

10-FEBRUARY-2012

From Our Website
www.hariani.co.in

■ THE UNRESOLVED
CONTROVERSY IN
INDIAN CORPORATE
LAW, "RIGHT OF
FIRST REFUSAL"

Your View

Please feel free to
comment on this
newsletter. You can
send us an email at
editor@hariani.co.in

ADOPTION - NURTURING THE NEGLECTED

Introduction:

Recent judicial pronouncements permitting adoption of a second child, who is of the same gender as that of the first child (whether biological or adopted), have not only opened up new avenues for couples desirous of adopting children in India but also given a new dimension to adoption laws prevailing in India.

There is no uniformity as far as adoption laws in India are concerned. In case of Hindus, adoption is governed by a personal law i.e. the Hindu Adoption and Maintenance Act, 1956 ("**HAMA**"), which confers upon the adopted Hindu child the status of a biological child, who also has a right to inherit from his/ her adoptive parents. The personal law in case of non-Hindus such as Muslims, Parsis and Christians does not recognise adoption; persons belonging to such communities can take a child in "guardianship" (1) under the provisions of the Guardian and Wards Act, 1890. The relationship of a "guardian" and "ward" comes to an end once the ward ceases to be a minor. Under the Guardians and Wards Act, 1890 a biological status is not conferred on the child taken in as a 'ward'. Such a child has no legal right of inheritance. Adoptive parents have to bequeath property to their children through a will, which can be contested by any blood relative.

Due to the rigidities and restrictions in personal law governing adoption, the Parliament enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 ("**JJA**"), a legislation that is secular in nature and applicable to all citizens of India. JJA is a special enactment that makes provisions for juveniles in conflict with law and provides for rehabilitation and social reintegration of orphaned, abandoned or surrendered children. Chapter IV of JJA deals with rehabilitation and social reintegration. Adoption is a technique recognised by JJA to achieve the object of rehabilitation and social reintegration of children that are in need of care and protection (2).

Further, India has also ratified the United Nations' Convention on the Rights of the Child on 11th December, 1992. Article 3 of the Convention provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. All States have undertaken to ensure to children such protection and care as is necessary for their well being and to take all appropriate legislative and administrative

measures. Article 20 of the Convention provides that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State. Such care could include foster placement and adoption amongst other alternatives. Under Article 21 States who are parties to the Convention recognized that the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.

Restrictions on "same gender adoption" set aside by Courts:

Section 11 of HAMA prohibits the adoption of a child of the same gender where the adoptive father or mother already has a child living at the time of adoption. If the adoption is of a daughter, the adoptive father or mother must not have a Hindu daughter or a son's daughter living at the time of adoption. Where the adoption is of a son, the adoptive father or mother should not have a Hindu son, grandson or great grandson living at the time of adoption. On the other hand, there is no embargo under JJA as far as adoption of a second child of the same gender as the living first child is concerned.

In a landmark judgment passed by Hon'ble Justice D.Y Chandrachud in the Indian Adoption Petition No. 31 of 2009 (3) filed by a Hindu couple before the Hon'ble Bombay High Court, it was held that the provisions of HAMA and JJA must be harmoniously construed. The Petitioners in this case professed Hindu religion and have a biological daughter. The Indian Adoption Petition No. 31 of 2009 was filed by the Petitioners for the adoption of a minor child of the same sex under the provisions of JJA. The child proposed to be adopted in this case was taken as a 'ward' by the Petitioners under the Guardians and Wards Act, 1890 four years ago before filing the Indian Adoption Petition No. 31 of 2009. It was held in this case that where a child is sought to be adopted falls within the description of an "orphaned, abandoned or surrendered child" or "a child in need of care and protection" as provided under the provisions of JJA, the restriction imposed by Section 11 of HAMA does not bar a Hindu already having a biological child from adopting a child of the same gender. Thus, in general Hindus cannot adopt a child of the same gender as an existing child, but there is a special rule in the case of abandoned, surrendered or orphaned children.

It was further held by Hon'ble Justice D.Y Chandrachud that JJA is a special enactment dealing with children in conflict with law and children in need of care and protection. While enacting JJA the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. The focus of the legislation is on the condition of the child taken in adoption. If the child is orphaned, abandoned or surrendered, that condition is what triggers the beneficial provisions for adoption. JJA seeks to ensure social integration of such children and adoption is one method to achieve that object. The religious identity of the child or of the parents who adopt is not a precondition to the applicability of JJA. The law is secular and deals with conditions of social destitution which cut across religious identities.

Recently, a Judges Order No. 2 of 2012 dated 13 January 2012 was passed in the Foreign Adoption Petition No. 1 of 2012 filed in the Hon'ble Bombay High Court by the Indian Association for Promotion of Adoption & Child Welfare ("**Petitioners**") and (1) Christopher Drury (2) Shenaz Drury ("**Proposed Adopters**") wherein it was held by Hon'ble Justice D.G Kamik that adoption of a second child who is of the same sex as the living first child (biological or adopted) is permitted under JJA. The Petitioner in this case is an Indian Placement Agency recognised by C.A.R.A(4) that applied to the Hon'ble Bombay High Court for permission to give a female minor in adoption to the Proposed Adopters, who have already adopted one female child in the year 2008 from India. The female child proposed to be adopted was diagnosed with a medical

abnormality, however, the Proposed Adopters still wished to adopt her with full knowledge of the abnormality. This judgment delivered by Hon'ble Justice D.G Karnik brightens the prospects of those children who are abandoned or surrendered by their biological parents and are in need of a home.

Section 41(6)(b) of JJA permits parents to adopt a child of the same sex irrespective of the number of living biological sons or daughters. It was interpreted by Hon'ble Justice D.G Karnik that although there is no express provision under JJA to permit parents to adopt a child of the same sex irrespective of the number of living adoptive sons or daughters; Section 41(6) (b) of JJA is permissive and not restrictive and that no other Section of JJA prevents adoption of a child where the adoptive parents have another living adopted child of the same sex.

The judgments delivered in the aforementioned cases have a progressive outlook and shall brighten the prospects of children (especially the girl child) that are abandoned and surrendered upon birth by their biological parents. It has been rightly observed by Hon'ble Justice D.Y Chandrachud, "*Adoption is a facet of right to life and the freedom and dignity of the young must count above all.*"

By - Shaili Muzoomdar & Aishani Nayak

Editor: Mirat Patel

[\(1\)](#) Under the Guardianship and Wards Act, 1890, the term 'Guardian' means a person having the care of the person of a minor or of his property or of both his person and property; the term 'Ward' means a minor for whose person or property or both there is a guardian.

[\(2\)](#) The term "child in need of care and protection" is defined under Section 2(d) of JJA. Clause (v) of Section 2(d) of JJA includes within this category a child who does not have a parent and whom no one is willing to take care of or whose parents have abandoned or surrendered the child.

[\(3\)](#) Indian Adoption Petition No. 31 of 2009 was filed by Vinay Pathak and Sonika Pathak before the Hon'ble Bombay High Court.

[\(4\)](#) Central Adoption Resource Authority (C.A.R.A) is an autonomous body under the Ministry of Women & Child Development, Government of India.

DISCLAIMER :

This new sletter is for informational purposes only, and not intended to be an advertisement or solicitation. This new sletter is not a substitute for professional advice. Hariani & Co. disclaim also responsibility and accept no liability for consequences of any person acting or refraining from acting on the basis of any information contained herein.

Copyright © : Hariani & Co. All rights reserved. Any form of reproduction, dissemination, copying, replication or modification of this new sletter and its contents is strictly prohibited.