

Gist of Workshop Paper On Concept of Law of Adoption & Maintenance Act

Introduction:

Parenting is a joyous journey of nurturing a young one with love and affection. Traditionally in India, adoptions were intra-familial with the objective of fulfilling religious and familial duties. Conceiving often becomes an issue due to today's changed lifestyles. Mostly, couples wait for years together before contemplating medical treatments or adoption. The couple is expecting their first child and very excited. Unfortunately, after many cycles of IVF and failure of ectopic pregnancy they gave up and by this time many years have lapsed and they decided to adopt a child to fulfill their dream to become parents. An adopting a child helps couples to complete their family. The main advantage of adoption is that a childless person can make somebody else's child as his own. Thus adoption means transplantation of the child from the family of his birth to the adoptive family.

Object of Adoption :

Spiritual benefit : The object of adoption are two-fold. 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.

Progeny : The second object of adoption is secular, namely, to secure an heir and perpetuate the name of the adoptor.

The Hindu Adoptions And Maintenance Act, 1956 came into effect from 21 December 1956. The law of adoptions has been simplified after the commencement of the Hindu Adoptions and Maintenance Act, 1956. This Act applies to Hindus, Buddhists, Jains

and Sikhs and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. An adoption effected contrary to the provisions of this Act will be void and it will not create any right in the adopted child.

Requirements of Valid Adoption (Section 6):

The requisites of valid adoption are four in numbers. For making the adoption valid:

- i) The person adopting has the capacity and also the right to take in adoption
- ii) The person giving in adoption has 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.

In **Dhanraj Vs. Suraj Bai, AIR 1975 SC 1103**, it is held by the Hon'ble Supreme Court that, failure of compliance with any of the requirements of valid adoption specified in Sec. 6 of the Act, will render the adoption null and void. It is further held that, the compliance of Sec. 6 of the Act is mandatory in character.

Who can Adopt :

The sections 7 and 8 bring about important changes in the Hindu law of adoption, and specify the persons who may lawfully take a son or daughter in adoption.

Capacity of Hindu Male to Adopt: Under S.7, any male Hindu of sound mind, and who is not a minor, can take a son or a daughter in adoption.

If he has a wife who is alive, he cannot adopt without her consent, unless the wife-

- i) **Renunciation of world** : has completely and finally renounced the world; or
- ii) **Apostasy** : has ceased to be a Hindu; or
- iii) **Unsound mind** : has been declared to be of unsound mind by a Court of competent jurisdiction.

Polygamy vis-a-vis consent of wives : If such a person has more than one wife living at the time of adoption (as polygamy was not prohibited by Hindu Law prior to 1955), the consent of all the wives is necessary, unless the consent of any one of them is dispensed with for any of the three reasons referred to above.

Nature of consent : It may be noted that the consent of the wife need not be express consent, i.e. it can also be spelt out from the facts and circumstances of the case. Thus, if the wife has taken a prominent part in the adoption ceremonies. Such an inference can validly be made.

Capacity of Hindu female to adopt: Under S.8 of the Act (as amended by the Personal Laws (Amendment) Act,2010), any female Hindu who is of sound mind and is not a minor, has the capacity to take a son or a daughter in adoption. However, if she has a husband who is alive, she cannot adopt without the consent of her husband, unless the husband.

- i) **Renunciation of world** : has completely and finally renounced the world; or
- ii) **Apostasy** : has ceased to be a Hindu; or
- iii) **Unsound mind** : has been declared to be of unsound mind by a Court of competent jurisdiction.

Person who can give the child - Giving in adoption

Three categories of persons : 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 the terms “father” and “mother” do not include the adoptive father and the adoptive mother.

Equal right of father and mother : Under the amended section, both father and the mother have an equal right to give a son or daughter in adoption. Even so, 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.

Power of Guardian : The guardian means a person having the care of the minor's person, or of both his person and property, and includes. 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.

- 1) A guardian appointed by the will of child's father or mother, and
- 2) A guardian appointed or declared by a Court.

The person who is adopted should be capable of being taken in adoption :

Section 10 provides that no person shall be capable of being taken in adoption, unless the following four conditions are satisfied, viz.

- i) **Hindu** : he or she is a Hindu;
- ii) **No previous adoption** : he or she has not already been adopted;
- iii) **Unmarried** :he or she is not married-unless there is a custom or usage applicable to the parties, which permits married persons being taken in adoption; and
- iv) **Under fifteen years of age** :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 over fifteen years being taken in adoption.

It is useful to refer the observations in para 1 of the citation of **Kondiba Rama Papal Alias Shrike V/s. Narayan Kondiba Papal, reported in AIR 1991 SC 1180** in which the Hon'ble Apex Court has considered the fourth condition of Section 10 of the Hindu Adoption and Maintenance Act 1956 and observed as under :

“(iv) he or she had 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. 'At the time when the plaintiff was adopted he was about 22 years old, but even though there is a difference of opinion between various schools as to the age when a boy may be adopted, so far as the Bombay State is concerned the position is well settled in view of more than one judicial decision. As pointed out in Mulla's Hindu Law, 14th Edition at page 550, in the Bombay State a person may be adopted at any age though he may be older than the adopter and though he may be married and have children. The adoption is not invalid although it took place after the thread ceremony of the boy was performed. Thus the custom is judicially recognised in the Bombay State as regards adoption of child at any age. Once the custom is juridically recognised, it is not required to be independently proved in subsequent cases. The plaintiff and the defendant No. belonged to the area which was part of the old Bombay State and accordingly such a custom prevailed amongst them as regards adoption of a child at any age. Even independently of this position, in the old Bombay State evidence was led of two instances of adoption of persons belonging to the same caste as the plaintiff where a child was adopted at the age above 15 years after the Act came into force. Thus in my opinion, in view of the settled position in law as judicially recognised, if the factum of the adoption is established its validity cannot be challenged on the ground that the adopted child had completed the age of 15 years at the time of his adoption”.

A lunatic is capable of being taken in adoption
Devgonda Raygonda Patil Vs. Shamgonda Raygonda Patil A.I.R. 1992 Bom. 189.

Conditions for a valid adoption :-

As per section 11 in every adoption, the following conditions must be complied with;

(i) 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;

(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 persons;

(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 a 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 datta homam shall not be essential to the validity of an adoption.

This section lays down some vital rules relating to the law of adoption. The rules and conditions stated in the section are absolute and non-compliance with any of them will render an adoption invalid.

Clause (i) Adoption of a son can only be by a person who has no son. The very basis of adoption being substitution of a secondary son in place of an aurasa or a real son for the objects mentioned above, the rule was fundamental that only a person who had no son, grandson or great-grandson could validly take a son in adoption. The

Act now conferred right to adopt on a female evidently clause (i) apply to both adoptive father and the adoptive mother by whom the adoption is made must not have Hindu son, grandson or great-grandson (whether by legitimate blood relationship or by adoption) living at the time of adoption.

Existence of an illegitimate son is not a bar to male or female Hindu taking a son by adoption. However, the existence of a son who is to be deemed to be a legitimate child of the parents by operation of Sec.16 of the Hindu Marriage Act, 1955, would be a bar to the father's or mother's right to take a son in adoption.

Clause (ii): Adoption of a daughter :-

The object of recognising the right to take a daughter in adoption now conferred by the Act is to permit a person, male or female, to have a substituted or secondary daughter in the absence of a natural born daughter and it, therefore, stands to reason that the right should not be allowed to be exercised when there is a daughter or a son's daughter in existence. A person who has an adopted daughter or the adopted daughter of a son living, cannot adopt a daughter.

Clause (iv) Age of the adoptive mother :-

This clause requires that, in case of adoption of a son by a female Hindu, the son must be at least 21 years younger than the adoptive mother. This is obviously, a precautionary measure, there was no such restriction of age under the previous law. This condition must be complied with, otherwise the adoption would be invalid. The requirement of difference in age is mandatory. An adoption in contravention of the rule would be void.

The Hon'ble Bombay High Court in case of **Hanumant Laxman Salunke -V/s- Shrirang Narayan Kanse, reported in AIR 2006 Bom.123**, held that; the other conditions set out under Section 11 of the Act are mandatory for a valid adoption.

Clause (v): Simultaneous adoption :-

This clause reiterates the rule that the simultaneous adoption of the same child by two or more persons is invalid as to the child, as well as all the adoptive parties. The Act proceeds on the principle that there can be adoption of one person by the adoptive person alone, either a male or a female Hindu.

Clause (vi): Act of adoption and ceremonies incidental to it :

Under the Shastric Law, ceremonies relating to adoption which included the physical act of giving and receiving with intent to transfer the boy from one family to another were essential to the validity of an adoption.

In **Laxman Singh Kothari V. Smt. Rup Kanwar - AIR 1961 SC 1378**, the Hon'ble Apex Court in para 10 observed as under: '10. The law may be briefly stated thus: Under the Hindu law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and

giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party.'

The nature of the ceremonies may vary depending upon the circumstances of the case. There was conflict of opinion as to datta homam is essence of valid adoption.

Now, Clause (vi) says that, the performance of datta homam is not essential to the validity of an adoption. No particular ceremonies are necessary for a valid adoption. The clause states that, there must be the actual giving and taking of the child with intent to transfer the child from the family of its birth to the family of its adoption. The section, however, does not prescribe any particular mode or manner for the act of giving and taking. It is essential that, there should be some overt act to signify delivery of the child from one family to another.

Persons entitled for maintenance and reasons :

The word 'maintenance' is defined in Section 3 (b) of Hindu Adoptions and Maintenance Act, 1956.

“maintenance” includes -

- (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
- (ii) in the case of an unmarried daughter, also the reasonable expenses of and incidents to her marriage;

Persons Entitled to Maintenance :-

As per provisions of Section 18 a Hindu wife, as per Section 19 widowed daughter in law, as per Section 20 children and aged parents, as per Section 22 dependants, as defined in Section 21 are entitled for maintenance under the Hindu Adoption and Maintenance Act 1956.

Section 18- Maintenance of Wife:

A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

The right of wife for maintenance is an incident of the status of estate of matrimony and a Hindu is under a legal obligation to maintain his wife. A Hindu wife shall be entitled to live separately from her husband without losing her right to claim maintenance as mentioned in sub-clause 2 of Section 18.

Reasons for awarding maintenance :

A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,

- (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her,
- (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband,
- (c) If he is suffering from a virulent form of leprosy,
- (d) if he has any other wife living,

- (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.
- (f) if he has ceased to be a Hindu by conversion to another religion.
- (g) if there is any other cause justifying her living separately.

The Reasons for awarding maintenance pendent lite are :

- 1) The wife or the husband has no independent income; or
- 2) Wife's or husband's independent income is not sufficient for
 - (a) her or his support, and
 - (b) necessary expenses of the proceeding.

The object behind this section is to provide financial assistance to the indigent spouse to maintain herself or himself during the pendency of the proceeding and also to have sufficient funds to carry on the litigation so that the spouse does not unduly suffer in the conduct of the case for want of funds. Grant of relief under this section is not dependent either on merits of petition or ultimate success of petition. In a case for interim maintenance, it requires that before granting interim maintenance the definite finding about the income of husband or wife must be made.

Maintenance of Widowed Daughter in law :

She can claim maintenance from the father in law only if she is unable to obtain maintenance from (1) her own resources; or (2) out of the estate of her husband or her mother; or from her son or daughter of his or her estate. Thus, the right to claim maintenance from the father in law is further conditional upon the father-in-law having in possession coparcenary property, out of which the widowed

daughter in law had not obtained any share. Thus, it can be seen that, daughter in law can not claim maintenance from her father-in-law when her husband is alive.

The obligation to maintain a daughter in law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise.

Maintenance of Children and aged parents :

As per Section 20 of the said Act a Hindu is bound during his or her lifetime to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents. So also, a legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is minor. The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter as the case may be, is unable to maintain himself or herself out of his or her own earning or property. As per said section parents includes a childless step-mother.

This section imposes an obligation upon the parents – mother and father, both equally to maintain the children – both legitimate and illegitimate. This is a unique feature of the Hindu law where both the parents are equally responsible to maintain the children.

This obligation under Section 20 is not only limited to the sons but it also extends to the daughters. The explanation to this section also includes stepmother in the term 'parent'.

In a landmark judgment of the case **Dr. Vijaya Manohar Arbat..vs..Kashi Rao Rajaram Sawai 1987 AIR 1100**, the Hon'ble Supreme Court held that the married daughter is liable to provide maintenance to their aged parents if they are unable to maintain themselves.

Dependants and Maintenance of Dependants

Section 21- Dependants defined :

For the purposes of maintenance “dependants” mean the following relatives of the deceased;

- (i) his or her father;
- (ii) his or her mother;
- (iii) his widow (so long as she does not remarry);
- (iv) his or her minor son;
- (v) the (minor) son of his predeceased son;
- (vi) the (minor) son of a a predeceased son of his predeceased son;
- (vii) his or her unmarried daughter;
- (viii) the unmarried daughter of his predeceased son;
- (ix) the unmarried daughter of a predeceased son of his predeceased son;
- (x) his widowed daughter;
- (xi) the widow of his predeceased son (so long as she does not remarry)
- (xii) the widow of a son of his predeceased son (so long as she does not remarry);
- (xiii) his or her illegitimate minor son;
- (xiv) his or her illegitimate daughter (so long as she remains unmarried).

Thus, Section 21 define and mention the persons who are called Dependants. The heirs of a deceased Hindu are bound to maintain the dependents of the deceased out of the estate inherited by them from the deceased. Where a dependent has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall

be entitled, subject to the provisions of this Act to maintenance from those who take the estate. The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

In determining the amount of maintenance, if any, to be awarded to a dependent under this Act, regard shall be had to ;

(a) the net value of the estate of the deceased after providing for the payment of his debts.

(b) the provisions, if any, made under a will of the deceased in respect of the dependent,

(c) the degree of relationship between the two,

(d) the reasonable wants of the dependent,

(e) the past relations between the dependant and the deceased,

(f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source,

(g) the number of dependents entitled to maintenance under this Act.

Conclusion :

The adoption involves the feeling emotions between the adopted family and adopted child. By the act of adoption the adopted child is uprooted from his natural family and transplanted in to adoptive family like a natural son. 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. The adopted child becomes the child of his adoptive family from the date of adoption for all the purposes like a natural child and thereby get all rights like birth in that family.

Providing basic requirements such as medical treatment to the spouse and child which is a moral obligation of the husband, can neither be denied nor be deferred till final adjudication of the suit proceedings. The Act is a beneficial legislation in favour of the wife and the dependent children and it is settled law that the provisions of such a Statute should be read down to give true meaning and effect to the aims and objects of the Act and do dispense justice.