

# Law of Adoption

## INTRODUCTION

The concept of sonship is very important for Hindus because they consider it necessary that their son should be in existence as *putre* (liberator from hell) and also to keep the lineal order intact. In order to ensure the existence of a son, they go for adoption of a male from a different family, endow it with the status of a real son. The doctrine of adoption is having religious, as well as, social sanction behind it. In this lesson we will try to understand its legal position and need to keep this institution going. It will also be analyzed as to, who can be adopted? What are the conditions for valid adoption and what are the rights and obligations of an adopted son or daughter, etc.

The doctrine of adoption has essentially a religious background, which has been in existence from the time Immemorial. According to Manu, a great Hindu Guru, the adoption is important for every Hindu and has prescribed the manner of following it as under:

He whom his father and mother give to another as his son, provided that the donee has no issue, if the boy was of the same class and affectionately disposed is considered as a son given, the gift being confirmed by pouring water.

Similarly, another authority on ancient Hindu religion, *Vasistha* declares: But let no man give or accept an only son, since he must remain to rise up a progeny for the obsequies (*funeral service*) of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord (*husband*). He who means to adopt a son must assemble his kinsmen, give humble notice to the king, and then having made an oblation (*solemn offering*) to fire with words from the Veda, in the midst of his dwelling house, he may receive as his son by adoption boy nearly allied to him or even one remotely allied.

Thus, adoption is the gift of a son by a family to another family, as a substitute for failure of male issue in that family which is having religious sanctity behind it and sustains the philosophy of reincarnation amongst the Hindus. According to Mulla, a great jurist, adoption can be described as under: Adoption is the admission of a stranger by birth to the privileges of a child by a legally recognised form of affiliation. The adopted son is then taken as being born in new family and he acquires rights, duties and status in the new family and his ties with the old family become severed.

### **OBJECT OF ADOPTION**

Adoption has both religious characteristics. There were twelve kinds of sons recognised under the Classical Hindu laws of which five were those of adopted sons. The modern Hindu law recognized the *aurasa* or legitimate son begotten by him on the lawfully wedded wife. Of the adopted sons it recognised only two kinds, the *dattaka* and the *kritrima*. The *dattaka* form prevailed all over India; the *kritrima* form prevailed in Mithila and adjoining districts. Like the ancient law the Adoption and Maintenance Act, also recognizes the adoption both of son and a daughter.

#### **Adoption under the Act**

The Adoption and Maintenance Act, 1956 is primary statute governing the law of adoption and contains a bundle of rules relating to Of a valid capacity and right of a male and female Hindu to take in adoption a son or daughter who must be a 'Hindu', an expression to be understood in the light of the comprehensive meaning given to it in the Act. It also deals with the subjects of persons who may give in adoption and persons who may be taken in adoption. It also provides for certain forms of ceremonies to be followed for the sake adoption. Section 5 of the Act makes it clear that after the commencement of this Act, no adoption can be permitted without following the provisions of this Act and any adoption made hereafter shall be null and void, in case it contravenes any provisions of the Act. An adoption which is void does not affect the status or rights of any of the parties. It creates no rights in favour of the adoptee boy or girl in the adoptive family. Nor does the adoptee lose any rights in the family of his or her birth. Adoptions made prior to the coming into force of the Act on 21<sup>st</sup> December 1956 are not

affected by the rules relating to the validity and effect of adoptions contained in this Act. Their validity and effect must be determined by the law as it stood before the Act came in force.

**Valid Adoption**—Requirements of Capacity to take in adoption *the requirements of valid adoption under the Act are:*

### **Person competent to give in adoption**

- 1) The person adopting must have the right to take and *Actual giving with full intention*. Be lawfully capable of taking a son or daughter in adoption under section 7 and 8 of the Act;
- (2) The person giving in adoption must be lawfully capable of being taken in adoption under section of the Act;
- (3) The person adopted must be lawfully capable of being taken in adoption under section 10 of the Act;
- (4) The conditions relating to adoption including actual giving and taking of the child with the intention of transferring the child from the family of its birth must be complied with in terms of section 11 of the

Prior to the enactment of the Hindu Adoption and Maintenance Act in 1956 only a son could be adopted. Adoption of a female was not permissible except under custom which had to be established. Even if the name of the alleged adoptive father is given as the father of the girl in the school certificate or other documents that would not establish that there was a legal adoption unless a custom permitting adoption of a female child is pleaded and proved. This was a case (*Lalitha v. Parameshwari*<sup>1</sup>) where adoption of a female child was alleged to have taken place in 1946 i.e., prior to the Act

### **CAPACITY TO TAKE IN ADOPTION**

Section 7 of the Act provides ---

Any male Hindu who is of sound mind and is not a minor 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

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<sup>1</sup> 2001 Mad 363

ceased to be a Hindu or has been declared by a court of competent jurisdiction to be unsound mind.

Explanation:-

If a person has more than one living wife at the time of adoption, the consent of all the wives is necessary, unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso. Under section 7 of the Act, a married male Hindu has to take his wife's consent for adopting a child and in case of more than one wife the consent of all the wives is required unless the consent of the wife/wives is not necessary under the provisions of the Act. There is however no rider on a widow's right to take in adoption without consulting her co-widows. This issue came up for determination in *Vijayalakshamma v. B.T.Shankar*<sup>2</sup> where a senior widow took a male child in adoption without consulting the junior widow. The adoption was challenged as being invalid. It was contended that the stipulation in the proviso to section 7 with the explanation requiring consent of all wives should be read into section 8 as well which refers to the capacity of a female Hindu to take in adoption. The court, however, did not accept this plea and held that the deliberate omission as regards requirement of consent from a co or junior widow was an indication of Parliament's intention to give independent authority to a female in this matter. This is in keeping with the changing social set recognizing equal rights and status for women. The apex court observed:

To subject the exercise of power by senior widow to adopt conditioned upon the consent of the junior widow where the Hindu male died leaving behind two widows with no progeny of his own, would render the exercise of power more cumbersome and paradoxical, leaving at times, such exercise of power to adopt only next to impossibility.

That apart, the court held that in any case no injustice would be caused to a co-widow whose consent is not obtained nor required to be obtained by the law since the adopted child would not divest any person of any estate vested in him or her before adoption. In this case, the husband had died in 1968 so under the provisions of Hindu Succession Act, all the widows inherited the properties in equal share. The adoption by one widow did not affect the share of the other widow. The court in this case referred to *Nariana Swami Naick v. Mangamal* decided

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<sup>2</sup> (AIR 2001 SC 1424)

by a division bench of the Madras High Court way back in 1905 where it was held that while for family peace and good relationship a senior widow should do well to consult the younger one before adopting but there is nothing in law which compels her to do so and the adoption would be valid.

### **Factum of adoption**

The Adoption and Maintenance Act does not provide for elaborate formalities for adoption still some fact has *to be shown*. The apex Court in a case captioned, *Ram D v. Gandhiabai*<sup>3</sup> where a significant point regarding the factum of marriage was involved. The petitioner filed the suit for partition against his deceased father's brother who alleged that the petitioner had no right as he was no longer a member of the family because he had been given away in adoption to a man whom his mother later married. The court held that simply because the step-father spent money on his maintenance does not by itself imply that he had been adopted by the step-father. It was accordingly held that even though he was brought up by the step father he continued to be the member of the deceased father's family and had all the rights of a son of that family.

### **CAPACITY TO GIVE IN ADOPTION**

Section 9 of the Act specifies the persons who are legally entitled to give a son or a daughter in adoption does not make any substantial changes in the law previously applicable to Hindus except that under the previous law the only persons could lawfully give a son in adoption were his father and mother. The present section principally confines the capacity to give a son or daughter in adoption to the father and the mother of the child but it also rules that where both the father and mother of the child are dead or disabled from exercising the right by reason of mental incapacity or renunciation of the world, etc. the guardian of the child can give the child in adoption with the previous permission of the court. When both the parents are dead, or have renounced the world or have abandoned the child or have declared by a court to be of unsound mind or where the parents of the child are not known, the guardian has the right to give the child in adoption. But he will do so only with the permission of the court. The court shall while according such permission satisfy itself that—

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<sup>3</sup> (AIR1997)

- (i) Welfare of the child, both physical and moral is safeguarded. It shall scrutinize the where withal of the guardian, his qualification to adopt a child etc.
- (ii) Wishes of the child may also be obtained in case the ward is intelligent enough to give such consent.
- (iii) The guardian is not doing it for the sake of some monetary consideration the applicant has not been offered money by somebody else to take in adoption.

In case of any violation committed by guardian under conditions stipulated in section 9 of the Act, he can be punished under section 17 of the Act. It may be noted that any agreement to give consideration for giving a son or daughter in adoption contrary to public policy as amounting to trafficking in children. The parliament has taken a serious view of the matter and prohibits in this section the giving and receiving of any payment or reward by any person in consideration of adoption of any person.

### **CAPACITY OF THE PERSON TO BE ADOPTED**

Section 10 of the Act specifies the persons who are eligible under the Act to be adopted. The section reads:

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:-

- 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.

The present section lays down some simple rules of uniform applicability to all Hindus, the expression Hindus being understood in the wide connotation given to it by section 2. Under the previous law it was necessary that the person to be adopted had to belong to the same caste as his adoptive father; thus a Brahmin could not adopt a Kshatriya, a Vaishya or a Sudra. No

such restrictions are imposing by the Act and the limitations pertaining to the caste of the child to be adopted are abolished. All that is now required is that the boy or girl to be adopted must be a Hindu whether a Hindu, which expression has to be understood in the very wide connotation given to it by section 2. It is, therefore, permissible now to a Hindu whether by religion and belonging to any caste, or Jain, or a Buddhist or a Sikh to take in adoption a boy or a girl who is a 'Hindu' in that expansive sense and regardless of the caste of the boy or the girl.

### **Proof of adoption whether implied**

The Calcutta High Court had to deal with a peculiar *case of adoption* where the adoptive mother sought decree for declaration of absolute right in the property of her adoptive son who merely her live therein .The court in this case, namely *Prafulla Bala Mukerjee v. Satish Chandra Mukerjee* <sup>4</sup> held that the 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 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. Similarly in *Suma Bewa v. Kunja Bihar Nayak*<sup>5</sup>, the plea of adoption was rejected as there was no proof of adoption whatsoever under section 6 of the Act. There was no document executed by the parties in support of the alleged adoption, nor any other document recording name of adopted son as son of adoptive father. On the other hand the voter's list indicated the name of the natural father. Besides oral evidence was found to be suspicious. Even there was no proof of the adoptive father and adopted son living together. Under such circumstances the only inference can be drawn that there existed no valid adoption.

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<sup>4</sup> (AIR 1998 Cal 86)

<sup>5</sup> (AIR 1998 Ori 29)

## CONDITIONS FOR A VALID ADOPTION

Section 11 of the Act is very significant section as it regulates the institution of adoption according to law, equity and justice. Section 11 reads: In every adoption, the following conditions must be complied with: -

(1) 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;

(2) 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;

(3) If the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(4) If the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

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

(6) 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 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: Provided that the performance of *datta homam* shall not be essential to the validity of adoption.

As noted above, the objects of adoption of a son by a Hindu are twofold. The first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and oblations of water to the names of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name. Hindu law at one time recognized twelve kinds of sons of which there were five kinds of adopted sons.

## EFFECTS OF ADOPTION

According to section 12 of the Act the adoption has certain vital effects and results which may be briefly enumerated as follows:

1. Transferring of the adopted boy or girl from his or her natural family into the adoptive family;
2. Conferment of same rights on the adoptee as enjoyed by the natural born child in the said family;
3. The adoptee deemed to have born in the adoptive family and all his ties with his original family deemed to cease;
4. Any property which vested in the adopted child before the adoption shall continue to remain in such person subject to the obligation, if any, attaching to the ownership of such property, including the obligations to maintain relation in the family of his or her birth.
5. The adopted child shall not divest any person of any estate, which vested in him or her before the adoption.

Perceived as a religious and spiritual act under the classical law and post-1956, an extremely important facility for the childless couples yearning for parenthood, as also for the orphans to get a home of their own, the issue of adoption of late has become more of a property grabbing mechanism than the pious objectives. Feigned adoption deeds in order to lay claim over the property or clinging to the biological family despite being given in adoption, with an eye on the natural father's assets, are common features of materialistic world of today with relations having little solace for each other. In *Khidmat Singh v. Joginder Singh*<sup>6</sup> the father had executed a will of his property in favour of one of the sons. The other, who had been given in adoption, challenged it saying that the father was incompetent to do so as the same were coparcenary property and thus he also had a share in it. The claim of the son was dismissed by the court citing two reasons, firstly, that post adoption, the son had no right in the property of the biological father, and second, that it was not the coparcenary but the separate property of the father and thus he was competent to make a will of the same in favour of any one. This

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<sup>6</sup> AIR 2010 (NOC) 617 (P&H).

judgment though ended correctly raises important issues of the effects of adoption, and bares the lack of clarification over the very legislative permissibility of testamentary disposition of coparcenary property by an undivided coparcener. Adoption under the present Act constitutes an irreversible act and once a child is given in adoption, presumption of his death for the biological parents, and a re-birth in the adoptive family are legally conclusive. Under the present law, whether it was the separate property or a share in the coparcenary property , the father is competent to bequeath the same and a son ,who ceases to be part of the natural family after his adoption , cannot challenge its validity.<sup>7</sup>

### **Proxy adoption**

The Punjab and Haryana High Court had to deal with an interesting situation in *Narinderjit Kaur v. Union of India* <sup>8</sup> wherein the issue raised was that of adoption by proxy and the effect of remarriage of a divorced Hindu woman on her right to adopt. The facts, briefly stated were thus. A divorced Hindu woman adopted a female child through her attorney and brother-in-law in whose favour she had executed a special power of attorney. All the formalities of physically handing over by the natural parents and taking of child by the mother's attorney for being handed over to her, and ceremonies were performed. A registered deed of adoption was also executed. The passport officer (defendant), however, refused to issue a new passport to the child with the adoptive mother's name, on the ground that an adoption made by a proxy was not valid in Indian law. Later on, however, in the written statement the defendant agreed that the Law Ministry had clarified that the child could be given/taken in adoption by parents, guardian 'under their authority' but a fresh objection was raised viz. That the adoptive mother having remarried she had no authority to adopt and so passport for the child with the adoptive mother's name could not be issued. The court, after going through the facts came to the conclusion that the respondent's plea was untenable as the adoptive mother had remarried in 1994 whereas the adoption took place in 1990. Thus, on the date of adoption and her subsequent remarriage cannot invalidate the adoption. The adopted daughter was held entitled to a new passport with the name of the adoptive mother inserted in it.

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<sup>7</sup> See P P Saxena, Hindu Law, Annual Survey of India 2010 at 386.

<sup>8</sup> (AIR 1997 P&H 280)

### Constitutional vires of section 11

What is the effect of conditional ties put on the right of a person to adopt and whether this section is constitutionally valid came into focus in a significant case reported as *Sandhya v. Union of India*<sup>9</sup> where section of the Act came under close scrutiny of the Bombay High Court. Under this section adoption of more than one child of the same gender is not permitted. In fact even when one has a biological child of that gender, adoption is not permissible. In this case the petitioner who had already adopted a daughter were prevented from taking another female child in adoption in view of the provision of section 11(I) and (ii) of the Act. The validity of the section was challenged on the ground that it violated articles 14 and 21 of the constitution. It was argued that, since it discriminated between (a) parents with unlimited number of children and parents without children, (b) between a child adopted and a child to be adopted,(c) between parents with any number of children of the same sex and parents prevented from taking any child of same sex in adoption, it was against the equality provision of articles 14 .It was also against the human dignity as contemplated under article 21 of the constitution. The court did not find favour with either of the two arguments. The court observed:

*Article 21, even by stretching it to its farthest end cannot embrace such right of having size of family according to one's own choice person could have any number of biological children, by Grace of God. That does not certainly render support to claim to have any number of children by adoption...The Act with its mythological and secular mission has stood the test of time for around four decades and has conveniently withstood the assault as attempted from time to time. We, therefore, refrain from examining validity of the impugned provisions on the touchstone of Arts.14 and 21.*

The judgment of the court has far reaching effect as the institution of adoption can be used for extraneous reasons, in case the refrain as suggested by the court is not adhered to. Adoption of girls for ulterior and dubious reasons cannot be checked unless there is blanket ban on adoption beyond one child especially the female one and that too when, it is found most desirable. It may also minimize discrimination of adopted children by the unsavory people.

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<sup>9</sup> (AIR 1998 Bom.228)

### **Non divesture**

A child given in adoption after the death of his father does not lose the right and title in the coparcenary property, which devolves on him immediately on death of his father. This was held by Rajasthan High Court in *Revti v. Board of Revenue, Ajmer*<sup>10</sup> wherein the father died in 1918 and the son was given in adoption in 1938, it was held that upon adoption, his right to property would not be affected. Even his own statement to the effect that upon adoption he has lost right, title and interest in the properties would not affect the right already vested in him. Any statement made by the said regarding his entitlement will have no effect in case it is against law.

### **Ceremonies of adoption**

While performance of any ceremonies, including *datta homam*, is not an essential requirement for adoption, nonetheless there must be some evidence of actual giving and taking of the child in adoption. In *Nilima Mukerjee v. Kanta Bhushan Ghosh*<sup>11</sup>, a landlord filed an eviction petition against the appellant who was a relative of the tenant and used to stay in the suit premises on the ground that after the death of the tenant, the tenancy had become extinct and the appellant was a trespasser. The latter raised an objection that she was adopted by the deceased and the fact that she had a joint bank account with him was an indication of the same. Apart from this, there was no document, no ceremony, nor any evidence that she was actually given in adoption by her father and taken in adoption by the deceased tenant. The court held that mere fact of having joint account was no proof of adoption and accordingly, she could not be considered to be the adopted daughter of the deceased tenant.

### **Customary adoption**

Long recognition of a child as an adopted child cannot give validity to an adoption which is otherwise prohibited. Thus, in *Satya Gupta v. Om Prakash Gupta*<sup>12</sup> where custom was pleaded in support of adoption of a son after the *upanayan*(thread) ceremony but the evidence produced was insufficient and ambiguous, it was held that the burden of proving the custom

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<sup>10</sup> (1998 AIHC 4507)

<sup>11</sup> (AIR 2001 Supreme Court 2725)

<sup>12</sup> (2001 AIHC1276,All)

was not discharged. In spite of the fact that the son was since long recognised as the adopted son, the court refused to accept the adoption. In fact, even a person who himself or herself is a party to an adoption which is legally not permissible can challenge the adoption as there can be no estoppels against law.

Likewise in *Ranjit Kumar Jain v. Kamal Kumar Chowdhury*<sup>13</sup> where validity of adoption of a daughter's son was challenged on the ground that it was against the rule of prohibited degrees and the plaintiff failed to prove community custom that allowed such adoption, the adoption was held to be invalid.

### **DOCTRINE OF RELATION BACK**

The doctrine of relation back owes its origin to the classical Hindu law under which there was a fiction of law under which a son adopted by a widow was deemed to have been adopted from the date of death of the father. It is rather anachronistic (improper) that the doctrine is being invoked even after the enactment of the Hindu Adoption and Maintenance Act which has already abrogated the doctrine. In *Heera Lal v. Board of Revenue*<sup>14</sup> the rights of a son adopted by a widow, in the coparcenary in which the deceased father to whom the child was adopted, was one of the coparceners. When the coparcener died in 1910, the other surviving coparceners got the property mutated in their name. The widow adopted a son in 1959 i.e. after the coming into force of the in 1956. The son sought his share in the joint family property on the basis of the fiction of law which relates back the adoption to the date of father's death whereupon the adopted son steps into the shoes of his father. Against this, it was argued that the property already vested in the surviving coparceners in 1910 and they could not be divested by the son who was adopted in 1959 in view of the provisions of section 12 of the Act. The court, however, did not accept this contention. It held that the adoption by the widow would divest the other coparceners and their legal representatives of the interest of her husband in the joint family property notwithstanding the partition amongst the surviving coparceners after the death of her husband. Thus, the adopted son was held to be entitled to the shares of his deceased father in the joint family property. Not this alone the court went

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<sup>13</sup> (2001 AIHC 3167)

<sup>14</sup> (AIR 2001 Raj 318)

further still and held that since he was not given his due share and he was compelled to litigate in civil court for nearly 35 years, it was a fit case for awarding exemplary costs.

*Krishtappa v. Ananta Kalappa Jarata Khare*<sup>15</sup> was another case where the doctrine of relation back was invoked divesting daughters and widow of the deceased of properties that came to be vested in them. The father, in this case, died in 1930 whereupon his widow and two daughters succeeded to the suit properties as heirs. The widow adopted a son who was born in 1933, in 1953. It was held that the daughters would be divested of the suit property belonging to the deceased father and the adopted son would become the exclusive owner. The plea that the son who was born in 1933 was even in existence in 1930 when the father died and, therefore, the property which vested in the widow and two daughters could not be divested from them by virtue of the adoption in 1953, was not accepted. The court held that: an adopted son is entitled to take in defeasance by the rights acquired prior to his adoption on the ground that in the eye of law his adoption relates back by a legal fiction to the date of death of his adoptive father, he being put in position of a posthumous son. As such the appellant must be deemed to have been in existence as the son of his adoptive father at the time of latter's death by virtue of the said legal fiction.

The cases decided on the doctrine of relation back seem to be passed in violation of section 12 of the Act which clearly forbids any legal fiction created by the doctrine of relation back. According to the legal experts these cases may have the effect of creating certain unmanageable problems by allowing divestiture of property after a long period of time. The best course suggested here is to adopt the doctrine in the background of section 12 of the Adoption and Maintenance Act and not in derogation of it.

Adoption does not automatically take away the adoptive parent's rights to will away their property. According to section 13 rights of adoptive parents to dispose of their property does get extinguished. It reads:

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivo* or by will.

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<sup>15</sup> (AIR2001 Kant 322)

### **Adoption by A Hindu Female**

Under the Act a female has a right to take in adoption without any legal infirmity.

Section 8 of the Act reads: 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 unsound mind, has the capacity to take a son or daughter in adoption.

This section brings about a very important and far-reaching change in the law of adoption as hitherto applied in case of Hindus. It is competent now to a female Hindu who is of sound mind and has completed the age of eighteen years to take a son or a daughter in adoption to herself, in her own right provided- she is not married; or is a widow; or is a legally divorcee; or if married, her husband has finally renounced the world, or ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect.

The Hindu Adoption and Maintenance Act, 1956, while systematizing and extensively modifying the classical adoption law have switched its primary purpose from purely religious/ spiritual to secular. Thus prior to 1956, amongst females the capability to adopt a son vested in a Hind widow but conditional upon the permissibility of the same coming from the deceased husband or his sapindas.<sup>16</sup> Post 1956, this qualified power was liberalized and she acquired competence to adopt a child in her own right. However, due to operation of the doctrine of relation back, the confusion persisted about the date of legal entry of the adopted child in the new family: whether the child would be deemed to be borne in the new family from the date of adoption or due to operation of the doctrine of relation back would be treated as in existence on the date of death of the adopted father, even though he in reality might not have been born. The issue rose in connection with the family pension to be awarded to the next of kin of a

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<sup>16</sup> See *Siddalingaiah v. H.K. Kariappa*, AIR 2009 (NOC) 888 Karn., wherein it was held that the consent of the sapindas was no longer required under the changed circumstances.

freedom fighter, who died in 1952 leaving behind his widow and a daughter.<sup>17</sup> The family pension as per rules was sanctioned to his widow that she received till her death in 1998. A little before her death, i.e., on 28 Oct.1997, she allegedly adopted a seven year old son of her own daughter through a registered adoption deed. This child, after death applied for the grant of family pension, which according to rules could be granted to the widow of the freedom fighter and then to the minor son. This application was forwarded to the concerned authorities and the district magistrate in 2008 who rejected the same on two grounds, firstly, that a Hindu woman cannot adopt the son of her own daughter, so the adoption in itself was invalid, and secondly, that this child born 45 years after the death of the freedom fighter was neither his son nor was entitled to any benefit due to family of the freedom fighter by way of pension grants. The court was confronted with these primary issues:

- i. Can a person validly take her daughter's son in adoption?
- ii. Was the adoption made by the widow valid?
- iii. What is the effective date of adoption in the light of legal fiction of the doctrine of relation back?
- iv. Is it the date of adoption in the adoptive family or is it the date of death of the husband of the widow, more so where death was much prior to the date of adoption?

With respect to the first and second issues, the court noted that the shastric Hindu law prohibited adoption of son of the sister, daughter or mother's sister. Only such son could be adopted who could have been begotten by the adopter through *Niyoga* and child could be adopted whose mother in her maiden state, the adopter could not have legally married. This invalidation of adoption on account of *Viruddh sambandh* as also the impediment on the explicitly and presently such a child can validly be taken in adoption capacity of females to take a child in adoption was removed by the Act. On the other issues the court held that in the instant case the legal fiction of relation back would not be applicable, as the child was adopted 45 years after the death of the husband. The court observed:<sup>18</sup>

<sup>17</sup> *Abhishek Sharma v. State of U.P.*, AIR 2009 All 77.

<sup>18</sup> See also *Namdev Vyankat v. Chandrakant*, AIR 2003 SC 1735, relied upon by the court in this regard.

There is specific change in the scheme of the Act as reflected in section 12. The adopted child is deemed to be the child of his adoptive father or mother with effect from the date of adoption. Earlier shastric law treated adoption as adoption even if the adoptive father died earlier. However, the apex court in *Namdev Vyankat v. Chandakant*, with respect to the consequences of adoption held 'it is plain and clear that adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of adoption as is evident from the main part of section 12. The proviso of the same section in clear terms states that the adopted child shall not divest any person of any estate, which vested in him or her before adoption. The adopted child therefore is not to be treated as far as the date of inclusion in the adoptive family is concerned as the natural born child but he is deemed to be born in the adoptive family from the date of adoption only<sup>19</sup>.

A contrary view on the same issue however, came from the Bombay High Court wherein applying the doctrine of relation back the court treated the adopted child in existence on the date of the death of adoptive father. It resulted in his acquiring the interest of the adoptive father in his property to the complete exclusion of his natural born daughters. The facts showed that a Hindu man died in 1948<sup>20</sup>, leaving behind three widows and four daughters. Upon his death, his widows and daughters took possession of the property. However, one of the widows adopted a son a year later and then remarried. This adopted son filed a suit in 1950, for a declaration that he was the sole owner of the complete property left by the adopted father and a further relief of recovery of possession of the property that was in the hands of the two widows and daughters. The daughters contended that the property had already vested in them, and a subsequent adoption could not divest them of the property and the doctrine of relation back did not apply as adoption was effected subsequent to the death of the deceased father whose property he was claiming. The trial court ruled in his favour. Subsequently, according to the sisters sued him for the other half of the property. The court held that only the son would be the exclusive owner of the property and the widows and the daughters of the

<sup>19</sup> In *Rajendra Kumar v. Kalyan* (2000) 8 SCC 99.

<sup>20</sup> *Nivrutti Kushaba BInnar v. Sakhubai*, AIR 2009 Bom. 93.

deceased could claim only maintenance out of this property. The court further held that as the widows were not the owner of the property, in any capacity not even as the limited owner, these maintenance rights would not mature into full-fledged ownership rights in 1956. Consequently, the son alone would continue to be the owner of the property. The claim of the daughters were dismissed on the ground that due to the application of the relation back, the adopted son was deemed to be in existence at the time of death of the adopted father. As the daughters were not heirs, there was no vesting of the property in their favour and to contend that adopted child cannot legally divest any person of the property already vested in them could not be applied here<sup>21</sup>.

### **Adoption by husband without consent of wife**

Amongst married couples, adoption is an act based on a mutual decision and its unilateral exercise is limited to cases where one spouse suffers from a legal disability making his/her consent irrelevant. Legal permissibility to adopt vests in a single woman or a man, but amongst married couples, it is only the husband who can do so though only with the consent of his wife unless the wife is judicially disqualified to give her consent. If the wife refuses, the husband cannot go ahead legally with this adoption.<sup>22</sup> Identical rules apply where the child is given in adoption. The father can give the child but only with the consent of the mother unless her consent is not required in law.<sup>23</sup> An adoption where the child was given by natural father but without the consent of the mother is invalid under the Hindu Adoption and Maintenance Act. The issue came up for adjudication before the court<sup>24</sup> in connection with the alleged adoption of an only son effected through a registered adoption deed but without the consent of the biological mother. The facts showed that an old lady who owned a house inducted tenants in the same but soon thereafter both the parties were embroiled in bitter multiple litigations. The lady filed, amongst others, a suit for eviction against the tenant. However, upon her death, a claim to the house was put forward by the tenant's son contending that when he was 12

<sup>21</sup> Poonam Pradhan Saxena, Hindu Law, Annual Survey Of India, vol. XLV 2009 at 462.

<sup>22</sup> Sarabjeet Kour v. Gurmel Kour, AIR 2009 NOC 889 (P&H).

<sup>23</sup> The consent of the mother is not required if she ceases to be a Hindu; or has finally and completely renounced the world or has been declared by a court of complete jurisdiction to be of unsound mind.

<sup>24</sup> Deen Dayal v. Sanjeev Kumar, AIR 2009 Raj. 122.

years old, the deceased had adopted him through a registered adoption deed. The heirs of the lady refuted this claim on the ground that:

- (i) The alleged adopted child and his family were neither the relatives nor knew the deceased before their introduction as tenant in the disputed house.
- (ii) Their relations towards each other were bitter, as the widow had filed several cases against the tenant in the court.
- (iii) Their caste and gotra were different from that of the lady; the child was the only son having two sisters in the biological family.
- (iv) No ceremony of giving and taking of the child in adoption were performed.
- (v) No witness was present at the time of the alleged adoption.
- (vi) And above all, even the mother of the child was neither present nor gave her consent to this alleged adoption.

The court rejected the claim by the tenant's son. It noted<sup>25</sup> that on the face of it appears highly implausible that a father would give his only son in adoption.

In *Ghisalal v. Dhapubai*<sup>26</sup> the Supreme Court had to deal with a matter where the father had through a registered deed given his son in adoption after observing all the ceremonies. The adopted father had inherited certain landed property from his late father and had gifted some of it to his wife and sold another portion of it to a third person. The adopted son challenged the disposition of the property by the adopted father on the ground of coparcenary rights. The court formulated two main issues in this case, firstly, whether the adoption of the petitioner by adopted father was in accordance with law and secondly, what was the character of the property in the hands of the adopted father. If the adoption was validly effected then the adopted son would be transported to adopted father's family as his son for all purposes including becoming a coparcener, but if the court concluded that the adoption in itself was not valid, then the second issue needed no exploration. The trial court concluded that the properties in the hands of adopted father were ancestral in character; the wife's presence at

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<sup>25</sup> Id. At 126

<sup>26</sup> AIR 2011 SC 644.

the site of adoption was equivalent to her consent perfecting adoption and since the petitioner was validly adopted, the deeds executed by him in favour of third persons were without any legal effect. The high court confirmed the judgment and declared the petitioner as the representative of W, the owner of half of the property. The apex court however, reversed the judgment and observed<sup>27</sup>:

Adoption is to be effected by the father but with the consent of his wife. Consent of the wife envisaged in section 7 proviso should be in writing or reflected by an affirmative /positive act voluntarily and willingly done by her. If adoption, by a Hindu male becomes subject matter of challenge before the court, the party supporting adoption has to adduce evidence to prove that the same was done either by producing document evidencing her consent in writing or by leading evidence to show that the wife had actively participated in ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or daughter in adoption. The presence of wife as spectator in assembly of people who gather at place where ceremonies of adoption are performed cannot be treated as her consent; court cannot presume the consent of the wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to adoption.

### **Limitation period to challenge the validity of adoption**

The validity of adoption can be challenged within a reasonable time. However, often the factum of adoption is challenged when succession to the property is to be decided. By then, considerable time would have elapsed and it becomes difficult to bring in the proof of adoption, more so when the adoptive parent is dead. The Karnataka High Court held<sup>28</sup>that the moment adoption deed is registered; the parties to the adoption would have a constructive notice of the same. Thus, a suit challenging this adoption, filed after 40 years after its registration, would be barred by limitation. Even if limitation is not set up as a defense, it becomes the duty of the

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<sup>27</sup> Id at 652, para 20.

<sup>28</sup> Siddalingaiah v. H K Kariappa, AIR 2009 (NOC) 888 Kar.

court to take note of it and dismiss the suit. The court further held that there can be no bar to raise the plea of limitation even at the stage of second appeal.

### **Adoption of a child who is above the age of 15 years**

Statutory accommodation to contrary customs and availing their benefits in all eventualities may not be a smooth ride in the light of the requirement of their stringent proof. The Hindu Adoption and Maintenance Act, 1956 provides the maximum age of the child as 15 years for a valid adoption, yet makes room for its contravention if the custom prevailing in the community permits so. The courts are often confronted with the issue of validity of adoption, where the person at the time of adoption was above 15 years but pleads a contrary custom in his community. In *Amit Chandhabhai Chouhan v. Ahmedabad Municipal Corporation*<sup>29</sup> the High court of Gujarat rejected the contention of the petitioner, who had attained the age of 24 years, that his adoption under custom in his community beyond the age of 15 years was a valid one. The court focused on the validity of adoption in *valimiki* community based on custom beyond the age of 15 years, which was not endorsed by authentic proof. In another case<sup>30</sup> apex court had to deal with a case which involved adoption of an 18 years old male. He filed the petition claiming the property of the alleged adopted father on the ground that since he died intestate, he being the adopted child was entitled to the complete property. The claim was resisted by the other relatives of the deceased who challenged the validity of adoption on the ground that since the claimant was above the age of 15 years on the date of adoption, the same would not be valid under the Act. Adoption was through a registered deed that stated that the natural parents of the claimant aged 18 years had given him in adoption in presence of the elders to *Anne Seetharamaiah* who was issueless in accordance with the provisions of the Hindu Adoptions and Maintenance Act 1956. The court accepted the adoption as valid, in view of the statutory exception made in favour of the custom to the contrary.<sup>31</sup>

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<sup>29</sup> AIR 2011 Guj 145.

<sup>30</sup> *Atluri Brahmanandam v. Anne Sai Bapuji*, AIR 2011 SC 545.

<sup>31</sup> The court relied on *Ujagar Singh v. Jeo*, AIR 1959 SC 1041.

## **J&K HINDU ADOPTION AND MAINTENANCE ACT, 1960**

Like other matrimonial laws, the present Act also came to be passed on the edifice of the central Act pertaining to the adoption and maintenance. Since the institution of Adoption is a well settled concept of the Hindu Philosophy so it is followed with all fervor and favour in all parts of India including the Hindus of Jammu and Kashmir as well. The local Act came into force on 9<sup>th</sup> of March, 1960 applicable in the whole of J&K state. The Act *inter alia* provides for the application & administration of the adoption & maintenance on the same lines as discussed in case of the central Act. This Act has tried to regulate the testamentary disposition by declaring in clear terms that it shall be the Mitakshara doctrine which shall govern the right of deposition of a Hindu coparcener. To conclude adoption is indispensable.

### **Hindu Law of Maintenance**

#### **Introduction**

We saw in the last chapter how the institution of adoption came to be regulated under the enactment of the Hindu Adoption and Maintenance Act and also the need for its enactment. In the present chapter we will try to know the other facet of this Act i.e. law of maintenance. We will try to understand the general principles of maintenance, the persons liable to pay it, the persons entitled to receive it and the conditions under which it is payable. It will also be our endeavor to highlight legal, economic and social dimensions of this institution, especially the role of courts to delineate its contours and parameters. 'Maintenance' means the necessities of life that a person is legally bound to provide to another person in discharge of that duty, which in turn entitles the beneficiary to get that, maintained necessarily by person. Now the question arises what does this term legally connote. According to Section 3(b) of the Hindu Adoption and Maintenance Act, 1956, the term 'maintenance' Includes---

- i. In all cases, provision for clothing, residence, and education and medical attendance and treatment;

- ii. In the case of an unmarried daughter, also reasonable expenses of and incident to her marriage;

The definition of maintenance is so worded that it rendered applicable to the case of all entitled to claim maintenance under the various provisions of the Act, in case of unmarried daughter it includes both maintenance and reasonable expenses of and incidental to the marriage.

### **Maintenance of wife**

The right of the wife emanates from the special tie with which she gets bound the legally wedded wife of her husband to the Exclusion of all others .The obligations to maintain the wife are in character and arise from the very existence of the relation between the parties.

Section 18 of the Act reiterates the right of wife to maintenance as under:

- i. Subject to the provisions of this section wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.
- ii. A Hindu wife shall be entitled to live separately from husband without forfeiting her claim to maintenance;
  - (a) if he is guilty of desertion ,that is to abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;
  - (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
  - (c) if he is suffering from a virulent form of leprosy;
  - (d) if he has any other wife living;
  - (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
  - (f) if he has ceased to be a Hindu by conversion to another religion;

(g) If there is any other cause justifying her living separately?

The rule laid down in the section cannot, however, be said to be absolute although the right exists independently of the possession of any property by the husband ancestral or self-acquired. The rule laid down in this section is subject to the exceptions stated in sub-section(3) which lays down that wife cannot claim separate residence and maintenance if she is unchaste or ceases to be Hindu by conversion to religion. The section has to be read with section 23 of the Act which lays down that it shall be in the discretion of the court any, and if so what, maintenance shall be awarded under the provisions of this Act.

### **Hindu law of Maintenance-Historical Perspective**

As noted above the law of maintenance has come to be regulated in India under the Hindu Adoption Maintenance Act, 1956 in its modern shape and size. But the institution of maintenance has a not only a social background based on a vital edifice, it has religious overtones as well. According to Manu the maintenance of aged parents virtuous wife and an infant must be maintained even by doing a hundred misdeeds. According to Mulla, the doctrine of maintenance has always been favored by Hindu jurisprudence. They speak of and insist upon maintenance and support of various members of the family and lay down an elaborate number of injunctions on a solid basis.

Modern Hindu law recognizes the rule that a Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents whether he possesses any property or not. The obligations to maintain these persons are personal in character and this obligation has to be discharged in every case.

According to Prof. Paras Diwan, the maintenance of the aged parents, infant children and wife is considered to be the greatest duty of a person. This is based on a general belief of a Hindu that if he faithfully discharges this duty, he will get *nirvana* and bliss of the Brahma and the gates of heaven remain wide open for that person.

## **Maintenance under Hindu marriage Act**

Section 24 of the Hindu Marriage Act, 1955 provides for the grant of maintenance pending litigation and also litigation expenses where it appears to the court that the petitioner has no independent sufficient income for her or his support and the necessary expenses to conduct proceeding. The use of the word “support’ in the section does not mean bare subsistence. It means that the claimant spouse should be able to live more or less in comfort, as the other spouse. This issue was agitated in *V.Usha Rani V .K.L.N.Roa*<sup>32</sup> where both the spouses had independent income but income of the husband was higher. She filed an application claiming Rs.10, 000/-per month plus Rs.15, 000/-towards litigation expenses. Relying on *Gurveen kaur v. Ranjit Singh Sandhu*<sup>33</sup>. It was argued that she was entitled to be maintained in the same standard of living even if her personal earning was less than her husband’s or no earnings at all. On the other hand, it was contended on behalf of husband that an application under this section could be granted only if the applicant was unable to maintain or incur litigation expenses. The court rejected husband’s argument. While conceding that section 24 could not be intended to bring about arithmetical equality between the two, it remarked that the ‘word ‘support should not be so narrowly interpreted. It does not mean bare existence. It means that the spouse be in so much comfort as the other spouse is. In the facts of the case, the court allowed Rs.2000/-per month to her to make her feel “more comfortable” and Rs.5000/- as expenses.

## **Voluntary incapacitation**

Under the provisions of the Hindu Marriage Act, both the spouses have a right to make an application provided the applicant has no means and the non-applicant is in a position to pay. Thus, where husband resigned his job and made an application under section 24 of the Hindu Marriage Act for maintenance from the wife, the trial court held that the petitioner was capable of getting a job and earning enough for self sustenance. Besides, the wife with her carry-home salary of Rs.4725 was maintaining not only her own self but also her two years old son. Moreover, the applicant had received enough money by way of provident fund and other dues

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<sup>32</sup> (AIR 2001 P&H 371)

<sup>33</sup> (1990 1 L.R.672)

after he resigned his job. The revision application by the husband was dismissed. The court in this case, namely *Yashpal Singh Thakur v. Anjana Rajput*<sup>34</sup> remarked: It can be irrefutably concluded that the husband petitioner has by his own conduct decided to a leisurely life and has made no attempt to money which he is capable of earning. He cannot afford to incapacitate himself and file an application under section 24 of the Act. It will be an anathema to the very purpose of the provision.

In *D. Balakrishishnan v. Pavalamani*<sup>35</sup> a wife's claim for permanent alimony was rejected as she had not made any proper application under section 25, furnishing details of her own and other party's income. She had got interim maintenance and prayed for permanent alimony by way of a request, which was made at the time of the disposal of the divorce appeal. A Hindu wife is entitled to maintenance under two statutes viz. the Hindu Marriage Act, 1955 and Hindu Adoption and Maintenance Act, 1956. While in the former, she can seek maintenance when proceedings under that Act are filed/pending, under the latter Act, she may ask for maintenance even in the absence of any matrimonial proceedings. Now let us try to explore the difference maintenance and alimony in order to understand its effect on the maintenance by a wife.

### **Permanent Alimony and Maintenance**

Section 25 of the Hindu Marriage Act, reads:

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

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<sup>34</sup> (AIR2001 MP67)

<sup>35</sup> (AIR 2000 MP 48)

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order. Section 25, although recognizes the right of the wife and the husband to be in equal proportion in the matter of maintenance when a decree is passed granting relief in any matrimonial cause, it is primarily intended to secure maintenance and support for the wife in whose favour a decree is made granting any of the reliefs under the Act. The obligation of the husband to provide for his wife's maintenance and support does not come to an end simply on the passing of a decree for any of the reliefs which the court is empowered to grant under the Act even when the decree is in favour of the husband. An order for permanent alimony or maintenance can be made only when any decree granting substantive relief is passed. When the main petition for relief under the Act is dismissed or withdrawn, permanent alimony under section 25 cannot be given. This is settled law in view of the apex court's judgment in *Chand Dhawan v. Jawaharlal Dhawan*<sup>36</sup>. In this case, after the husband's divorce petition was got dismissed, the wife filed an application for maintenance under 25. After analyzing the case law on the issue the court ruled that an order of dismissal of petition is not a decree. It remarked:

Without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act, the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption.

Relying on this, the Madhya Pradesh High Court in *Badri Prasad v. Urmila Mahobiya*<sup>37</sup> held that a husband's petition for divorce was dismissed by the court, the wife could not be granted alimony under section 25.

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<sup>36</sup> (1993) 3 SCC 406

<sup>37</sup> (AIR 2001 MP 106)

## Interim Maintenance

The question whether a wife is entitled to interim maintenance in a petition under section 18 of the Hindu Adoption and Maintenance Act can be gauged by analyzing the following two cases decided by Orrisa and Bombay High Courts. The Orrisa High Court in *Purusottum Mahakud v. Annapurna Mahakud*<sup>38</sup> wherein the husband had contended that in the absence of any statutory provision recognizing the *right to interim maintenance*, an order made by the civil court was without jurisdiction. The High Court, however, did not accept this argument. Likewise, the Bombay High Court in a case titled *Sangeeta Piyush Raj v. Piyush Chaturbhuj*<sup>39</sup> held that a suit filed under section 18, the court has jurisdiction and power to pass appropriate interim and ad interim orders. The following observations of the Supreme Court in *Savitri v. Govind Singh Rawat*<sup>40</sup>, a case under section 125 of the Code of Criminal Procedure, were court ostensibly ruled & relied upon:

Whenever anything is required to be done by law and it is found impossible to do that unless something not authorized in express terms be also done, then that something else will be supplied by necessary intendment. Another issue decided by the court in *Sangeeta Piyush Raj* was that even if matrimonial proceedings between the parties are pending there is no requirement that an application for interim maintenance must be made only under the provisions of section 24 of the Hindu Marriage Act, 1955.

Whenever the marital status is being affected or disrupted by the matrimonial court unless provided otherwise under the Hindu Marriage Act, the claim of permanent alimony could not be valid as ancillary or incidental to such affection or disruption. Relying on this, the Madhya Pradesh High Court in *Badri Prasad v. Urimila Mahobiya*<sup>41</sup> held that when a husband's petition for divorce was dismissed by the court, the wife could not be granted alimony under section 25 of the Hindu Adoption and Maintenance Act.

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<sup>38</sup> (AIR 1997 73)

<sup>39</sup> *Raj*(1998 Bom 151)

<sup>40</sup> (AIR 1986 SC 986)

<sup>41</sup> (AIR2001 MP 106)

In *Lata v. Neeraj Pawar*<sup>42</sup> the petition filed by the husband for dissolution of marriage on the ground that she lived an immoral life but the court granted the interim maintenance as a statutory right irrespective of the result of the litigation.

In a case from AP pursuant to matrimonial differences, the husband filed a petition praying for a decree of divorce and the wife claimed maintenance for herself as also for two children born of this wedlock under section 24 of the HMA. This prayer for interim maintenance was allowed and maintenance at the rate of Rs. 15000 per month was granted in her favour as also for the children. The petition of the husband was accepted and the decree of divorce was awarded to him in 2005. The family court directed the husband to pay the arrears of maintenance awarded in favour of the children as also to the wife. However, the AP High court reversed the judgment of the family court for grant of interim maintenance beyond the period of pendency of the case<sup>43</sup>.

### **Maintenance under Hindu Adoption and Maintenance Act**

Apart from the provisions under section 125 of the Cr P.C. and the Hindu Marriage Act, a Hindu wife can seek maintenance even under section 18 of the Hindu Adoption and Maintenance Act. The Bombay High Court, however, restricted this right to a wife whose marriage was subsisting. Once there is a divorce she has to seek relief under section 25 of the Hindu Marriage Act or under the provisions of section 125 Cr.P.C. according to the court. This dictum was pronounced in *Panditrao Chimaji Kalure v. Gayabai*<sup>44</sup>. This is in contrast with *Vishal Mangaldas Patel v. Maiben Vithalal Patel*<sup>45</sup> wherein the court held that a wife includes a divorced wife and the husband's contention that the section would be applicable only where the marriage subsists was not accepted. Provision for maintenance is contained in more than one Act as is clear from the above discussion. While a claimant is not entitled to maintenance under all Acts simultaneously, the provisions under the different Acts are supplementary. Thus maintenance application under one Act cannot foreclose the remedy under the other Act. In *Aher Mensi Ramsi v. Aherani Bai Min Jetha*<sup>46</sup>, a wife had obtained a maintenance order under

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<sup>42</sup> (2010) DMC 540 (P&H)

<sup>43</sup> Arvind Chenji v. Krishanveni, 1 (2010) DMC 545 (AP).

<sup>44</sup> (AIR 2001 Bom 445)

<sup>45</sup> (AIR 1995 Guj 88)

<sup>46</sup> (AIR 2001 Guj 148)

section 18 of the Hindu Adoption and Maintenance Act also. The husband challenged the same on the ground that once an order had been made in proceedings under section 125 of the Cr PC the trial court would not grant maintenance under another statute as well.

The court, however, did not accept this argument. It is obvious that the legislature did not intend to oust the remedies available under several Acts since, when the Hindu Adoption and Maintenance Act was enacted in 1956, section 488 of the old Cr PC was already existent. Likewise when the Cr PC was amended in 1973, the old provision under section 488 was retained by way of section 125 in the new code and section 18 of the Hindu Adoption and Maintenance Act was also already there. The very fact that despite maintenance provisions in the Cr PC, section 18 was incorporated in the Hindu Adoption and Maintenance Act providing for maintenance to the wife goes to show that section 18 is a specific provision as against the general provision in section 125 of the Cr PC. According to the court, the grant and receipt of maintenance under Cr PC is no bar or impediment to grant of adequate amount of maintenance under the Hindu Adoption and Maintenance Act. Provisions in the Cr PC are general in nature whereas Hindu Adoption and Maintenance Act is a special enactment and order passed under general law cannot take away the remedy under special law. The court held:

The remedies under both these laws are available to the wife and these remedies are co-existent, mutually complementary, supplementary and in aid and addition of each other.

A widow is one of the dependants under section 21 of the Act who is to be maintained by the heirs of the deceased out of the estate inherited by them from the deceased. In this context, a reference may be made to an interesting case (*Shobha Suresh Jumani v. Appellate Tribunal, Forfeited Property*,<sup>47</sup> where a wife invoked the above mentioned provision to get an advantage under Smuggler and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. Under section 12(4) of the Act, a person aggrieved by an order of forfeiture of properties is competent to file appeal against such order. A wife sought to file such appeal on the plea that a wife of the smuggler whose property is forfeited has a vested right to maintenance from

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<sup>47</sup> AIR 2001 SC 2288)

her husband and his properties and as such she is an “aggrieved person” within the meaning of the Act. The court, however, dismissed the appeal and held that while it is true that a wife may be aggrieved because her husband’s properties are forfeited but that would not confer a right to file an appeal against such order of forfeiture. There is no infringement of her legal right for the purpose of the Act. In any case no charge of maintenance was created in favour of the wife on properties which were forfeited. “She has not suffered any legal grievance and has no legal plea for a justifiable claim to hang on”, the court remarked.

The HMA contains two specific provisions dealing with maintenance of spouse involved in a matrimonial litigation. These provisions are not available to any of the spouses during the smooth running of marriage or upon a mere refusal of either of the spouse to maintain the other without any litigation. Two things are important in this connection, first, that maintenance can be claimed only when a matrimonial petition is either pending in the court awaiting disposal or has culminated into the award of a decree, and second, that maintenance can be claimed by either the husband or the wife dependent solely on the criterion of who is in indigent circumstances and who is financially secured. Section 24 deals with maintenance *penden lite*, i.e., during the pendency of litigation<sup>48</sup> and therefore, as the terminology itself indicates, it cannot be availed of by the parties if no matrimonial litigation is pending in the court. Similarly, section 25 stipulates that at the time of passing of any decree or at any time subsequent thereto, the court on the application made by either spouse may pass an order directing one of the parties to pay to the other permanent alimony or maintenance. In *Polavarapu Hanumantha v. Plollavarapu Siva Parvathi*<sup>49</sup> the parties had two children and lived together for a short time period after which they separated. The husband filed a petition for divorce and the wife successfully claimed maintenance for her and the children under section 24 of HMA. She had also claimed maintenance under section 125 of Cr P C, that was granted in her favour but owing to its non-compliance by the husband, the wife filed an application for his arrest and detention in a civil prison. The matrimonial court passed an order granting maintenance to the wife and the children under section 25, even when the petition

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<sup>48</sup> Section 24 of the Hindu Marriages Act 1955.

<sup>49</sup> AIR 2009 AP 98.

filed by the husband for divorce was dismissed by the court. The matter went to the High Court which overruled the maintenance order passed by the lower court on the ground that since the main matrimonial remedy had not been granted, the court cannot invoke section 25 of the HMA<sup>50</sup>.

### **Incapacity of Educated Wife to Maintain Herself**

The first and foremost condition that the wife has to satisfy in order that she becomes eligible to claim maintenance from her husband is her incapability to maintain herself. Under the core Hindu law, while deciding the claim of husbands who sought maintenance from their wives, their ability to earn has always been taken into consideration and the mere fact that for the time being or temporarily they were not economically active has not worked in their favour. If the husband is an able bodied man or is highly or even modestly educated and is in a position that upon his earnest attempts to seek employment he would be successful, his claim of maintenance as against the wife would be dismissed.<sup>51</sup> However, the educated wife can maintain a petition for maintenance if she is unable to maintain herself unlike the husband as mandated by section 125 of Cr P C. the Karnataka High Court therefore, granted the maintenance to the wife who had been asked to resign after marriage and was now living an indigent life.<sup>52</sup>

### **Evasion of economic responsibilities by bigamous husbands**

Hindu law contemplates an exclusive matrimonial union with monogamy as the primary rule for Hindu men. Consequentially, both parties who violate this rule suffer though differently. A bigamous party attracts the penalty under section 494; fails to get the status of a legally wedded spouse and this deprivation is not merely a denial of status but also of their mutual rights and obligations including their economic rights. In *Gurmit Kour v. Buta Singh*<sup>53</sup> the wife herself was guilty of getting married to the man while her first marriage was subsisting. The husband prayed for a decree of nullity and a declaration of the marriage as *non est* (non-existing) in the eyes of law, and the wife filed a claim for maintenance as against him. The court dismissed his

<sup>50</sup> Annual Survey of India, 2009 at 484.

<sup>51</sup> *Kanchan v. Kamalendra*, AIR 1993 Bom 493.

<sup>52</sup> *Tejeswini v. Arvinda Tejas Chandra*, AIR 2010 NOC 228 (Kar.).

<sup>53</sup> 1(2010) DMC 316 (P&H)

contention and followed an earlier apex court decision wherein it was held that even in cases where marriage was declared null and void under section 11 read with section 5(i) of the HMA, the party was entitled to maintenance at the time of the passing of a decree. The present court thus awarded permanent alimony and maintenance to the wife as also costs of litigation to the tune of Rs 11,000.

In complete contrast the Bombay high Court in *Mangla Bivajilad v. Dhondiba Rambhau Aher*<sup>54</sup> the court denied maintenance to a woman who was an innocent victim of fraud played by the husband regarding the subsisting bigamous marriage. This decision has been criticized by commentators on Hindu law<sup>55</sup>.

### **Maintenance includes a provision for residence**

The term maintenance has not been defined under the Act but is understood to have a monetary connotation and its quantum, enough to prevent destitution and vagrancy of the grantee. It is never intended to financially or economically strengthen the indigent spouse, but should be sufficient to take care of his/her primary needs. What are the basic needs is in itself a question that has been answered variedly by courts in the light of facts and circumstances of each case, but in case of the spouse who is thrown out of the home, should it also include a residence is a question that becomes very important from the point of view of an estranged wife as the first problem is that she is confronted with situations like where to go? Matrimonial home is usually in the name of the husband or his parents or is arranged by them. It is ironic that in Indian patriarchal society, customarily a married woman has very limited choice or rights over a home in her own right more specifically in case of a marital discord. Husband's continued residence post-marriage in the same home that he or his parents own accords him a security that can rarely be felt by an estranged wife. Usually, therefore, marital discords take a woman back to her natal home but in several cases with increased parental support, awareness and necessity of a secured roof, women are prompted to retain residences of the husband in totality or partially post-matrimonial discord as well. Statutory recognition to her rights of residence has also been accorded with the enactment of Protection of Women from

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<sup>54</sup> AIR 2010 Bom. 122

<sup>55</sup> See Saxena P P, Hindu Law, Annual Survey of India, Vol. XLVI 2010 at 417.

Domestic Violence Act 2005, but would they generally be included under MHA, was a question that arose before the apex court. Here,<sup>56</sup> a suit was filed by the owner for declaration of title to the property that he had purchased out of his own funds. The wife had taken exclusive possession of this house pursuant to a decree of maintenance. The High Court declared the husband to be the owner of the property; directed the wife to hand over the possession to him and observing that in view of the factual setting in the case when the relations between the husband and the wife are estranged, the wife cannot still claim a right of residence in the matrimonial home so as to resist a decree for possession, dismissed the second appeal preferred by the wife. The matter was taken to the Supreme Court which endorsed the right of woman to a residence as included in the general term 'maintenance' and observed:

Maintenance necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less to which she was accustomed. The concept of maintenance must therefore include provision for food, clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money or property in lieu thereof. It may also be made by providing for the course of the lady's life, a residence and money for other necessary expenditure.

### **Application of the HAMA to members of schedule tribe**

The Hindu Adoption and Maintenance Act, 1956 applies to Hindus but a specific provision excludes members of scheduled tribes from its application. If they marry in accordance with Hindu rites and traditions, would this fact be sufficient to bring them within the application of the Act? If two members of scheduled tribes, who are not obliged to marry or follow the provisions of the Hindu law, do so, would they be governed by the provisions of Hindu law even though an express provision takes them out of its application? In *Lakhan Murmu v. Gurubhai Murmu*<sup>57</sup> the court granted the maintenance to the wife despite the contention of the husband that they were not bound by the HAMA and belonged to *santhal* tribe specifically excluded by section 2(2) of the Act.

<sup>56</sup> *Kemalam Amma v. Kumara Pillai Raghavan Pillai*, AIR 2009 SC 636.

<sup>57</sup> AIR 2011 Ori 13

### **Claim presented by the partner of a live relationship**

Economic responsibilities can be imposed on a person only through the instrumentalities of law and relationships of people's own making short of legal recognition would give to no mutual rights and obligation that are legally enforceable. Intimate physical relationships may stem from love and affection and a mutual desire to cohabit, but unless and until they are preceded by legally recognised rituals and ceremonies of marriage, this affectionate tie has no statutory force. Despite promises of faithfulness, love and caring for each other's physical and economic requirements, a breach of the same would result in affixing of no responsibilities. Economically insecure women, therefore, entering into such a relationship do it at their own peril as in cases of desertion by their partners; law does not guarantee them any sustainable financial rights as against the male partner/ friend. In a case from Jharkhand<sup>58</sup>, the application was filed by a woman claiming maintenance from the man on the ground that she was his wedded wife, a claim that she could not substantiate. The man, on the other hand, was able to convince the court that he never married her and at the most, the relationship can be equated with the live-in relationship. The claimant, a married woman with four children after the death of her husband had started living with this man D K Sinha of the Jharkhand High Court reemphasized the importance of marriage before a claim of maintenance can be entertained from a woman, and equated it with live-in relationship. He said that a legal and valid marriage was not proved as between the parties and the concepts of live-in relationship in the background of Indian culture and societal sanction is yet to be interpreted by the larger bench of the apex court. The court refused to widen the language of section 125 of Cr PC to include a partner within the meaning of the term "wife" and dismissed her petition claiming maintenance.

### **Maintenance claim by an able-bodied husband**

Law in theory treats both the spouses with equality in matters of claim of maintenance. However, the provision cannot be disassociated with the social reality and accepted familial behaviour in a patriarchal society. In case the prayer for claiming maintenance emanates from a woman as against her husband and she claims to be either a home maker or even gainfully

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<sup>58</sup> Vineeta Devi v. Bablu Thakur, 2011 MLR 805 (Jhar).

employed but with meager income, her able-bodiedness or capability to secure a gainful employment fetching her a good income is not a matter of serious concern for the judiciary as her economic dependence on the husband still remains predominantly the rule. A man's status as that of a provider makes it mandatory, on the other hand, for him to earn a livelihood and an able-bodied man sitting at home or without making a living is perceived as displaying a sign of an abnormal behaviour bordering to delinquency. Such a person would be looked down upon and advices from all walks of life would pour in enjoining upon him to mend his ways. Though advocacy of self sufficiency are desirable for every person yet the force or rigidity of its application is glaringly apparent in case of a man than that of a woman. A consistent judicial stand further corroborates it. In a case under the survey<sup>59</sup>, the husband filed a petition praying for a decree of divorce and then made an application under section 24 of the HMA, claiming interim maintenance and litigation expenses from his earning wife. He pleaded that he had no source of income. The wife was able to prove that he was well qualified, but had deliberately left his job. His father had retired as a school teacher and his mother was working in a government school. The trial court on the application of the husband had granted maintenance to him to the tune of rupees 500 per month and an additional rupees 2000 as the litigation expenses. On appeal, the high court reversed the judgment of the trial court and held that a person who is able-bodied, capable to earn but incapacitates himself deliberately is not allowed to claim maintenance from the spouse.

### **Maintenance obligations: daughter-in-law vis-à-vis the father-in-law**

The right of maintenance of the wife by the husband are universally recognised. While husband's obligation towards the wife is well entrenched in Hindu law, statute gives some relief to genuinely financially distressed husbands from their economically secure wives as well, but beyond the spousal relations and responsibilities, the extended/joint family system saddles other relations with the financial/maintenance liabilities as well. A widowed daughter-in-law in this connection assumes an important place. Being a member of the family, can the father-in-law be brought under a legal obligation to maintain her and if the answer to this question is in the affirmative, can in appropriate situations a daughter-in-law be directed to

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<sup>59</sup> Monika Rana v. Yogeshwar Singh Sapehia, AIR(2011) 7 HP54

maintain the parents in law? In our son centred economy , heavily reflected in the patriarchal society if the son dies and the compensation package including a job on compassionate grounds goes to the spouse it may leave the parents of the deceased son totally helpless. In *Bharati Mahanta v. Narahari Mahanta* <sup>60</sup> a couple's only married son died. He was working as a peon in a school , which after his death , provided his widow with employment as a peon under the rehabilitation scheme in his place. The entire pension and other related benefits upon the death were availed of by the widow. The parents in law claimed maintenance from her, but she denied any obligation on her part to maintain them. Her main contentions were; firstly, that parents in law had sufficient income to maintain themselves and thus their basic eligibility to claim maintenance from anybody else does not arise; secondly, the language of section 125 of the Cr PC is very clear and binds only children with maintenance obligations and a daughter-in-law cannot be called a child. Section 125 obliges a person to maintain his wife, son, daughter or parents who are incapable to maintain themselves and the statutes do not use the term daughter-in-law or parent-in-law. Thirdly, it cannot be said that she has stepped into the shoes of the husband as she did not inherit any of his property nor enjoyed any share in the ancestral property belonging to him or belonging to him or belonging to his family in which he had a share. She cannot be equated and placed on the same footing as a son. The court dismissed all of her contentions held her responsible for maintaining the parents of the deceased husband and said that section 125 not only conceives of an order of maintenance but is essentially a measure of social justice with a view to protect persons who do not have sufficient means for survival. Social justice is not a mere constitutional claptrap but fighting faith which enlivens legislature texts with militant meaning and illustrates its functional relevance as an aid to statutory interpretation. Keeping this in mind , if any person having sufficient means neglects or refuses to maintain his father or mother who is unable to maintain him or herself an application under section 125 is maintainable. Thus section 125, that entitles a wife, child and parent should be widely interpreted to include other members of a family. Since the term "family" includes a group of people related to each other by blood or marriage , even a married daughter is liable to maintain parents if they do not have any

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<sup>60</sup> 2011 MLR509 (Ori)

sufficient means to maintain themselves and there is no justifiable reason whatsoever for a daughter-in-law not be saddled with similar responsibility in the event of the death of the son, especially when she obtains all the death-cum pension benefits including employment under the rehabilitation scheme. It is interesting to note that all the three courts, i.e.,: the lower appellate court and the high court , here adopted a consistent line of reason and awarded maintenance to the parents in law as against the daughter-in-law.

In another case <sup>61</sup> having a reversal of facts , the parties married and the husband died in a motor accident. Next day, the wife left the matrimonial home. The parents in law went to her natal home; brought her back but she returned after two/three days back to her parents. She received around one lakh as the insurance claim; applied for her husband's share in the property in the court of tehsildar, got a favourable order; got the share , and she sowed paddy in it . Thereupon, she claimed maintenance from her father-in-law. The family court rejected her claim firstly, because she was voluntarily residing at her parents' house without any sufficient reasons and secondly, under section 19 of the HAMA, the obligation of the father-in-law to maintain the daughter-in-law is not personal but is depended upon the coparcenary property in his hands. Even in cases where the father-in-law has coparcenary property in his hands, his obligation to maintain the daughter-in-law is subject to the condition that:<sup>62</sup>

- i) The daughter-in-law is unable to maintain herself out of her own earnings or other property of her own;
- ii) She is unable to obtain maintenance from her son or daughter or his/her estate,
- iii) That father-in-law has coparcenary property in his hands/possession out of which she has not obtained any share,
- iv) That coparcenary property has sufficient income, and
- v) That the daughter-in-law has not remarried.

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<sup>61</sup> Dayali Sukhal Sahu v. Anjubani Santosh Sahu, AIR 2010 Chh 80.

<sup>62</sup> Id., at 81.

The high court noted that in the present case, as she had already taken her share, she was not entitled to claim maintenance from her father-in-law.

### **Conclusion**

The Adoption and Maintenance Act, 1956 has specifically made the provision of maintenance not only mandatory but also meaningful. It has followed the doctrine of equitable provision for maintenance rather than the minimal quota provided under the general law. Courts have allowed maintenance to wife even if she is working and can maintain herself and has made arrangements to separate residence and maintenance according to the standard of their living. In Jammu and Kashmir a separate but an analogical enactment is in vogue which specifically applies to Hindus in the state, apart from the general maintenance provision under section 488 of Cr.P.C.1898. While as the J&K Hindu Adoption and Maintenance Act, 1960 does provide for maintenance to wife, children and parents, this is supplanted by the general law where one of the parties is a non-Hindu. The maintenance is payable from the date of application, unless the wife proves with cogent reasons the circumstances warranting its grant from the date of becoming entitled to receive it as a legally wedded wife. It was remarked by the J&K High Court in the case of *Anita Nargotra v. Shri Rajinder Nargotra*<sup>63</sup> that where the husband has been paying interim maintenance to his wife and children in such eventuality it not be given from the date of application unless proved otherwise.

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<sup>63</sup> 2002 SLJ 402