

Adoption

Introduction

According to Hindu mythology, through a son one conquers the world, through a grandson one obtains the immortality, and through the great-grandson one ascends to the highest heaven. The desire to have a son among the Hindus is too much. It has been prevalent since Vedic period,' Those parents who had no son used to adopt a son. But the son could be adopted by the husband only as he was to inherit his father's property. Later on the widow had a right, under certain situations, to adopt a son, which was always deemed to be adoption to her deceased husband. This was known as 'doctrine of relation back'. Necessary implications were that the adoption of the son related back to the date of death of the husband. It created number of problems. Now the law of adoptions has been simplified after the commencement of the Hindu Adoptions and Maintenance Act, 1956.

The codified law has brought about several changes in the old law pertaining to adoptions among Hindus. The Act provides for adoption of boys as well as of girls. The unmarried woman can also adopt for herself A widow too has been extended the right to adopt in her own capacity a son or a daughter.

The main advantage of adoption is that a childless person can make somebody else's child as his own. It is not just to have a son but the adopted son must bear a reflection of the natural son. In fact, adoption means transplantation of the child from the family of his birth to the adoptive family. The adoptive child severs his ties from the family of his birth and becomes a regular member of the family in which the child has been adopted.

Once the child is adopted, he can neither be given further in adoption nor can be reverted back to the family of his birth. The child is also prohibited to divorce his adoptive parents.

Capacity of a male Hindu to take in adoption:

Any male Hindu who is of sound mind and is not a minor (has completed the age of 18 years) has the capacity to take a son or a daughter in adoption. Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Where a decree of judicial separation has been passed between husband and wife, the consent of the wife would be necessary for the husband to adopt a child, because the decree of judicial separation did not bring the marriage to an end. In case of void marriage no consent of the wife is needed as she is not a lawlilly

wedded wife and as such does not enjoy any legal status and rights. The consent can be implied or express. When the wife has participated in the ceremony of adoption without any objection then her consent shall be implied.

Capacity of a female Hindu to take in adoption:

Any female Hindu, (a) who is of sound mind, (b) who is not a minor, and (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead / or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or a daughter in adoption. Smt. Laliha Ubhayakar v. Union of India, deals with the rights of a married woman to adopt a child. She challenged the vires of section 8 of the Act as it violates her right to equality under Art. 14 of the constitution of India. According to her section 8 of the Act permits the unmarried, divorcee and a widow to adopt a child for her whereas it does not permit the married lady to adopt. Thus she has been discriminated. The Court while rejecting her plea, made a distinction between adoption by individuals and adoption by family and held that the classification was justified and reasonable. Thus, within the permissible limits of Art. 14 of the Constitution. The Court observed that under section 7 the husband also needs consent of his wife before adopting a child. Therefore, the adoption made by the married

spouses is adoption to the family and not to individual spouses. The law is made in such a way that permitting the wife to adopt separately without consent of husband or vice-versa does not destroy the harmony of the family. Who can give the child in adoption? No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption. If the father is alive, unless he is disqualified, he alone shall have the right to give the child in adoption but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. The guardian can give the child in adoption when 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.

Persons who may be adopted:

No person shall be capable of being taken into adoption unless, (i) he or she is a Hindu; (ii) he or she has not already been adopted; (iii) he or she has not been married unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption; (iv) he or she has not completed the age of fifteen years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption. It is clear from the forgoing provisions mentioned at (iii) and (iv) that these conditions are not absolute prohibitions. These conditions can be relaxed if it is established that there is a custom or usage governing the parties to adopt a married child or a child who is more than 15 years of age.

Other essential conditions for valid adoption:

a) If the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

b) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

According to clauses (a) and (b) above a person has a right to adopt 'a son' and/or 'a daughter', meaning thereby that one cannot adopt more than one daughter and/or one son.

In *Sandhya Supriya Kulkarni v. Union of India*,¹⁴ an important issue was taken up. In the instant case it was demanded that the family should be allowed to adopt more than one female child. It was contended that under Ancient Hindu Law, the parents had a right to adopt only one male child. The Amending Act extended that right to adoption of a female child also.¹⁵ What is the harm if the condition of adoption of only one child is relaxed particularly in case of adoption of abandoned children who are with orphanage or social institution? It is further contended, that if restriction is removed, such children will get parentage and home in adequate numbers. There is no risk involved in such adoptions as such adoptions are made under the supervision of the Court. This minimizes the probability of abuse or misuse. The Court refused to go into the merit of the contentions except observing, "we appreciate the urge and earnest desire in the appeal, but it revolves round the domain of legislative policy and its competence." The Court further observed that the persons who are keen to serve the

interests of child can have guardianship of a child under the Guardian and Wards Act without there being any restrictions on number.

The Court when requested to examine its constitutionality did not agree to it and observed that the Act with its mythological and secular mission has stood the test of time for around four decades and has conveniently withstood the assaults as attempted from time to time. Thus, it refrained from examining validity of the impugned provisions on the touchstone of Articles 14 and 21 of the Constitution of India.

c) In case of adoption of opposite sex, there must be age difference of 21 years. The adoptive father or mother must be elder by 21 years.

d) The same child may not be adopted simultaneously by two or more persons;

e) The child to be adopted must be actually "given and taken" in adoption by the parents or guardian concerned or under their authority "with intent to transfer the child" from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.

In *Khagembam Sadhu alias Rabei Singh v. Khagembam Ibohal Singh* the Imhal Bench of the Gauhati High Court had the occasion to examine the proof of adoption. In the present case it was established that the 'giving and taking' of adoption was performed at the house of adoptive father and that on same day ceremony of sacred thread and afternoon meals to clan members were also performed according to Manipur custom. The statement of the natural mother of adopted son, that adoptive father asked her to give her son in adoption and that she consented to said proposal, was accepted by the Court.

In *Doctor Nahak v. Bhika Nahali* the validity of the adoption was challenged. In this case the natural father pleaded that he had given his son in adoption whereas the person who was alleged to have taken the child in adoption denied it. The Orissa High Court held that normally, evidence of natural father who is to give is of great importance. Where, however, the person who is stated to have taken in adoption denies the adoption, clear evidence of giving and taking is necessary to be adduced to corroborate the natural father and clear circumstances which would lead to an inference that denial by the person to have taken in adoption is not correct, are to be brought to record. In this case, natural mother who is alive has not been examined. Trial Court has found that person who is related to both parties has not been examined. Explanation that he was suffering from gout was not accepted to be cogent since he could have been examined in Commission. Priest who was examined did not know the basic requirement of a Brahmin; other witnesses were also disbelieved for cogent

evidence. Trial Court who had occasion to see the witnesses and assess their demeanor has disbelieved them for cogent reasons. Thus the High Court was also satisfied that the witnesses are not acceptable; therefore, no 'giving and taking' has taken place. Where the 'adoptive' mother had been permitted by the adoptive son to live with him it was not considered to be sufficient proof of adoption.

In *Prafulla Bala Mukherjee v. Satish Chandra Mukherjee* the 'adoptive' mother sought a decree for declaration of absolute right, title and interest in respect of the property built by the adopted son and also a decree for perpetual injunction restraining his relatives from interfering with occupation and possession of the property. The Court held that mere fact that an allegedly adopted son allowed his 'adoptive' mother and her family to live in his house was no proof of adoption. On the contrary there were several facts to disprove adoption like the adopted son considering his natural mother as his mother till his own death, making her his nominee in the insurance policy, provident fund etc., performing the shradha ceremony of the real father and on his own death his shradha ceremony being performed by his brother.

I A child can be either adopted by the adoptive mother herself or by any person authorised by her through special power of attorney. All the formalities of giving and taking were performed between the natural parents of the child and the adoptive mother's \ attorney. The Punjab and Haryana High Court held it to be a valid adoption.

Registered deeds of adoption if produced in a Court:

Section 16 of the Act, lays down that whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.' In this connection it is earnestly desire that the registration should be made compulsory in every adoption. Thus without registered deed the adoption should be treated invalid. It will reduce litigation as well as check fake adoption claims.

The Effect of adoption:

According to section 12 of the Act, an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family; provided (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth; (b) any property which vested in the adopted child

before the adoption shall continue to vest in such person subject to the obligation to maintain relatives in the family of his or her birth; (c) the adopted child shall not divest any person of any estate which is vested in him or her before the adoption.

a) Coparcenary property rights of the child in the family of birth:

There appears to be some controversy about the property rights of the adopted child in the family of his birth, especially in the case of coparcenary[^] property. There is difference of opinion among different writers as well as judicial approach adopted by different High Courts. The sole question for determination is whether the share of a coparcener in the Joint Hindu Family property governed by Mitakshara Law will 'vest' in that child or not. If it vests in him then he has lien on that property even after adoption otherwise the result will be different. According to one learned author['] the undivided interest of a person in a Mitakshara coparcenary property will not be divested by adoption but will continue to vest in him even after adoption. Not only the self acquired property, property inherited by him from other persons and property held as a sole surviving coparcener in a Mitakshara property, but also even the undivided interest of a male child in Mitakshara coparcenary would pass with him as if he had separated from the coparcenary. Such a view is expressed in Mayne's, 'Hindu Law and Usage' also. On the contrary Mulla^{^®} opines that the proviso (b) relates only to such property, which was absolutely 'vested' in the adopted son prior to his adoption and not his undetermined and fluctuating interest as a coparcener in his natural family.

The Andhra Pradesh High Court in *Yarlagadda Nayudamma v. Government of Andhra Pradesh*, has held, "notwithstanding the adoption, a person in Mitakshara family has got a vested right even in the undivided property of his natural family which on adoption he continues to have a right over it do so. But there is an exception to this rule. When anyone adopts a child, the parents who have given their child in adoption can enter into an agreement contrary to such a right so as to restrict the adoptive parent's right to dispose of their property. Such an agreement will be valid as per the provisions of section 13 of the Act.

Can money be paid in consideration of adoption?

There is complete prohibition on any kind of payment to be made in consideration of adoption. It is not sale of the child rather the child is given in adoption out of love and affection. Giving or taking of money in consideration of adoption has been completely prohibited. Any one who contravenes this provision shall be punishable with imprisonment,

which may extend to six months, or with fine or with both. The prosecution, under the Act. can be instituted only with the prior permission of the State government.

Case Laws:

Ankush Narayan v. Janabai

Court held that on adoption by a widow, the adopted son becomes the son of the deceased adoptive father and the position under the old Hindu law as regards ties in the adoptive family is not changed.

Guradas v. Rasaranjan

Adoption is made when the actual giving and taking had taken place and not when the religious ceremony is performed like Datta Homam. For a valid adoption, it would be necessary to bring on records that there has been an actual giving and taking ceremony.

Conclusion:

Person adopting has to carry it according to law, in order to avoid any complications. The limitations and important provisions are discussed in detail under the Act.