRRSENTED BY THE SECRETARY , DEPARTMENT OF
WOMEN AND CHILD DEVELOPMENT , GOVERNMENT
SECRETARIATE, THIRUVANANTHAPURAM, PIN - 695002
- 2 CHILD WELFARE COMMITTEE
VENGALLOOR P.O, THODUPUZHA , REPRESENTED BY ITS
CHAIR PERSON, JAYASEELAN .P, PIN - 685608
- 3 xxxxxxxx

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4 ADDL. R4. THE STATION HOUSE OFFICER,
KUMILY POLICE STATION (ADDL. R4 IS SUO MOTU
IMPLEADED AS PER ORDER DATED 08/10/2024 IN WP(C)
35211/2024)

BY ADVS.
JOSEPH GEORGE
P.A.REJIMON(K/700/2017)
NIKITA NAIR C.S.(K/002018/2022)
VIVEK JOS PUTHUKULANGARA(K/834/2024)

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 23.10.2024, THE COURT ON 25.10.2024 DELIVERED
THE FOLLOWING:



V.G.ARUN, J

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W.P.(C).No.35211 of 2024

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Dated this the 25th day of October, 2024

JUDGMENT

A young lactating mother is before this Court, aggrieved by an order passed by the Child Welfare Committee (hereinafter referred to as "CWC"), finding her unfit to look after her baby aged just one year and four months and gave custody of the baby to her husband the 3rd respondent herein. The circumstances that led to the impugned order are as under;

The petitioner had married the 3rd respondent on 16.08.2019 and a child was born to them on 25.08.2023. The petitioner left the company of her husband on 15.11.2023, which according to her, was due to his constant harassment, both mental and physical. When the petitioner left his house, the 3rd respondent lodged a complaint before the police, resulting in registration of



Ext.P1 FIR under Section 57 of the Kerala Police Act, 2011. After leaving her husband, the petitioner started to live with her mother. During her stay in her mother's place, she eloped with a person named Mohammed Rafi. On coming to know about this, the 3rd respondent lodged another complaint on 19.09.2024, which led to the registration of Ext.P2 FIR, again under Section 57 of the Kerala Police Act. During the course of investigation based on Ext.P2 FIR, police produced the petitioner before the Judicial 1st Class Magistrate, Nedumkandam on 22.09.2024. The Magistrate recorded petitioner's statement and on being convinced that she was aged 23 years and had chosen to live with Mohammed Rafi on her own volition, set the petitioner at liberty. By the same order, the Magistrate directed the police to produce the child before the Child Welfare Committee for appropriate orders, being of opinion that the child may be in need of care and protection. The petitioner and child were produced before the CWC on 23.09.2024 and custody of



the child was handed over to the 3rd respondent, after obtaining Ext.P4 undertaking from him. Hence, this writ petition seeking the following relief;

“issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding the 2nd respondent to handover the custody of the minor daughter Duva Mariam to the petitioner herein.”

2. When this writ petition came up for admission, learned counsel for the petitioner submitted that the baby is being breastfed by the petitioner and by reason of the impugned order, the child is deprived of mother's milk. Thereupon, this Court issued the following direction;

“ 3. As the petitioner submits that the minor child is still being breastfed, custody of the child shall be given to the petitioner for half an hour every day, from the premises of Kumily Police Station. During that period, the presence of a woman police constable and privacy for the petitioner to breastfeed the child shall be ensured.

4.The Station House Officer, Kumily Police Station is suo motu impleaded as the additional 4th respondent. Learned Government Pleader takes notice for the additional 4th respondent.

The additional 4th respondent shall serve a copy of this order to the 3rd respondent and require him to produce the child between 10.00 am and 11.00 am every day.”



3. On receipt of notice from this Court, the 3rd respondent entered appearance and filed a counter affidavit along with a copy of order of the CWC dated 23.09.2024, containing the reasons for depriving the petitioner the custody of her baby. Thereupon, the petitioner amended the writ petition by incorporating a prayer for quashing that order (Ext.P8). A rough translation of the reasons stated in Ext.P8 order is given below;

"As the mother of the child has stated that she is not interested in living with the father of the child, and having left her house twice earlier with Mohammed Rafi (42 years), the step-grandfather of the child, the Committee is apprehensive about the safety of the child.

Even though the father of the child expresses willingness to accept the child's mother if she severs her relationship with Mohammed Rafi, the lady is not prepared to do so and informed the Committee that she is interested in living with Mohammed Rafi. The father thereupon told the Committee that it will be unsafe to send the child along with the mother and the Committee is also of the same view. As the Committee is apprehensive about the safety of the one year old child and a



person owing moral responsibility to look after the child as its grandfather having irresponsibly decided to live with his daughter in law and the child's father as well as maternal grandmother having expressed willingness to take care of the child, the Committee is convinced that it will be appropriate to entrust the child's responsibility with its father."

4. Based on the above reasoning, the custody and protection of the child was entrusted with the 3rd respondent, considering him as the fit person.

5. Heard Advs.Bhanu Thilak for the petitioner, Joseph George for the 3rd respondent and Deepa Narayanan, the Government Pleader for respondents 1 and 2.

6. Learned counsel for the petitioner contended that the CWC exceeded its powers by issuing the impugned order in violation of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act) and without adhering to the principles of natural justice. It is argued that the decision of the CWC is based on the moral perception of its members, rather than judicial reasoning. Relying on the Division Bench decision of this Court in **Aneesa**



F v. Shafeekmon K.I. [2023 4 KHC 436], it is contended that judicial orders should be based on legal reasoning and not morality alone. According to the counsel, separating the baby from a lactating mother, thereby denying her right to breastfeed the child, violates the mother's right to give care and comfort to the child and militates against the infant's right to be loved and breastfed by its mother. In support of this argument, reliance is placed on the decision of the High Court of Karnataka in **Husna Banu v. State of Karnataka** [2021 SCC OnLine Kar 15717].

7. Learned counsel for the 3rd respondent contended that, by her immoral act of eloping with the husband of her mother-in-law, the petitioner had rendered herself unfit to keep custody of the child. It is submitted that the child will not be safe with the petitioner and her paramour. The CWC passed the impugned order after taking these factors into consideration. It is submitted that the 3rd respondent is willing to permit the petitioner to live in his house, so that her concern about feeding the child is redressed and if the petitioner is not prepared to do



so, the child can be breastfed by the sister of the petitioner, who is also a lactating mother and has expressed her willingness.

8. Learned Government Pleader contended that the impugned order was passed after due enquiry and the petitioner has put her thumb impression, as a witness to Ext.P5 undertaking, based on which custody of the child was entrusted with the 3rd respondent. It is also submitted that in the Social Investigation Report obtained by the CWC later, the recommendation is to give custody of the child to the father.

9. In reply, the learned counsel for the petitioner submitted that the person with whom her client has chosen to live is aged only 32 years and the finding of the CWC that he is aged 42 years is factually incorrect. It is also submitted that the petitioner's thumb impression was obtained forcefully and members of the CWC had behaved in a rude and arrogant manner.

10. Before proceeding to decide the correctness of the impugned order, this Court deems it appropriate to highlight



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three of the general principles to be followed in the administration of the Act. The said principles contained in Section 3 are extracted below;

Section 3:- **General Principles to be followed in administration of Act-** The Central Government, the State Governments, the Board, the Committee, or other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely—

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

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(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.

xxx xxx

(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.”

11.If the above principles are scrupulously followed, by the CWC treating all persons with equal dignity, keeping the best interest of the child in mind while taking decisions and



ensuring fairness in procedure, there will be a marked difference in its decision making process and the decision itself. This Court is making the above observation on finding that the impugned order was passed on the day the child was produced before the CWC, without conducting any enquiry or affording reasonable opportunity of hearing to the petitioner.

12. For the CWC to invoke its powers under the Act, the child produced before the Committee, must be a child in need of care and protection as defined in Section 2(14) of the Act. Being contextually relevant, Section 2(14) is extracted hereunder for easy reference;

"Section 2

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

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person-

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or



(b)has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c)has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv)who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(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

(vi)who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii)who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii)who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix)who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x)who is being or is likely to be abused for unconscionable gains; or

(xi)who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii)who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage; "



13. From a reading of the above provision, it is clear that, if at all, only Section 2(14)(v) would attract to the case under consideration. But for Section 2(14)(v) to be attracted, the parent or guardian should be found unfit or incapacitated. A question would also arise as to whether the CWC is having the power decide the right to custody when both parents are capable of and willing to look after the child. As has been rightly held by a Division Bench of this Court in **Shaiju S and others v. Child Welfare Committee, Kollam and others** [2021 6 KHC 573], going by various provisions of the Act, including Section 2(14)(v), the Committee's role would arise only when both parents are not in a position to take care or protect the child or children. The *parens patriae* principle would enable intervention by the CWC for protecting the child and acting as its parent only when the biological parents fail to take care and protect the child. The CWC found the petitioner to be unfit based on the predilections of its members. This Court in **Aneesa F** (supra) has held that the moral judgment reflected in orders would defeat the objective of inquiry in



matters of this nature. The one and only concern of the Committee should be the best interest of the child. That, the mother of the child has chosen to live with a person other than her husband is not the Committee's concern. Judged by moral standards of the members, the petitioner may not be a good person, but that does not make her a bad mother. Personal moral values always result in biased judgments. Unfortunately, the order reflects nothing other than the moral bias of the Committee members.

14. Surprisingly, the fact that the child was being breastfed is not seen to have been taken into account by the Committee, while hastily granting custody of the child to the 3rd respondent. The counsel for the petitioner is correct in her submission that, severance of a one year and four month old baby from its mother violates her right to breastfeed the baby and that of the baby to be breastfed, such right being a facet of right to life under Article 21 of the Constitution. Our Constitution also imposes a duty on the State to raise the level of nutrition, which implicitly support breastfeeding. The



following erudite discussion in **Husna Banu** (supra) throws more light on this aspect;

"(d) Article 25 (2) of the Universal Declaration of Human Rights provides: "Motherhood and childhood are entitled to special care and assistance...". Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR, 1966) recognizes right of the child to the measures of protection as are required by its status as a minor and the correlative duty resting on the shoulders of its family, society and the State. Joint WHO/UNICEF Meeting on In October 1979 a Infant & Young Child Feeding adopted the following statement:

"Breastfeeding is an integral part of the reproductive process, the natural and ideal way of feeding the infant and unique biological and emotional basis for child development. It is therefore a responsibility of society to promote breastfeeding and to protect pregnant and lactating mothers to many influences that would disrupt it".

e) Further, Section 3(ix) of the Juvenile Justice (Care and Protection of Children) Act 2015 which enacts inter alia the above principle of paramount interest of the child reads as under:

"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"

Section 2(9) of the said Act defines the term the best interest of the child to mean "...The basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development."

The modern Medical Science says that breastfeeding is the best way to give babies all the necessary nutrients & antibodies, which provide a vital shield of protection; the experts in the field of neo-natal science are of a considered opinion that the interaction between the lactating mother and the suckling infant involves a world of messages, which is essential for the intellectual & emotional development of the child; WHO recommends exclusive breastfeeding until the baby attains the age of at least six months; the research also shows that the adolescents & adults who were breastfed have less chance to be overweight & obese and that they demonstrate better IQ test results; breastfeeding lowers the risk of breast & ovarian cancers, diabetes & post partum depression, according to Yukie Mokuo of the UNICEF.

(g) In the light of domestic law and the international law as briefly discussed above, breastfeeding needs to be recognized as an inalienable right of lactating mother; similarly, the right of the suckling infant for being breastfed too, has to be



assimilated with mother's right; arguably, it is a case of concurrent rights; this important attribute of motherhood, is protected under the umbrella of Fundamental Rights guaranteed under Article 21 of the Constitution of India; it is unfortunate that this pretty child for no fault remained un-breastfed, its lactating mother having had no access to it till now; in a civilized society such things should never happen.

15.It is disheartening to note that by reason of the impugned order, the baby is separated from its mother for the past almost one month, denying the care, comfort and love which is most crucial at this stage. The CWC having failed to consider these crucial factors, the impugned order cannot withstand the scrutiny of law.

16. Although learned counsel for the 3rd respondent contended that the writ petition is not maintainable in view of the alternative remedy available under Section 27(10) of the Act, the contention is rejected, as the impugned order is passed in violation of the principles of natural justice, thereby impinging upon the fundamental rights of the petitioner as well as the child.



17. For the aforementioned reasons the writ petition is allowed and Ext.P8 order is quashed. The 3rd respondent is directed to forthwith handover custody of the child to the petitioner. The additional 4th respondent, Station House Officer, Kumily Police Station shall ensure that the 3rd respondent complies with the above direction.

In the nature of the allegations raised, the Registry is directed to mask the name of the petitioner and the 3rd respondent.

sd/-

V.G.ARUN, JUDGE



APPENDIX OF WP(C) 35211/2024

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF CRIME NO. 999/2023 OF KUMALY POLICE STATION, IDUKKI DATED 15-11-2023
- Exhibit P2 TRUE COPY OF CRIME NO. 820/2024 OF KUMALY POLICE STATION, IDUKKI DATED 19-09-2024
- Exhibit P3 TRUE COPY OF THE STATEMENT OF ASNA DATED 22-09-2024
- Exhibit P4 TRUE COPY OF THE ORDER DATED 22-09-2024 OF JUDICIAL 1ST CLASS MAGISTRATE, NEDUMKANDAM IN CRIME NO. 820/2024
- Exhibit P5 TRUE COPY OF THE UNDERTAKING SIGNED BY THE 3RD RESPONDENT DATED 23-09-2024

RESPONDENT EXHIBITS

- Exhibit R-3 (a) True photocopy of order No: CWC/IDK/OP No: 700/2024 dated 23-09-2024 of the 2nd respondent

PETITIONER EXHIBITS

- Exhibit.P6 True copy of the Aadhar card of Mr. Rafi
- Exhibit.P7 True copy of the birth certificate of Mr. Rafi
- Exhibit P8 TRUE COPY OF THE ORDER DATED 23-09-2024 PASSED BY THE 2ND RESPONDENT.