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

Judgment reserved on: 11.08.2015

% Judgment delivered on: 26.08.2015

\+ **C.M. No.14403/2015 in CM (M) 579/2015**

THE TIBETAN CHILDREN'S VILLAGE SCHOOL ..... Petitioner

Through: Mr. Jagdeep Kishore, Advocate.

versus

KARMA LAMA & ANR ..... Respondents

Through: Mr. Gopal Subramanium and Mr.Sandeep Sethi, Senior Advocates along with Mr. Giriraj Subramanium, Mr. Hitesh Kumar Saini & Mr.Ankit Mishra, Advocates for respondents No.1 & 2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. This application has been preferred by the respondent No.1 to seek permission of this Court to allow the respondents to temporarily travel with the minor child in question, viz. Master Tenzin Tsering (Tenzin for short) to United States of America (USA). The application has been opposed by learned counsel for the petitioner.

2. A little background of the case may first be noted. The common case of the parties is that one lady, namely Ms. Tashi Choedon brought with her a

Tibetan Buddhist male child, i.e. Tenzin, when he was just one and a half years old to the Tibetan Children's Village (TCV) at Dharamsala Cantonment from Nepal. As per information furnished with TCV, the child was born on 03.03.2007 in Nepal. The whereabouts of the natural and biological parents of the minor child Tenzin are not known. This fact is recorded in the records of the school, i.e. TCV. Tenzin was enrolled vide Roll No.01/10796/08 in the Baby Home. His date of admission in TCV was shown as 13.08.2008.

3. The respondents, namely, Mr. Karma Lama & Mrs. Paola Pivi are permanent residents of USA and, presently, they are temporarily residing in Northern India. The respondents desired to be appointed as guardians of the minor child Tenzin when he was just about four and a half years old and was studying at TCV, Dharamsala Cantonment. Tenzin was then residing in the hostel premises of TCV.

4. The respondents preferred a petition under Sections 7, 8, 9, 10 & 11 of the Guardians and Wards Act, 1890 to obtain the custody of the minor child Tenzin in the Court of Senior Civil Judge, Senior Division, Dharamsala. The High Court of Himachal Pradesh transferred the case to the Court of Sh. Madan Kumar, Senior Civil Judge, Senior Division, Shimla, Himachal Pradesh, who was then exercising powers of District Judge under the Guardians and Wards Act, 1890. This petition was registered as Petition No.RBT 8-2/2013. The respondents in this petition, who were the petitioners in the Guardianship Petition, stated that by way of sponsorship support, they have committed for funding of the entire education, boarding & lodging expenses of Master Tenzin until he passes the school. The respondents also committed themselves to sponsor Master Tenzin's higher education – whether in India, or abroad.

5. The respondents disclosed that they had deposited US$ 480 towards sponsorship of Master Tenzin for the period August 2012 to August 2013. The respondents stated that they had identified Master Tenzin for future adoption, as and when permissible within the parameters. The respondents claimed that TCV had disclosed that they have a policy to allow sponsorship support arrangement for minor orphan children studying in their school, and the concerned children could take their decision with regard to adoption by their prospective/potential adoptive parents. As an interim arrangement, TCV allowed the sponsors exclusive access to the child, and also made custody arrangement during vacation, with permission to take the child out of the school premises. It was claimed that TVC had also represented that their office had a policy to identify the families for adoption in which, at least, one of the parents should be of Tibetan origin. Respondent no.1 claimed that he is of Tibetan origin and follows the Tibetan religion. His first language is Tibetan. He has been educated in the famous Tibetan Swayambhunath Monastery, Kathmandu, Nepal. Respondent no.1 disclosed that he was born in Kathmandu in the year 1973; he lives in Anchorage, Alaska, USA; he is a composer of Tibetan music and culture, and is popular by the name of Culture Brothers. He has published five albums of music inspired from his Tibetan heritage. Respondent no.2 disclosed that she is the wife of respondent no.1; she is an artist by profession; she was born in Milan, Italy in the year 1972; she also lives in Anchorage, Alaska, USA; she is an internationally recognised artist of visual arts, sculptures and photographs. She received the Golden Lion award in 1989 in Venice Biennial for the best international participation, and she has received various other awards in her field. The respondents claimed that they have adequate movable and immovable assets to give a secure and stable home to the minor child Tenzin. They stated that they occupy one residential house and the second home is rented out by them, and both are taxpayers. They stated that

they are attached to the minor child Tenzin, and aware that his parentage is not known to the school authorities. They stated that the minor child Tenzin requires a family atmosphere. They stated that they had strong commitment to family values and to preserving their culture and heritage. They stated that they have dedicated their entire life to promote their respective culture, jointly and individually. The respondents stated that they have been married since the year 2000. The respondents claimed that they were allowed to take the minor child Tenzin during vacation from 25.12.2012 to 24.02.2013. They sought guardianship of the minor child with a view to eventual adoption by both the applicants, in USA, and further prayed for permission under Section 260 of the Guardianship and Wards Act to take the minor child to USA. They also sought interim custody of the minor child Tenzin.

6. In these proceedings, notice was issued to the respondents, namely, the general public; TCV; Ms. Tashi Choedon, and; the Principal Secretary (Social Justice & Empowerment), State of H.P. The petition was contested only by two respondents, namely, TCV and the State of Himachal Pradesh.

7. TCV stated that the temporary custody of the minor child Tenzin was with the applicants/respondents and they do not want to part with his custody. It was also pleaded that the respondents were required to follow the Central Adoption Resource Authority (CARA) guidelines for adoption. They also expressed their apprehension that there was possibility of the minor child Tenzin being exploited. TCV also stated that the respondents had procured temporary custody of the child by playing a fraud upon it. TCV also sought the return and custody of the minor child Tenzin, and also sought a restraint against the minor child being taken to USA. An objection to the maintainability of the said petition was also raised by TCV.

8. The learned Civil Judge, Senior Division, Shimla, H.P. framed several issues. Amongst others, the following issues were framed:

i) Whether the applicants (the respondents herein) are liable to be appointed as guardian of the minor child Tenzin;

ii) Whether the best interest and welfare of the minor child Tenzin-being the paramount consideration lies with the applicants;

iii) Whether the application was not maintainable.

9. The learned Civil Judge by his detailed reasoning, and on the basis of evidences and materials placed before him decided the material issues in favour of the respondents/applicants vide his order dated 11.12.2014. The learned Civil Judge in the ultimate analysis held as follows:

> "*72. So far as the fact of permission under section 26 of the Act is concerned, the applicants being the prospective/adoptive parents are required to take master Tenzin Tsering in adoption as per CARA guidelines and the Adoption Law prevalent in U.S.A. also. Ld. Counsel for the applicants submits that the applicants are willing and ready to give undertaking to the court as they are on working VISA and the applicant No.2 Paola Pivi has obtained PAN card and she is assessed to income tax by the authorities in India. Unless and until master Tenzin Tsering has not been adopted in accordance with law, the applicants cannot be permitted to take him outside India.*
>
> *73. .....*
>
> *<u>Relief</u>*
>
> *74. In view of the discussion made herein-above, while discussing the aforesaid issues for determination, the application of the applicants is allowed. The applicants are appointed guardians of master Tenzin Tsering and the custody of child master Tenzin Tsering is already with them as per the order of the Hon'ble High Court of H.P. Both the applicants are required to execute bonds in the sum of Rs.2,00,000/- each to*

the satisfaction of this Court within one month from the date of passing of this order to the effect that they will take proper care, look-after, properly educate and to bring up master Tenzin Tsering along with the following undertakings:-

i. The applicants shall produce the child master Tenzin Tsering in Court whenever required.

ii. The applicants shall communicate the address of the child to Woman and Child Welfare Committee, H.P. Shimla-1 by 31st December, of every year.

iii. The applicants shall treat the mater Tenzin Tsering on equal footing with their natural and/or adopted children, if any, in all matters of maintenance and education and succession.

iv. The applicants shall not take master Tenzin Tsering to abroad without proper adoption.

v. The applicants shall take steps to adopt master Tenzin Tsering within a period of two years in accordance with law.

vi. The applicants are required to submit the report to this court in every three months for the first two years and every six months uptill his majority (in case legal adoption has not taken place), progress report of the above-named child along with his recent photographs made or verified as true and correct by the Organization which is made by the study report, regarding his moral and material progress and his adjustment in house of the applicants with other family members and send the true copy of the adoption order. A copy of the same also be sent to the Woman and Child Development Authority, H.P. Shimla-1 and also to the President, Tibetan Children's Village, Dharamshala, District Kangra, Himachal Pradesh".

10. The petitioner herein, TCV has preferred an appeal to assail the order passed by the learned Civil Judge dated 11.12.2014 which, admittedly, is pending disposal before the High Court of Himachal Pradesh, and is registered as F.A.O. No. 140/2015. The said appeal stands admitted.

11. Consequent upon the passing of the order dated 11.12.2014, it appears that the respondent no.1 addressed a communication to CARA for adoption of minor child Tenzin. To this, he received a response dated 09.03.2015, from CARA wherein it was stated that:

> "*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*."

12. The respondents, it appears, also corresponded with the respective Embassies of USA and Italy in New Delhi, since respondent no.1 is an American citizen and respondent no.2 is an Italian citizen. The Embassy of USA sent a communication on 20.02.2015 to CARA, informing that the respondents had approached the said Embassy concerning their intention to adopt:

> "**…..** *an Indian child in accordance with the Juvenile Justice Act, 2000 (JJA) or Hindu Adoption and Maintenance Act, 1955 (HAMA).*
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> *According to the laws of the United States of America, U.S. citizen who are habitually resident in a foreign country may obtain an immigrant visa for a child they have adopted outside the United States as long as the laws of the child's country of origin allows such adoption and the child is otherwise eligible.*
>
> *In order to qualify as a child under U.S. immigration law, the child must have been legally adopted while he or she was under the age of 16 and the child must have been in the legal custody of, and resided with, the adoptive parent(s) for at least two years. After completion of the two years, the parent who is a U.S. citizen may file an immigrant visa petition of the adopted child as an immediate relative (IR2, child of U.S. citizen). Article 5 letter is not a requirement in IR2 cases. Once the child has been found to have complied with the requirements for the*

immediate relative status (including the above two-year residency requirement) and statutory criteria for admissibility to the United States, a visa will be issued to the child. The moment that the child is admitted into the United States as a minor recipient of an immigrant visa, the child would become either a permanent resident or, under certain circumstances, a citizen of the United States.

In the case of disruption of the family after settling in the United States, the child would be subject to U.S. and state child protection laws to ensure the child's best interests."

13. Similarly, the Embassy of Italy sent a communication dated 26.02.2015 to CARA stating that the respondents had approached the said Embassy, and informed that they seek to take the minor child Tenzin in adoption:

"*… … … in accordance to the Para 40 of the Guidelines Governing Adoption of Children 2011, as advised by CARA.*

According to Italian laws regarding international adoption, Italian citizens who reside outside Italy for more than two years can give their application to the Tribunal of the Country in which they reside, in order to obtain a minor in adoption in accordance with the law of the child's country of origin.

According to Italian regulations, the decree of adoption issued by a foreign Tribunal, attested by the local authorities and with the Apostille issued according to the Hague Convention 1961, should be submitted to the Italian Consular Representative who will send it, for their ratification, to the Italian judicial authorities. The competent Italian administrative authorities will then register the Italian Court's ratification, thus granting Italian citizenship to the adopted child."

14. On 13.04.2015, the Embassy of Italy in New Delhi sent a communication to respondent no.2 stating that the Embassy of Italy:

"*.... will not be in a position to accept any documents or certificates issued by the Tibetan Government in Exile, in support of your request for adoption of the minor child Tenzin*

Tsering, as the Government of Italy has not officially recognized the Tibetan Government in Exile.

Therefore, the only document which would be acceptable, according to Italian laws regarding international adoption, is the adoption decree issued by the competent Indian Tribunal, duly attested by Indian authorities (Sub Divisional Magistrate and Home Secretary of the State Government), with the Apostille issued by the Ministry of External Affairs, Government of India.

The Embassy of Italy will be in position to forward the Court Decree – establishing your legal right to adopt the minor child Tsering Tenzin – to the Italian competent Court, requesting the Italian judicial authorities to ratify the sentence of the Indian Tribunal in regard to the adoption, thus allowing the Registrar of Birth of the competent Municipality Office to register the adoption decree."

15. The respondents then proceeded to prefer a petition under Section 7, read with Section 9(4) of the Hindu Adoption and Maintenance Act, 1956 (HAMA) being HAM No.04/2015, wherein respondent no.1 was shown as the petitioner and respondent no.2 was shown as the respondent. This petition was preferred before the Principal Judge, Family Courts (South East), Saket, New Delhi. The said petition was decreed on 23.05.2015 and it was ordered that respondent no.1 is appointed as the adopted father of minor child Tenzin with effect from 23.05.2015. In this background, the petitioner TCV has preferred the present petition under Article 227 of the Constitution of India to assail the judgment and decree dated 23.05.2015 passed by the Principal Judge, Family Courts (South East), Saket, New Delhi, and to seek a restraint against the respondent from removing the minor child Tenzin outside India.

16. The submission of Mr. Gopal Subramanium, learned senior counsel for the respondents, is that the minor child Tenzin is studying in the American Embassy School in New Delhi, while he is in custody of the

respondents. The U.S. Department of State has issued a travel document in respect of the said minor child on 17.07.2015. On the aspect of the citizenship of the minor child, the Embassy of USA, New Delhi has sent a communication to the respondents dated 17.07.2015 which, *inter alia*, states that the minor child has been issued an immigrant visa allowing him to immigrate to the USA. Mr. Subramanium submits that the child is stateless and lacks protection of citizenship. He, therefore, not only is deprived of the benefits of a citizenship but also faces hazards of statelessness. This communication also states that under the Child Citizenship Act of 2000 (of USA):

> *"..... a child under 18 automatically becomes a US citizen if the child is lawful permanent resident, if at least one parent is U.S. citizen by birth or naturalization, and if the child is residing in legal and physical custody of the citizen parent. Tenzin will be become a citizen automatically, by operation of this law, no naturalization procedure required, as soon as he arrives and is admitted to the U.S. as a lawful permanent resident pursuant to his immigrant visa. This will happen at the airport – Tenzin will get a stamp on his travel document showing that he is lawful permanent resident. He is then a citizen and can then immediately apply for a U.S. passport. This usually takes a few weeks, but with an emergency expedited appointment can be done more quickly, even within a few days.*
>
> *For this reason, to protect against Tenzin's statelessness and provide him with the protections of U.S. citizenship, I urge you to travel to the United States as soon as possible to take advantage of the Child Citizenship Act*."

17. Mr. Subramanium submits that under Section 9(4) of the HAMA:

> "*(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 percentage 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 guarding himself*."

18. He further submits that the welfare of the child Tenzin in the present case lies in giving the child in adoption to the respondents, considering the aforestated background of the respondents, and the findings returned by the Civil Judge, Senior Division, Shimla in his judgment dated 11.12.2014. Mr. Subramanium submits that the child receives the love and care of the respondents, and he too is emotionally attached and loves the respondents and looks upon them as his parents. Mr. Subramanium submits that the Family Court had the jurisdiction to deal with the adoption petition. In this regard, he has referred to Section 7(1)(a) of the Family Courts Act, which states *"Subject to the provision of this Act, a family court shall 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 Explanation (g) states that the suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely – *"a suit or proceedings in relation to the guardianship of the person or the custody of, or access to, any minor."*

19. Mr. Subramanium has sought to place reliance on a Division Bench judgment of the Madhya Pradesh High Court in ***Tarun Kadam & Anr. v. State of Madhya Pradesh & Anr.***, AIR 2015 MP 31, wherein the Division Bench has held that an application under Section 7 read with Section 9(4) of HAMA for adoption of an abandoned child vests with the Family Court as well. In this regard, the Division Bench placed reliance on Rule 33 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (JJ Rules for short) which, *inter alia*, provides:

> "*(5) 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*."

20. The Division Bench of the Madhya Pradesh High Court, *inter alia* held as follows:

> "*12. The intend of the legislation clearly shows that the "Family court" has the same jurisdiction which is exercisable by any District Court or any sub-ordinate Civil Courts.*
>
> *13. In Madhya Pradesh, the Family Courts are established in different districts but jurisdiction has been restricted to the municipal areas of that place in which the courts have been established; whereas the District Courts have jurisdiction to try such cases arising out of the area other than the municipal area of that district in which the Family Court is established.*
>
> *14. That being so, the dispute regarding the jurisdiction of Family Court is now very clear after the enactment of Juvenile Justice (Care and Protection of Children) Rule, 2007.*
>
> *15. ...*
>
> *16. We, therefore, find it absolutely safe to come to a definite conclusion that "Family Court" can have jurisdiction to entertain the application under Section 41 (6) of Juvenile Justice (Care & Protection of Children) Act, 2007.*"

21. Mr. Subramanium submits that the petitioner does not even have the *locus standi* to maintain the present petition, since the custody of the minor child Tenzin has been granted to the respondents. The TCV is not even recognized as an institution registered under the JJ Act and it cannot, under any circumstance, be called the legal guardian of the minor child Tenzin. At best, it is a boarding school, which has no right whatsoever to challenge the judgment and decree passed by the Principal Judge, Family Court, granting the minor child Tenzin in adoption to the respondents.

22. Mr. Subramanium submits that the petition filed by the respondents under Section 7 read with Section 9(4) of HAMA itself shows that it was registered under the said enactment and was, in fact, the fourth such case to be registered in the year 2015. Thus, the Family Court has been entertaining

petitions for adoption under Section 7 read with Section 9(4) of HAMA. Mr. Subramanium submits that the High Court of Himachal Pradesh has clarified that the said Court has not passed any order in the appeal – being FAO No.140/2015 pending before it, so as to curtail the liberty of the respondents herein to move out of the country.

23. Mr. Subramanium has also drawn the attention of the Court to the following observations made by the Supreme Court in ***Lakshmi Kant Pandey v. Union of India***, (1984) 2 SCC 244, in para 10, 11 and 22 of the said judgment:

> **"***10. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the court and is permitted by the court to take the child to his own country under the provision of the Guardians and Wards Act, 1890. Today, therefore, as the law stands, the only way in which a foreign parent can take an Indian child in adoption is by making an application to the court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents …….*
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> *11. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the*

biological parents would be the best persons to decide whether to give their child in adoption to foreign parents.

…. … ….

22. Lastly, we come to procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child."

24. Reference has also been drawn by Mr. Subramanium to the recent judgment of the Supreme Court in ***Shabnam Hashmi v. Union of India & Ors.*** (2014) 4 SCC 1, and in particular to the following extract from the said judgment:

"*5. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:*

> *"2(aa)- "adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship.*

6. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and city civil court. [Rule 33 (5)] Substantial changes were made in the other sub-sections of Section 41 of the JJ Act, 2000. The CARA, as an institution,

received statutory recognition and so did the guidelines framed by it and notified by the Central Government [Section 41 (3)]

7. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with ***rehabilitation and social re-integration****. Under Rule 33 (2) guidelines issued by the CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the concerned State. ... ...*

8. ....

9. In the light of the aforesaid developments, the petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

10. The All India Muslim Personal Law Board (hereinafter referred to as 'the Board') which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that

Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption Under Section 41(5)of the JJ Act, 2000.

11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date."

25. On the basis of the above quoted observations, Mr. Subramanium submits that the respondent No. 1 and the minor child being Buddhists- are hindus, to whom HAMA is applicable, and it was open to the respondent No. 1 to adopt the route of Section 7 read with Section 9(4) of HAMA, rather than proceeding under Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act for short). On the other hand, the submission of Mr. Jagdeep Kishore, learned counsel for the petitioner is that Section 7(1), Explanation (g) of the Family Courts Act does not deal with the aspect of adoption. It only deals with the proceeding in relation to guardianship, custody or access to the minor in the context of *inter se* disputes between the warring parents of the minor child.

26. Mr. Kishore submits that the subject of "adoption" has been dealt in Section 41(3) of the JJ Act. Sub section (3), *inter alia,* provides that in keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, or the Central Adoption Resource Agency (CARA) i.e. CARA, and modified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigation having been carried out as are required for giving such children in adoption. Mr. Kishore submits that the CARA guidelines, therefore, have received statutory recognition.

27. Rule 33 of the JJ Rules, which also deals with the subjection of "adoption", *inter alia*, provides:

> "*Rule 33(2) For all matters relating to adoption, the guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub-section (3) of section 41 of the Act, shall apply*."

28. Rule 33(3) and 33(4) set out the procedure to be followed in case of orphaned and abandoned children, which provides as follows:

"*(3) In case of orphaned and abandoned children the following procedure shall apply, namely:-*

(a) Specialized Adoption Agencies shall produce all orphaned and abandoned children who are to be declared legally free for adoption before the Committee within twenty-four hours of receiving such children, excluding the time taken for journey;

(b) a child becomes eligible for adoption when the Committee has completed its inquiry and declares the child legally free for adoption;

(c) such declaration shall be made in Form-XIV;

(d) a child must be produced before the Committee at the time of declaring such child legally free for adoption;

(e) whenever intimation is received by the police about an abandoned infant, the police shall take charge of the infant and arrange to provide immediate medical assistance and care;

(f) subsequently, the child shall be placed in a specialized adoption agency or recognized and certified children's home or in a pediatric unit of a Government hospital followed by production of the child before the Committee within twenty-four hours;

(g) procedure for declaring a child abandoned and certifying him legally free for adoption:

(i) in case of an abandoned child, the recognized agency shall within twenty four hours, report and produce the child before the Committee with the copy of the report filed with the police station in whose jurisdiction the child was found abandoned;

(ii) the Committee will institute a process of inquiry, which shall include a thorough inquiry conducted by the Probation Officer or Child Welfare Officer, as the case may be and who shall give report in Form XIII to the Committee containing the findings within one month;

(iii) there shall be a declaration by the specialized adoption agency, stating that there has been no claimant for the child even after making notification in at least one leading national newspaper and one regional language newspaper for children below two years of age and for children above two years, an

additional television or radio announcement and notification to the missing persons squad or bureau shall be made;

(iv) the steps stated in (iii) shall be taken within a period of sixty days from the time when the child is found in case of a child below two years of age and in case of children above two years of age, this period shall be four months;

(v) the period of notification shall run concurrently with the inquiry to be conducted and report submitted under clause (ii) of this sub-rule;

(vi) the Committee shall declare the child legally free for adoption on completion of the process of inquiry, including declaration of the specialized adoption agency made under clauses (ii) and (iii) of this sub-rule;

(vii) no child above seven years who can understand and express his opinion shall be declared free for adoption without his consent.

(4) In case of surrendered children the following procedure shall apply, namely:-

(a) a surrendered child is one who had been declared as such after due process of inquiry by the Committee and in order to be declared legally free for adoption, a 'surrendered' child shall be any of the following:

i) born as a consequence of non-consensual relationship;

(ii) born of an unwed mother or out of wedlock;

(iii) a child in whose case one of the biological parents is dead and the living parent is incapacitated to take care;

(iv) a child where the parents or guardians are compelled to relinquish him due to physical, emotional and social factors beyond their control;

(b) serious efforts shall be made by the Committee for counselling the parents, explaining the consequences of adoption and exploring the possibilities of parents retaining the child and if, the parents are unwilling to retain, then, such children shall be kept initially in foster care or arranged for their sponsorship;

(c) if the surrender is inevitable, a deed of surrender in Form XV shall be executed on a non-judicial stamp paper in the presence of the Committee;

(d) the adoption agencies shall wait for completion of two months reconsideration time given to the biological parent or parents after surrender;

(e) in case of a child surrendered by his biological parent or parents, the document of surrender shall be executed by the parent or parents before the Committee;

(f) after due inquiry, the Committee shall declare the surrendered child legally free for adoption in Form XIII as the case may be after a sixty days' reconsideration period as per Central Adoption Resource Agency guidelines".

29. Rule 35 sets out the criteria for selection of family for foster care, and the said rule reads as follows:

"*35. Criteria for selection of families for foster care.— (1) In case of the children covered under rule 34 of these rules, the following criteria shall apply for selection of families for foster care, namely:-*

(i) foster parents should have stable emotional adjustment within the family;

(ii) foster parents should have an income in which they are able to meet the needs of the child and are not dependent on the foster care maintenance payment;

(iii) the monthly family income shall be adequate to take care of foster children and approved by the Committee;

(iv) medical reports of all the members of the family residing in the premises should be obtained including checks on Human Immuno Deficiency Virus (HIV), Tuberculosis (TB) and Hepatitis B to determine that they are medically fit;

(v) the foster parents should have experience in child caring and the capacity to provide good child care;

(vi) the foster parents should be physically, mentally and emotionally stable;

(vii) the home should have adequate space and basic facilities;

(viii) the foster care family should be willing to follow rules laid down including regular visits to pediatrician, maintenance of child health and their records;

(ix) the family should be willing to sign an agreement and to return the child to the specialized adoption agency whenever called to do so;

(x) the foster parents should be willing to attend training or orientation programmes; and

(xi) the foster parents should be willing to take the child for regular (at least once a month in the case of infants) checkups to a pediatrician approved by the agency.

(2) There shall be no discrimination in selection of foster-parents on the basis of caste, religion, ethnic status, disability, or health status and the best interest of the child shall be paramount in deciding foster-care placement.

(3) The foster parents shall be declared 'fit persons' by the Committee before placing the child as per the provisions laid down in clause (i) of section 2 of the Act after thorough assessment done by the Child Welfare Officer or Social Worker as per Form XVI".

30. Attention has also been drawn by Mr. Kishore to the Guidelines Governing the Adoption of Children (CARA Guidelines), 2011 issued vide notification dated 24.06.2011 by the Ministry of Women and Child Development in pursuance of Section 41(3) of the JJ Act. The said guidelines define "pre-adoption foster care" to mean the stage when the custody of child is given to Prospective Adoptive Parents (PAPs) with a view to adopt. Guideline 8, *inter alia*, provides:

"*8. Priorities for Rehabilitation of a Child. – (1) The best interest of the child is served by providing him or her an opportunity to be placed with a family within his or her own socio-cultural milieu in the country itself.*

(2) Due consideration should be given to the child's upbringing and to his or her ethnic, religious, cultural and linguistic background while placing him or her in adoption but, a child can be placed with any Indian PAP (s) within the country without any geographical barrier.

(3) The citizens of a country that has ratified the Hague Convention on Inter-country Adoption, 1993 and who are also habitual residents of a country that has ratified the said Convention can adopt a child from India.

(4) Indian nationals who live in countries which are not signatories to the Hague Convention are also eligible to adopt.

(5) Preference shall be given for placing a child in in-country adoption and the ration of in-country adoption to inter-country adoption shall be 80:20 of total adoption processed annually by a RIPA, excluding special needs children.

(6) The following order of priority shall be followed in case of inter-country adoptions;

(i) Non Resident Indian (NRI);
(ii) Overseas Citizen of India (OCI);
(iii) Persons of Indian Origin (PIO);
(iv) Foreign Nationals."

31. Guideline 26 of these guidelines prescribes the procedure for inter-country adoption as per the Hague Convention on inter-country adoption. Guideline 28 prescribes that a home study shall be conducted by a professional school worker of the Authorized Foreign Adoption Agency (AFAA), or Central Authority of Government Department dealing with adoption matters in the country of the habitual residence of the PAPs and shall prepare a Home Study Report (HSR) with documents as specified in Schedule VI of the said guidelines. The manner in which the said HSR shall be prepared and authenticated is also prescribed by guideline 8.

32. Notice may also be taken to guideline 29 which deals with the identification of the Recognized Indian Placement Agency (RIPA) by

CARA. Guideline 39 lays down the procedure for making the recommendation for inter-country adoption by Adoption Recommendation Committee. Guideline 34 deals with the aspect of filing of the petition in the competent court. It, *inter alia*, provides that within five days of receipt of NOC from CARA, the RIPA shall proceed to obtain a court order for inter-country adoption of child from the competent court in India. The RIPA cannot file an application at the competent court for adoption "without NOC from CARA". It further provides that inter-country adoption of orphaned, abandoned, surrendered child shall proceed under the Act, namely, the JJ Act.

33. Mr. Kishore submits that the said guidelines have been completely overlooked by the learned Principal Judge, Family Court while passing the judgment and decree in questing granting the minor child Tenzin in adoption to the respondents.

34. In his rejoinder, Mr. Subramanium, on instructions, has submitted that the respondents do not intend to disturb the schooling of the minor child Tenzin, which is in progress at the American Embassy School at New Delhi since he is well settled in the said school and performing well. He submits that the respondents are willing to give an undertaking to this Court that they shall bring back the minor child Tenzin after a brief visit to the USA to show him around, and with a view to end his stateless character. He submits that the respondents are willing to be subjected to whatever terms this Court may deem appropriate to ensure that the minor child Tenzin is brought back within the jurisdiction of this Court till the final disposal of the appeal pending before the High Court of Himachal Pradesh, and the present petition.

35. Firstly, I do not find merit in the submission of Mr. Subramanium that the petitioner does not have the locus standi to prefer the present petition. This is for the reason that the petitioner was a party to the proceedings initiated by the respondent themselves under section 7, 8, 9, 10 and 11 of the Guardians and Wards Act, 1890 in the Court of the Civil Judge, Senior Division, Shimla, wherein the respondents have been appointed as the guardian of the minor child Tenzin vide order dated 11.12.2004. The TCV has, admittedly, preferred an appeal against the said order, which is pending consideration before the High Court of Himachal Pradesh in FAO No.140/2015. The impugned judgment and decree passed by the learned Principal Judge, Family Court is premised on Section 9(4) of HAMA – a pre-requisite whereof is that 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. Since the issue of guardianship itself is not finally concluded in favour of the respondents, as the aforesaid appeal is pending before the High Court of Himachal Pradesh, the impugned judgment and decree passed by the learned Principal Judge, Family Court is, obviously, conditional upon the order dated 11.12.2014 passed by the learned Civil Judge, Senior Division, Shimla attaining finality.

36. The petitioner, TCV is interested in, and is affected by the passing of the impugned judgment and decree by the learned Principal Judge, Family Court, since the impugned judgment and decree grants the minor child Tenzin in adoption to the respondents. In fact, the passing of the impugned judgment and decree, if sustained, would render the appeal preferred by the TCV before the High Court of Himachal Pradesh infructuous.

37. No doubt, the respondents appear to have acted bonafide by first approaching the CARA – in response to which the CARA sent a reply dated 09.03.2015, as extracted above. The respondents were granted conditional

custody of the minor child Tenzin by the learned Civil Judge, Senior Division, Shimla – one of the conditions being that the respondents (the applicants) shall not take the minor child Tenzin abroad without proper adoption. In para 72 of the said order, it was observed that the applicants, i.e. the respondents herein are required to take the minor child in adoption as per CARA guidelines, and the adoption law prevalent in USA. It was also observed that unless and until the minor child has not been adopted in accordance with law, the applicants cannot be permitted to take him outside India.

38. The communication dated 09.03.2015 issued by the Deputy Director, CARA, *prima facie*, appears to be in complete ignorance of the CARA guidelines. Even Mr. Subramanium has candidly submitted that there is no such thing as Tibetan Government in Exile, which the respondents could have approached for taking the minor child Tenzin in adoption. Pertinently, the Embassy of Italy in its communication dated 13.04.2015 also made its position clear that they would not accept any document, or certificates issued by the Tibetan Government in Exile, in support of the respondents request for adoption of the minor child Tenzin.

39. Prima facie, it appears to me that merely because the CARA had sent the response dated 09.03.2015, the respondents could not have bypassed the procedure prescribed for adoption under Section 41 of the JJ Act read with Rule 33 of the JJ Rules. Even if the submission of Mr. Kishore, that the Family Court did not have jurisdiction to deal with the adoption petition were to be accepted – in the light of the judgment in ***Tarun Kadam*** (supra), *prima facie*, this Court is of the view that the learned Principle Judge, Family Court, Saket could not have granted permission for adoption of the minor child-in-question, without being satisfied that the adoption will be for the welfare of the child, and such satisfaction could not have been arrived at

without complying with the procedure prescribed by the CARA guidelines notified vide notification dated 24.06.2011 vide S.O. 1460(E).

40. A perusal of the impugned order shows that the learned Principal Judge, Family Court has not undertaken any exercise, much less by following the CARA guidelines, to arrive at the satisfaction that the adoption by the respondents of the minor child will be for the welfare of the child. Interestingly, it appears that apart from preparation of the formal decree sheet granting the minor child in adoption to the respondent no.1, there is no judgment or order passed by the learned Principal Judge, Family Court showing the application of mind by him to the relevant considerations.

41. To permit the respondents to take the child to USA, at this stage – when the respondents have been appointed as guardians of the minor child would, in terms of the letter dated 17.07.2015, would have the effect of vesting the said minor child with American citizenship upon his entry into the USA. Once granted American citizenship, it would be very difficult, well-nigh impossible, for this Court to require the respondents to bring back the child, who would then be an American citizen, into this country. In fact, if the same is permitted, it would lead to not only the present petition, but even the petitioner's appeal pending before the High Court of Himachal Pradesh being met with *fait accompli*.

42. From the submissions of Mr. Subramanium, as well as the observations made by the learned Civil Judge, Senior Division, Shimla in his order, it, *prima facie*, appears that the adoption of minor child Tenzin by the respondents would be in the welfare of minor child Tenzin. However, the compliance of the CARA guidelines, before the said minor child is given in adoption, is *prima facie* mandatory, and cannot be bypassed. I am, therefore, not inclined to allow this application and the same is, accordingly, dismissed.

43. It is made clear that the observations made by me in this order shall not cause any prejudice to either party at the final determination of the petition, as the said observations have been made only on a *prima facie* view of the matter, and without going deep into the merits of the case and the submissions of the learned counsels. Dasti.

(VIPIN SANGHI)
JUDGE

AUGUST 26, 2015
sr/***B.S. Rohella***