



PAST AND PRESENT OF HINDU ADOPTION LAW

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Abstract

Adoption is an act of giving and taking of a child male or female. Hindu adoption and maintenance act Made adoption secular institution. Manu and other Smritikaras have mentioned 12 or 13 kinds of sons in texts. Under the textual Hindu law the main motive of adoption was religious. Present law provides male and female has capacity to take adoption. Section nine of the Act Deal with Parson who can lawfully give a son or daughter in adoption. In India there is no separate act that governs adoption by foreign citizens. Section 58 of the juvenile justice (care protection of the children) defines that any Indian citizens of India in respective of their religion adopt a child, may apply a specialized adoption agency.

Keywords:- Inter country, juvenile, Niyoga, Dattaka Mimamsa, Dattaka Chandrika

Introduction

At the outset, it is interesting to note that only Hindu law reorganized adoption whereas Muslim, Christian, Parsi family laws Do not recognise the concept of adoption. To went a step further in Hindu law, From the classical times had elaborated provision on this topic. Again the uncodified Hindu law from the ancient times Recognised 12 kind of secondary sons. Further the uncodified law, a daughter could not be adopted. Now the Hindu Adoption and Maintenance Act, 1956, recognises adoption of both a son and a daughter.

In the early days a son by Niyoga (vicarious progeniture of a son to a sonless person) was always preferred to a son by adoption. A Vedic sage declares that an adoptive son born of another is no son at all¹. The foundation of the doctrine of adoption under Hindu Law is the religious side of it. When marriage failed in its most important object of producing a son, or when a son born died before the father, the want was supplied by secondary sons. Adoption is widely practised and recognised in Hindu Law in India. It object is also to secure spiritual benefit to the adopter and his ancestors, and to secure an heir and perpetuate the adopter's name.

Dattaka Mimamsa and Dattaka Chandinika of Bengal says that adoption is tantamount to civil death and fresh birth in the adopter's family. That means adoption has been spoken of as a new birth. Nor is this

expression a mere figure of speech. The theory involves the principles. As complete severance of the child From the family in which he is born and complete substitution Into the adaptive family as if he were born in it.

Therefore, Adoption is regarded in classical Hindu law as secondary birth upon the fiction of Law that the adopted son is born again into the adoptive family.

As reffered earlier during Vedic age the son is regarded as means of salvation’ “ Adoption is an act of giving and taking a child, male or female into the family having no son or daughter.” Previously man could adopt a boy without a consent of his wife, But woman could not adopt during the lifetime of her husband or after his death accept under authority given to her by the husband or with the consent of his sapindas. The Hindu adoption and maintenance act made adoption a secular institution. According to present law male and female has capacity to take in adoption. Manu explained the necessity of a son because through a son a man conquers the world, though a grandson he obtain immortality and through his great grandson he gain the world of the son² The son is called Putra because son delivers his father from Hell called ‘Put’. Right from Vedic age to this, that Hindus have always desired to have an auras (natural born legitimate son for the spiritual benefit and continuation of the family. Manu and other Simratikaras have mentioned 12 or 13 kinds of sons in terms. Son is called ‘Putra’ i.e. Put (Hell) Tra (Saviour), who save the forefathers from hell called ‘Put’. The following kind of sons have been enumerated under the textual law : (1) Aurasa or Legitimate son, (2) Kshetraja son begotten on ones own wife by another man with consent of the husband, (3) Gudhaja – Son secretly brought forth by the wife. (4) Kania – Son secretly born to an unmarried damsel, (5) Purika Putra – Son of an adopted daughter, (6) Sahodhaja – Son born of a wife who was pregnant at the time of marriage, (7) Dattaka – Adopted son, (8) Krita – Son purchased, (9) Kirtima – Son made, that is orphan adopted, (10) Svayamdatta – Where an abandoned son offers himself to some one, (11) Punarbhava – Son of a remarried woman, (12) Apavidha – Where an abandoned son as accepted by a person on his own initiative. One more kind of son added by some lawgivers, was Nishad, i.e., a son of a Brahmin by his sudra wife³.

An unmarried girl could not adopt at all under the uncodedified Hindu Law, now there is no such bar under the Act. Formerly there was a difference of opinion among the various schools of Hindu law as to whether a married person could or could not be adopted. Now, it is provided by Section 10 of the Act that the Son or daughter to be adopted must not be a married person-unless there is a custom or usage to the contrary.

Object of Adoption :

The first object is religious, namely, to secure spiritual benefit to the adoptor and his ancestors, by having a son to offer funeral cakes and libations of water. The second object of adoption is secular, namely, to secure an heir and perpetuate the name of the adopter.

The Shastric Hindu law looked at adoption more as a sacramental than a secular act. There has an acute controversy not only among writers but also among judges whether in adoption the secular motive predominates or the religious motive predominates⁴. Some judges still insist that the object of adoption is twofold to secure performance of one’s funeral rites and preserve the continuance of one’s lineage⁵. Under Hindu Law there were

many rules relating to adoption which could be supported only on the basis that adoption was a sacramental act⁶.

Requisites of valid adoption

Section 6 of the Act enumerates the requisites of a valid adoption section 6 of the act runs as follows :

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.
- (iv) The adoption is made in compliance with the other conditions mentioned in this adoption and maintenance.

Adoption by Hindu Male

A Major Hindu male of sound mind can adopt whether he is a bachelor widower divorcee or married person. But for a married Hindu male, it is obligatory to obtain the consent of his wife. In case he has more than one wife, consent of all the wives is necessary⁷. An adoption made without the consent of the wife is void⁸. The consent of the wife may be express or implied. For instance, If the wife takes part in the performance of ceremonies of adoption, her consent will be implied unless she plead fraud or force.

The consent of the wife, or of any of the wives, in case a person has more than one, may be dispensed with in any of the following cases⁹.

- a) If the wife has ceased to be a Hindu (b) if she has finally and completely renounced world and (c) if she has been declared by a court of competent jurisdiction to be of unsound mind. The requirement of adjudication by the court of insanity is necessary to prevent a man from declaring his wife as insane. The consent of the wife cannot be dispensed with in any other case.

If a Hindu male adopts a female child, he must be senior to her by at least 21 years, otherwise the adoption will be void¹⁰.

Adoption by a Hindu female :-

The Act makes a fundamental departure from the old law by empowering Hindu female¹¹. Earlier, a married woman whose marriage was in subsistence had no capacity to adopt even with the consent of her husband. This section 8 has undergone a change by virtue of an amendment in 2010. Now a married woman can also adopt a child, subject to certain restrictions which are applicable on her husband also with due consent of her husband¹². Under the old Hindu law, a female had no capacity to make an adoption to herself, though a

widow under certain circumstances could adopt a son to her deceased husband¹³ since such an adoption was by her and not to her, she was not the adoptive mother in her own right. She was the adoptive mother being the wife of her deceased husband to whom adoption was made.

Under the Hindu adoptions and maintenance Act 1956, a Hindu unmarried woman, widow or divorced, has capacity to adopt. It has been held in *Vijayalakshamma V.B.T. Shankar*,¹⁴ that where a widow adopts a child, she need not take consent of a co-widow because she adopts the child in her own capacity. An unchaste woman (Un married or widow) also has capacity to adopt. But, a married woman has no capacity to adopt. She cannot adopt even with the consent of her husband. If there is to be an adoption, it must be made by her husband with her consent. The position is thus that a married woman totally lacks the capacity to adopt except in anyone of the following three cases.

- a) if her husband has ceased to be a Hindu.
- b) If he has finally and completely renounced the world, or
- c) If he has been declared by a court of competent jurisdiction to be of unsound mind.

If a female adopts a male child, she must be senior to the child by at least 21 years¹⁵.

Adoption by widow :-

According to what is stated in the various commentaries. it would seem that the old view as regards the capacity of the widow to adopt that she adopts in her own right, appears to have been modified in the modern age that she has no right herself, but that “ She is deemed to act merely as an agent, delegate or representative of her husband or that she is only an instrument through whom the husband is supposed to act”¹⁶.

1. In mithila school, a widow could not adopt at all, even when she was given an express authority to adopt by her husband.
2. In Bengal, Benaras and Madras schools, a widow could adopt but under an authority from her husband in that behalf such authority might be express or implied.
3. In Madras school, she could make an adoption even without her husband’s authority, if the husband was living separate at the time of his death, but she can adopt with the authority of Spindas also.¹⁷
4. In the Bombay school, a widow could adopt even without any authority¹⁸.

A widow can adopt without authority of husband if recognized by custom¹⁹.

Now every Hindu female, of course, a major and of sound mind, whether married or unmarried, widow or divorced has capacity to adopt. section 8 of the Act provides the capacity of female Hindu to take in adoption as under.

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 who 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 adoption²⁰.

Who may give in adoption :-

Section 9 of the act (As amended by the personal laws (amendment) act, 2010) deals with persons who can lawfully give a son or daughter in adoption. only three categories of persons, viz, the father, the mother and the guardian are given this right. Further, it is also clarified that terms “Father” and “Mother” do not include the adoptive father and the adoptive mother.

Under the amended section, both the father and the mother have an equal right to give a son or daughter in adoption however, either of them cannot exercise this right except with the consent of the other spouse, unless such other spouse.

- i) Has completely and finally renounced the world : or
- ii) Has ceased to be a Hindu or
- iii) Has been declared to be of unsound mind by a court of competent jurisdiction.

The guardian of the child has also been given the power to give a child in adoption, with the previous permission of the court in cases where.

- i) Both the father and mother.
 - a) are dead or
 - b) have completely and finally renounced the world or
 - c) have abandoned the child or
 - d) have been declared to be of unsound mind by a court of competent jurisdiction or
- ii) The parentage of the child is not known.

It may be noted that a child can be given in adoption to any person, including the guardian himself.

It is also clarified that a “guardian” in this context, means a person having the care of the minor’s person, or of both his person and property and includes.

- i) A guardian appointed by the will of child’s father or mother, and
- ii) A guardian appointed or declared by a court.

Before granting such permission to a guardian, the court will have to be satisfied that the adoption will be for the welfare of the child. As in the case of the appointment of a guardian, the child's welfare is always the paramount consideration. For this purpose, the court will also give due consideration to the wishes of the child, having regard to the age and understanding of the child, It will also ensure that the applicant 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 adoption, except such as the court may sanction.

Inter-country adoption :-

In India, there is no statutory provision providing for adoption by foreign parents to Indian child but as per the Supreme Court guidelines for inter-country adoption a foreign parent can adopt an Indian child before he/she completes the age of 3 years. Chapter VIII of the juvenile justice (care and protection of children) Act, 2015 deals with adoption in such category of the child. Section 58 of this act speaks.

Procedure for adoption by Indian prospective adoptive parents living in India –

- (1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a specialised adoption agency in the manner as provided in the adoption regulations framed by the authority.
- (2) The specialised adoption agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the authority.
- (3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the specialised adoption agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulation framed by the authority.
- (4) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to the prospective adoptive parents.
- (5) The progress and wellbeing of the child in the adopt family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the authority.

Section 57 defines Eligibility of prospective adoptive parents:-

- 1) The prospective adoptive parents shall be physically fit financially sound mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
- 2) In case of a couple, the consent of both the spouses for the adoption shall be required.

- 3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provision of adoption regulations framed by the authority.
- 4) A single male is not eligible to adopt a girl child.
- 5) Any other criteria that may be specified in the adoption regulations framed by the authority.

Conclusion:-

In summing up, every social institution originates to contribute towards the progresses and development of human society. Like the life history of man himself his organisations are confronted to the constant flux of change. Similarly in the case of Hindu adoption law in India is on the point as the comprehensive adoption is already passed in 1956. But the customs of adoption is different places are different and many places of India they over rules the Act.

In the HAMA, 1956, Act new rights of adoption have been created, as we have seen, but no new rights of property by “relation back” have been created.

The personal property of the person adopted is not divestible nor the boy or girl who is adopted can divest his personal property, the adoption also cannot be cancelled by any person, if it is a valid made and the burden will be on the person who challenges. This act has no retrospective effect. Further in the uncodified law there was no restriction on the age of the son and daughter who is going in adoption. But in the Act of 1956, a male adopted by female and a female adopted by male must be 21 years younger.

To conclude, the ancient sacramental adoption law now lives on in a new environment conceived though as yet imperfectly wider and free terms.

Hardly, since it is notorious that most adoptions are made out of mixed motives and that parents about to give their child invariably ask themselves whether its financial future is secure perhaps where property speculation ceases to bed evil, adoption the institution will perform, more frequently than it now does. It's real function, which is the consolation of the childless or those who need a richer family life, and the rescue of unwanted children.

Note and Reference

- 1- Rig Veda ch VII verse 5-7
- 2- Manu IX 137-138
- 3- Agarwala , RK Hindu law 22nd addition page-164-165.
- 4- Mayne, Hindu law and usage (11th ed) 184-188.
- 5- Inder singh V. kartar singh AIR 1966 punj 258.
- 6- Diwan's paras family law Eleventh edition 2018, page no.318.
- 7- Proviso sec.7 of the HAMA, 1956
- 8- Ibid Section 5 (1)
- 9- Proviso to s 7
- 10- section 11 (ii)
- 11) Brajendra sikh v state of madhya pradesh AIR 2008 SC 1056.
- 12) (Amendment) HAMA Act 2010.
- 13) Appaswami v. sarangpani AIR 1978 SC 1051.
- 14) AIR 2001 SC 1424.
- 15) Supra note no 6 pages no 320- 321
- 16) Collector of madura V. Mootooramaling 912 9 M.I.A. 397.
- 17) Vallabhalalji V. Mahalaxmi. AIR 1962 SC 356.
- 18) Amruta V. kondabai, AIR 1994 Bom 293.
- 19) Munnalal V. Raj kumar, AIR 1962 SC 1493.
- 20) K. sarma B.K Hindu law, 2nd edition 2008- page 204-205.