THE HINDU ADOPTIONS – AN INTROSPECTION AND CASE FOR AMENDMENTS*

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INTRODUCTION

According to Hindu mythology, through a son one conquers the world, through a grandson one obtains the immortality, and through the great-grandson one ascends to the highest heaven.

The desire to have a son among the Hindus is too much. It has been prevalent since Vedic period.[1] Those parents who had no son used to adopt a son. But the son could be adopted by the husband only as he was to inherit his father's property.[2] Later on the widow had a right, under certain situations, to adopt a son, which was always deemed to be adoption to her deceased husband. This was known as 'doctrine of relation back'. Necessary implications were that the adoption of the son related back to the date of death of the husband. It created number of problems. Now the law of adoptions has been simplified after the commencement of the Hindu Adoptions and Maintenance Act, 1956.[3] The codified law has brought about several changes in the old law pertaining to adoptions among Hindus. The Act provides for adoption of boys as well as of girls. The unmarried woman can also adopt for herself. A widow too has been extended the right to adopt in her own capacity a son or a daughter. According to section 14(1) of the Hindu

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[1] The son was needed for spiritual benefit and the continuation of the family.

[2] The females had no right to own the property. They had the right to enjoy the property only. The ownership in the property was limited one.

[3] The assent of the President of India was obtained on 21st December 1956.

Succession Act, 1956 she is entitled to take the property absolutely, therefore, under the changed circumstance she can adopt without seeking the consent of the sapindas.[4]

According to the provisions of section 5(1) of the Act, if any adoption is made by or to a Hindu after its commencement[5] then the requirements of law as laid down under the Act must be complied with. Thus, the Act is prospective and not retrospective in its application. Another principle given in section 5(2) makes the things more clear. It lays down that an adoption which is void shall neither create any rights in the adoptive family in favour of the person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

The main advantage of adoption is that a childless person can make somebody else's child as his own. It is not just to have a son but the adopted son must bear a reflection of the natural son. In fact, adoption means transplantation of the child from the family of his birth to the adoptive family. The adoptive child severs his ties from the family of his birth and becomes a regular member of the family in which the child has been adopted.[6] Once the child is adopted, he can neither be given further in adoption nor can be reverted back to the family of his birth. The child is also prohibited to divorce his adoptive parents.[7]

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[4] Prior to the passing of the Hindu Adoptions and Maintenance Act, 1956, there was a need to seek the consent of the sapinds for the reason that there was deprivation of proprietary interest of the reversioners. The consent was also necessary to act as an assurance that the adoption was a bona fide performance of the religious duty and not due to any capricious action by the widow. Prior to 1956, in the case of a joint Hindu family it was necessary that the widow should consult the elders in the husband's family particularly the father of the husband who was her venerable protector, but when the family was divided the duty of the widow was to consult the agnates of the husband at the first instance. If the consent by the nearer agnates was withheld for improper reasons she could proceed to consult and obtain the consent of remoter agnates. See, Ramanad (1867) 12 Moo Ind App 397 (PC); Sri Balusu Gurulingaswami *v.* Sri Balusu Ramalakshmamma (1899) ILR 22 Mad 398 (PC); G. Appaswami Chettiar *v.* R. Sarangapani Chettiar AIR 1978 SC 1051.

[5] The Hindu Adoptions and Maintenance Act came into force w.e.f 21st December, 1956.

[6] Section 12 of the Act. However, there are three exceptions (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 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 obligation to maintain relatives in the family of his or her birth; and (c) the adopted child shall not divest any person or any estate which vested in him or her before adoption.

[7] Sections 10, 11 and 15 read together.

Capacity of a male Hindu to take in adoption :

Any male Hindu who is of sound mind and is not a minor (has completed the age of 18 years) has the capacity to take a son or a daughter in adoption. Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Where a decree of judicial separation has been passed between husband and wife, the consent of the wife would be necessary for the husband to adopt a child, because the decree of judicial separation did not bring the marriage to an end. In case of void marriage no consent of the wife is needed as she is not a lawfully wedded wife and as such does not enjoy any legal status and rights. The consent can be implied or express. When the wife has participated in the ceremony of adoption without any objection then her consent shall be implied.

Capacity of a female Hindu to take in adoption:

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

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[8] AIR 1991 Karnataka 186. In this case the petitioner No.1 hails from a very famous family with a cultural and musical heritage. She is a famous musician of both national and inter-national repute. She is the recipient of Karnataka Sangeetha Academy Award. Besides being great singer she is also a social worker and has held many important and key positions in India.

spouses is adoption to the family and not to individual spouses. The law is made in such a way that permitting the wife to adopt separately without consent of husband or vice-versa does not destroy the harmony of the family.

Who can give the child in adoption?

No person except the father or mother[9] or the guardian of a child shall have the capacity to give the child in adoption. If the **father** is alive, unless he is disqualified, he alone shall have the right to give the child in adoption but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. The **mother** may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. The **guardian** can give the child in adoption when both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.[10]

Persons who may be adopted:

No person shall be capable of being taken into adoption unless, (i) he or she is a Hindu; (ii) he or she has not already been adopted; (iii) he or she has not been married unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption; (iv) he or she has not completed the age of fifteen years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

It is clear from the forgoing provisions mentioned at (iii) and (iv) that these conditions are not absolute prohibitions. These conditions can be relaxed if it is

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[9] The expressions "father" and "mother" do not include an adoptive father and an adoptive mother.

[10] However, before granting permission to a guardian, 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.

established that there is a custom or usage governing the parties to adopt a married child or a child who is more than 15 years of age.

Other essential conditions for valid adoption:

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

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

According to clauses (a) and (b) above a person has a right to adopt 'a son' and/or 'a daughter', meaning thereby that one cannot adopt more than one daughter and/or one son. In *Sandhya Supriya Kulkarni* v. *Union of India,*[11] an important issue was taken up. In the instant case it was demanded that the family should be allowed to adopt more than one female child. It was contended that under Ancient Hindu Law, the parents had a right to adopt only one male child. The Amending Act[12] extended that right to adoption of a female child also.[13] What is the harm if the condition of adoption of only one child is relaxed particularly in case of adoption of abandoned children who are with orphanage or social institution? It is further contended, that if restriction is removed, such children will get parentage and home in adequate numbers. There is no risk involved in such adoptions as such adoptions are made under the supervision of the Court. This minimizes the probability of abuse or misuse. The Court refused to go into the merit of the contentions except observing, "we appreciate the urge and earnest desire in the appeal, but it revolves round the domain of legislative policy and its competence." The Court further observed that the persons who are keen to serve the interests of child can have guardianship of a child under the Guardian and Wards Act without there being any restrictions on number.

The Court when requested to examine its constitutionality did not agree to it and observed that the Act with its mythological and secular mission has stood the test of time for around four decades and has conveniently withstood the assaults as attempted from

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[11] Sandhya Supriya Kulkarni *v.* Union of India I (1999) DMC 143 (Bom)

[12] The Hindu Adoptions and Maintenance, 1956.

[13] Sub-clauses (i) and (ii) of section 11 of the Act.

time to time. Thus, it refrained from examining validity of the impugned provisions on the touchstone of Articles 14 and 21 of the Constitution of India.

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

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

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

In *Khagembam Sadhu alias Rabei Singh* v. *Khangembam Ibohal Singh*[14] the Imhal Bench of the Gauhati High Court had the occasion to examine the proof of adoption. In the present case it was established that the 'giving and taking' of adoption was performed at the house of adoptive father and that on same day ceremony of sacred thread and afternoon meals to clan members were also performed according to Manipur custom. The statement of the natural mother of adopted son, that adoptive father asked her to give her son in adoption and that she consented to said proposal, was accepted by the Court.

In *Doctor Nahak* v. *Bhika Nahak*[15] the validity of the adoption was challenged. In this case the natural father pleaded that he had given his son in adoption whereas the person who was alleged to have taken the child in adoption denied it. The Orissa High Court held that normally, evidence of natural father who is to give is of great importance. Where, however, the person who is stated to have taken in adoption denies the adoption, clear evidence of giving and taking is necessary to be adduced to corroborate the natural father and clear circumstances which would lead to an inference that denial by the person to have taken in adoption is not correct, are to be brought to record. In this case, natural mother who is alive has not been examined. Trial Court has found that person who is related to both parties has not been examined. Explanation that he was suffering from gout was not accepted to be cogent since he could have been examined in Commission. Priest who was examined did not know the basic requirement of a Brahmin; other

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[14] Khagembam Sadhu alias Rabei Singh *v.* Khangembam Ibohal Singh, AIR 2001 Gau 95.

[15] Doctor Nahak *v.* Bhika Nahak II(1994) DMC 236 (Orissa)

witnesses were also disbelieved for cogent evidence. Trial Court who had occasion to see the witnesses and assess their demineour has disbelieved them for cogent reasons. Thus the High Court was also satisfied that the witnesses are not acceptable; therefore, no 'giving and taking' has taken place.

Where the 'adoptive' mother had been permitted by the adoptive son to live with him it was not considered to be sufficient proof of adoption. In *Prafulla Bala Mukherjee* v. *Satish Chandra Mukherjee*[16] the 'adoptive' mother sought a decree for declaration of absolute right, title and interest in respect of the property built by the adopted son and also a decree for perpetual injunction restraining his relatives from interfering with occupation and possession of the property. The Court held that mere fact that an allegedly adopted son allowed his 'adoptive' mother and her family to live in his house was no proof of adoption. On the contrary there were several facts to disprove adoption like the adopted son considering his natural mother as his mother till his own death, making her his nominee in the insurance policy, provident fund etc., performing the shradha ceremony of the real father and on his own death his shradha ceremony being performed by his brother.

A child can be either adopted by the adoptive mother herself or by any person authorised by her through special power of attorney. All the formalities of giving and taking were performed between the natural parents of the child and the adoptive mother's attorney. The Punjab and Haryana High Court held it to be a valid adoption.[17]

Registered deeds of adoption if produced in a Court:

The significance of the registered documents pertaining to adoptions has been highlighted in section 16 of the Act. It lays down that whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.[18] In this connection it is earnestly desire that the registration should be made compulsory in every adoption. Thus

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[16] Prafulla Bala Mukherjee v. Satish Chandra Mukherjee, AIR 1998 Cal 86; See also Suma Bewa v. Kunja Bihar Nayak, AIR 1998 Ori 29.

[17] Narinderjit Kaur v. Union of India, AIR 1997 P&H 280.

[18] See M. Vaithilingam Pillai v. Minor Maruganandham, II (1994) DMC 226 (Mad)

without registered deed the adoption should be treated invalid. It will reduce litigation as well as check fake adoption claims.

The Effect of adoption:

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

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

There appears to be some controversy about the property rights of the adopted child in the family of his birth, especially in the case of coparcenary property. There is difference of opinion among different writers as well as judicial approach adopted by different High Courts. The sole question for determination is whether the share of a coparcener in the Joint Hindu Family property governed by Mitakshara Law will 'vest' in that child or not. If it vests in him then he has lien on that property even after adoption otherwise the result will be different. According to one learned author[19] the undivided interest of a person in a Mitakshara coparcenary property will not be divested by adoption but will continue to vest in him even after adoption. Not only the self acquired property, property inherited by him from other persons and property held as a sole surviving coparcener in a Mitakshara property, *but also even the undivided interest of a male child in Mitakshara coparcenary would pass with him as if he had separated from the coparcenary.* Such a view is expressed in Mayne's, 'Hindu Law and Usage' also.

On the contrary Mulla[20] opines that the proviso (b) relates only to such property, which was absolutely 'vested' in the adopted son prior to his adoption and not his

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[19] Gupte S.*V.*, Hindu Law of Adoption, Maintenance, Minority and Guardianship.

[20] See, The Principles of Hindu Law, by Mulla, 15th Ed. 1982, revised by S.T. Desai.

undetermined and fluctuating interest as a coparcener in his natural family. Bombay[21] and Patna[22] High Courts hold one view whereas the Andhra Pradesh[23] High Court has taken another view. In a recent judgment Patna High Court has explained the true intent of the Legislature in enacting proviso (b) in the following words:

"The main provision of S. 12 creates, in fact recognizes, a legal fiction by which the adopted child is deemed to be the son or daughter of the adoptive parents and member of the new family of his adoptive parents. His previous relationship with the family of birth having come to an end, the interest, which the adopted child had acquired by birth, cannot continue after the adoption. Proviso (b) interjects to protect his rights in any property, which stood vested before the adoption. But it does not mean that the adoptee will continue to have same interest in the estate of the natural family, which he had acquired by birth even though he is legally deemed to be member of the new family. *That could not be the intention of the Legislature. The Legislature is supposed to be aware of the principles of Hindu Mitakshara Law. If the Legislature had intended to protect even the coparcenary interest of the adopted child, perhaps, proviso (b) would have been couched in different language. As it is, the proviso protects only the property, which had vested in the adopted child before the adoption. A coparcener has right to partition of the coparcenary property, he can even bring about separation in status by unilateral declaration of his intention to separate from the family, and enjoy his share of the property after partition. But it is only after such partition that property "vests" in him. Till partition takes place he has only a right to joint possession and enjoyment of the property. The ownership of the coparcenary property vests in the whole body of the coparceners and not in a member of the family.* While the family remains undivided, one cannot predicate the extent of his share in the joint and undivided family. What is vested in a coparcener before adoption is his right of joint possession and enjoyment of the coparcenary property, not the right to exclusive possession and enjoyment of a particular property ? What is saved under Proviso (b) is the property which had already vested in the adoptee before adoption by, say, inheritance, partition, bequeath, transfer etc., which alone can be said to vest in him, to the exclusion of others. The vesting of that property

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[21] Devgonda Raygonda Patil *v.* Shamgonda Raygonda Patil, AIR 1992 Bom 189.
[22] Santosh Kumar Jalan *v.* Chandra Kishore Jalan AIR 2001 Patna 125.
[23] Y. Nayudamma *v.* Govt. of A.P., AIR 1981 AP 19.

is not affected by adoption. As there is no vesting of "any property" and there is vesting of only community of interest with other coparceners, the proviso cannot be extended to cover such interest."[24]

Contrary to the general view, the Andhra Pradesh High Court in *Yarlagadda Nayudamma* v. *Governemnt of Andhra Pradesh,*[25] has held, "notwithstanding the adoption, a person in Mitakshara family has got a vested right even in the undivided property of his natural family which on adoption he continues to have a right over it."

The Bombay High Court in *Devgonda Raygonda Patil* v. *Shamgonda Raygonda Patil,*[26] dissenting from the view of the Andhra Pradesh High Court has held that the undivided interest of a coparcener is not 'vested' property within the meaning of Proviso (b) and, therefore, the adopted child is not entitled to claim, after adoption, any share in the natural family. The court observed that the interest of a coparcener in the joint family property is a fluctuating one, increasing by the death of a coparcener and decreasing by the birth of a new coparcener. It becomes specified or fixed only on partition. There is community of interest between all members of the joint family and every coparcener is entitled to joint possession and enjoyment of coparcenary property. The ownership of coparcenary property vests in the whole body of coparceners. There is no vested property in a coparcener and hence the Proviso (b) is not attracted. The Proviso (b) is applicable only to those properties, which are already vested in the adoptee prior to

the year 1928 leaving behind him his widow Champabai. The properties owned by the joint family of Dharma and Miragu passed on to the hands of Dharma who was the sole surviving coparcener on the death of Miragu.

On 9-8-1968 Champabai took Pandurang, in adoption and immediately thereafter a suit was filed by them in the District Courts for partition and separate possession of one-half share in the properties of the joint family of which Dharma and Miragu were coparceners. Before the said adoption took place, two items of the joint family properties had been sold for consideration. Champabai had instituted a suit for maintenance against Dharma and obtained a decree for maintenance.[29] Dharma resisted the suit on the ground that Pandurang was not entitled to claim any share in the properties which originally belonged to the joint family in view of clause (c) of the proviso to section 12 of the Act and the properties which had been sold by him in favour of third parties could not in any event be the subject-matter of the partition suit.

The Trial Court dismissed the suit. The appeal was preferred to the District Court. The District Judge allowed the appeal and passed a preliminary decree for partition in favour of Pandurang and Champabai and separate possession of one-half share of the joint family properties except the two fields, which had been sold earlier in favour of third parties. Aggrieved by the decree of the District Judge, the appellant filed an appeal before the High Court of Bombay. The High Court affirmed the decree passed by the learned District Judge following the decision of that Court in *Y.K. Nalavade* v. *Ananda G. Chavan*[30] in which it had been held that clause (c) of the proviso to section 12 of the Act was not a bar to such a suit for partition. The present appeal by, special leave is filed by the appellant against the judgment of the High Court of Bombay.

It is argued that Pandurang became the child of the adoptive mother for all purposes with effect from the date of the adoption and only from that date all the ties of Pandurang in the family of his birth should be deemed to have been severed and replaced by those created by the adoption in the adoptive family and, therefore, Pandurang, the adopted son, could not claim a share in the joint family properties which had devolved on the appellant by survivorship on the death of Miragu.

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[29] Under the law, as it stood then, Champabai had only a right of maintenance in the joint family properties.

[30] Y.K. Nalavade v. Ananda G. Chavan, AIR 1981 Bom 109.

The Supreme Court held that the joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for the legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. If a son is subsequently born to or adopted by the sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener, an alienation made by the sole surviving coparcener before the birth of a new coparcener or the induction of a coparcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the coparcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted.

In *Sawan Ram* v. *Kala Wanti*[31] a widow, whose husband had died before the Hindu Succession Act, 1956 came into force, adopted a child after the commencement of the Act. On the widow's death Sawan Ram claiming to be the nearest reversioner of her husband filed a suit challenging the adoption on the following grounds :

(i) That the adoption was invalid as the child was given in adoption by his mother, even though the father was alive;

(ii) That under the Act an independent right of adoption had been given to Hindu female, if a widow adopted a son, he could become the adopted son of the widow only and could not be considered to be the son of her deceased husband also.

But the Supreme Court negated both the contentions. With regard to second contention the court held that the proviso to section 12 of the Act made it clear that the adopted son

[31] Sawan Ram *v.* Kala Wanti AIR 1967 SC 1761.

of a Hindu female, who had been married, was in fact the adopted son of her husband also. Thus the appeal was dismissed.

Once again in *Vasant* v. *Dattu*[32] the effect of section 12 of the Hindu Adoption and Maintenance Act, 1956 came up for consideration before the Supreme Court. In interpreting clause (c) to the proviso of section 12 of the Act, O.Chinnappa Reddy, J who spoke for the Court observed that *where the joint family properties had passed on to the hands of the remaining members of the coparcenary on the death of one of the coparceners no vesting of the property actually took place in the remaining coparceners while their share in the joint family properties might have increased on the death of one of the coparceners which was bound to decrease on the introduction of one more member into the family either by birth or by adoption* (emphasis supplied).

To conclude it may be submitted that the interest of a coparcener becomes specified or fixed and thereby becomes 'vested' only on partition. Partition may be actual or fictional. Thus, if a coparcener marries a non-Hindu under the Special Marriage Act, 1954, he is deemed to have been separated from others from the date of his marriage and his share becomes specified; or, if a coparcener dies undivided leaving a female heir or a male claiming through female of Class I of the schedule to the Hindu Succession Act, 1956, his share becomes specified under notional partition as per Explanation 1 to section 6 of the Act. In other words, the undivided interest of a coparcener is not 'vested' property.

It is submitted that the rule of survivorship has not altogether been abolished. Generally a Mitakshara coparcener has no power to sell, mortgage or otherwise alienate for value of his undivided interest without the consent of other coparceners. Similarly, a coparcener cannot dispose of his undivided interest in the joint family property by gift inter vivos. Thus as the rights of a coparcener over his undivided interest are restricted, such interest is not a fully 'vested' property within the meaning of Proviso (b) to section 12 of the Act.

Parents right to dispose of property after adoption:

Every person has unqualified right to dispose of his personal and self-acquired property, the way he likes. No one can impose any kind of restrictions upon his right to

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[32] Vasant *v.* Dattu, AIR 1987 SC 398.

do so. But there is an exception to this rule. When anyone adopts a child, the parents who have given their child in adoption can enter into an agreement contrary to such a right so as to restrict the adoptive parent's right to dispose of their property. Such an agreement will be valid as per the provisions of section 13 of the Act.

Can money be paid in consideration of adoption?

There is complete prohibition on any kind of payment to be made in consideration of adoption. It is not sale of the child rather the child is given in adoption out of love and affection. Giving or taking of money in consideration of adoption has been completely prohibited. Any one who contravenes this provision shall be punishable with imprisonment, which may extend to six months, or with fine or with both. The prosecution, under the Act, can be instituted only with the prior permission of the State Government.[33]

SUGGESTIONS

1. It is submitted that when male Hindu, under section 7 of the Act, makes adoption while he is married; the consent of the wife is absolutely essential. If the consent of the wife is not obtained then the adoption shall be invalid. The requirement of obtaining consent can be dispensed with if the wife has converted to another religion. We understand we are discussing the provisions of personal law; therefore, the parties should be Hindus. But at the same time it may be pointed out that such a provision cannot find justification in the light of the constitutional guarantees to profess, practice and propagate a religion of one's own choice. In fact by conversion to another religion she is losing her right of motherhood, which appears to be most unjustified. Therefore, under the adoption law if any person on conversion to another religion loses his/her right the matter should be looked into with all seriousness.
2. According to the provisions of section 11 of the Act one cannot adopt a son or a daughter in case his own son, son's son, or son's son's son, or daughter or son's daughter. **Hindu** by religion is living at the time of adoption. Here again the right to adopt can be exercised when the relation, mentioned above though alive, has ceased to be a Hindu. Why, the only answer could be that it is Hindu personal

[33] Section 17 of the Act.

law that is why the parties should be Hindus. It is submitted that this provision too is exclusively based upon the religion, therefore, be done away with.

3. Again the mother acquires the right to give the child in adoption, when father ceases to be Hindu. This provision is again exclusively based upon religion, requires to be amended.
4. The restriction has been imposed to adopt "a" son and/or "a" daughter. It is submitted that when the husband and wife have no limit to conceive and deliver any specific number of children why there should be limit to adopt only one son and/or one daughter. This problem has come up in number of cases where the parents wanted to adopt more than one daughter. They have been refused to do so. If it is allowed it will go a long way to help the needy children.
5. We take away the right to adopt if a son or a daughter is there, even though the child may be mentally retarded or physically handicapped. Don't we feel concerned about such parents who may be in need of personal attendance or financial assistance? The adoption should be allowed under such exceptional circumstances. We would like to go a step forward to propose that the right to adopt a child may also be extended in genuine cases where the natural born child does not maintain good relations with his parents or has permanently sought immigration to a foreign country and has not been taking care of his parents during old age or when the parents need his assistance. The time has come when we are required to apply our mind to such modren problems, as the joint Hindu family system is in its last legs particularly in urban areas. Everyone wants severance of status. The children do not want to maintain their parents but keep an eye on their property. Shouldn't we extend the right to adopt and, be looked after properly by the adoptive child, and die peacefully? Let us suggest these circumstances as exception to the general rule and allow such parents the right to adopt a child.
6. There is ban on adoption when grandchildren are there. The grandchildren mostly remain under the influence of their parents. When their parents, throughout their lifetime, remained hostile do we expect the grandchildren to look after their grand parents? We are far away from reality, therefore, it is proposed that under such

circumstances they should be given the right to adopt a child who can look after them during their dark time. This right again should be considered as an exception to the general rule.

7. According to the provisions of section 13 of the Act the right of adoptive parents to dispose of their properties can be restricted. It should be done away with, as this restriction can't be imposed in the case of natural born children they simply have right to maintenance only, why such an extra-ordinary right in favour of adoptive children.

8. The adoptions are invariably challenged as they affect the property rights of some of the family members. The registration of adoptions be made compulsory so as to solve this problem to a great extent. It is accepted that the observance of which is a difficult task but not impossible. It will reduce the litigation to a great extent.

9. Proviso (b) to section 12 of the Act lays down *inter alia*, "any property which vested in the adopted child before the adoption shall continue to vest in such person." Similarly, proviso (c) speaks of "the adopted child shall not divest any person of any estate which is vested in him or her before the adoption." The position with regard to "vested rights" of joint Hindu Family property has been a subject matter of judicial scrutiny. Let us make a provision in the Act itself that in the joint Hindu property there shall be no vested rights of a child unless he seeks partition or otherwise partition takes place before his adoption.

10. The adoption materially affects the rights of the child to be adopted and nowhere we have made a provision for his consent. It is understandable when the child is in its infancy we cannot take child's consent but when the age of the child is such that the child can also express his wishes we should include him in the process. We should not leave everything to the whims of the natural guardian.

11. Let us resolve to have secular law of adoptions. The children from all religions may be given and taken in adoption. It will be in consonance with the Constitution mandate enshrined in Articles 39 and 44.