EMERGING TRENDS IN SONSHIP AND ADOPTION UNDER HINDU LAW

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Introduction

Whilst the relation of the son to the mother is an obvious biological fact the concept of paternity and the relationship of father and son as known in the present day society has evolved over a period of time. Primitive man probably did not understand the concept of paternity. In Hindu customary law the ceremony of *Couvade* seems to be the first step towards recognizing the concept of paternity. During this ceremony the father would lie with the child after it was born. This ceremony gave the father-right to the child. This ceremony was unconnected with the fact of procreation[1].

The idea of sonship during the infancy of mankind was associated with the notion of ownership. The issues of a man were considered his property. The father-child relation indicated the right of the father over the child. This right went even to the extent of taking the life of the child. Thus, sonship to begin with, was a form of proprietary right over the child.

I

Definition of *Aurasa* Son

The *Aurasa* son occupies a very high status in ancient legal literature of India. It is through the *aurasa* son that the seers desired immortality. From the Rigvedic[2] period down to this day, prayer for the *aurasa* son continue to be made. The *Sutrakaras* and the *Dharmasastrakaras* have defined the *aurasa* son in an unambiguous way. Apastamba defines an *aurasa* son as a son begotten by a man from a woman of equal caste, who has not belonged to another man, and whom he has married legally *Aurasa* sons (*sastravihita*) have the right to (follow) the occupations (of their castes) and to inherit the estate[3].

Baudhayana, like Apastamba defines the *aurasa* son in the same way. He states that one must know a son begotten by (the husband) himself on a wedded wife of equal caste (to be) a legitimate son of the body

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1 N.C.Sen Gupta, *The Evolution of Law*, p.55, Firma, 3rd edn., (1962).

2 Rig. 7.4.7.8.

3 G.N.Jha, *Hindu Law in its Sources*, Vol.II, pp. 175-76.

(*aurasa*). Now they also quote (the following verse); ' From the several limbs (of my body) art thou produced, from my heart art thou born; thou art "self" called a son; mayest thou live a hundred autumns'[4].

Apastamba and Baudhayana both insist that the *aurasa* son is only one who is born of a wife of the same *varna.* This view has not been followed by the later *Dharmasutrakaras* and *Dharmasastrakaras.* Vasishtha defines the *aurasa* son as one who is assigned the first place among the twelve kinds of sons, who is begotten by the husband himself through his lawfully wedded wife. Vasishtha does not insist that the married wife should be of the same *varna* as that of husband.[5] *Vishnu Dharmasutra* defines the *aurasa* son as the son of the body, *viz,* he who is begotten (by the husband) himself through his own lawfully wedded wife[6]. Unlike Baudhayana and Apastamba, *Vishnu Dharmasutra* does not speak of the same *varna* of the wife as that of the husband.

Manu defines an *aurasa* son as one, whom a man begets through his own wedded wife, let him know to be a legitimate son of the body (*aurasa*), the first in rank[7]. He speaks only of the wedded wife and does not require that the wife should be of the same *varna. Kautilaya* says that an *aurasa* son is one who has been procreated by a man himself through his wedded wife according to the rules of *Shastra*[8]. The *aurasa* son is in fact a son born in a lawful wedlock. Gradually, the *varna* of the wife became irrelevant, at least in the case of an *anuloma* marriage[9].

The definition of the *aurasa* son was subjected to judicial scrutiny in *Pedda Amani v. Zemindar of Marungapuri*[10] case. The Privy Council following the English law did not approve of the Indian definition of *aurasa* son. The Court made modifications in this definition. It held that even according to the ancient texts, procreation after marriage was not distinctly necessary for legitimacy as a son. To insist on this condition would be inconvenient and that the Hindu law on the issue was the same, as the English law. This decision of the Privy Council being the law of the land is based on the English conception of legitimacy and on the Section 112 of the *Indian Evidence Act, 1872.*

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4 Baudhayana, 11,2,3,14, *Sacred Books of the East,* Vol.14, p.226, Motilal Banarsidass.

5 Vasishtha, XVII, 13, *S.B.E.* Vol.14, p.85.

6 Vishnu, XV, 2, *S.B.E.* Vol.7, p.61.

7 Manu, X, 166, *S.B.E.* Vol.25, p.361.

8 Svayamajatah Kritkriyamaurasash, Arth.III,7.

9 P.V. Kane, *History of Dharmasastra*, Vol.III, p.656, Bhandarkar Oriental Research Institute, 2nd edn., (1973).

10 1 1.A 282, 293

This decision has been rightly criticised by Gooroodass Banerjee in his *Tagore Law Lectures*, (1878) entitled "The Hindu Law of Marriage and Stridhan". He says that the Hindu law of legitimacy is stricter than the English law. Manu defines the *aurasa* son or son of the body, thus: " Him whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body". And to the same effects are the texts of Vasishtha, Devala, Baudhayana, Apastamba, and Yajnavalkya[11]. According to the Hindu sages, therefore, in order to constitute legitimacy, there must be not only birth but also procreation in lawful wedlock; and some of the leading commentators, such as Kulluka, Vijaneswar, and Nilkantha, confirm this view of their texts "[12].

The Privy Council has however, taken a different view. Sir Barnes Peacock in delivering the judgment of the Judicial Committee in the case of *Pedda Amani v. Zemindar of Marungapuri*[13] observed: "the point of illegitimacy being established by proof that the procreation was before marriage, had never suggested itself to the learned counsel for the appellant at the time of the trial, nor does it appear from the authorities cited to have been distinctly laid down that, according to Hindu law, in order to render a child legitimate, the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law that law must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of opinion that the Hindu law is the same in that respect as the English law". This decision, so long as the Privy Council do not think it fit to re-consider the point, must be received as the law on the subject. But as Gooroodass Banerjee points out "with every respect that is due to the decision of the highest Tribunal for India, it may be observed that the doctrine that procreation in lawful wedlock is necessary to constitute legitimacy, is not only supported by the language of the texts cited above, but is also in accordance with the general spirit of the Hindu law, by which the nuptial rites are primarily meant only for virgins; while the necessity of marrying girls before puberty, reduces the practical inconvenience of the doctrine within the narrowest possible limits"[14].

In the background of this rigorous law with regard to sonship one needs to examine the Hindu law of adoption.

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11 Colebrooke's Digest, BK.V, 193, 195, 196, 199 and 200

12 Mitakshara, Ch.I, sec.XI, 2; Vyavahara Mayukha, Ch. IV, Sec.IV, 41.

13 Supra n. 10.

14 Gooroodass Banerjee, *The Hindu Law of Marriage and Stridhan*, pp. 161-62, Calcutta University, (TLL, 1878).

II

Hindu Law of Adoption

The *Hindu Adoptions and Maintenance Act, 1956* has made radical changes in the law of adoption. Now any one who is a Hindu can be given and taken in adoption. Section 10 of the *Hindu Adoptions and Maintenance Act, 1956* (hereinafter referred to as *HAMA*) embodies the law regarding the child who may be taken in adoption, it reads:

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:

(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.

Section 10 has provided for uniformity in the law of adoption relating to the child be it boy or girl to be taken in adoption. Section 10 embodies the simple rule of uniform applicability to all Hindus. The term 'Hindu' has been given a wide meaning by Section 2 of the Act[15]. Now the child to be adopted may be daughter' s son, sister's son or mother's sister's son. The *varna* and caste qualifications stand abrogated. The only qualification is that the child must be a Hindu and must not have already been adopted. The term "Hindu", as Section 2 shows include various offshoots or variations of Hindu religion. The conflicting opinion of different High Courts regarding the age and married status of the boy has been given statutory recognition under clauses (iii) and (iv) of Section 10.

There has been a very acute controversy over the interpretation and true import of clauses (iii) and (iv) of the Section 10. Such true import cannot be ascertained without first arriving at a correct interpretation of clause (a) of Section 3 and clause (a) of Section 4 of the *HAMA*. The controversy has been raging for quite a long time in the Bombay High Court where the question of

15 For details see Section 2 of the *Hindu Adoptions and Maintenance Act, 1956.*

adoption of a boy of more than fifteen years of age or of married persons has been debated. In order to arrive at a correct position the Bombay High Court referred to the work of Kane, P.V. The interpretation of Sections 3 clause (a), 4 clause (a) and Section 10 clause (iii) and (iv), was made in several cases in the Bombay High Court. The first being the opinion expressed by Malvankar J[16]. He had reviewed a large number of authorities and took the view:

> That it was clear in spite of the provisions of Section 6 clause (iii) and Section 4 clause (a) of the HAMA, 1956, if a custom applicable to the parties is proved which permits persons who have completed the age of fifteen years being taken in adoption, then such a custom is saved in view of the provisions of Section 4 clause (a) read with Section 10 clause (iv) of the Act. It was fairly conceded before him that if the adoption of a person over the age of fifteen years was permissible under any text, rule or interpretation of Hindu law before the Act came into force, and not in accordance with any custom, then the same could not be allowed to be proved, in view of the provisions of the said Sections[17].

Malvankar J's view was accepted by the Bombay High Court in *Laxman v. Anusuyabai*[18], Vimaldalal and Naik JJ, who observed that in their opinion the position as was laid down by Malvankar J. in his judgment in the *Bhima Rao Vithu*[19] case was the correct position in law as to the interpretation of Section 10 clause (iv).

The opposite view was taken by the division bench in *Haribai v. Baba Anna*[20]. These two conflicting opinions were ultimately reconciled by a full bench of the Bombay High Court to which reference had become necessary to resolve the conflicting opinions. The opportunity came in *Anirudh v. Babarao*[21], in which the opinion of Malvankar J. in the *Bhimarao*[22] case and Vimaldalal and Naik JJ. decision in the *Laxman*[23] case and Joshi J. decision in the *Balakrishna*[24] case were overruled. After exhaustive inquiry the full bench settled the controversy and held:

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16 S.A. No. 1444 of 1965, *Bhima Rao Vithu v. Chandra Savala Khandagale*, judgment delivered on 24.4.1972.

17 *AIR* 1976 Bom. 264 at p. 271.

18 *AIR* 1976 Bom. 264.

19 Supra n.16.

20 *AIR* 1977 Bom.289.

21 *AIR* 1983 Bom. 391.

22 Supra n. 16.

23 Supra n. 18.

24 *Balakrishna Raghunath v. Sadashiv Hira, AIR* 1977 Bom. 412.

> the Expressions ' custom' and 'usage' as defined in clause (a) of Section 3 of the said Act include not only custom and usage in the ordinary sense which have obtained the force of law among Hindus in any local area, tribe, community, group or family, but also texts, rules and interpretation of Hindu law which have been continuously and uniformly observed and have obtained the force of law among Hindus in any local area, tribe, community, group, or family[25].

The definition of the terms 'custom' and 'usage' would thus include within its scope any text or rule of the Bombay school of Hindu law known as *Vyavahara Mayukha* which recognises taking in adoption any person even above the age of fifteen years made even though such adopted person was married. Such rules would therefore be saved by Section 4 read with clauses (iii) and (iv) of Section 10 of the Act.

The Bombay High Court in *Housabai v. Jijabai*[26] analysing the meaning of 'custom' and 'usage' held that "the term 'usage' may refer to a practice which may not even be ancient wherein reliance for proving the custom has been placed on two instances one of 1942 and another of 1948 and certain oral evidence. These instances may not be sufficiently ancient to establish a custom. But what Section 10 clause (iv) of the *HAMA*, 1956 talks of is not only custom, but also usage. The instances and the evidence would be sufficient to establish a usage[27]".

III

Ushering in Gender Parity

The *HAMA*, *1956* has given effect to the Articles 14 and 15 of the Constitution in a substantive way by bringing the male and female children on a par in the matter of adoption. Before 1956 according to the then Hindu law a daughter was not to be adopted. The two epics contain references with regard to adoption of daughters. The adoption of Santa by Dasaratha and adoption of Kunti by Kuntibhoj are two striking examples of adoption of daughters. In later period not only did the adoption of daughters go out of vogue but adoption of daughters was expressly prohibited. The *HAMA* has thus in according gender revived an ancient Indian practice.

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25 Supra n.21 at p. 403.
26 *AIR* 1972 Bom. 98.
27 Id. at p. 99.

Under the Act any person who does not have a daughter or a son's daughter can adopt a daughter. In the case of the adoption of a daughter by a male Hindu, the Act lays down that the adoptive father needs to be at least twenty-one years older than the person to be adopted[28].

The old rule that adoption of a son though made by a widow was considered always an adoption to her deceased husband has undergone a sea change. Under the Act there are certain situations wherein a woman is competent to take a son or a daughter in adoption in her own right[29]. In view of this change a woman can take a boy in adoption if the adoptive mother is at least twenty-one years older than the boy to be adopted[30]. The provisions contained in Section 11 clauses (iii) and (iv) have been incorporated to avoid abuse of the institution of adoption. The clause (ii) reads: 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. But if one' s own daughter or son 's daughter got converted to any other religion the adoption of a daughter could be made. An adopted daughter of a son is a bar for adopting a daughter by the father. But an illegitimate daughter is no bar to adopt a daughter. The law as it stands is that a person must not have a daughter in existence i.e. a legitimate daughter and a daughter by adoption but if the legitimate daughter renounces the world, a daughter can be adopted. And if the adopted daughter also renounces the world even then the adoption of a daughter will be permissible.

IV

Adoption of Illegitimate, Orphan and Otherwise Invalid Children

Under the old Hindu law an illegitimate child could not be considered for adoption. This was because under the text of *Vasishtha* the father alone had the capacity to give a son in adoption. Under the *HAMA, 1956* no such bar operates because a child can be given in adoption even by a guardian. Though the guardian can give the child in adoption only with the previous permission of the Court. Interestingly, the guardian can be the adopter of the illegitimate child or orphan. Section 9 lays down exhaustive rules as to who can give a child in adoption.

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28 Section 11 (iii) of *Hindu Adoptions and Maintenance Act, 1956.*
29 Section 7 of *Hindu Adoptions and Maintenance Act, 1956.*
30 Section 11 of *Hindu Adoptions and Maintenance Act, 1956.*

The statute also gets past the other disqualifications imposed in ancient Hindu law. Children with physical and mental disability were excluded from the benefits of adoption under the ancient Hindu law. The *HAMA* extends the benefit of adoption to them.

The Bombay High Court in *Davgonda v. Shamgonda*[31] held that a lunatic can be adopted if he or she was a Hindu and also fulfilled other conditions of Section 10 of the Act, also such a child was capable of being taken in adoption under Section 6 clause (iii).

The adoption under the Act of 1956 cannot be made in violation of the provisions of the Act. Even custom under Section 10 clauses (iii) and (iv) cannot save an adoption which is in violation of the provisions of the Act. The Orissa High Court in *Krushna Kahali v. Narana Kahali*[32] held that a custom which allowed adoption during the lifetime of a male issue would be invalid because it was violative of the express provisions of the Act of 1956. Section 11 clause (i) even under the old Hindu law adoption in such a case was not permissible.

Other important change introduced in the law of adoption is the elimination of *Dvyamushyayana* or son of two fathers because the *HAMA, 1956*, Section 11 clause (v) clearly lays down that "the same child may not be adopted simultaneously by two or more persons". Now, therefore, no question of *Dvyamushyayana* raised under the provisions of modern Hindu law, neither two sons nor two daughters can be adopted simultaneously.

V

Conditions of Adoption Under *HAMA, 1956*

The *HAMA, 1956* has converted the old Hindu law of adoption which was based on *Shastric* texts into statutory law. Now, the provisions contained in the Act of 1956 govern the whole law of adoption amongst Hindus Section 2 of the Act defines the term Hindu. Section 4 gives overriding effect to the provisions of the Act over the existing Hindu law. Section 5 of the Act provides that after the commencement of the Act, no adoption by or to a Hindu shall be valid if not made in accordance with the provisions of the Act.

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31 AIR 1992 Bom. 189.
32 *AIR* 1991 Ori. 134.

VI

Formal Conditions of Adoption

Under the old Hindu law the formality of adoption was regulated by the text of *Vasishtha* wherein the sole authority of giving or taking was vested in the husband. The wife always acted on behalf of the husband. Under the *HAMA, 1956* the formality of giving and taking a child in adoption is vested in the parents of the child. The wife and the husband both are equal partners in the act of giving and taking a child in adoption. Therefore, the Act requires that there should be consensus between the parents in the matter of giving and taking a child in adoption. Section 11 clause (vi) provided that the parents can give authority to any person to perform the physical act of giving or taking a child in adoption. Similarly the guardian may also authorize some other person to perform the physical act of giving or taking a child in adoption.

Section 11 has also done away with the requirement of *Dattaka Homam.* This may be because *Dattaka Homam* was never considered an essential condition of a valid adoption under the old Hindu law. The Judicial Committee of Privy Council in *Balgangadhar Tilak v. Shrinivas Pandit*[33] expressly held that the performance of the *Dattaka Homam* ceremony was optional and not essential to the validity of adoption.

The essential formality in adoption is actual giving and taking of 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. Non-compliance of this condition renders the adoption invalid. The ceremony of adoption cannot validate an otherwise invalid adoption[34].

In *Chandrani Bai v. Pradeep Kumar*[35], it has been held that where the fact of adoption has been sufficiently proved the absence of a registered document is not sufficient to disturb the finding of fact. In *Urmila Devi v. Hemanta Kumar Mohanta*[36], the Orissa High Court held that giving and taking ceremony of adoption was essential for the validity of adoption. Where the ceremony is not proved with sufficient independent evidence adoption is invalid not withstanding the fact that the child was brought up in the alleged adoptive family.

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33 (1915) *ILR* Vol. 39, p. 441.
34 *Nathuni Prasad v. Mst. Kachnar, AIR* 1965 Pat. 160.
35 *AIR* 1991 MP 286.
36 *AIR* 1993 Ori. 213.

In *Pathivada Ramaswami v. Korada Surya Prakasa Rao*[37], the A.P. High Court has found registration of adoption under Section 16 of the *HAMA, 1956* to embody a statutory presumption. Therefore, where a registered document of adoption is produced the court shall presume that the adoption has been made in accordance with the provisions of the Act.

In *Vandavasi Karthikeya v. S. Kamalamma*[38], the A.P. High Court found the absence of the deed of adoption insufficient to negative the *fact* of adoption, when the ceremony of giving and taking is proved. Moreover, the school register showed that the adoptive father and the adoptee were living together.

In *Nemichand Shantilal v. Basantabai*[39], the Bombay High Court held that the requirements of Sections 10 and 11 regarding custom and actual ceremony of giving and taking were not proved. Therefore, the adoption was invalid. In *Arjun Banchhor v. Buchi Banchhor*[40], the Orissa High Court held that the onus to prove adoption lies on the person who alleges it. In this case the proof of adoption was of doubtful authority because the age of the adoptive father was thirty years at the time of adoption. His wife was living and he had already fathered a daughter. These circumstances raised suspicions on the adoption of a son. Especially as the witness who deposed that he was present at the ceremony of adoption was not a relative. Moreover, the adoptive was mentioned as the son of his contemporaneous sale deed mentioned the allegedly adopted son as the son of his natural father. These facts were found to disprove adoption.

The discussion makes it clear that the ceremony of giving and taking a child in adoption is a statutory requirement under Section 11. The ceremony is presumed to have taken place under Section 16 of the *HAMA* if a registered document is produced. However the absence of a registered deed does not displace the ceremony of giving and taking where proved by independent evidence.

The statutory law has made some changes as to the vesting and divesting of property. According to Section 12 of the *HAMA,* adoption is prospective. It takes effect from the date of adoption. It also, consequently, does not divest any person of any property already vested in any person before

37 *AIR* 1993 AP 102; 1993 (2) HLR 219 (AP).
38 *AIR* 1994 AP 102.
39 AIR *1994 Bom. 235.*
40 *AIR* 1995 Ori. 32.

the adoption. The viable change made by the statutory law is that it has ostensibly secularized the law in all its aspects and adjusted it to the changing social values. That, of course, is a departure from the ancient Hindu law. The adopted son is as much the substitute of the *Aurasa* son in the statutory law as he was under the ancient Hindu law. Only the ancient conditions and effects have been clothed with the statutory provisions. However, Section 12 clause (c) has curtailed the proprietary interest of the adopted son. In fact the Hindu law of adoption has retained much of the spirit of old Hindu law of adoption except that the form has been changed. The formal conditions also remain the same and where the Act says that *Dattaka -Homam* is not necessary it is only the re-statement of the *ratio decidendi* of the *Balgangadhar Tilak*[41] case.

VII

Doctrine of Filial Relation-back

The Supreme Court's decision in 1987 in *Vasant v. Dattu*[42] very clearly spelt out the operation of the doctrine of filial relation back as to the proprietary rights of an adopted son. The Court made the distinction between vesting and divesting of property by succession on the one hand and acquiring an interest in the property by survivorship on the other. The adopted son can acquire interest in the property by survivorship on the basis of the fiction of the doctrine of filial relation back. The Supreme Court explained the law on this point as follows:

> We are concerned with proviso (c) to Section12. The introduction of a member into a joint family, by birth or adoption, may have the effect of decreasing the share of the rest of the members of the joint family, but it certainly does not involve any question of divesting any person of any estate vested in him. The joint family continues to hold the estate, but, with more members than before. There is no fresh vesting or divesting of the estate in anyone[43].

The Supreme Court in this case has confirmed the view of Bombay High Court in *Ankush Narayan v. Janabai*,[44] and its own view in *Sita bai v.*

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41 Supra n. 33.
42 *AIR* 1987 SC 398.
43 Id. at p. 399.
44 *AIR* 1966 Bom. 174.

Ramachandra[45] case that a son adopted by a widow will also become the adopted son of her deceased husband who shall become coparcener in the joint family.

Conclusions and Suggestions

The *HAMA, 1956* has introduced a very welcome reform in Hindu law, but it contains, some anomalies and infirmities which have come to light after its operation. The first infirmity which was partially rectified by the Supreme Court while construing the effect of adoption made by a widow in *Sawan Ram v. Kalawanti*[46] and *Sita bai v. Ramachandra*[47] case. The Supreme Court rightly held that when a widow adopted a son, the son should be also related to her deceased husband. The main question which the Supreme Court had to decide was the determination of the family of the adoptive child who was adopted by widow or by a married woman whose husband had completely and finally renounced the world or had been declared to be of unsound mind. The Supreme Court decided this question on well-recognised social principles that a married woman belonged to the family of her husband, and naturally the adopted child also belonged to the same family. The natural conclusion, therefore, is that the adopted child shall become the adopted son of the deceased husband of the widow or the married woman taking him in adoption. The decision has been subjected to criticism. However, this overlooks some of the essential principles of interpretation. It is an elementary rule that a statute is to be construed in its entirety. In reaching the conclusion that the adopted son by a widow or married woman would be the son of the husband of the widow or the married woman the Supreme Court had examined the entire statute. The Supreme Court did not read Hindu "widow" or "married woman" in isolation but considered the Hindu woman who was a widow or married as belonging to the family she was married in. Therefore, where the adoption is made by a widow she brings in a member in the family, who becomes the member of the family and all rights are replaced in the family of his adoption which have been lost in the family of his birth by virtue of his adoption. Thus, all the ties of the child in the family of his or her birth shall be deemed severed and replaced by those created by adoption in the adoptive family.

The adopted child becomes the child of the widow and of her deceased husband from the date of adoption. Such child does not divest any person of property already vested in a person. This interpretation does not revive the doctrine of relation back. The doctrine of relation back restricts the rights of the adopted son and the restriction placed by Section 12 clause (c) is not

displaced by the decision of the Supreme Court. About Section 12 clause (c) the Supreme Court observed:

> It appears that, by making such a provision, the Act has narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (c) of the proviso to Section12, and Section 13 of the Act were incorporated. In that respect, the rights of the adopted child were restricted. It is to be noted that this restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted child cannot, therefore, in our opinion, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband[48].

The critics even twisted the judgment in the *Sawan Ram* case to contend that the approach of the Supreme Court in the *Sawan Ram* case is in flagrant breach of Section 12 of the Act. For instance Gupte states that in the *Sawan Ram* case the Supreme Court has held that the adoption of a son by a widow after the *HAMA*, is not only to herself but also to her deceased husband and that *it relates back to the death of the husband for the purpose of determining the rights of the adopted son to succeed to the estate of the deceased husband whether vested in her or others.* The Court so held notwithstanding the express language of Section 12 which abolishes the doctrine of relation back[49]. In fact the Supreme Court did not use the words emphasised above. Instead the Supreme Court gave the correct interpretation to clause (c) of Section 12 by recognising the restriction in respect of the rights of adopted child which were equally applicable whether the adoption was by a male or a female. These restrictions do not lead to any inference

45 *AIR* 1970 SC 343.
46 *AIR* 1967 SC 1761.
47 Supra n. 45.
48 Supra n. 46 at p. 1765.
49 S.V.Gupte, *Hindu Law of Adoption, Maintenance, Minority and Guardianship*, p.11, N.M.Tripathi Pvt. Ltd., 1st edn., (1970).

that a child adopted by a widow will not be deemed to be the adopted child of her deceased husband. It should be remembered that the law relating to the joint Hindu family has not been amended by statutes.

A correct appreciation of the law laid down in *Sawan Ram* line of cases is not grasped properly by the critics. The Orissa High Court in *Akhay Kumar v. Sarada Dai*[50] case observed:

> In spite of decision of Supreme Court reported in *Sawan Ram v.Kalawanti*[51] which hold the field, jurists have expressed that son adopted by a widow though member of family of her husband, it may not be correct to say that he is son of her husband. This view is expressed in view of language of Section 5 of the Hindu Adoptions and Maintenance Act, 1956. However, till the decision of Supreme Court reported in *Sawan Ram v. Kalawanti*[52] holds the field, it is binding on me and son adopted by widow after death of her husband is also son of her husband. As such he is entitled to all the rights of a son[53].

Therefore, in order to dispel the doubt, if any, appropriate amendments in the Act must be made.

It is, therefore, suggested that a proviso should be added to Section 7 of the Act that when a widow or a married woman makes an adoption, the adoption will also be filially related to her deceased husband or to the husband of the married woman, whose husband either finally renounced the world or has ceased to be a Hindu or has been declared by a competent Court of jurisdiction to be of unsound mind. These changes, if made, would ensure a safer home for the child to be adopted. A female Hindu who is married and whose husband becomes incapacitated, would remain a member of the family of her husband if she chooses, not to remarry. If she desires to make an adoption, the adopted child must be ensured full relationship in the family of his adoption. Such a child must be related to the husband of the female making the adoption. This would be in consonance with the words and spirit of the Act.

When an adoption is made by an unmarried or divorcee Hindu female or a male Hindu bachelor or a widower the Act provides that the husband

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50 AIR 1995 Ori. 212.
51 Supra n. 46.
52 Ibid.
53 Supra n. 50 at p.213.

with whom such a female marries shall be deemed to be the step-father of the child adopted before marriage; likewise a male who is bachelor or widower after making an adoption marries, his wife shall be deemed to be the step-mother of the adopted child.

The existing provisions are onerous and they are not in the interest of the adopted child because the adopted child if adopted by a female will not have paternal relations and the adopted child of a single male shall not have maternal relations. Such a child will not have his relations replaced in his family of adoption by those relations he left behind in his family of birth. It is therefore, submitted that in such cases injustice is done to the adoptee. Hence, in order to obviate the injustice to the adoptee amendment in the *HAMA*, is suggested. The suggestion is that: a bachelor or widower male if desires to make an adoption of a child the choice of a child for such a male to take in adoption should be from amongst the children who are either orphans or illegitimate. Similar provision should be made where a single Hindu female under the category mentioned above desires an adoption of a child. Again, such single males and single females should not be allowed to adopt unless they have attained the age of sixty years. Under old Roman law there was such a provision. This provision will minimize the chances of abuse of the institution of adoption. Alternatively, in this connection the following suggestion may be considered.

The alternative suggestion is made to abrogate the provisions of clauses (3) and (4) of Section 14. These clauses should contain the word "mother" and "father" respectively instead of the "step-mother" and "step-father". These suggestions have been made so that the adopted children may have full relationships on the marriage of the adopters, in the paternal and the maternal lines.

Presently, there is possibility of various types of sons emerging due to these provisions. The son adopted by a widow or unmarried woman resembles the *Sadhaj* son after her marriage and the male adopter's adopted son during his bachelorhood is another type of son who will not have a mother, and maternal relationship, i.e., any relative on the maternal side. These two type of sons will not have parity of status, because both will have imperfect one sided relationship, the bachelor's adopted son will have no maternal relations which he left behind in his family of birth, while Section 12 of the Act says that "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". In this case there is no replacement of maternal relations.

The adopted child in the adoptive family is, therefore, in the disadvantageous position, which is against his social status and interest. The same argument applies to the adoption made by an unmarried Hindu female. This anomaly still continues.

HAMA was enacted by the Parliament to remove the anomalies and inequalities between male and female. In fact, under the old Hindu law the law of adoption was absolutely male oriented. The female had no part to play in the law of adoption, whatsoever. For example, the right to give a child in adoption was vested in the husband. The husband was completely empowered to give a son in adoption notwithstanding the dissent of his wife. Even after the death of the husband she was not entitled to give or take a son in adoption except in the circumstances where the husband had permitted her during his lifetime to take a son in adoption. She was merely to act as an agent of her deceased husband.

The new Act is more balanced. Gender sensitivity has been inducted in the Hindu law of adoption which was earlier entirely absent. Consequently the husband can neither take nor give a child in adoption without the concurrence of his wife. The statute does not only ensure the equality between wife and husband but also between male and female children. Both are now capable of being taken or given in adoption. The right to take in adoption has also been extended to single persons. Here again the right has been extended to both men and women.

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