



**GENDER BIAS IN ADOPTION LAW: A COMMENT  
ON *MALTI ROY CHOWDHURY V.*  
*SUDHINDRANATH MUJUMDAR***

GENDER BIAS embedded in section 8 of the Hindu Adoptions and Maintenance Act, 1956 (HAMA) with regard to a married woman's right to adopt a child has been once again judicially reiterated in *Malti Roy Chowdhury v. Sudhindranath Majumdar*.<sup>1</sup> While there is no denying the fact that the HAMA has considerably improved the position of women with respect to their right to adopt, there still exists a bias based on gender as well as marital status. Under the HAMA, females have been given a limited right to take and give in adoption under certain conditions: an unmarried girl and a divorcee can adopt; a widow can adopt to herself; and a girl can be adopted too. Besides, a married male Hindu who wishes to adopt a child has to take consent of his wife/ wives<sup>2</sup>. However, there is a clear bias in section 8 of the Act which refers to a female's capacity to adopt a child.

Section 8 says:

*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.

Thus, it is clear that a *married* female cannot adopt, not even with the husband's consent, unless her husband suffers from the disabilities referred to in the section, *viz*, he has ceased to be a Hindu, has renounced the world, or is of unsound mind. A husband, on the other hand, may adopt with the consent of the wife.<sup>3</sup>

Likewise, in the matter of giving a child in adoption, the father has a superior right. If he is alive, he alone can give away the child, though

---

1. AIR 2007 Cal 4.

2. See, *Sidaramappa v. Gouravva*, AIR 2004 Karn 230; see also *Dashrath Ramchandra Khairnar v. Pandu Chila Khairnar*, (1976) 79 Bom LR 426.

3. Hindu Adoption and Maintenance Act, 1956 s. 7.



with mother's consent. The mother may give the child in adoption only if the father is dead, or has renounced the world, or has ceased to be a Hindu, or is of unsound mind.<sup>4</sup>

*Malti Roy Chowdhury* involved a property dispute. The appellant, M had applied for grant of letters of administration under section 278 of the Indian Succession Act, 1925 in respect of estate of the deceased T, as the sole heiress. She claimed this right as the adopted daughter of T. The trial court, after considering the oral and documentary evidence, held that the appellant, M, was not the adopted daughter and so dismissed her application. Hence the appeal.

On behalf of the appellant it was argued that there was overwhelming evidence to indicate adoption, like proof of ceremony of adoption, natural parents handing over the child M, who was 2 years old at that time, to T in the presence of her (T's) husband and the priest; acknowledgement and acceptance by T that M was her daughter in school records; M lighting the funeral pyre of T and later performing her *shradha* ceremony; M looking after T's estate, and so on. It was also contended that T had adopted M in the presence of her husband who raised no objection and so his consent was complicit. The appellate court, however, did not accept the argument of valid adoption. It conceded that there was evidence to prove that the biological parents had handed over M to T in the presence of T's husband, and the priest, and also that M was admitted to school by T and also used their surname but these facts, according to the court, were not suggestive of valid adoption. According to the court<sup>5</sup> under the provisions of the Act, the husband alone could adopt but in this case, "it is an admitted position that Malti was adopted by Tripti but not by Bimalkanta Roy Chowdhury [father]".

The court referred to sections 7 and 8 of the HAMA which refer to capacity of a male and capacity of a female, respectively, to adopt. On the basis of these provisions it held that T could not have adopted while her husband was alive. It remarked:<sup>6</sup>

[A]doption has to be taken factually or legally by the male in case of marriage, and not by the wife. In other words, *the wife has no capacity to adopt even with the consent of the husband.... The gender discrimination in the matter of adoption which prevailed prior to this Act [HAMA] has been eliminated by enactment giving both male and female right to adopt under sections 7 and 8 respectively under the Act. Thus it is clear that during subsistence of a marriage a wife has no right to*

---

4. *Id.*, s. 9.

5. *Supra* note 1 at 6.

6. *Id.* at 7 [Emphasis added].



*adopt, only to give consent* in adoption if taken by her husband meaning thereby that it is the husband who is to take a decision and initiative and such right of adoption of husband is inchoate until consent is given by his wife.

Thus, while conceding that a wife has *no right to adopt* but only to give consent, and that it is the husband who is to take decision and initiative, the court yet states that *gender discrimination in the matter of adoption which prevailed prior to the Act has been eliminated*. One really wonders whether the gender discrimination has indeed been eliminated even while the bias in the statute and the court's own remarks and judgement belie this.

The court relied on two rulings in support of its decision, *viz. Dashrath Ramchandra Khairnar*<sup>7</sup> and *Lalitha Ubhyakar v. Union of India*.<sup>8</sup> In the former case, even though the husband had, by executing an agreement, consented to his wife's adopting a son, yet the adoption was held to be invalid. Reference was made by the Bombay High Court to some Hindu texts and authorities on the point as also to the provisions of the HAMA. Without going into the details thereof, it is significant to note that the proviso to section 7 which enjoins upon a male Hindu to obtain the wife's consent for adoption was viewed by the court as "a drastic *encroachment* on the right of a Hindu male to adopt, compared to his right or capacity to adopt prior to the coming into force of the Act".<sup>9</sup> On the other hand, while endorsing the bar against a married woman's right to adopt *even with the husband's consent*, the court observed:

[S]ince an adoption made by the husband under S. 7 is both for himself and his wife or wives it would follow that *it was wholly unnecessary and redundant to recognise or continue the pre-existing right of a Hindu wife to adopt with the consent of her husband*.

With due respect to the court, it is hard to accept this logic for, would not an adoption made by a *wife* with her husband's consent (if she were permitted to do so) be both for herself and her husband as well? Then why is *he* permitted to adopt with wife's consent and the wife debarred even with husband's consent? Besides, what if the husband takes no initiative and the wife wishes to adopt?

The other case relied upon by the Calcutta High Court in the case under comment was *Lalita Ubhayakar*<sup>10</sup> where section 8 of the HAMA

---

7. *Supra* note 2.

8. AIR 1991 Kant 186.

9. *Dashrath Ramchandra Khairnar*, *supra* note 2 at 429.

10. *Supra* note 8.



was challenged as being violative of the equality clause in article 14 of the Constitution. One basis for the challenge was the discrimination between a married wife's right to adopt and the right of women of single status to adopt. Upholding the validity of the section the court ruled that a woman in married status falls into a different class and so there was no discrimination between women, *inter se*, belonging to different classes. The other point of challenge, *viz*, "the requirement of consent of husband before adoption by wife under section 7"<sup>11</sup> is confusing. While one could have ignored this factually wrong statement as an inadvertent error or slip of words but the same statement has been repeated and reiterated in the following words:<sup>12</sup>

Under Section 7 *not only the wife but the husband also needs consent of his wife before adopting a child*. The adoption is to the family and not to individual spouses. The law is made in such a way that the harmony of the family is not destroyed by permitting the wife to adopt separately without the consent of husband or vice-versa. As long as the wife is in a position to *induce* her husband to give consent to adoption, it cannot be said that she is aggrieved.

But under what law is a wife permitted to adopt with her husband's consent? One wonders. Neither statutory law nor judicial pronouncements support the court's remarks. In fact, there is a clear mandate against a wife's right to adopt *even with husband's consent*. Be it what it may, the constitutional validity of section 8 of the Act was upheld.

Reverting to the case under comment, the Calcutta High Court ruled that case of adoption sought to be made by the appellant was not proved as the husband of T, the deceased lady, never took any initiative in this regard; he was only present when the child 'M' (appellant) was handed over to his wife T and that, according to the court does not confer validity to the adoption. However, the court held that since 'M' was well acquainted with the estate and was staying in the house of the deceased, she can certainly administer properties left by T, though without any heritable or other interest therein. The court clarified that it would be open for heirs or legal representatives of the deceased to apply for removal of the appellant, M, if such situation arises.

A reference may be made to another observation of the court in this case which could be sought to be relied on in some case at some point of time. There was oral evidence that the deceased (T) and her husband were judicially separated, which fact was noted by the trial

---

11. *Id.* at 186.

12. *Ibid.* [Emphasis added].



court but there was no documentary evidence in support of this. The high court, in appeal, observed:<sup>13</sup>

Factum of passing a judgement of judicial separation can only be proved by the production of certified copy of decree itself. Therefore, oral evidence is inadmissible.

A query that arises out of these observations is — would it have made any difference in T's right to adopt if there was documentary proof and certified copy of a decree of judicial separation between her and her husband? Under section 8 (c) of the HAMA any female, *inter alia*, whose marriage has been *dissolved* only has the capacity to adopt. But a decree of judicial separation does not dissolve the marriage. It only suspends the relationship without snapping the legal tie.<sup>15</sup> The above stated remarks of the Calcutta High Court seem to convey that had there been a documentary proof and certified copy of the decree of judicial separation, the adoption made by T could have been recognised as legally valid. Assuming that this is what the court in fact implied, it is submitted that this is not a legally tenable argument.

The net result in *Malti Roy Chowdhury*, however, is that the adoption of the appellant was held to be invalid since the deceased had adopted her while she (the deceased) was in a married state — even though the physical handing over of the child and the ceremony of adoption was performed in the presence of the husband without his raising any objection. Even acquiescence or consent of husband to adoption made by his wife does not legally validate the adoption. This is unfair to a female who wishes to adopt; the husband holds the veto power to deny fulfilment of maternal instincts of his wife. Maternal instincts are stronger than paternal instincts; why should a wife be deprived of the right to adopt, with husband's consent at least. The husband could be unreasonable or vindictive in not taking initiative to adopt. Law should give equal rights in the matter to both spouses, and in circumstances (such as in this case) where there is evidence of acquiescence, tacit consent or ratification, the adoption should be held to be legally valid irrespective of the fact whether the child is put in the lap of the father or of the mother.

*Kusum*\*

---

13. *Supra* note 1 at 6.

14. See, for example, *Tej Kaur v. Hakim Singh*, AIR 1965 J&K 111; *Narasimha Reddy v. Basamma*, AIR 1976 A.P.77.

\* Former Professor, Indian Law Institute, New Delhi.