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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : 11.11.2016*
Judgment delivered on: 18.11.2016.

\+ CM(M) 579/2015 & C.M. Nos.11006/2015, 31084/2015, 31085/2015, 2550/2016 & 29897/2016

THE TIBETAN CHILDRENS VILLAGE SCHOOL

..... Petitioner

Through Mr. Jagdeep Kishore, Mr. Naresh Mathur and Ms. Rekha Gupta, Advs.

versus

KARMA LAMA & ANR

..... Respondents

Through Mr. Giriraj Subramanium, Mr. Simarpal Singh Sawhney and Mr.Sidhant Krishan Singh, Advs for R-1 & R-2.
Mr. Tenzing Tsering and Mr. Tenzin Namgyal, Advs for R-3.
Mr. Kapil Kumar Nim, Adv for R-4.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The petitioner before this Court is Tibetan Children's Village School (TCV). It is functional from upper Dharamshala, Himachal Pradesh. This petition has been filed through its General Secretary.

2 This petition concerns the adoption rights of a minor child namely Master Tenzin Tsering (in short 'Tenzin'). The averments in the writ petition disclose that a lady namely Tashi Choedon brought with her a tibetan male child namely Tenzin when he was 1- ½ years old to the TCV.

She had brought him from Nepal. As per the information furnished to the TCV, the child was born in Nepal on 03.03.2007. His natural and biological parents were not known. Tenzin was enrolled in the petitioner school on 13.08.2008.

3 Respondents No. 1 & 2 are Karma Lama and Paola Pivi. They are permanent residents of United States. At the time of filing of this petition, they were residing temporarily in Northern India. Respondents No.1 & 2 approached the petitioner for sponsoring the education of Master Tenzin. The petitioner accepted the sponsorship offer and received $480 for a period of one year as sponsorship charges from respondents No.1 & 2. This was in August, 2012. It was made clear to respondents No.1 & 2 that they could meet the child periodically and they could also take the child out for winter vacations which fell between 25.12.2012 and 24.02.2013. The condition was that the child had to be brought back before the end of the winter vacation or earlier, if need be.

4 In the second week of January, 2013, Tashi Choedon came to the petitioner institute with a request to take the child back to New Delhi for a possible relocation in France. The petitioner informed respondents No.1 & 2 asking them to bring back Master Tenzin on 13.01.2013. Respondents No.1

& 2 visited the school of the petitioner on 13.01.2013. They were un-accompanied with Master Tenzin. They agreed to bring back Master Tenzin to the petitioner school but thereafter they disappeared. They in fact lived at Dharamshala and shifted to New Delhi without informing their whereabouts to the petitioner.

5 On 17.01.2013, the petitioner learnt that respondents No.1 & 2 had approached the National Commission for Protection of Child Rights (NCPCR) and had obtained an ex-parte order restraining the child from being forcibly taken to France or any place outside India.

6 On 22.01.2013, respondents No.1 & 2 filed a guardianship petition under Sections 7, 8, 9, 10 & 11 of the Guardians and Wards Act, 1890 (hereinafter referred to as the Act of 1890). They wished to obtain the custody of the minor child. This petition was filed before the Senior Civil Judge, Senior Division, Dharamshala. The High Court of Himachal Pradesh transferred the case to the Court of Senior Civil Judge, Shimla who on 11.12.2014 while exercising the powers of the District Judge appointed respondent No.1 as the guardian of Master Tenzin. Tashi Choedon had been impleaded as respondent No.4 being the adoptive mother of the minor but before she could be heard, her name was deleted and thus she did not have

the opportunity of contesting the proceedings. The petitioner had however contested the petition.

7 The petitioner aggrieved by the order passed by the Guardian Court (11.12.2014) preferred an appeal before the High Court of Himachal Pradesh at Shimla. This appeal was taken up for hearing after its admission on 07.05.2015. Respondents No. 1 & 2 were also served. The petitioner had in fact moved an application on 04.06.2015 before the High Court of Himachal Pradesh seeking a direction from restraining respondents No.1 & 2 from removing the child outside India. This appeal was however subsequently withdrawn on 21.08.2015 by the petitioner.

8 The petitioner, thereafter, learnt that respondents No.1 & 2 had approached the Principal Judge, South-East, Family Court Saket and in proceedings under Section 9 (4) of the Hindu Adoption and Maintenance Act (hereinafter referred to as the 'HAMA'), they obtained a decree dated 23.05.2015 whereby respondent No.1 was appointed as guardian of minor Tenzin.

9 Submission being that this order was clearly without jurisdiction as the Family Court had assumed an illegal jurisdiction; he could not have passed any order under Section 9 (4) of the HAMA appointing respondent No.1 as

the adopted father of the minor; respondents No.1 & 2 were the only parties; the guidelines for determining adoption of foreign nationals had been ignored; the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'JJ Act, 2000') as also the guidelines issued by the Ministry of Women and Child Development, 2011 (hereinafter referred to as the 'CARA') had been ignored; the Hague Convention on Protection of Children and Cooperation in respect of Inter-Country Adoption, 1993 (hereinafter referred to as the Hague Convention) was also taken into account.

10 This petition has been filed seeking to lay a challenge to the order passed by the Family Court dated 23.05.2015. The prayer is that respondents No.1 & 2 should be restrained from removing Master Tenzin from the country.

11 In the course of these proceedings, an application had been filed by respondents No.1 & 2 seeking permission of this Court to permit Master Tenzin to temporarily travel with them to the United States. This application was dismissed on 26.08.2015. The Bench of this Court was of the view that prima-facie the procedure prescribed for adoption as contained in Section 41 of the JJ Act, 2000 read with Section 33 of the Juvenile Justice (Care and

Protection Rules, 2007) (hereinafter referred to as the JJ Rules) had been ignored; CARA guidelines had also not been adhered to; the same being prima-facie mandatory could not have been bypassed. While dismissing the application, the Court had also made an observation that the adoption of minor child Tenzin by respondents No.1 & 2 appears to be in the welfare of the minor child. However the aforenoted permission as sought for by respondents No.1 & 2 was not granted to them.

12 On 22.09.2016, C.M. No.22106/2016 had been filed by the petitioner seeking impleadment of two persons i.e. Central Tibetan Administration (in exile) (hereinafter referred to as the CTA) and CARA. This application was not opposed by the respondents. The aforenoted respondents i.e. CTA and CARA were impleaded as parties.

13 Apart from the response of respondents No.1 & 2, the response of the newly impleaded respondents i.e. CTA and CARA is also on record.

14 On behalf of respondents No.1 & 2 it is stated that the impugned order (23.05.2015) passed by the Family Court is a legal order; it suffers from no infirmity.

15 Section 7 of the Family Court Act, 1994 empowers the Family Court to pass such an order under Section 9 (4). The present case does not fall

within the CARA guidelines. Learned counsel for the respondents has placed reliance upon a judgment of the Apex Court reported as 2004 (1) SCC 382 *Smt. Anokha Vs. State of Rajasthan* as also another judgment of a Bench of this Court in W.P. (C) No.5718/2015 *Parminder Kaur Hunda Vs. Central Adoption Resource Authority through its Secretary* (PKH). Submission being that the case of the petitioner qualifies as a case of an 'inter-country direct adoption'; the CARA Guidelines do not have to be followed. In the alternate, it is pointed out that after the Senior Civil Judge, Dharamshala had passed an order under the Act of 1890 directing them to seek adoption under the CARA guidelines and the adoption law prevalent in the United States, the respondents had approached CARA but CARA by its communication dated 09.03.2015 had informed them that since the CTA is fully functional, it was appropriate for the respondents to seek their assistance. Submission being that CARA had refused to entertain the case of the respondents. The respondents had thereafter approached the CTA. The CTA is however neither recognized by the US authorities and nor the Italian Embassy; respondent No.1 being a US citizen and respondent No.2 being an Italian citizen; it would have been a futile path to have approached the CTA. The communications in this regard from the US Embassy and the Italian

Embassy dated 16.06.2015 and 23.02.2015 have been relied upon. The Hague Convention was also not applicable. The only course available to the answering respondents was to approach the Family Court under Section 9 (4) of the Family Court Act. The minor child having lived with his adoptive parents (respondents No.1 & 2) for the last three years, the Hindu Adoption Law i.e. the HAMA would be applicable. Submission being that the respondents are running from pillar to post to legalize the adoption of Master Tenzin who has been living with them since the last more than three years (at the time of filing response to the present petition); the order of the learned Family Court does not suffer from any infirmity.

16 The response of the newly impleaded respondents i.e. CTA and CARA is also on record.

17 The affidavit of CARA filed through its Deputy Director states that respondents No.1 & 2 had approached their Department with their application dated 17.05.2016 for a re-consideration of its decision regarding the NOC in their case; on the submission of the requisite documents on 25.07.2016, a NOC had been issued by CARA for the move of the adopted child to United States to habitually reside with his adopted parents i.e. respondents No.1 & 2. Relevant would it be to note that earlier CARA had

not issued an NOC to respondents No.1 & 2 but had thereafter reconsidered the case of respondents No.1 & 2 and had issued an NOC to them on 26.07.2016.

18 The response of CTA is also on record. The affidavit has been filed through the Secretary of the office of the Bureau of his Holiness the Dalai Lama, CTA having its office at Lajpat Nagar. In this affidavit, it is stated that the present controversy appears to be between the petitioner and respondents No.1 & 2; neither of them at any point of time had approached the CTA seeking consent or permission for adoption of Master Tenzin. The stand of CTA being that they are not necessary parties in these proceedings.

19 The counter affidavit of the other respondents is not relevant for the purposes of deciding this petition.

20 A rejoinder had been filed by the petitioner to the aforenoted stand of the respondents. The averments made in the writ petition have been reiterated and the defence sought to be set up by the respondents has been refuted.

21 On behalf of the petitioner, arguments have been addressed by learned counsel Mr. Jagdeep Kishore assisted by Mr. Mathur, Advocate. The

foremost submission of the petitioner is that the impugned order suffers from an illegality for the reason that the Family Court was not vested with the jurisdiction to deal with the case of a child who was admittedly a Nepalese by birth. Section 7 of the Family Court Act, 1984 has been highlighted. Reliance has been placed upon a judgment of High Court of Bombay as also two judgments of the Bench of the Kerala High Court reported as *Foreign Adoption Petition No.100/2009 (dated 19.12.2009) as also 1 (1998) DMC 266 Vinod Krishnan Vs. Missionaries of Charity* delivered on 03.11.1997 as also a third judgment of the Kerala Bench reported as 2008 (1) CARLJ 647 *Andrew Mendis Vs. State of Karla.* Submission being that the jurisdiction to pass an order giving a child in adoption vests with the District Court or the High Court; a Family Court cannot deal with matters of adoption. This position at law has been ignored. The order passed by the Family Court on 23.05.2015 under Section 9 (4) of the HAMA being devoid of jurisdiction was an order non-est. Respondent No. 1 & 2 had not complied with the directions of the Senior Civil Judge, Shimla and have by-passed the procedure of obtaining an NOC from CARA which was a mandate upon them; the guidelines of the Hague Convention have been given a go-bye. Attention has been drawn to Articles 5 & 17 of the Hague Convention.

Additional submission being that in the light of the judgment reported as 1984 (2) SCC 244 *Laxmi Kant Pandey Vs. Union of India* efforts should have been made to first give the child to a local family in India; this process had not been followed. Respondent No. 1 & 2 had taken upon themselves to adopt Master Tenzin without there being any effort made to first offer the child to a local Indian family India and only when this situation is negatived can a foreign couple seek an adoption. Learned counsel for the petitioner submits that the JJ Rules, 2007 would be applicable as the Act of the year 2015 in the absence of the formal Rules having been formulated cannot be implemented; these Rules have been flouted. Attention has also been drawn to Rule 52 & Rule 53 of the 2015 of the CARA Guidelines; submission being that the CARA Guidelines of 2015 would be applicable; however CARA having reviewed its decision in granting an NOC ex-post facto to respondent No. 1 & 2 on 26.07.2016 has gone back on its own conditions. The impugned order cannot be sustained.

22 These submissions have been countered. Learned counsel for respondent No. 1 & 2 in addition to his stand as adopted in his counter affidavit submits that there is a distinction which he would like to draw between the term 'inter-country adoption' and 'inter-country direct

adoption'. His case would fall in the second category i.e. an 'inter-country direct adoption'. Reliance has been placed upon a judgment passed by a Bench of this Court in PKH (supra). Submission being that this term was coined in this judgment. The learned Single Judge had relied upon the judgment in *Smt. Anokha* (supra) to hold that where there is a case of a direct adoption under the provisions of HAMA, the CARA guidelines do not have to be followed; submission being that in that case where the adoption was made by a Canadian couple from an Indian widow the Court had held that there being no intermediary between the parties, the provisions of either the CARA guidelines or the Hague Convention having to be adhered to was not a mandate. Submission being that his case also stands on the same footing. Respondents No. 1 & 2 had admittedly been appointed as lawful guardians of Master Tenzin vide an order of the Guardian Court on 11.12.2014. This order was never challenged; it had become final; since the child had a legal guardian he no longer remained an orphan, abandoned or a surrendered child; CARA Guidelines would thus not apply. Section 9 (4) of the HAMA adequately permits a guardian of any child to give in adoption with the previous permission of the Court to any person including the guardian himself; this has been done so in the instant case. The order suffers from no

infirmity. Learned counsel for respondents No. 1 & 2 additionally submits that the submission of the petitioner that the child was in illegal custody of respondents No. 1 & 2 is clearly belied from their own documents and evidence on record. Submission being that even as per the case of the petitioner, Master Tenzin had been permitted by the petitioner to travel between December, 2014 up to January, 2015 with respondent No. 1 & 2; respondent No. 1 & 2 were admittedly sponsors of the child; a sponsor is never permitted to take the child out station unless the idea was to give the child in formal adoption to respondents No. 1 & 2 which was the undertaking and promise of the petitioner to respondents No. 1 & 2. Submission being that on 13.01.2013, on the request of the petitioner, respondents No. 1 & 2 had appeared before the petitioner and had a long drawn out meeting with them. On 17.01.2013, respondents No. 1 & 2 had obtained an ex-parte order from the NCPCR whereby no coercive steps/police action was to be taken against them qua the custody of the child. On 04.02.2013, respondents No. 1 & 2 had approached the Civil Court and had obtained an interim custody order qua Master Tenzin in their favour up to 15.02.2013 which order continued up to 01.08.2013 when on 01.08.2013 the Civil Judge at Dharamshala had directed respondent No. 1 & 2 to

handover the custody of the child to the petitioner by 01.09.2013. This order was assailed before the High Court of Shimla. It was stayed by the High Court on 08.08.2013; submission being that on 04.09.2013, this petition was disposed of by the High Court with a direction to the learned Civil Judge, Shimla to allow respondent No. 1 & 2 to retain the custody of Master Tenzin till the disposal of the petition pending before it. Submission on this count being that the stand of the petitioner that respondent No. 1 & 2 were having an illegal custody of the child is thus belied; they initially had permissive custody of Master Tenzin which thereafter got converted into a lawful custody. Learned counsel for respondent No. 1 & 2 has placed strong reliance upon the judgment delivered by the Guardian Court at Dharamshala on 11.12.2014; submission being that this was after a long trial wherein 20 witnesses had been examined by the respective parties and 40 articles of evidence had been exhibited. The Court had come to the conclusion that the interest and welfare of the child demanded that the child should remain with respondent No. 1 & 2; this was after having a meeting with the child in the Chambers of the Judge. At the cost of repetition, learned counsel for respondent No. 1 & 2 argues that the order dated 11.12.2014 directing respondents No.1 & 2 to comply with the CARA Guidelines and other inter-

country laws could not be complied with for the reason that on his approaching the CARA, he was addressed a communication dated 09.03.2015 (by CARA) asking him to approach the CTA; the CTA is neither recognized by the US Embassy and nor by the Italian Embassy of whom respondent No. 1 & 2 are citizens. Respondent No. 1 & 2 thus had no other remedy but to approach the Family Court under Section 9 (4) of the HAMA. Impugned order in the peculiar facts of this case does not suffer from any infirmity. Submission being reiterated that this argument is in the alternate; his first submission is that since this is a case of an inter-country direct adoption, guidelines of CARA did not have to be followed. Even otherwise, CARA has now given an NOC on 26.07.2016. Even presuming that on ex-post facto approval/no objection has been granted, the petitioner should have no quarrel on this issue as even as per the case of the petitioner the child whose interest and welfare is the primary concern and the aim and object of this Court while dealing with this petition it has to be noted that Master Tenzin is happy and comfortably placed in the hands of respondents No. 1 & 2. This fact is not disputed by the petitioner and on repeated questions put by the Court on this score, they admit this position.

23 In rejoinder, learned counsel for the petitioner submits that respondent No. 1 & 2 have necessarily to follow the CARA Guidelines which have not been adhered to; CARA has ignored its own objects; the Hague Convention has also been given go-bye.

24 Arguments have been heard. Record has been perused.

25 The facts of the case evidence that Master Tenzin had been brought by Tashi Choedon to the TCV from Nepal; his parentage and the details of his biological parents were not known. Tashi Choedon had enrolled Master Tenzin in the TCV on 13.08.2008. He was just about 1- ½ years of age at that point of time.

26 The definition of "orphan" as contained in Section 2 (k) of the JJ Rules, 2009 reads herein as under:-

'Orphan' means a child who is without parents or willing and capable legal or natural guardian.'

27 The facts as noted supra qua Master Tenzin persuades this Court to hold that Master Tenzin at the time of his admission in the petitioner school fell within the definition of an 'orphan'.

28 This Court is of the view that the JJ Act, 2000 would be applicable. The Rules of 2007 which came into effect on 26.10.2007 would be the prevailing rules as the incident relates to the period 2008.

29 It is an admitted fact that respondents No. 1 & 2 (permanent residents of United States) had approached the petitioner for sponsoring the education of Master Tenzin. They had paid 480 $ for a period of one year. The petitioner had permitted respondents No. 1 & 2 to take Master Tenzin out during his winter vacations between 25.12.2012 to 24.02.2013 i.e. for a period of almost two months. It is also an admitted fact that pursuant to Tashi Choedon having approached the TCV in January, 2013, a request had been made by the petitioner school to respondents No. 1 & 2 to bring back Master Tenzin to the school. Respondents No. 1 & 2 had gone to the petitioner school on 13.01.2013. Master Tenzin was not with them. The request of the petitioner was that Master Tenzin be returned to the petitioner school as Tashi Choedon wanted to take him to France.

30 On 17.01.2013, an order was passed by the NCPCR. This was on a complaint made by respondents No. 1 & 2 regarding the protection of the rights of Master Tenzin. In this complaint, it was brought to the notice of the NCPCR that Master Tenzin had been permitted by the petitioner to

accompany respondents No. 1 & 2 for a two month holiday; he was admittedly under a sponsorship program of the TCV for which sponsorship charges had been paid by respondents No. 1 & 2. The child had been issued an I-Card stating the name of his father as Karma Lama. The fact that this I-Card had been issued to Master Tenzin being an undisputed fact this Court is of the view that the submission of respondents No.1 & 2 that the petitioner school had ultimately promised the custody of the child to them is a submission which cannot be ignored; the submission of the petitioner that it was only as an interim measure that respondents No. 1 & 2 had been granted permission to take the child with them being his sponsors and not entitled to any better right is belied by the fact that a sponsor would not be permitted to take a minor child out for a two months vacation; he would also not have an I-card with the name of respondent No.1 as his father; there was obviously something more in the mind of the petitioner school; the submission of respondents No. 1 & 2 on this score that this was with a view to give minor Tenzin for adoption to respondents No. 1 & 2 is thus not without any force.

31 This Court notes that on 17.01.2013, the NCPCR on the complaint of respondents No. 1 & 2 had restrained the police from taking any coercive action against respondents No. 1 & 2 for any act of alleged kidnapping; it

was noted that there was a written promise and consent from the petitioner school in favour of minor child for a period of two months between 25.12.2012 till 24.02.2013 which period had not yet expired.

32 On 04.02.2013 (i.e. before the expiry of the period of the interim custody which had been granted to respondents No. 1 & 2 by the petitioner and which was up to 24.02.2013), an application had been filed by respondents No.1 & 2 under Section 12 of the Act of 1890 before the Guardian Judge, Dharamshala. The petitioner school was arrayed as a party. Tashi Choedon was also arrayed as respondent No. 4. Master Tenzin was also present in Court on that date. An interim order was passed on the same date. The Court was of the view that respondents No. 1 & 2 had lawful custody of minor child Master Tenzin; this custody was validly granted to them by the petitioner school between 25.12.2012 up to 24.02.2013. An ex-parte interim order had been passed in favour of respondents No. 1 & 2 granting temporary custody of minor child Master Tenzin to them.

33 This order was the subject matter of challenge before the Himachal Pradesh High Court in C.M. (P) No.4085/2013. On 04.09.2013, the High Court after hearing the respective parties i.e. the petitioner and respondents No. 1 & 2 was of the view that the proceedings which were pending before

the Civil Judge, Senior Division Kangara be transferred to the Civil Judge, Senior Division, Shimla; interim protection granted to respondents No.1 & 2 would continue till the disposal of the petition before the Civil Judge, Senior Division. The High Court while disposing of this petition on 04.09.2013 had thought it fit to describe Master Tenzin as an 'abandoned orphan'. This was after noting the facts of the case.

34 Section 12 of the Act of 1890 empowers the Guardian Court to pass orders for the temporary custody and protection of the minor. The petition under Section 12 was disposed of by the Civil Judge, Senior Division, Shimla on 23.11.2014. The petitioner as also respondents No. 1 & 2 were duly represented. Facts were noted in detail. It was noted that Master Tenzin is a Tibetian Buddhist by religion. A receipt dated 20.08.2012 had been issued in the name of respondents No. 1 & 2 acknowledging the fact that they had paid 480 $ towards the sponsorship and support for a period of one year for Master Tenzin. It was admitted that the petitioner had permitted Master Tenzin to accompany respondents No. 1 & 2 for a period of two months during his winter vacation. The financial status of respondents No. 1 & 2 had been noted. It was noted that both the respondents had adequate moveable and immoveable assets and they were in a position to provide a

secure and stable home to Master Tenzin. Their strong commitment to family values and in preserving the cultural and heritage of a parental home had also been noted.

35 All parties before the said Court had been served including Tashi Choedon (respondent No.4). She chose not to appear. She was subsequently deleted from the array of parties vide order dated 15.02.2013. It was noted by the Court that Tashi Choedon had not been capable of taking care of her son; she thus could not be termed as a 'relative' of Master Tenzin; she had also never made any effort to get herself appointed as guardian of Master Tenzin. This order (of the deletion of her name) was never challenged; neither by the petitioner and nor by Tashi Choedon herself.

36 Twenty witnesses were examined before the Guardian Court. Forty documents had been exhibited. The statement of the petitioner was recorded. It was deposed that the child was an orphan and the whereabouts of his biological parents were not known. It was admitted that Master Tenzin had been sponsored by respondents No. 1 & 2 and he was permitted to spend his winter vacations with them. The Judge had framed several issues in the matter and dealt with each of them issue-wise. The question as to whether respondents No. 1 & 2 were liable to be appointed as guardians of Master

Tenzin was framed as issue No. 1. The interest and welfare of the minor child was framed as issue No. 1 (a). The Court after examination of the oral and documentary evidence was of the view that since Master Tenzin was a domicile of India and being a minor, the provisions of Guardians and Wards Act would be applicable. The observations of the Apex Court in *Laxmi Kant Pandey* (Supra) noting a no distinction between a 'foreign national' and an 'Indian national' on the concept of guardianship was highlighted. The status of the petitioner school gathered from the evidence which included the fact that a teacher of the petitioner school had been arrested for committing rape on a female child was also noted; it was also noted that admission of Master Tenzin had not been reported by the school authorities to any local police or to the Child Welfare Committee (CWC).

37 While disposing of the petition on 11.12.2014, the learned Guardian Court appointed respondents No. 1 & 2 as guardians of Master Tenzin and his custody which was already with them was to continue. However, Master Tenzin was not permitted to be taken outside India unless and until he was adopted in accordance with law; a direction was given by the Court that adoption should be as per the CARA Guidelines and the inter-country adoption law prevailing in the USA.

38 This order dated 11.12.2014 was the subject matter of challenge before the High Court of Himachal Pradesh. The appeal was admitted and taken up for hearing on 07.05.2015. Notice was issued to respondents No. 1 & 2 for 18.06.2015. The apprehension of the petitioner that respondents No. 1 & 2 would take the child out of country led them to file an application before the High Court of which an advance copy of the same was given to the learned counsel for the respondents. Counsel for the respondents appeared before the High Court on 04.06.2015. They produced a copy of an order passed by the learned Family Judge, Family Court, Saket dated 23.05.2015 under Section 9 (4) of the HAMA appointing respondent No. 1 as the adoptive father of Master Tenzin.

39 The vehement contention of the learned counsel for the petitioner that respondents No.1 & 2 fully well knowing about the factum of pendency of the appeal before the Himachal Pradesh High Court (against the order dated 23.11.2014) had yet in a clandestine manner obtained an ex-parte order under Section 9 (4) from the Family Court, Saket is belied. The order of the Family Court passed on 23.05.2015 was passed prior in time to the petitioner having made an application before the Himachal Pradesh High Court seeking a restraint on the respondents from taking Master Tenzin out of the country.

It is also not the case of the petitioner that notice of the pending appeal had been served upon respondents No.1 & 2 prior to 23.05.2015. This is clear from the averments made in the writ petition and the ambiguity, if any, is washed away in the list of dates which has been appended by the petitioner in his petition. These averments and list of dates clearly show that on 23.05.2015 when the Family Court, Saket had passed an order appointing respondent No. 1 as the guardian of Master Tenzin, the respondents had no notice of any appeal pending before the Himachal Pradesh High Court.

40 Be that as it may, this Court as an additional fact notes that this appeal was voluntarily withdrawn by the petitioner on 21.08.2015. This was a chosen act of the petitioner. They had consciously withdrawn the appeal. Thus the order of the Guardian Court dated 23.11.2014 had become a final order. This final order appointing respondents No. 1 & 2 as guardians of Master Tenzin having attained its finality, it was by law established that respondents No. 1 & 2 are undisputed guardians of Master Tenzin.

41 Sections 9 (4) & (5) of the HAMA are relevant. They read as under:-

"9 Persons capable of giving in adoption. —

(1) xxxxxx.

(2) xxxxxx.

(3) xxxxxx.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.]

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction. Explanation.— For the purposes of this section—

(i) the expressions "father" and "mother" do not include an adoptive father and an adoptive mother; [6] *[***]*

[7] *[(ia) "guardian" means a person having the care of the person or a child or of both his person and property and includes—*

(a) a guardian appointed by the will of the child's father or mother; and

(b) a guardian appointed or declared by a court; and]

42 The definition of a 'guardian' as contained in the Explanation to Section 1 (ia)(b) includes a guardian appointed or so declared by a Court.

43 This provision {Section 9 (4)} clearly stipulates that where the parentage of a child is not known, the guardian of the child may give the

child in adoption to any person including the guardian himself. The rider is that this has to be with the permission of the Court.

44 It was on the premise of this statutory provision that respondents No. 1 & 2 had moved the Family Court at Saket. They were admittedly guardians of Master Tenzin. This had been held by a Competent Court of Civil Judge, Senior Division, Dharamshala on 23.11.2014. This order, at the cost of repetition, had attained a finality. The guardian with the permission of the Court under Section 9 (4) of the HAMA may give the child in adoption.

45 Sub-Section 5 casts an obligation on the Court to ensure that the adoption should be for the welfare of the child and the wishes of the child having regard to the age and understanding of the child have to be considered.

46 Respondents No. 1 & 2 were thus fully permitted to file this application under Section 9 (4) of the HAMA. The order passed by the Family Court was well within its jurisdiction. The registered adoption deed dated 15.04.2015 in favour of respondents No. 1 & 2 is also a part of the record. This adoption deed had been produced before the Court pursuant to the order of the Family Court dated 30.04.2015 who had directed the parties to produce the registered adoption deed from the concerned Registrar

relating to Master Tenzin on or before 05.05.2015. It was thereafter i.e. after the perusal of the deed of adoption and the statement of the parties that the order dated 23.05.2015 had been passed by the Family Court.

47 The submission of the petitioner that the Family Court did not have the jurisdiction to deal with the aspect of adoption in terms of Section 7 of the Family Court Act, 1984 is a submission which is misunderstood.

FAMILY COURT ACT, 1984

48 Relevant would it be to extract Section 7:-

"7. Jurisdiction - (1) Subject to the other provisions of this Act, a Family Court shall

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(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a "district court" or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends".

49 Explanation (g) to Section 7 of the Family Court Act reads herein as under:-

"7. Jurisdiction.-

(1) Subject to the other provisions of this Act, a Family Court shall- -

(1) (a) xxxxxx

(b) xxxxxx.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor."

50 A Family Court thus has the same jurisdiction which is exercisable by any District Court or any subordinate Civil Court. Sub-clause (g) appended to the Explanation provides that a suit or proceedings in relation to guardianship of a person or custody of a minor will be the subject matter of jurisdiction before the Family Court.

51 Section 8 excludes jurisdiction of all other Courts except the Family Court in a suit of the nature as described in sub-clause (g) of the Explanation appended to Section 7. It stipulates that where a Family Court has been established, no District Court or any other subordinate Court in relation to that or will have or exercise jurisdiction in respect of any suit or proceedings of the nature referred to in the Explanation of Section 7.

HAMA, 1956

52 Section 2 (a) of the HAMA applies to any person who is a Buddhist, Jaina or Sikh by religion. Master Tenzin was a Buddhist by religion. The HAMA would be applicable to the rights of Master Tenzin. Chapter II of the HAMA which deals with adoption stipulates that no adoption shall be made after the commencement of this act (21.12.1956) except in accordance with the provisions of this Chapter. Sections 9 (4) and (5) have already been referred to supra. Section 9 (4) provides that where the parentage of the child is not known (as is so in the instant case), a guardian of the child may give the child in adoption to any person including the guardian himself. The definition of 'guardian' as highlighted in the Explanation (ia) (b) appended to Section 9 of the HAMA has also been referred to supra. This definition includes a guardian appointed by a Court. Respondents No.1 & 2 had admittedly been appointed as guardians by a Court of competent jurisdiction i.e. Court of Senior Civil Judge, Dharamshala on 23.11.2014. That order is a final order.

JJ ACT, 2000

53 The JJ Act, 2000 was promulgated on 30.12.2000. Section 41 contained in Chapter IV describes the rehabilitation and social integration

process. Section 41 (2) applies to a child who is an orphan. Sub-clause (3) makes a reference to the CARA Guidelines as notified by the Central Government; sub-clause (4) stipulates that the child has to be free for adoption before the child can be offered for adoption. Sub-section 4 recognizes the institutions or voluntary organizations for placement of orphan, abandoned and surrendered children for adoption in accordance with its Guidelines. Sub-clause (5) states that no child shall be offered for adoption unless he is made free for adoption. Section 68 gives powers to the State Government (by a Notification in the official gazette) to make Rules to carry out the purposes of the Act.

JJ RULES, 2007

54 These Juvenile Justice (Care and Protection of Children) Rules, 2007 came into effect on 26.10.2007. These Rules have been notified under the powers conferred to the State Government under Section 68 of the JJ Act, 2000. These Rules have a statutory force.

55 The best interest of the child as described in Section 2 (c) means a decision taken to ensure that the physical, emotional, intellectual and moral development of the juvenile or the child is taken care off. Rule 33 contained in Chapter V lays down the procedure for adoption. The primary object

being to provide a child who cannot be cared off by his biological parents with a permanent substitute family. The CARA Guidelines notified by the Central Government are to apply for all persons falling under Section 41 (3). This includes an orphan child as has been described in Section 41 (2).

56 Rule 33 (5) reads as under:-

"For the purpose of Section 41 of the Act, 'Court' implies a Civil Court, which has jurisdiction in matters of adoption and guardianship and may include the court of the District Judge, Family Court and City Civil Court."

57 This sub-rule defines a Court to include a Civil Court which has jurisdiction in matters of adoption in guardianship and may include the Court of District Court, Family Court and the City Civil Court.

58 A holistic, wholesome and harmonious reading of the aforenoted provisions of law particularly Sections 7 & 8 of the Family Court Act, Sections 9 (4) & (5) of the HAMA and Sections 41 (2)(3) of the JJ Act, 2000 coupled with Rule 33 (5) of the JJ Rules, 2007 clearly reflects the intent of the Legislations; it evidences that the Family Court has the same jurisdiction which is exercisable by any District Court or any other sub-ordinate Civil Court.A Family Court is thus specifically clothed with the jurisdiction to

deal with matters of adoption as contained in Section 41 which includes an orphan child. It persuades this Court to hold that the Family Court was well within its domain to exercise jurisdiction in matters of adoption; its jurisdiction was in no manner ousted by the subsequent enactment of JJ Act, 2000.

59 This Court is fortified in this view by a judgment of a Division Bench of Madhya Pradesh on this score reported as First Appeal No.55/2013 *Tarun Kadam & Another Vs. State of Madhya Pradesh and Another* delivered on 17.09.2014.

60 The judgment of the Bombay Bench in *Foreign Adoption Case* (supra) and of the Kerala Bench in *Andrew Mendis* (supra) had relied upon its earlier dicta given in *Vinod Krishnana*; the judgment of *Vinod Krishnan* had not considered the scope of Rule 33 (5) of the JJ Rules, 2007 obviously for the reason that it was passed prior in time to the promulgation of the said Rules. The judgment of *Andrew Mendis* in fact presupposed that Rule 33 (5) confers by necessary implication a jurisdiction on the Family Court to deal with matters of adoption but nevertheless had gone on to examine the provisions of the General Clauses Act to draw a conclusion to the contrary.

This Court with respect does not adhere to the view of the Kerala Bench in *Andrew Mendis* or of the Bombay Bench.

61 This Court again notes that the Guardian Court, Senior Division, Shimla while disposing of the petition on 23.11.2014 had directed the respondents to get the adoption of Master Tenzin to be effected in terms of the CARA Guidelines as also the inter-country adoption laws of United States of America.

62 CARA (subsequently impleaded as a party) has filed an affidavit as also an additional affidavit. It was stated that the application filed by respondents No. 1 & 2 seeking a NOC was examined in July, 2016; this was examined in the light of the Guidelines governing Adoption of Children Rules, 2015; this was pursuant to the order dated 23.05.2015 issued by the Principal Judge, Saket. The 2015 Adoption Guidelines would apply in terms of para 53 (3) of the said Regulations which apply to pending adoptions; the instant adoption allowed by the Family Court on 23.05.2015 came under the category of the pending adoptions; it was for this reason that 2015 Adoption Guidelines would apply. CARA has issued a NOC in exercise of its jurisdiction as conferred upon it under para 17 (1) of the said Regulations and 17 (c) of the Hague Convention. This NOC has been issued only after

the dossier was placed before the NOC Committee and duly approved by the Committee. It has also been brought to the notice of this Court that this NOC had been granted after a home study had been conducted by CARA on 25.07.2016, a no objection certificate (dated 26.07.2016) has been issued in favour of respondents No. 1 & 2. This home study conducted by CARA was to verify the antecedents of the adoptive parents. This home study was conducted on 14.07.2016. Two social workers had met respondents No. 1 & 2 along with Master Tenzin at their residence. It was reported that the emotional, financial and physical status of respondents No.1 & 2 was stable and they were well prepared for adoption of Master Tenzin who had by then integrated into the family (being lived with them for over four years). Respondents No. 1 & 2 appeared to be suitable parents; it was accordingly recommended this couple (respondents No.1 & 2) was right for adopting Master Tenzin as per all required criteria.

63 It is relevant to note that this home study has made a detailed and a comprehensive analysis of the prospective adoptive parents and the conclusion had been arrived at only thereafter. This format by itself runs into 8-9 pages. It was noted that Master Tenzin was living with the family for more than four years and he has a good bonding with his parents. The

needs and desires of the child appeared to be fulfilled; the parents were concerned about the education and other developmental issues of the child; being an educated family, their focus was on providing the child with a healthy upbringing; the awareness of Master Tenzin and his comfort with the family as also his further dream of going to Alaska, USA were also noted. It had accordingly wholeheartedly recommended that respondent No. 1 & 2 be given a clearance and a no-objection from CARA. This home study report was signed by the Programme Officer as also the Programme Manager of the Department of Women and Child Development.

64 Pursuant to this home study report dated 25.07.2016, a 'no objection certificate' had been issued by CARA on 26.07.2016. This document is a part of the record. It is not assailable.

65 The vehement contention of the learned counsel for the petitioner that CARA by giving a 'no objection' at this stage (which is admittedly an ex-post facto approval) has gone behind its own objects. This submission has neither been expanded and nor has it been taken any further than the aforenoted sentence. How CARA has gone back on its objects has not been explained.

66 The CARA Guidelines, 2015 notified on 17.07.2015 in Rule 53 states that the earlier Guidelines governing Adoption of Children Rules, 2011 are repealed; all pending adoptions shall be processed as per these Guidelines. Admittedly the application of the respondents seeking an NOC from CARA was made in July, 2016 on which date the notified Guidelines for adoption were of the year 2015. Thus the 2015 Cara Guidelines would be applicable to an NOC to be granted by CARA which has been granted on 26.07.2016. This is also the stand of the petitioner.

67 Reliance by the learned counsel for the respondents on Section 60 of the JJ Act, 2015 is also an argument which has force. It is pointed out that under Section 60 of the JJ Act, 2015 (prevailing at the time when CARA granted its NOC on 26.07.2016) postulates that an ex-post facto approval can be granted; Section 60 (1) in fact states that a relative who intends to adopt a child shall obtain an order from the Court and he may then apply for an NOC from the authority in the manner as provided in the Adoption Regulations framed by the Authority. This Section thus clearly contemplates an ex-post facto approval. A Bench of this Court in PKH (supra) while examining the provisions of Section 60 had noted that the scope of this provision should be expanded in order to advance the best interest of the child. It had also

instructed CARA to ensure that all applications for approval/NOC should be processed in a child friendly manner and within a fixed time frame.

68 In this context, it would be relevant to note the conduct of respondents No.1 & 2. It is noted that after an order had been obtained by respondents No. 1 & 2 from the Guardian Court on 23.11.2014 asking them to comply with a direction to follow the CARA Guidelines as also the inter-country adoption laws, respondents No. 1 & 2 made all out efforts to comply with this direction. They approached the CARA. CARA by its communication dated 09.03.2015 noted herein as under:-

"In this regard, the inter-Ministerial Meeting held on 02/02/2011 was of the view that since Tibetans have a Government in Exile, which is fully functional, it may be appropriate for it to decide whether they want to give their children in adoption. It was also viewed that in case immigration clearance is required for Tibetan citizens leaving India for adoption purpose, MHA would offer necessary facilitation."

69 Respondents No. 1 & 2 had no other option but to approach the CTA. CTA is admittedly neither recognised by the US authorities (of whom respondent No. 1 is a citizen) and neither by the Italian Government (of whom respondent No. 2 is a citizen). The communication from the Italian Embassy (dated 23.02.2015) and the U.S. Embassy (dated 16.06.2015)

clearly informs the respondents that the CTA is not an identifiable body qua the US and Italian authorities.

70 It would obviously thus have been a futile attempt for respondents No.1 & 2 to have approached the CTA.

71 On 23.05.2015, an application under Section 9 (4) of the HAMA was preferred by respondents No.1 & 2 before the Family Court, Saket on which the impugned order had been passed.

72 It was not as if respondents No.1 & 2 were sleeping over their rights or not making any effort to legalize the adoption of Master Tenzin. They had made all out efforts to do the needful. They were in fact running from pillar to post. CARA did not entertain them in the first instance. This is clear from its communication dated 09.03.2015. Respondents No.1 & 2 then chose to approach the CTA but the non-recognition of the CTA by their respective Governments left them with no option but to approach the Family Court under Section 9 (4) of the HAMA. At the cost of repetition, the Family Court was clothed with jurisdiction to deal with such an application. Respondents No.1 & 2 had been appointed as guardian of Master Tenzin by an unassailable order dated 23.11.2014; Section 9 (4) of the HAMA enabled

the Family Court to appoint respondent No. 1 as the adoptive father of Master Tenzin. This was well within the parameters of law.

73 This Court also notes the stand of CARA who has now on 26.07.2016 granted a 'no objection certificate' in favour of respondents No.1 & 2. The Hague Convention and particularly Articles 5 & 17 of the Hague Convention also stand satisfied.

74 The stand of the CTA has already been noted in its counter affidavit. Their uncontroverted stand is that they have no role to play in these proceedings which are inter-se proceedings largely between the petitioner and respondents No. 1 & 2.

75 This Court is also of the view that this is not a case of 'inter-country direct adoption'. This was the alternate argument propounded by the learned counsel for respondents No.1 & 2. This is not a case where the natural/ biological parents of Master Tenzin were transferring their child to the adopted parents which in the view of this Court would alone qualify as an 'inter-country direct adoption'; that would be a case where there is no intermediary party.

76 The connected argument in this context has also been noted. It had been propounded that the petitioner/TCV is admittedly not registered; this fact is undisputed; it has also come on record that the admission of Master Tenzin in the petitioner school was not reported to any Child Welfare Committee; this had emanated in the evidence recorded before the Guardian Court at Dharamshala, Shimla; it would thus be a case of a private adoption and not on inter-country adoption.

77 The view of this Court is that such a non-registration/non-reporting is amenable to a penalty both under the JJ Act, 2000 and the subsequent Act of 2015. It would not take the case of Master Tenzin away from the ambit of an 'inter-country adoption'. This would still qualify as an 'inter-country adoption' and not an 'inter-country direct adoption'. Master Tenzin being an orphan and having been placed in the petitioner institution. The CARA Guidelines had to be adhered to.

78 The celebrated judgment of *Laxmi Kant Pandey* had in fact recommended a regulatory body i.e. Central Adoption Resource Agency (CARA) to be set up which has since been playing a pivotal role in matters of inter and in-country adoption. This has been reiterated by the Supreme Court in W.P. (C) No.470/2005 in *Shabnam Hashmi Vs. Union of India*

delivered on 19.02.2014. This judgment while considering the provisions of the JJ Act, 2000 had noted that this is an enabling legislation giving the prospective parents an option for adoption of an eligible child by following the procedure prescribed by the Act, Rules and CARA Guidelines as notified under the Act.

79 In the peculiar facts and circumstances of this case, this Court is of the firm view that the impugned order in no manner suffers from any infirmity. Respondent No. 1 is the legally adopted parent of Master Tenzin.

80 Petition is without any merit. Dismissed.

INDERMEET KAUR, J

NOVEMBER 18, 2016
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