

Chapter 1

INTRODUCTION

The origin of the custom of adoption is lost in antiquity. In Hindu law, five kinds of adopted sons were recognized. These were the Krita (Son Bought), Apavidha (the deserted son), Svayamdatta (the son self-given), Kritrima (the son made), and the Dattaka (the adopted son who is seen as the reflection of the natural son). Out of the five kinds of adopted sons, only two survive today, namely, the Dattaka form prevalent throughout India and the Kritrima form, which is confined to Mithila and adjoining districts.¹

The object of an adoption is mixed, being religious and secular. According to Mayne, the recognition of the institution of adoption in early times had been more due to secular reasons than to any religious necessity, and the religious motive was only secondary. As time moved on, the primary object of adoption was now the gratification of the ancestors by annual offerings and, therefore, it was considered necessary that the offerer should be as much as possible a reflection of a real descendant and had to look as much like a real son as possible and certainly not be one who would never have been a son.²

Although there is no general law of adoption, yet it is permitted by a statute amongst Hindus and by custom amongst a few numerically insignificant categories of persons. Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Muslims, Christians and Parsis have no adoption laws and have to approach court under the Guardians and Wards Act, 1890. Muslims, Christians and

¹ Ms. Pinky Anand, *Family Law & Adoption*, 2nd ed. (Bombay: Green Book House, 2009), pp. 1-5.

² *Ibid.*

Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance. Foreigners, who want to adopt Indian children, have to approach the court under the aforesaid Act. In case the court has given permission for the child to be taken out of the country, adoption according to a foreign law, i.e., law applicable to guardian takes place outside the country.³

Hindu Law, Muslim Law and the Guardians and Wards Act, 1890 are three distinct legal systems which are prevalent. A guardian may be a natural guardian, testamentary guardian or a guardian appointed by the court. In deciding the question of guardianship, two distinct things have to be taken into account - person of the minor and his property. Often the same person is not entrusted with both.

The Hindu Minority and Guardianship Act, 1956 (32 of 1956) has codified laws of Hindus relating to minority and guardianship. As in the case of uncodified law, it has upheld the superior right of father. It lies down that a child is a minor till the age of 18 years. Natural guardian for both boys and unmarried girls is first the father and then the mother. Prior right of mother is recognized only for the custody of children below five. In case of illegitimate children, the mother has a better claim than the putative father. The act makes no distinction between the person of the minor and his property and, therefore guardianship implies control over both. The Act directs that in deciding the question of guardianship, courts must take the welfare of child as the paramount consideration.⁴

Under the Muslim law, the father enjoys a dominant position. It also makes a distinction between guardianship and custody. For guardianship, which has usually reference to guardianship of property, according to Sunnis, the father is preferred and in his absence his executor. If no executor has been appointed by the father, the guardianship passes on to the paternal grandfather. Among Shias, the difference is that the father is regarded as the sole guardian but after his death, it is the right of the

³ [<http://www.cara.nic.in/adoption/hindu>, last visited on date 09-02-2010.]

⁴ [http://en.wikipedia.org/wiki/adoption_of_the_child, last visited on February 10, 2010.]

grandfather to take over responsibility and not that of the executor. Both schools, however, agree that father while alive is the sole guardian. Mother is not recognized as a natural guardian even after the death of the father.

As regards rights of a natural guardian, there is no doubt that father's right extends both to property and person. Even when mother has the custody of minor child, father's general right of supervision and control remains. Father can, however, appoint mother as a testamentary guardian. Thus, though mother may not be recognized as natural guardian, there is no objection to her being appointed under the father's will. Muslim law recognizes that mother's right to custody of minor children (Hizanat) is an absolute right. Even the father cannot deprive her of it. Misconduct is the only condition which can deprive the mother of this right. As regards the age at which the right of mother to custody terminates, the Shia school holds that mother's right to the Hizanat is only during the period of rearing which ends when the child completes the age of two, whereas Hanafi School extends the period till the minor son has reached the age of seven. In case of girls, Shia laws uphold mother's right till the girl reaches the age of seven and Hanafi School till she attains puberty.

The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. This Act also provides that the court must take into consideration the welfare of the child while appointing a guardian under the Act.⁵

⁵ [<http://www.britannica.com/EBchecked/topic/3114/adoptin>, last visited on February 10, 2009.]

Chapter 2

GENERAL CONCEPT

The two renowned works on adoption, viz the *Dattaka-mimamsa* of Nanda Pandit and *Dattaka-chandrika*, attributed to Kuvera, were accepted all over India. But, in case of difference between the two, the latter was followed in Bengal.

The main points, according to the *Dattaka-chandrika*, are as follows. There are two motives in adopting a son; viz. (i) to perform obsequial rites in honour of the adoptive father and his ancestors, (ii) to be the successor of the adoptive father. Any sonless man may adopt a son; 'sonless' implies the absence of son, grandson and great-grandson. Except for a Sudra, one cannot adopt a daughter's son or a sister's son. A person's single son cannot be given in adoption. A woman cannot give away a son without the permission of her living husband. If the husband is dead, she can do so in the absence of prohibition by the husband. An adopted son is placed on equal footing with a natural son.⁶

2.1 Definition of Adoption

Act of transferring parental rights and duties to someone other than the adopted person's biological parents. The practice is ancient and occurs in all cultures. Traditionally, its goal was to continue the male line for the purposes of inheritance and succession; most adoptees were male (and sometimes adult). Contemporary laws and practices aim to promote child welfare and the development of families. In the latter part of the 20th century, there was a relaxation of traditional restrictions on age

⁶ [Banglapedia, National Encyclopedia of Bangladesh, *Hindu Law*, CD version, (Dhaka: Asiatic Society of Bangladesh, 2007).]

differences between adoptive parents and children, on the parents' minimum income level, on the mother's employment outside the home, and on placements across religious and ethnic lines. Single-parent adoptions and adoptions by same-sex couples also became more acceptable. Beginning in the 1970s, a growing adoptees-rights movement in the United States called for the repeal of confidentiality laws in most states that prevented adoptees as adults from viewing their adoption records, including their original birth certificates.⁷

2.2 Purposes of Adoption

The ancient practice of adoption was a way of ensuring male heirs to childless couples in order to preserve family lines and religious traditions. Modern adoption laws are designed with the best interests of the child in mind, not the best interests of the adult who intends to adopt. Throughout most of the twentieth century, adoptions were conducted in secret, and records were often sealed to protect those involved from the social stigma of birth out of wedlock. After World War I, the advent of commercial formula facilitated raising babies without their being fed by breast. Adults were trained in parenting, and childless couples became interested in adopting. Because of the rapidly increasing interest in infant adoptions, many state laws demanded investigations of prospective adoptive parents and court approval before the adoption could be completed.

Adoptions can be conducted privately between individuals, between independent agencies and individuals, and between public agencies (such as a state's child protective services) and individuals. Adoptees may be infants or older children, they may be adopted singly or as sibling groups, and they may come from the local area or from other states or countries. Adoptive parents may be married couples, single men or women, or nontraditional couples. Adoptive parents may be childless or have other children.⁸

⁷ [<http://family.jrank.org/pages/40/Adoption-History-Purpose.html>, last visited on April 01, 2010.]

⁸ *Ibid.*

2.3 Necessity of Law of Adoption

Adoption has been known from biblical times and in many cultures. Adoption has a long tradition. In Hindu literature, discussions of adoption go back more than 5,500 years. Common themes dominate the purposes behind adoption in ancient times.

The goal of adoption was to perpetuate the family based on the male line of descent and to ensure the continuation of the family's religious practices. Thus, the adopter originally had to be a male without a legitimate son. Adoption also served the purpose of cementing political alliances between families and continuing political dynasties.

The object of adoption was to produce a legal successor, and the process was governed by strict rules. For example, the adoptee had to be from the same clan as the adopter, or at least have the same surname and be younger than the adopter so as to maintain order in the family genealogy.

In relatively recent times there has been a significant worldwide shift to recognizing the role adoption should play in advancing the interest of the individual adoptee, rather than the goals of broader elements of society or the interests of would-be adopters. This process has been enhanced by the evolution of global standards as reflected, for example, in the United Nations Convention on Rights of the Child. In some countries, for example, Argentina and Uganda, this Convention is an integral part of the country's adoption law. In others, as in Scotland, the Convention is highly influential.⁹

2.4 Rights of Adopted Children

Adopted children have the same rights as natural children and the same claims on their adoptive parents' estate. For example, if a child's adoptive parent dies without leaving a will (dying "intestate") the rules governing what happens to the parent's property will apply to that child just as they would apply to natural children.

⁹ *Ibid.*

The child's consent to the adoption is not required, regardless of how old he or she is. However, the adopted child's wishes will be considered when the court considers whether the adoption will promote the child's welfare and interests. The child's age will be a factor in determining how much weight to give his or her wishes.

It is the Department's belief that adopted children have the basic human right to know that they are adopted. This is contrary to the "clean break" approach of the past. In assessing the eligibility of prospective adoptive parents it seems that the Department must be satisfied that the parents will at some point tell their child that he or she is adopted.

An adopted child's birth certificate contains only the names of the adopted parents, as they are deemed to be the legal parents. If it is agreed to by the adoptive parents, a child may keep his or her natural last name.

However, once a child turns 20 he or she may apply to the Registrar-General of Births and Deaths for an original birth certificate. The Registrar-General must notify the adopted person of the counseling services that are available. If the adopted person then indicates that he or she does wish to attend counseling, the birth certificate is sent to the relevant counselor or counseling organization and the adopted person can then obtain it from that counselor or organization.

If the adopted person doesn't notify the Registrar-General that counseling is desired, the adopted person is notified that the birth certificate is being kept on his or her behalf and is then sent to the person if he or she makes another request for it.

The birth parents also have the right to find out about their natural child, but this is subject to the adopted person's right to register a veto against contact. An adopted person who has turned 19 can request the Registrar-General to register a veto on the original birth certificate if he or she does not want to be contacted by the birth parents or by a particular birth parent. The Registrar-General must notify the adopted person that counseling is available, but if no counseling is requested or if the person still requests the veto after attending counseling, the Registrar-General must enter the veto. The veto lasts for 10 years, but can be extended.

Chapter 3

GENERAL RULES FOR ADOPTION

3.1 Requirements for a valid adoption

In the Hindu law the requirements for a valid adoption. The Act reads, no adoption is valid unless

1. The person adopting is lawfully capable of taking in adoption;
2. The person giving in adoption is lawfully capable of giving in adoption;
3. The person adopted is lawfully capable of being taken in adoption;
4. The adoption is completed by an actual giving and taking and the ceremony called *data homan* (oblation to the fire) has been performed.¹⁰

3.2 Who may adopt?

Capacity of male

Any male Hindu, who is of sound mind and is not a minor, has the capacity to take a son or daughter in adoption. Provided that if he has a wife living, he shall not adopt except with the consent of his wife, unless his 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. If a person has more than one wife living at the time of adoption the consent of all the wives is necessary unless the consent of one of them is unnecessary for any of the reasons specified in the preceding provision.¹¹

¹⁰ Abul Kalam Azed, *Introduction of Hindu Law*, 3rd ed. (Dhaka: Ideal Law Book House, 2004), pp.69-70.

¹¹ *Ibid.*

Capacity of female

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 daughter in adoption.¹²

3.3 Finality of Adoption and Cancellation of Adoption

As regards cancellation, the Act says that no valid adoption can be cancelled by the adoptive father or mother or any other person, not even by the adopted child. However, this does not mean that an adoption once shown through an adoption deed, for instance, would be final. When there is a registered document placing on record the factum of adoption, this only raises a presumption that the adoption is valid and genuine. The onus of proving the invalidity of an adoption in any such case is on the one who is challenging the adoption (S. 22). However, the Supreme Court has held that it is a rebuttable presumption.

It has been held in the case of *Jai Singh v. Shakuntala*,¹³ that the conduct of a person seeking benefit on basis of the adoption deed can be ascertained from the appreciation of evidence taken into account. In case of non-production of adoption deed, oral evidence may be considered by the court to decide the factum of adoption.¹⁴

¹² *Ibid*, pp. 71-73.

¹³ (2002) 3 SCC 634: AIR 2002 SC 1428: (2002) 3 JT 52

¹⁴ Ms. Pinky Anand, *ibid*, pp. 50-56.

Chapter 4

LAWS RELATING TO ADOPTION

The preamble of the Hindu Adoptions and Maintenance Act, 1956, states that the Act codifies as well as amends the old Hindu law of adoption and maintenance.

As far as adoption is concerned, in *Vijayalakshamma v. B.T. Shankar*,¹⁵ the Supreme Court has held that the objective of the Act was not only to amend, but also to codify the law regarding adoption and maintenance and also to give overriding effect to provisions of the Act over any text, rule or interpretation of Hindu law, custom or usage inconsistent with it. The growth of the law and custom of adoption was mainly to be found in the ancient Hindu belief that a son was necessary for the spiritual salvation of the father, and of the ancestors. However, under the Act this seems to have been overtaken by a more secular approach. The Act contemplates and provides that 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 adoption and from such date, and that all 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 adoption in the adoptive family except for the purposes of marriage.¹⁶

4.1 Adoption under Hindu Law

The Shastric Hindu Law looked at adoption more as a sacramental than secular act. Some judges think that the object of adoption is two fold:

¹⁵ (2001) 4 SCC 558: AIR 2001 SC 1424

¹⁶ S.K. Routh, *Elements of Hindu Law*, 2nd ed. (Dhaka: Comilla Law Book House, 2008), pp. 37-40.

1) to secure one's performance of one's funeral rites and 2) to preserve the continuance of one's lineage. Hindus believed that one who died without having a son would go to hell called poota and it was only a son who could save the father from going to Poota. This was one of the reasons to beget a son. Ancient Hindu Shastras recognized Dattaka and Kritrima as types of sons.¹⁷

In the Hindu Shastras, it was said that the adopted son should be a reflection of the natural son. This guaranteed protection and care for the adopted son. He was not merely adoptive parents, but all relations on the paternal and maternal side in the adoptive family also came into existence. This means he cannot marry the daughter of his adoptive parents, whether the daughter was natural-born or adopted. In the modern adoption laws, the main purpose is considered to be to provide consolation and relief to a childless person, and on the other hand, rescue the helpless, the unwanted, the destitute or the orphan child by providing it with parents. However, in the Chandrashekhara case, it was held that the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.¹⁸

Currently, the adoption under Hindu Law is governed by The Hindu Adoption and Maintenance Act, 1956.

The Hindu Adoption and Maintenance Act, 1956 extends to only the Hindus, which are defined under Section-2 of the Act and include any person, who is a Hindu by religion, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or AryaSamaj, or a Buddhist, Jaina or Sikh by religion, to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh.

¹⁷ Md. Altap Hossain, *Hindu Law*, 6th ed. (Dhaka: City Law Books, 2004), pp. 113-116.

¹⁸ *Ibid.*

Adoption is recognized by the Hindus and is not recognized by Muslims, Christian and Parsis. Adoption in the Hindus is covered by The Hindu Adoptions Act and after the coming of this Act all adoptions can be made in accordance with this Act. It came into effect from 21st December, 1956. Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the state of Jammu and Kashmir. It applies to Hindus, Buddhists, Jainas and Sikhs and to any other person who is not a Muslim, Christian, Parsi by religion.¹⁹

2.2 Adoption under Muslim law

Adoption is the transplantation of a son from the family in which he is born, into another family by gift made by his natural parents to his adopting parents. Islam does not recognize adoption. In *Mohammed Allahabad Khan v. Mohammad Ismail*, it was held that there is nothing in the Mohammedan Law similar to adoption as recognized in the Hindu System. Acknowledgement of paternity under Muslim Law is the nearest approach to adoption. The material difference between the two can be stated that in adoption, the adoptee is the known son of another person, while one of the essentials of acknowledgement is that the acknowledgee must not be known son of another. However an adoption can take place from an orphanage by obtaining permission from the court under Guardians and wards act.²⁰

2.3 Adoption under Parsis and Christian laws

The personal laws of these communities also do not recognize adoption and here too an adoption can take place from an orphanage by obtaining permission from the court under Guardians and wards act. A Christian has no adoption law.

Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Christians have no adoption laws and have to approach court under the

¹⁹ Ms. Pinky Anand, *ibid*, pp. 37-46.

²⁰ Md. Altap Hossain, *ibid*, pp. 119-121.

Guardians and Wards Act, 1890. National Commission on Women has stressed on the need for a uniform adoption law. Christians can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance.

The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. This Act also provides that the court must take into consideration the welfare of the child while appointing a guardian under the Act.²¹

4.1 The Adoptions and Maintenance Act, 1956

Section 5²² provides that- Adoptions to be regulated by this chapter-

(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provision shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favor of any person which he or she could not have acquired except by reason of the adoption, nor destroy the right of any person in the family of his or her birth.

COMMENTS

Adoption that takes place after the death of the husband contrary to the will of deceased husband and after the Act came into force it was held that, legality of the adoption is to be considered in accordance with the provision of Act, and the adoption cannot be held invalid just for the fact that it was against the directions as mentioned in the will of deceased husband.²³

²¹ [<http://www.cara.nic.in/adoption/hindu>, last visited on date 09-02-2010.]

²² *The Adoptions and Maintenance Act, 1956*. Sec. 1.

²³ *Kavuluru v. Kuntamukkala* 1971 (1) An. WR 134

Section 6²⁴ Requisites of a valid adoption

No adoption shall be valid unless-

- (i) The person adopting has the capacity, and also the right, to take in adoption;
- (ii) The person giving in adoption has the capacity to do so;
- (iii) The person adopted is capable of being taken in adoption; and
- (iv) The adoption is made in compliance with the other conditions mentioned

in this Chapter.

COMMENTS

Where any of the requirements as laid down under s.6 are not strictly observed, that non-observance of the requisite or requisites is enough to convert the adoption as invalid one.²⁵

Doctrine of factum valet does not have its application in case the adoption is against what is said by the provisions of the Hindu Adoption and Maintenance Act, 1956.²⁶

Section 7²⁷ Capacity of a male Hindu to take in adoption

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

Explanation: If a person has more than one wife living 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.

²⁴ *The Adoptions and Maintenance Act, 1956. Sec. 6.*

²⁵ *Dhanraj v. SurajBai*, 1972 Raj LW 612

²⁶ *Lalla Ram v. Gohri Ram*, 1972 All WR (HC) 612

²⁷ *The Adoptions and Maintenance Act, 1956. Sec. 7.*

COMMENTS

The person taking in adoption must not suffer from idiocy or insanity; he must have the capacity enough to understand the nature of the Act and what would be the legal effects of adoption. Simultaneously it is not the requirement the person concerned must be possessed with a very high degree of intelligence. There is a very strong presumption favoring soundness of mind.²⁸

Deaf and dumb but possessed with the capacity to express through signs and gestures, though not clearly, is to be taken as a person of sound mind.²⁹

Proviso places a restriction as concerned to right to take in adoption that makes the consent of the wife a necessity so as to make the adoption valid. The consent must be obtained prior to the civil adoption takes place and not later on where the proviso is disregarded adoption is not valid.³⁰

In the case of divorce the consent is not necessary but in the case of judicial separation, consent would be necessary. In case of two wives, consent must be of both the wives despite the fact that one of them was not living under the same roof for a big job of twenty or thirty years.³¹

Section 8³² 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 daughter in adoption.

²⁸ *Babubarelal v. Gulzari Devi*, 1979 All LJ 1333

²⁹ *Ambrish Kumar v. Hatu Prasad*, 1981 HLR 781

³⁰ *Badrilal v. Bheru*, 1986 (1) HLR 81

³¹ *Bhooloo Ram v. Ram Lal*, 1989 (2) HLR 162

³² *The Adoptions and Maintenance Act, 1956. Sec. 8.*

COMMENTS

After the completion of the age of eighteen, a woman gets the capacity to adopt even though. She herself is unmarried. Where after the adoption, she is married, her husband would be step-father and she herself would remain adoptive mother as earlier. Adoption by an unmarried can also take place despite the fact that she is having an illegitimate child.³³

A married woman has got no right to take in adoption during the subsistence of the marriage. But where the husband has completely and finally renounced the world or he had ceased to be Hindu or some competent court has declared him to be of unsound mind, the wife can adopt.³⁴

Section 9³⁵ Persons capable of giving in adoption

(1) No person except the father or mother the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provision of sub-section (3) and sub-section (4), the father, if alive, shall alone have the right to give 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 has been declared by a court of competent jurisdiction to be of unsound mind.

(3) 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.

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

³³ *Ashoka Naidu v. Raymond*, AIR, 1976 Cal 272

³⁴ *Dashrath V. Pandu*, 1977 Mah LJ 358

³⁵ *The Adoptions and Maintenance Act, 1956. Sec. 9.*

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

Explanation: For the purposes of this section-

(i) The expression "father" and "mother" do not include an adoptive father and an adoptive mother;

(ia) "Guardian" means a person having the care of the person of a child or of both his person and property and includes-

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

(b) A guardian appointed or declared by a court: and

(ii) "court" means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

COMMENTS

Where the adoption takes place and step-son is given in adoption by step-mother having no capacity to give in adoption such an adoption is not valid one by virtue of s.5 (1) read with s.6 (ii).³⁶

It is the District Court where in the application for giving and taking in adoption has to be moved and not in the Family Court. How and in what manner the permission is to be made there is no such mention under the Act and the provisions that have to be followed are there as laid down under Guardians and Wards Act.³⁷

Section 10³⁸ Persons who may be adopted

³⁶*Dhanraj v. SurajBai*, 1975 (Supp) SCR 73

³⁷ *Central Bank Relief & Welfare Society v. India*, In re AIR 1991 Kar 6

³⁸ *The Adoptions and Maintenance Act, 1956. Sec. 10.*

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

(i) He or she is 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.

COMMENTS

There is a bar imposed by this s. 10 and that being a married person cannot be adopted. But the case is different where there is some custom among Jats of Punjab and Haryana in having a legal sanction and judicially recognized where under the custom permits the adoption of married person.³⁹

The person above the age of 15 years cannot be given in adoption and if there is some custom permitting that the same must be strictly pleaded and proved.⁴⁰

Existence of custom be it family or tribal custom having its applicability to the parties concerned whereby the adoption of a person married or of the age of more than 15 years is permitted, is all that is required to be established by the provision of section 10 so as to make adoption valid.⁴¹

Section 11⁴² Other conditions for a valid adoption

In every adoption, the following conditions must be complied with:

³⁹ *Amar Singh v. Tej Ram*, 1982 (84) Punj LR 2387

⁴⁰ *Mahalingam v. Kannayyar*, AIR 1990 Mad. 333. 1989 (2) MLJ 3441

⁴¹ *Maya Ram v. Jai Narian*, 1989 (1) HLR 352

⁴² *The Adoptions and Maintenance Act, 1956. Sec. 11.*

(i) if the adoption is of a son, the adoptive father or mother by whom 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;

(ii) 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;

(iii) 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;

(iv) 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;

(v) The same child may not be adopted simultaneously by two or more person;

(vi) 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 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 dattahomam shall not be essential to the validity of adoption.

COMMENTS

Requirement of an age gap of 21 years between the adoptee and the adopted, if violated is sufficient to render the adoption invalid.⁴³

Where the case is, one child is given to the family of other so that the child is brought up; this giving of the child does not constitute adoption. There must be an intention to give and to take the child in adoption.⁴⁴

Absence of parents at the time of adoption ceremony and not proving the giving and taking the child in adoption, adoption was held invalid.⁴⁵

⁴³ *Golak Chandra v. Kritibas*, AIR 1979 Ori. 205

⁴⁴ *Kewal Singh v. Bakshish Singh*, 1975 (77) Punj LR 321

⁴⁵ *Bakshish Singh v. Kewal Singh*, 1979 HLR 431

Section 12⁴⁶ Effects of adoption

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 all 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 that -

(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 obligations, if any, attaching to the ownership of such property, including 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 vested in him or her before the adoption.

COMMENTS

The assumption that all the ties of child with the family of his or her birth shall be severed operates only from the day the adoption takes place and from the day the ties are replaced by those created by the adoption in the adoptive family.⁴⁷

Adopted girl is conferred an entitlement to succeed the property within the meaning of s.8 of Hindu Succession Act despite the fact that the property was owned by the deceased by reason of his adoption.⁴⁸

Under the provisions of s.14 of the Hindu Succession Act, widow becomes an absolute owner, and it is not possible that the child adopted by her is divesting her of the right which has already been vested in her.⁴⁹

⁴⁶ *The Adoptions and Maintenance Act, 1956*. Sec. 12.

⁴⁷ *Kanwaljit Singh v. State of Haryana*, 1981 Pun LJ 64

⁴⁸ *Neelawwa v. Shivawwa*, 1988 (2) HLR 799

⁴⁹ *Dinajiv.Dadde*, AIR 1990 SC 1153

Where the property is in absolute terms vested in a person as the last surviving coparcener a child subsequently adopted cannot divest him of it.⁵⁰

Section 13⁵¹ Right of adoptive parents to dispose of their properties

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 vivos or by will.

COMMENTS

Where the child is taken in adoption by the sole surviving widow, oral relinquishment by her in favor of adopted child is valid and effective.⁵²

Section 14⁵³ Determination of adoptive mother in certain cases

(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be deemed to be the adoptive mother and the other to be step mothers

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be step mother of the step mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step father of the adoptive child.

Section 15⁵⁴ Valid adoption not to be cancelled

No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

⁵⁰ *Krishnabai v. AnandaSevaram*, AIR 1981 Bom 240

⁵¹ *The Adoptions and Maintenance Act, 1956*. Sec. 13.

⁵² *Hirabai v. BabuManika*, AIR 1980 Bom. 315

⁵³ *The Adoptions and Maintenance Act, 1956*. Sec. 14.

⁵⁴ *Ibid*, Sec. 15.

Section 16⁵⁵ Presumption as to registered documents relating to adoption

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.

COMMENTS

In case a challenge is thrown to the deed of adoption on the ground of its execution being by fraud, coercion or undue influence, it is for the party challenging the document that has to establish that the execution was so vitiated.⁵⁶

Presumption as to registered documents relation to adoption is only a rebuttable presumption.⁵⁷

Where the validity of the adoption was asked for on the ground of not obtaining the consent if the husband on account of his unsound mind but this fact found no place in the plaint as required by order 6, rule 6, CPC and there was only the presentation of registered document it was held that presumption as under s. 16 of Hindu Adoption and Maintenance Act would prevail over the provision of order 6, rule 6 of CPC. It is for the other party if it wants to, to rebut the presumption.

Section 17⁵⁸ Prohibitions of Certain Payments

(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

⁵⁵ *Ibid*, Sec. 16.

⁵⁶ *Sushil Chandra v. BhoopKunwar*, AIR 1977 All 441

⁵⁷ *Bhoolo Ram v. Ramlal*, 1989 (2) HLR 162

⁵⁸ *The Adoptions and Maintenance Act, 1956*. Sec. 17.

(2) If any person contravenes the provision of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorized by the State Government in this behalf.

Chapter 5
ADOPTION BY WIDOW, MARRIED WOMAN
AND THE JUVENILE JUSTICE

5.1 Adoption by widow under express authority from her husband

5.1.1 Who may give authority to adopt

Every Hindu of sound mind who has attained the age of discretion may authorize his wife to adopt a son to him after his death, even if he has not attained the age of majority.

The authority to adopt may be given by the husband, even if he was a member of a mitakshara joint family at the time of his death.⁵⁹

5.1.2 Authority to widow to adopt

Authority can be given to widow alone. The authority to adopt can be given to the widow alone, and not to any another person, nor can it be given to the widow conjointly with another.

Joint authority to widow and another- Where the authority to adopts given to the widow conjointly with another person, the authority is void and an adoption made in pursuance of such authority is invalid.

Authority to widow to adopt with consent of a specified person– But though Hindu cannot join any other person with his wife in making an adoption, he may direct his wife to adopt with the consent of a specified person, or he may direct her not to adopt without the consent of a specified person. Where the direction is to adopt with the consent of a specified person, and it appears form the context and surrounding circumstances that the consent was to be a condition precedent, as where the wife is

⁵⁹ D. F. Mullah, *Principles of Hindu Law*, 5th ed. (Bombay: N.M. Tripathi Private Limited, 1982), pp. 493-496.

very young and the paramount intention shown by the document giving authority to adopt is not to obtain the spiritual benefits arising from the adoption but to have a son to inherit, an adoption made without the consent of the person named is invalid, whether such person be alive or dead at the time of adoption.

Where the boy to be adopted was to be chosen by four executors and one of the executors selected the boy after consulting the co-executors who did not express their disapproval either before or at the time of adoption.⁶⁰

5.1.3 Conditional authority

Conditional authority means the authority to adopt may be conditional, but the condition must not be illegal.

An authority to adopt in the event of a disagreement between the widow and the natural born son, even if the son should then be living, is invalid; the reason is that a Hindu cannot adopt while he was a son living. But an authority to adopt in the event of the natural born son dying under age and unmarried is valid.⁶¹

5.1.4 Authority must be strictly followed

The authority to adopt must be strictly obeyed. The duty of the widow is to obey such directions as her husband may have given as to the way in which she should exercise the power of adoption to him or to the boy to be adopted. Where the husband directed that the widow should adopt a boy from his family or of his gotra the adoption of any another boy is invalid.⁶²

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

5.2 Adoption by widow without authority from her husband

5.2.1 Adoption by widow without husband authority

Generally widow has no authority to adopt any child without husband consent. The only parts of India where a widow may adopt without an express authority from her husband are the Madras and Bombay states.⁶³

5.3 General rules as to adoption by widows

5.3.1 Extent of widow's power to adopt

A widow has no larger powers of adoption than what her husband would have, if alive.

Thus a widow cannot adopt so long as there is a son, grandson or great-grandson natural or adopted, of her husband, in existence.⁶⁴

5.3.2 Minor widow

A minor widow may adopt in the same circumstances as an adult widow, provided she has attained the age of discretion and is able to form an independent judgment in selecting the boy to be adopted.

According to Bengal writers the age of discretion is reached at the beginning of the sixteenth year according to Benares writers, at the end of the sixteenth year, the former view was taken in a madras case. All authorities agree in holding that the widow must have attained competence for independent judgment. But no such judgment is required when the boy to be adopted is named by the husband in the authority to adopt. In such a case she can adopt though she has not attained the age of discretion.⁶⁵

5.3.3 Unchaste widow

A widow living in concubinage is incompetent to adopt a son, as she is incapable of performing the religious ceremonies.

⁶³ Dr. Mohd. Shabber, *Muslim Personal Law and Judiciary*, 3rd ed. (Allahabad: The Law Book Company, 1988), pp. 335-340.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

There are no such disabilities in the case of a shudra widow as no religious ceremonies are essential in the case of shudras. It has been held by the Bombay High Court, that even amongst regenerate classes, a widow though unchaste or otherwise impure can make a valid adoption provided she performs herself the physical act of taking the boy in adoption and delegates to somebody else the performance of religious ceremonies which are duly performed by the latter.⁶⁶

5.4 Termination of widow's power to adopt

5.4.1 Generally provisions

(1) A widow's power to adopt continues all her lifetime.

(i) In all cases where husband has died without leaving any son; and

(ii) In cases where her husband has left a son dies leaving her as his nearest heir.

(2) (a) if the son dies leaving a son or a wife, the widow's power to adopt comes to an end at his death, and she cannot there after exercise it, though she may have been expressly authorized by her husband to adopt in the event of the son's death. The reason is that the estate then vests in an heir of the deceased son and the widow cannot adopt to her husband so as to divest the estate taken by that their.

(b) If the son dies leaving a daughter, it has been held in Bombay that the adoption is valid.⁶⁷

5.5 Adoption by married woman

The Hindu wife does not have an independent right of adoption. She has no right to adopt during her husband's lifetime even with his consent. She can do so only if her husband is dead, or her marriage has been dissolved or he has completely and finally

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

renounced the world or he has ceased to be a Hindu or has been adjudged as a person of unsound mind.⁶⁸

5.6 The Juvenile Justice Act

The Juvenile Justice Act is not a stand-alone law on adoption, but brings in adoption as one of the mechanisms by which abandoned or abused children could be rehabilitated. The focus in this Act, as regards adoption, is on providing a rehabilitative mechanism for children. This Act has sought to lay down a procedure whereby children can be given up in adoption. It envisages the setting up of Juvenile Justice Boards (district-level committees under a District Magistrate with special experience in child welfare) to give children in adoption according to guidelines laid down by a State government. According to this Act, a ‘child’ is a person who has not completed 18 years of age, which is an improvement on the Hindu Adoptions and Maintenance Act, in which a ‘child’ is a person who has completed 15 years.⁶⁹

⁶⁸ [<http://www.answers.com/topic/law-of-the-adoption>, last visited on April 01, 2010.]

⁶⁹ *Ibid.*

Chapter 6

CONCLUSION

6.1 Recommendations

In the light of above discussion, namely actions to be taken immediately, mid-term activities and long-term activities to be undertaken:

6.1.1 Ensure the rights of the adopted child by the government

As a welfare state government should ensure rights of the all child of the state. For this reason when any child is adopted, government may ensure the rights of the child and duties of his guardian. Government can make a yearly basis list of adopted children.

6.1.2 Separate legislation

Adoption is one of the most important parts of our legal jurisprudence, so we need separate laws for the protection of rights of the adopted children.

6.1.3 Rights of property

Under provisions of Hindu Law adopted child is entitled to property less than of the real child. This provision must be amended and equal portion of property should be introduced.

6.1.4 Forming a national committee

To mentor real situation related to adoption, government can form a national committee, which would publish report regarding this, and should be accountable for any violation of rights of the adopted children.

6.1.5 Establishing a legal aid

For the protection of rights of the adopted child government can arrange special legal aid board.

6.1.6 Adoption of female child

Personal Law does not permit adoption of female child but we need to change these provisions of personal law. So that female children can get the benefit of being adopted and can have a normal life supported by our humanity.

6.2 Concluding remark

Personal law of Muslims, Christians, Parsis and Jews do not recognize complete adoption. As non-Hindus do not have an enabling law to adopt a child legally, those desirous of adopting a child can only take the child in 'guardianship' under the provisions of The Guardian and Wards Act, 1890.

Unlike a child adopted under the Hindu Adoption and Maintenance Act, 1956 the child cannot become their own, take their name or inherit their property by right. This Act confers only a guardian-ward relationship. This legal guardian-ward relationship exists until the child completes 21 years of age.

The Supreme Court has held that the objective of the Act was not only to amend, but also to codify the law regarding adoption and maintenance and also to give overriding effect to provisions of the Act over any text, rule or interpretation of Hindu law, custom or usage inconsistent with it. The growth of the law and custom of adoption was mainly to be found in the ancient hindu belief that a son was necessary for the spiritual salvation of the father, and of the ancestors. However, under the Act this seems to have been overtaken by a more secular approach. The Act contemplates and provides that 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 adoption and from such date, and that all 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 adoption in the adoptive family except for the purposes of marriage.