

THE DOCTRINE OF RELATING BACK: AN ANALYSIS

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INTRODUCTION

An adoption is a doctrine that transfers a child from a family in which he or she is born into another family, thereby acquiring new rights, duties and status and ending all ties with the old family. Under ancient Hindu law, the main reason for adopting son in order to fulfill religious duties. In early societies, the need to have a son was prevalent for the continuation of the family, father's name, lineage and for performing various offerings, rites and rituals.

A Hindu widow has a right to adopt a son or a daughter to herself under the Hindu Adoptions and Maintenance Act, 1956. The doctrine of relation back under old Hindu Law states that if a Hindu widow adopts a son after the death of his husband then the adopted son will be deemed to have been adopted on the death of the husband. The theory is against the rule that 'a property once vested cannot be divested'.

The first chapter of this project contains the concept of adoption and Son-ship under both old Hindu Law and Modern law. The second chapter contains information about whether a widow can make an adoption or not, if she can, then on what conditions. The third chapter of the project contains the conceptual framework of the doctrine of relation back which existed in old Hindu law. The last and fourth chapter is very relevant for the project as it deals with the idea of the doctrine under modern Hindu law, does this doctrine survive after the Hindu Adoptions and Maintenance Act? What is its relevance today? All answers to such questions will be dealt in the last chapter of the project.

CHAPTER-1

ADOPTION: THE CONCEPT

Adoption: under old Hindu Law

Throughout early societies, the need to have a son was prevalent for the continuity of the family, the name of the father, the lineage, and various offerings, rites, and rituals. Through their texts, earlier writers like Manu, Veda, Yajnavalkya, etc. described and clarified the need to have a child. The concept of having secondary son cannot be seen in the Vedic literature however the concept of adoption emerge in the Sanskrit literature at a later stage.¹ Manu had defined an adopted son as “A Son equal in caste and affectionately disposed whom his mother or father give with water at a calamity, is called to be known as Dattaka son”.²

There are twelve various kinds of son in ancient Hindu texts which are: *Apavidha*, *Aurasa*³ (legitimate son), *Dattaka* (Adopted son), *Gudhaja*, *Kanina*, *Krita*, *Kshetraja*, *Purika Putra*, *Punarbhava*, *Sahodhaja*, *Svayamdatta*. Also, it is well established fact that there are three kinds of sons- legitimate, illegitimate and adopted sons. An adoption is a doctrine under which a child is transferred from a family in which he is born to another family thereby the son acquiring new rights, duties and status and ending all ties with the old family. Under old Hindu law the main motive for having adopted son for the fulfilment of religious duties.

Adoption: under present Hindu Law

The Statutory law of adoption⁴ has codified and modified the old law of adoption. Now, all adoptions by Hindu shall be carried out in accordance with the provisions of the Act after having uniform statutory law for adoption. Various changes have been made under the Adoption Law, such as previously women were not permitted to adopt a child but now they can. The ceremony of *Datta-Homam* is not essential for adopting a child, which was earlier necessary. Provisions relating to the registration and the presumption are

¹ HERBERT COWELL, THE HINDU LAW, (2nd ed. R.Cambray & Co. Private Ltd., Kolkata 2013).

² Manu 8, 168.

³ Pedda Amani v. Zemindar of Marungpuri, (1874) 1 I.A. 282, 293 (India)

⁴ The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

made necessary. It is now not essential that the adopter and adoptee must be of same caste but the only requirement to be fulfilled is that they should both be a Hindu or governed under the Hindu Law.⁵ A divorced woman, widow, unmarried woman or a wife can legally adopt with the consent of her husband. There has to be a twenty one year gap between the adopter and the adopter when adopting a child of the opposite sex. The adoption can only be carried out legally if the adoptee is under the age of fifteen years unless there is a tradition that requires such adoption. A married Hindu male could adopt only with his wife's permission. The Act has also brought some changes with respect to power of the widow to adopt a child. One of the important changes made by the Act is that the doctrine of relation back has been abrogated and now the adopted son or daughter comes into existence only from the date when adoption is being made.⁶

⁵ The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India) S.2.

⁶ The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India) S.12.

CHAPTER-2

ADOPTION BY A WIDOW

Under the Hindu Adoptions and Maintenance Act, 1956, a Hindu widow has a right to adopt a son or a daughter to herself. The same has been recognized under Section 8 of the Act. A widow can make an adoption provided that she is of sound mind and not a minor. A widow cannot adopt a son if she has already Hindu son, grandson or great grandson living at the time of making an adoption. Also, in case of adopting a daughter, she must not have a Hindu daughter or son's daughter living at the time of adoption. The woman (adopter) and adopted son must have a gap of 21 years between them.

Earlier it was necessary for adopting a child by a widow to have a consent of her husband. There must be consent of nearest *sapinda* while making an adoption by a widow the reason being that a woman is incapable of independent judgment. The woman who is making an adoption need not obtain the consent of senior female member who is also a widow.⁷

But now, in 1956, HAMA had lifted the restriction placed on a widow's adoption for her husband's permission. Even after the legislation has been passed, a child adopted by a widow without her husband's permission shall be treated as the son of the deceased husband of the widow.⁸ If there is more than one widow, a widow can make an adoption without obtaining the consent of other widows.⁹

The power of a *sapinda* to give his consent to an adoption by a widow is a fiduciary power. It is implicit in the said power that he must exercise it objectively and honestly and give his opinion on the advisability or otherwise of the proposed adoption in and with reference to the widow's branch of the family. As the object of adoption by a widow is two-fold, name by, (1) to secure the performance of the funeral rites of the person to whom the adoption is made as well as to Offer pindas to that person and his ancestors and (2) to preserve the continuance of his lineage, he must address himself to ascertain whether the proposed adoption promotes the said two objects.¹⁰

⁷ Tahsil Naidu v. Kulla Naidu, A.I.R. 1970 S.C. 1673 (India); See also A.I.R. 1982 Karnataka 334.

⁸ Sawan Ram v. Kalawanti, A.I.R. 1967 S.C. 1761 (India).

⁹ Vijayalakshamma v. B.T. Shankar, A.I.R. 2001 S.C. 1424 (India).

¹⁰ Tahsil Naidu & Anr vs Kulla Naidu & Ors, A.I.R. 1970 S.C 1673 (India).

CHAPTER-3

DOCTRINE OF RELATION BACK: MEANING

According to the doctrine of relation back, under old Hindu Law, if a Hindu widow adopts a son after the death of his husband then the adopted son will be deemed to have been adopted on the death of the husband. It means that the adopted son will be entitled in the interest of his deceased adoptive father. The theory is against the rule that 'a property once vested cannot be divested'. The theory was based upon the legal fiction that the continuity of the line of the adoptive father should not break.¹¹

The principle has some variations that do not follow the law. Next, in the event that an estate had already been inherited in the hands of collateral and the collateral died prior to adoption, the adoptee cannot sell the properties of the collateral's successor. The principle can only be enforced when there is a question concerning the succession of the deceased father's property. The second instance where the rule cannot be applied is in case where the alienation is made by a female heir after the death of the adoptive father and before adoption.

The adopted son is considered to be born on the adoptive father's death date. The ideas that arise are that the adoption of a widow cannot be obstructed by the joint family's anterior division, and the adopted son can claim a share as if he were begotten and alive when the adoptive father died. As a preferential heir, an adopted son could divest his mother of the property of his adoptive father and his adoptive mother of the property she gets as an heir of her son, died after her husband.¹²

The doctrine of relation back applies only when the claim is made by the adopted son relates to the property of his adoptive father. A coparcener continues as long as there is a widow of coparcener who is capable of bringing a son into the family by adoption. The rights of the adopted son are the same as if he had been there at the time when his adoptive mother died and that his title as a coparcener will be there as against any person's title claiming as an heir.¹²

¹¹ R.K. Agarwal, Hindu Law (25th ed. Central Law Agency, Allahabad 2016). ¹² Krishnamurthi v. Dhruvaraj, A.I.R. 1962 S.C. 59 (India).

¹² R.K. Agarwal, Hindu Law (25th ed. Central Law Agency, Allahabad 2016).

CHAPTER-4

DOCTRINE OF RELATION UNDER MODERN LAW

Under the Act¹³, the doctrine of relation back has been abrogated according to section 12 of the said Act. Earlier, however, the adopted child came into being in the adoptive family from the date of the death of his adoptive father, but now, in accordance with proviso (c) to section 12 of HAMA, the adopter came into being from the date of the actual adoption. The new Act has abrogated the principle of relation back only for a limited purpose of vesting and divesting land. The doctrine of relation back still exists in a sense that, by making an adoption, by a widow, the adopted child entails the relationship with the deceased husband of the widow and is (the deceased husband) thereby becomes the adoptive father of the child.

Effect of Adoption: Statutory Provision

Section 12 of the Act reads as follows:

“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.”

According to the provisions contained in proviso (c) of section 12, an adopted child does not have a right to divest any person of any property vested in him or her before such

¹³ The Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

adoption. The adopted child will be entitled to the properties left by his adopting parent on his or death.

The widow could not be divested of any property vested in her before adoption if she makes an adoption of a son.¹⁴ Also, the partition effected before such adoption could not be reopened for the purpose of making re-adjustment of the joint family properties.

Judicial Interpretation

In *Vasant v. Dattu*¹⁵, the SC clearly spelt out the operation of doctrine of relation back with regards to the proprietary rights of an adopted child. Proviso (c) of section 12 does not prevent the adopted child from claiming his or her share in the adoptive family. There is no question of divesting of any person of any property already vested in him before adoption if the share is given to the adopted child. The court held that by adopting a child to a joint Hindu family may have effect of decreasing the shares of the members in the family. But it can't be taken as divesting any person of any property under clause (c) to section 12. Thus the adopted son can acquire an interest in the property by survivorship on the footing of doctrine of relation back.

In a leading case of SC in *Sawan v. Kalawanti*¹⁶, it has been said that the SC's judgment had resulted in the revival of the doctrine of relation back, but it was not really convincing. The facts of the case were that one Ramji Das died leaving behind his widow Smt. Bhagwani, who inherited the property of her husband as a limited owner. Later on, she executed a gift deed in favour of her grand-niece Smt. Kalawanti. Sawan Ram, the collateral of Ramji Das, challenged the validity of the gift as it was made without having any legal necessity and claiming that he was the nearest reversionary heir of Ramji Das. The trial court ordered the suit in favour of collaterals and held the gift as invalid. Kalawanti went on appeal, and while the appeal was pending in court, Bhagwani adopted a son Deep Chand in 1959 and thereby subsequently died. Sawan brought another suit to recover the possession of the property from Kalawanti. Now, the adopted son Deep Chand brought a suit to claim his rights in the gifted property on the ground that once gift made by her adoptive mother before the commencement of the Act. His right in the property revived as from the date of his being taken into adoption, he became the son

¹⁴ *Kesarbai v. State of Maharashtra*, A.I.R. 1981 Bom. 115 (India).

¹⁵ A.I.R. 1987 S.C. 398 (India).

¹⁶ A.I.R. 1967 S.C. 1761 (India).

not only of his adoptive mother but also of her deceased husband. Hence he became a member of the joint family and in that capacity his right in that property became revived. The critics have argued that the said judgment resulted in the revival of the doctrine as the adopted son acquired the right in the gifted property after the gift was declared void.

But it is not so because the right to challenge the gift by the widow before the act of adoption made by her, did not vest in the adopted son. Hence it cannot be said that the doctrine has been revived.

In a case, the Supreme Court stipulated that Section 12 clause (c) departs from Hindu law and makes it clear that the adopted child will not deprive any person of any property that has invested in him prior to adoption. In a case¹⁷, a widow who was the limited owner of estate after the death of her husband and after Hindu Succession Act, has become an absolute owner and the property of her husband vested in her and therefore, by adopting a child she could not be deprived of any of her rights in the property. The adopted child can claim his rights only after her death.

¹⁷ Dinaji v. Daddi & ors, A.I.R. 1990 S.C. 1153 (India).

CONCLUSION

In the Hindu Adoptions and Maintenance Act, there were some infirmities that were corrected in some of the cases by the Supreme Court. In those cases, the Supreme Court rightly said that a widow's adopted son applies to the deceased husband of the widow. When a widow adopts a child, she brings a member to the family and all the rights of the child in his birth family are replaced by in the family of his adoption which have been lost in the family of his birth. Thus, all the ties of the child are severed with the family and replaced by new rights created in the adoptive family. As soon as the child is adopted by a widow he becomes the child of the widow and also the child of her deceased husband. The adopted child do not have right to divest the estate of any person vested in him. This interpretation of Supreme Court does not revive the doctrine of relation back.