ADOPTION- SOME UNSOLVED ISSUES

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The Hindu and Adoptions & Maintenance Act 1956, replaced the common Hindu Law and to a great extent has codified the Law on Adoption. One of the basic aims of the Act is to remove the caste divisions in the Hindu society. Adoption, under the common Hindu Law, was permissible only between persons belonging to the same caste but this restriction was done away with by the Hindu Adoptions Act. There is no express prohibition in the Act that adoption has to take place only within the community. However, there are some unsolved issues in the Law of Adoption for which the judiciary itself has not formulated binding legal principles. One such issue is the effectiveness of Sec.12 of the Act. Section 12 provides:

"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.

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This section deals with the effects of a valid adoption. The main effect of an adoption is to transplant the child adopted from the family of his birth to the adoptive family. As from the date of adoption the child will be considered to be the natural child of the adoptive family and all the ties with the original family are severed. However, this section is subject to three exceptions as stated in the provisio : 1) that the adopted child cannot marry any person whom he could not have married had he continued in the original family; This Provisio (a) prevents consanguinous marriages or marriages within the prohibited degrees which are tantamount to incestuous relationships. 2) That the adopted child is not deprived of the estate vested in him prior to his adoption when he lived in his natural family subject to any obligations arising from such vesting of the estate, 3) that the adopted child shall not divest any person in the adoptive family of any estate vested in that person prior to the date of adoption. Provisio (b) and (c) indicate the prospective nature of adoption, meaning thereby that the natural devolution before adoption cannot be reopened after adoption. The main object of the present section is to codify the old Hindu law that considered doctrine of 'relation back'. The Act does away with the theory of relation back and confers on the child adopted a status equivalent to that of a natural born child in the adoptive family only from the date of adoption. The expression "effects of adoption" refers to all the legal consequences flowing from an adoption.

With this background, an attempt is made in this paper to discuss the attitude of the judiciary in the matters of giving effect to Section 12 of the Act. In A.S.Sailaja v. Principal, Kurnool Medical College[1], the petitioner, daughter of A.S.Radhakrishna, an advocate of Cuddapah in Andhra Pradesh, had initially appeared for Common Entrance Examination for 1984-85 for admission into Medical College but failed. For the Common Entrance Examination for 1985-86 she described herself to be daughter of the natural father Radhakrishna but in the application for admission made on 13-7-1985, she claimed that she was adopted by one B.Sivaramaiah (shepherd), a Backward Class in Andhra Pradesh and sought admission on that basis. She secured 417 marks out of 600 and when she claimed to be an OBC, but was not given admission, she filed a writ petition in the A.P.High Court for direction to the College to admit her in the Backward Class Group-D. The High Court considered the interplay of adoption under the Hindu Adoption and

Maintenance Act, 1956 and the protective discrimination under Article 15(4) of the Constitution of India. It held that the native endowments of men are by no means equal. The mind of children brought up in culturally, educationally and economically advanced atmosphere is accounted highly as they are bound to start the race of life with advantages. It would apparently have its inevitable profound effect on the quality of the child born in that atmosphere. The children born amongst Backward Classes would not start the race of life with the same quality of life. It would, therefore, be necessary to identify the competing interests between diverse sections of society and it is the duty of the Court to strike a balance between competing claims of different interests. Citizens belonging to a group of Backward classes identified by the appropriate authority or the Commission, as a part of that class, fulfilling the traits of socially and educationally backward among that group, would alone be eligible for admission as Backward Class citizens under Art.15 (4). In that event, the Court declined to go into the question whether such person is socially or educationally backward which is an exclusive function of the commission/authority appointed under Art.340 of the Constitution. But any person who would attempt, by process of law, and seek to acquire the status of such a Backward Class, should satisfy that he/she suffered the same handicaps or disadvantages due to social, educational and cultural backwardness. A person born in upper caste and having early advantages of education is not entitled to the benefit of Art.15 (4). In that context, it was held that caste would be one of the considerations along with other factors applicable to homogeneous group of the people. A homogeneous group together being identified as a class for the purpose of Art.15 (4) or 16(4) would become a mockery. Therefore, it was held that the petitioner, though by adoption became a member of the Backward Class, was not eligible for admission into Medical College under Art.15 (4) since she did not undergo any sufferings or disadvantages, handicaps or ignominy which the members of the homogeneous Backward Class are subjected to.

In K.Shanthakumar v. State of Mysore[2]; Nataraja v. Selection Committee[3] and R.Srinivasa v. Chairman, Selection Committee[4] the Karnataka High Court had consistently held that a boy belonging to a Forward Caste adopted by a Backward Class citizen is not entitled to the benefit of reservation under Art.15 (4).

In Khazan Singh v. Union of India [5], the Delhi High Court had held that on adoption of a Jat boy into Scheduled Caste family, he became entitled to the benefit of reservation under Art.16 (4). An elaborate study on adoption law has been made in this case. During the course of the judgment, the Judge quoted: 'As Ganapathy Iyer points out in his Hindu Law," it cannot be said that membership of caste is determined only by birth and not by anything else". The Judge also said: 'it appears to me that the answer to the question depends on the legal effect of an adoption and that the fact that the transaction of adoption took place on the eve of the petitioner seeking a Government employment and perhaps with a view to obtain "S.C.status" is immaterial. In Mohan Rao's case[6] the motive for reconversion was ignored. For the purposes of the present arguments, we have to proceed on the basis that the adoption is a valid and genuine one and, if so, the question of motive for the conversion is of no consequence. It was also held that the legal proposition that 'on adoption he became a member of the caste to which his adoptive parents belong has to be accepted. I think that the decisions regarding the effect of marriage have no relevance in the present context." The Judge further held that under the old Hindu Law an adoption by a sonless parent was for all purposes equivalent to the birth of a son directly to him. The question of caste however did not assume any importance because adoption was permitted only between members of the same caste. (Old law). The Hindu Adoption and Maintenance Act makes a specific provision in Section 12 regarding the effect of adoption. The language of the section is quite clear, explicit and emphatic. The adoptee child, it says, (a) is deemed to be the child of the adoptive father for all purposes; and (b) all the ties of the child in the natural family shall be deemed to be severed and replaced by those of the adoptive family. The emphatic repetition of the word 'all' in relation to the 'purposes' and 'ties' is significant. The word 'ties' is a very wide and comprehensive word and would include all types of bonds, social, religious, cultural or any other that bound the adoptee to his natural family. All his relationsships are, according to the mandate of the section, replaced by the corresponding ties in relation to the adoptive family.

Another aspect in adoption the Judge discussed was relating to the impact of adoption and effect on the future generations – the children and grandchildren that may be born to the adoptee. The question is - for how many generations those children have to

wait for admission into the community? Hence recognising the adoption would be the only choice that would remove the caste factor to a greater extent.

Equally important is the next issue – the right of the Scheduled Caste persons to adopt a child born in a higher community. The governments in many States offer special inducements and rewards for cases of inter-caste marriages and encouragement should be given to attempts at mutual integration whether by marriage or adoption. The Judge in Khazan Singh's case concluded that 'once a scheduled caste, always a scheduled caste' should not receive acceptance and added that if genuine adoptions both ways become frequent they may eventually lead to the development of that social equality at which the Constitution aims.' He held that the certificate granted to the petitioner was not liable to be cancelled on the ground that the petitioner's claim to be a Scheduled Caste by adoption was unsustainable. In nutshell Khazan Singh case decided the following:

a) if the adoption is valid and genuine one, the motive is of no consequence;
b) The emphatic repetition of 'all' in Sect.12 of the Hindu Adoption and Maintenance Act in relation to 'purposes' and 'ties' is significant.
c) The impact of adoption, and effect on the future generations – for how many generations the children, grandchildren and the great grand-children have to wait for getting admission into the community;
d) The genuine adoption both ways would strengthen the social equality aimed in the Indian Constitution;
e) The decisions regarding the effect of marriage have no relevance in the present context.

In Valsamma v. University of Cochin[7], a case concerning with inter-caste marriage, the Supreme Court held that change of caste by inter-caste marriages would not be recognised for changing the caste from forward to backward. While discussing many cases concerning with inter-caste marriages, the Supreme Court had made a one sentence reference to Khazan Singh's case[8]. In the end without discussing any valid or reasonable grounds, the Supreme Court had stated that the Delhi High Court in Khazan Singh's case too did not lay down the law correctly[9]. As the main issue in Valsamma is not concerned with adoption, it is submitted that

the passing reference of the Supreme Court has to be taken as an obiter. Moreover, the Supreme Court had stated that when a member is transplanted into the Dalits, Tribes and OBC's, he/she must of necessity also have undergone the same handicaps and must have been subjected to the same disabilities, disadvantages or sufferings so as to entitle the candidate to avail the facility of reservation. The Supreme Court has not mentioned the kind of sufferings, or the age criteria or even the existing recognised sufferings. It is really sad that the Supreme Court despite the existence of the Protection of Civil Rights Act and the National Human Rights Commission should suggest something that has been condemned during the fifty years of our Independence. It did not even discuss the distinction between a constitutional right and a legal right. Similarly, there is no mention about the community status of the future generations of the adoptee. The Judge also failed to discuss the community status of the orphans. Thus the issue to be solved is Whether section 12 of the Hindu Adoption and Maintenance Act has to be interpreted on the Khazan Singh's lines or not? Or it has to be amended making prohibition for 'career planners'. As the issue is delicate and complicated, larger-Bench of the Supreme Court should take up this issue and pass final orders. In Ashutosh Vs. State of Rajastan[10] question arose for determination is whether a natural son born to an adopted father by a scheduled caste is entitled to the benefits of reservation. In other words, a son born to an already adopted father into Scheduled Caste can claim for reservations. The High Court of Rajastan held that the petitioner (natural born son) being born to such Scheduled Caste does acquire the S.C, status by birth and not by voluntary act and therefore any Scheduled Caste who acquires the status by birth is entitled to the benefits of reservation for being born in S.C. family as he does not fall under the category of adoption or inducted in the Scheduled Caste family because of his volition.

Barring Khazan Singh's case the courts have obviously digressed from the statutory provisions, especially the provisio to section 12 which does not speak anything about caste, class but only indicates the matrimony and vesting or divesting of property in relation to the adoptee. It is observed with due respect to the judiciary that the courts have transgressed from the scheme and objects of the Hindu Adoption Act by means of introducing the extraneous propositions such as caste, casteist sufferings in the judgements though the scheme of the Act has purposely avoided such ingredients in the provisio to Section 12. Such judicial decisions not only blur the letter but also dampen the spirit of the Hindu Adoption Act which aims at

integration of the society, confluencing in the sea of humanity devoid of caste, creed, class and other disgusting frontiers.

References

[1] AIR 1986 AP 209
[2] (1971) 1 Mys. LJ 21
[3] (1972) Mys.LJ 226
[4] AIR 1981 Kant. 86
[5] AIR 1980 Del.60
[6] Principal, Guntur Medical College v. Mohan Rao (1976) 3 SCC 411
7. (1996) 3 SCC pp.545-568
8. Ibid p.558 para 15. The Supreme Court consisted of Hon'ble Mr.Justice K.Ramaswamy and Hon'ble Mr.Justice B.L.Hansaria. The judgment of the Court was delivered by Hon'ble Mr.Justice K.Ramaswamy.
9.Id. Para 36 at p.568
10. (2000(1)HLR)