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Adoption: Fundamental Changes Brought About by Hindu Adoptions & Maintenance Act, 1956

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ABSTRACT

The Hindu Adoption and Maintenance Act, 1956 has now totally classified the law of adoption and has materially adjusted it. This amendment compared the necessities of dynamism of Hindu society. Presently after the enforcement of this Act, each adoption will be made as per the accordance with the provisions of this Act. Any adoption made in violation of the provisions of this Act will be void. The Act will apply just to Hindus however the term Hindu has been deciphered in an exceptionally wide implication in order to incorporate Jains, Sikhs, and Buddhists. Every one of the texts, rules and customs, which were in vogue, preceding the Act came into existence shall not have effect regarding any matter for which provision is made in this Act. The Doctrine of Relation Back has been totally repealed by which a son adopted by the widow was considered to have come into existence in the adoptive family on the day of the death of her husband.

Keywords: *Adoption, Amendment, Doctrine of Relation Back, Adoptive Family.*

I. INTRODUCTION

Adoption is one of those fictions of law which have been marshaled for furtherance of the individual interest. The law of adoption enables a childless person to make somebody else's child as his own. Hindus foresaw this at the dawn of their civilization. Their ideal was not just to have a son but the adopted son must bear a reflection of a natural son. With this refinement, it was natural for them to hold that for all intents and purposes an adopted son was like a natural son[2]. Such was the ideal that the adoption meant the removal of the child from the natural family and his transplantation in the adoptive family, so much so that all his ties with the natural family were severed in the natural family whom he could have married, had he not been adopted and all the ties in the adoptive family came into existence. He was not merely to the adoptive parents but all relations on the paternal and maternal side of the adoptive family also came into existence. This also meant that he could not marry the daughter of his adopted parents, whether

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[2] Paras Diwan, *Family Law*. (Faridabad: Allahabad Law Agency,2012)316

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that daughter was natural born or adopted as she, by fiction by law, became his sister. This is also the position under the modern law. In modern Hindu law, an adoption has the effect of transferring the adoptee from his natural family to that of his adopter's conferring on him thereby the legitimate natural born son's rights and privileges in the adopter's family. On the other hand, the adopted child loses all rights and privileges of a natural born child in the natural family. Under the old Hindu law, a son adopted by his widow was deemed to be her husband's son and therefore adoption related back to the death of her husband. Under Act, adoption is effective from the date on which it is made and the adopted child cannot divest any person of the property vested in him before adoption. The child, too, cannot be divested of the property vested in him before adoption.

Under the old law a woman could not adopt a child to herself except a widow. The widow too could not adopt to herself but only to her deceased husband and that too subject to certain conditions. Under the Act a woman who has attained majority, spinster, widowed or divorce can adopt a son or daughter. A married woman also can adopt a child under certain circumstances. However, even after the passing of the Act, the courts have expressed the opinion that where a widow adopts a child he belongs to her deceased husband. Thus, the old doctrine of relation back is, to some extent resurrected. Under the present Act, where the adopter and adoptee child are of different sexes, there should be an age difference of at least 21 years. However, there was no such express restriction under the old law. Under the old law only the parents could give a child in adoption. Now even a guardian with the permission of the court can give the child in adoption.

II. HISTORICAL BACKGROUND OF ADOPTION

Predominantly, adoption was considered as a sacramental act. There has been an acute controversy not only among the writers but also among the judges, whether in adoption secular motive predominates or the religious motive predominates[3]. Some judges still insist that the object of adoption is twofold: to secure performance of one's funeral rites and to preserve the continuance of one's lineage[4]. Under the old Hindu law, there were many rules relating to adoption which could be supported only on the basis that adoption was a sacramental act. For instance, the following rules could be supported only on this basis: the adopted son must be a reflection of a son (saunaka) : this prevented the adoption of orphans and illegitimate children; daughter could not be adopted: no one could have more than one adopted son; one could not

[3] Mayne, Hindu Law and Usage, (11th Ed.) 184-88
[4] Inder Sigh v. Kartar Singh, 1966 Punjab 258

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adopt a child whose mother one could not marry when she was a maiden; thus a daughter's son or sister's son could not be adopted as one could not marry one's sister or daughter. The same seems to be the reason for the rule that when widow adopted a son, it was always deemed to be adoption to her deceased husband. This principle is responsible for the "**relating back**"[5]. (The doctrine of relating back may be illustrated by an example, when a widow, whose husband died on 1.1.30, adopted son on 1.1.40, the adoption was deemed to have taken place on 1.1.30. The fiction was necessary so that it could be said that the Hindu did not die sonless). It is needless to say that, apart from the religious motives, secular motives were also important, such as man's desire for the celebration of his name, for the perpetuation of his lineage, for providing security in the old age and for dying in satisfaction that one has left an heir to one's property. Which of the motives, religious or secular, were dominant need not detain us here. One thing is certain that different people adopt with different motives, sometimes the motive may be base, just as one may adopt to despise a prospective heir who could take the property, in the absence of a son.

Motive is irrelevant, whatever it may be. The main purpose of law of adoption is to provide consolation and relief to a childless person. In modern law its purpose is also to rescue the helpless, the unwanted, the destitute or the orphan child and provide it with parents and a home. Its purpose may also be to provide a richer family life. For instance, a person who has only a son can adopt a daughter and vice versa. Whatever be the motives, the court need not enquire into them.

In the present submission, the Hindu Adoptions and Maintenance Act, 1956, has steered off clearly from all the religious and sacramental aspects of adoption and has made adoption a secular institution and secular act, so much so that even a religious ceremony is not necessary for adoptions. Under the Hindu Adoptions and Maintenance Act, there cannot be two types of adoptions, one purely secular and the other the sacramental. All adoptions after 1956 are secular and to be valid, must conform to the requirement of the Act. It is a different matter that a Hindu while exercising his right of adoptions may still adhere to old notions, such as he may still not adopt a daughter's son or sister's son; he may still not adopt a daughter, but that should not detract us from the essentially secular nature of adoption. On the other hand, a Brahman dispensing his spiritual benefit may adopt a Sudra's son or may adopt a daughter or may adopt his own sister's son or daughter's son. If he does so, the adoption is still valid. It is submitted that with whatever motive a person may adopt, secular or sacramental, the act of adoption under

[5] Srinivas v. Narayan, 1954 SC 379

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the Hindu Adoptions and Maintenance Act, 1956, is essentially a secular act.

However, secularization of adoption does not mean that the new law of adoption makes a total departure from the old law. What has happened is this: some aspects of the old law which should have been rejected are still retained. The two examples: (a) adoption is even now a private act without any supervision by the State; no order of the court is necessary for an adoption except when guardian gives the child in adoption (b) Even now not more than one son or/and daughter could be adopted.

III. FEATURES OF ADOPTION

(A) WHO MAY TAKE IN ADOPTION

An agreement not to adopt is void being against public policy. An adoption made by person having capacity to adopt, in breach of any such agreement, will be valid. Under the Act even when an adoption is made in consideration of some pecuniary or proprietary benefit, the adoption is valid, despite the fact that such an agreement is void.

Both a Hindu male and female can make adoption.

Common requirements of capacity: No person can make an adoption unless he or she is: (a) a major (b) of sound mind

Majority means completion of the age of 18 years and it seems, this is the age even for a person to whom a guardian has been appointed under the Guardians and Wards Act, 1890 (in case a guardian is appointed for a minor, the age of majority is extended to the completion of 21 years).

Section 7 and 8, Hindu Adoptions and Maintenance Act, 1956-

"Unsoundness of mind" relates to general condition of mind. No adjudication of insanity by a court is necessary. All condition of insanity, including epilepsy, and lunacy will come under 'unsoundness of mind'.

A Hindu male or female, married under the Special Marriage Act, 1954, or whose parents have married under that Act, has also capacity to adopt. If the marriage under the Special Marriage Act is between two Hindus, the disabilities laid down under Sections 19, 20 and 21 do not apply. The presence of a widowed daughter-in-law is no bar in making an adoption by a sonless Hindu male or female where otherwise he or she has capacity to make an adoption[6].

Adoption by a Hindu male- A major Hindu male of sound mind can adopt, whether he is a bachelor, widower, divorcee or married person. But for a married Hindu male, it is obligatory

[6] Bhima v. Sarat, 1988 Ori 19

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to obtain the consent of his wife. In case he has more than one wife living, consent of all the wives is necessary. An adoption made without the consent of the wife is void. If consent of a wife living with e husband is taken but the consent of the wife living separately is not taken, the adoption will be void. The consent of the wife may be express or implied.

The consent of the wife, or of any of the wives, in case a person has more than one, may be dispensed with in any of the following cases: (a) if the wife has ceased to be a Hindu (b) if she has finally and completely renounced the world (c) if she has been declared by a court of competent jurisdiction to be of unsound mind.

If a Hindu male adopts a female child, he must be senior to her by at least 21 years, otherwise the adoption will be void[7].

Consent of wife for adoption: Prior to the commencement of Act, 1956 there was no such requirement that the consent of the wife was necessary and there was no any prohibition to adopt the plaintiff in view of the aforesaid relationship. The consent of the wife is only required under the Act, 1956 and the Act of 1956 had no application as the said adoption took place prior to the Act of 1956 came into force. Fact that wife was minor when adoption took place, was irrelevant. Since adoption ceremony was proved by witness, adoption deed was executed and registered, such adoption was valid.

Adoption by a Hindu female: The Act makes a fundamental departure from the old law by empowering a Hindu female, though not a married woman, to adopt to herself in her own right. Under the old Hindu law, a female had no capacity to make an adoption to herself, though a widow, under certain circumstances, could adopt a son to her deceased husband. Since such an adoption was by her, and not to her, she was not the adoptive mother in her own right. She was the adoptive mother being the wife of her deceased husband to whom adoption was made.

Under Hindu Adoptions and Maintenance Act, 1956, a Hindu unmarried woman, widow or divorcee, has capacity to adopt. It has been held in ***Vijayalakshmma v. B.T. Shankar***[8], that where a widow adopts a child, she need not take consent of a co-widow because she adopts the child in her own capacity. An unchaste woman also has capacity to adopt. But, a married woman has no capacity to adopt. She cannot adopt even with the consent of her husband. If there is to be an adoption, it must be made by her husband with her consent. The position is thus that a married woman totally lacks the capacity to adopt except in anyone of the following three cases: (a) If her husband has ceased to be a Hindu (b) if he has finally and completely renounced the

[7] Section 11(iii)
[8] 2001 SC 1424

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world (c) if he has been declared by a court of competent jurisdiction to be of unsound mind.

Section 9(4), Hindu Adoptions and Maintenance Act: *Giver cannot be taker*- Under the old Hindu law as well as the modern Hindu law, the rule is that a giver cannot be a taker. Thus, under the Hindu law, a mother could not adopt her illegitimate child, and a guardian could not adopt his ward, though a putative father could adopt his illegitimate child, since mother could give such a child in adoption, originally, under the Hindu Adoptions and Maintenance Act, 1956, this was also the position. This position was modified by the Hindu Adoptions and Maintenance (Amendment) Act, 1962, to the extent that the guardian of an orphan, abandoned child, foundling or the guardian of a child whose both parents have completely and finally renounced the world or have been declared by a court of competent jurisdiction to be of unsound mind, may himself adopt the child[9].

(B) WHO MAY GIVE IN ADOPTION

Section 9, Hindu Adoptions & Maintenance Act, 1956- Under the old Hindu law, only father or mother could give the child in adoption. According to Yajnavalkya, 'A *dattaka* son is one whom his mother or father gives. Before 1956, the father's power to give his son in adoption was absolute and he could give the child in adoption even if his wife (child's mother) dissented from it. After the father, the mother could give the child in adoption. No one else could give the child in adoption, not even the guardian. Under the Hindu Adoptions and Maintenance Act, 1956, father, mother and the guardian have the power to give the child in adoption[10].

The father- The father cannot give the child in adoption without the consent of the mother of the child. The consent of the mother of the child may be dispensed with anyone of the following three cases[11]: (a) If she has finally and completely renounced the world (b) if she has ceased to be a Hindu (c) if she has been judicially declared to be unsound mind. In no other case, even if the marriage has been dissolved, consent of the mother can be dispensed with. In the absence of mother's consent adoption is void.

The expression 'father' here does not include an adoptive father, putative father or stepfather. The putative father of an illegitimate son is not included even if subsequent to the birth of the child, he had married the mother of the child because Hindu law does not recognize legitimation.

The mother- The mother of an illegitimate child has power to give the child in adoption and no question arises of putative father's consent. But the mother of a legitimate child has during the

[9] Section 9(4)
[10] Section 9
[11] Proviso to Section 7

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life-time of the father, no power to give the child in adoption even with the consent of the father. Under the Act the mother of a legitimate child can give the child in adoption during the life=time of the father only in the following cases: (a) if the father has ceased to be a Hindu (b) if he has finally and completely renounced the world (c) if he has been judicially declared to be of unsound mind. In these cases dissent of the father is of no consequences. But a remarried woman has not right to give away in adoption her son born to her from her deceased husband, since Section 3, Hindu Widow Remarriage Act, 1956 divest her of her right of guardianship over children born to her from her deceased husband[12].

The mother has power to give her legitimate child in adoption after the death of the father. Even if a father, before his death expressed himself categorically that his child should not be given in adoption, the mother can, after his death, validly give the child in adoption.

The expression mother does not include adoptive mother or stepmother and therefore a stepmother or adoptive mother has no capacity to give the child in adoption. But it seems that a mother in conversion to another religion will not lose her right to give the child in adoption, Since Section 9(4) does not empower a guardian to give the child in adoption in case parent has ceased to be a Hindu. Mother also does not lose her right of giving the child in adoption on divorce.

The Guardian- The term guardian includes both de jure and de facto guardians. Thus, a manager, secretary or any person in charge of the orphanage or a person who has brought up the child, or under whose care the child is, can give the child in adoption[13]. A guardian can exercise the power only in the following cases: (a) If both the parents are dead (b) if parents have finally and completely renounced the world (c) parents have been judicially declared to be of unsound mind (d) if parents have abandoned the child (e) if the percentage of the child is not known, just as in the case of a foundling or a refugee child.

(C) WHO MAY BE TAKEN IN ADOPTION

Section 10, Hindu Adoptions and Maintenance Act, 1956- The *Dharmashastras* deal elaborately with the qualifications of the child to be taken in adoption. Most of the requirements laid down in the *Dharmashastras* were considered merely recommendatory and were not insisted upon during the Raj. For instance, the requirement that an only son or eldest son cannot be given in adoption was considered merely recommendatory and adoption of an only or eldest

[12] Martland v. Narayan, 1939 Bom 305
[13] Dhanraiv. Suraj, 1981 Pat 204

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son[14] was valid. On the other hand, some prohibitions were considered mandatory and violation of them rendered an adoption void, such as one cannot adopt one's sister's or daughter's son. Under the modern law, requirements are as under:

Two persons cannot adopt the same child- This requirement was mandatory under the old law and this is so under the Act.

Child must be Hindu- It is necessary that the child to be adopted must be Hindu. Whether he is related to the adopter by blood or marriage or is a totally stranger is immaterial. It is also immaterial as to which caste he belongs.

Orphan, foundling and abandoned child- Under the old law, an orphan, foundling or abandoned child could not be adopted. This state of law is obviously unsatisfactory in the modern context. The fact of the matter is that it is the orphan whose need of adoption is the greatest. The Hindu Adoptions and Maintenance Act, 1956 makes the provision for the adoption of orphans. The Act goes much beyond this. If the parents have renounced the world or have been judiciously declared to be of unsound mind, the child can be given in adoption by the guardian. Adoption of an abandoned child can be made. A foundling can also be adopted. A foundling is a child who has been found by someone and whose parents are not known. If the parents are known, such a child is known as an abandoned child. Thus, in the modern Hindu law, the institution of adoption can be utilized to solve the social problems of orphans, abandoned and refugee children.

The child whose mother could not have been married by adopter- Under the old Hindu law, it was an established rule among the first three classes that no one could be adopted whose mother in her maiden state the adopter could not have legally married. Thus, one could not adopt his own daughter's, sister's, mother's sister's or father's sister's son[15]. Exception by custom was recognized. Under the modern Hindu law, no such restriction exists and howsoever related or unrelated the child may be, he can be taken in adoption.

The age of the child- Before 1956, it was a settled law that in all schools of Hindu law, except Bombay, the adoption of a son among the twice born classes was valid if made before the performance of upanayana ceremony and among the Sudras if made before marriage. In Bombay adoption of a child of any age was valid. Under Punjab customary law alsothere was no restriction as to age. The Hindu Adoption and Maintenance Act now lays down that the child must not have completed the age of fifteen years. Thus, a child can be adopted upto the age of

[14] Jandumani v. Haji Oijh, (1974) 40 CLR 70
[15] Minakshi v. Ramanodha, (1180) 11 Mad 49 (FB)

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14 years and 364 days. A custom to the contrary is recognized. This means that in Bombay and Punjab and elsewhere, where such a custom prevails, adoption of a child of the age of 15 or more will be valid[16]. But the custom must be specifically pleaded and proved. Therefore, adoption of a daughter prior to the Act was held invalid, especially also when no such custom was so alleged.

Married child- Before 1956, the adoption of a married child among all the classes was invalid throughout India except Bombay and among Jats. In Bombay, adoption of a married person or a married person with children was valid. Section 10 (iii) prohibits adoption of a married child but recognizes custom to the contrary[17]. Adoption of a married person of any age is permitted among the Jats in Punjab. Where adoption of a married person is valid, any child born to him after adoption will be the child of the adoptive family.

Daughter- Under the old Hindu law, a female child could not be adopted as adoption of daughter did not confer any spiritual benefit on the adopter. Prior to 1956, adoption of daughter was recognized by custom only. However, custom has to be averred and proved for overage adoption otherwise such an adoption shall be invalid[18].

Illegitimate child- Under the old Hindu law, adoption of an illegitimate child was not permitted as such an adoption did not confer any spiritual benefit on his adoptive father. Under the modern Hindu law, adoption of an illegitimate child is valid.

The sons and two daughters- Under the Act no person can adopt more than one son or more than one daughter. A person may adopt one son and one daughter.

Provisions of 1956, Act not applicable to adoption made prior to its commencement- The provisions of Hindu Adoption and Maintenance Act, 1956 have no application to the adoptions made prior to the said Act came into force. Under the Act of 1956 there is a legal presumption under Section 16 with regard to the validity of the registered documents relating to adoption. The Court shall presume that the adoption had been in compliance to the provisions of the Act unless and until, it is disproved. Therefore, the general presumption is in favour of the adopted son to treat the adoption deed as a genuine document unless contrary is proved. Under Section 30 of the Act, the validity of the adoptions made before commencement of the Act had not been passed. As, such, the provisions of the Act has no application to the adoptions made prior to the date of the commencement of the said Act.

[16] Balkrishna v. Sadashiv, 1977 Bom 412
[17] Maya v. Jai, 1989 P & H 202
[18] M.D. Gopalaiah v. Usha Priyadarshini, 2002 Kant. 73

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IV. EFFECT OF ADOPTION

Section 12- Hindu Adoptions and Maintenance Act, 1956- The section runs thus: "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 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 the Natural Family- Under Hindu law, both old and new, the adoption of child means that the child is totally uprooted from the natural family and transplanted in the new family.

Relationship with the members of the natural family- For secular, religious and civil purposes, the adopted child ceases to be the child of the natural family. His father and mother cease to be his parents and all relations on the father's side and mother's side cease to be his relations. Only tie that he retains with his natural family is that he cannot marry any person in his natural family whom he could not have married before his adoption.

The natural parent's right of guardianship ceases with effect from the date of adoption, whatever is the age of the child. Even if the child is below 5 years, its natural mother cannot claim its custody (which she would be entitled to otherwise under Proviso to Section 6 (a), Hindu Minority and Guardianship Act, 1956). When adoption of a married person is permitted, that person cannot give in adoption his child born to him prior to adoption[19], though a contrary opinion was expressed in a case under the old law.

Divesting of property- Proviso (b) to Section 12 of the Act provides that "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 the relatives of the family of his or her birth". Thus, any property that the child inherited from any relation before adoption will continue to be his property even after adoption.

In the Adoptive Family- The adopted child is deemed to bet the child of the adopter for all the purposes. His position for all intents and purposes is that of natural born son, he has the same rights, privileges and the same obligations in the adoptive family[20].

Relationship with the members of the adoptive family-The adoption in Hindu law means complete transplantation of the child in the adoptive family. This means that he is not merely the child of the adoptive parents but he is also related to all relations on mother's side as well

[19] Sharad Chand v. Shanta Bai, 1944 Nag 66 (FB)
[20] Keshavpal v. State of Maharashtra, 1981 Bom 115

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as father's side as if he is the natural born child of the family. Thus, father's and mother's parents are his grandparents. His adoptive parent's daughter is his sister and so on. In ***Prafulla Bala Mukherji v. Satish Chandra Mukherji***[21], adoption was not proved as the adoptee all along considered his natural mother as his mother. He made her his nominee in L.I.C. policy and provident fund. He attended the 'shraddha' ceremony of his natural father. It was held under the facts there was no proof of adoption. But under the modern law as well under the old Hindu law, if an unmarried person, a bachelor or a virgin, adopts a child, the child will only have one parent, adoptive father or adoptive mother and he will have only one line, parental or maternal, as the case may be.

Guardianship, inheritance and maintenance- The adoptive parents are the natural guardians of their adopted minor child, first the father, then the mother. If the adopted child is less than five years, then the adoptive mother will have preferential claim to the custody of the child.

The position of an adopted child in respect of inheritance and maintenance is the same as that of the natural born child. If there is an adopted child and a natural child both will inherit equally. The adopted child has the right of collateral succession both on his adoptive mother's side and adoptive father's side. In short, he will inherit in the adoptive family as if he is born in the adoptive family. Conversely, all persons are entitled to succeed to him, if they would have succeeded to him had he been a natural child.

Adoptive parent's right of disposing the property- Section 13 of the Act lays down: "Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will. Thus an adoptive parents is in no way restrained in the disposal of his/her properties by reason of adoption. Adoptive parent's right of disposing of his property is subject to any agreement to the contrary that might have been entered into between the adoptive parent and the natural parent on behalf of the child. The adopted child cannot demand any property or its enjoyment during the life-time of his father even if there is an agreement that the adoptive father will not deprive him from inheritance, as question of inheritance will arise only on the death of the father; till then father has full right to hold and enjoy the properties.

Divesting of property- Section 12 (c) specifically lays down that '*the adopted child shall not divest any person of any estate which vested in him or her before the adoption*'[22]. The old Hindu law of divesting the property on adoption was very complicated and a source of constant

[21] 1998 Cal 86
[22] Chandrani v. Pradeep, 1991 MP 286

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litigation. Under the modern Hindu law, this source of litigation has been done away with by laying down that the adopted child cannot divest any person of the properties vested in him or her before adoption.

V. IMPORTANT CHANGES INTRODUCED HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

The secular approach adopted by the Legislature is reflected in introducing some **fundamental changes in the Hindu Adoptions and Maintenance Act, 1956**. Following are some of the important changes introduced by the Act:

1. Under the old law a woman could not adopt a child to herself except a widow. The widow too could not adopt to herself but only to her deceased husband and that too subject to certain conditions. Under the Act a woman who has attained majority, spinster, widowed or divorce can adopt a son or daughter. A married woman also can adopt a child under certain circumstances[23]. However, even after the passing of the Act, the courts have expressed the opinion that where a widow adopts a child he belongs to her deceased husband. Thus, the old doctrine of relation back is, to some extent resurrected[24].

2. Old law discriminated between a man and a woman. A married or unmarried woman had no power to adopt a child whereas a man whether married or not could adopt a child. A married man could adopt a son even without or against the consent of his wife or wives. Under the present law the sex-based discrimination is given a go-by. A married man now cannot adopt a child without the consent of his wife[25].

3. Similarly, there was discrimination with respect to the sex of the child to be adopted. Only a son could be adopted as he was considered to discharge his father from the three debts and continue his lineage. Now a son or a daughter or both can be adopted.

4. Old law provided certain qualification of the child. For instance, the boy to be adopted must be of the same caste as that of the adoptive father and no one could be adopted whose mother in her maiden state, the adopter could not have legally married. For this reason the adoption of the son of a daughter, or of a sister or an aunt was forbidden. Similarly, adoption of an illegitimate child was not permitted as it did not confer any spiritual benefit on his adoptive father. For the same reason, a child who from any

[23] Section 8(c) of the Act of 1956
[24] Swan Ram v. Kalawati, AIR 1967, SC 1761
[25] Section 7 of the Act

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personal disqualifications would be incapable of performing funeral ceremonies could not be adopted. Under the old law orphan, foundling or an abandoned child also could not be adopted. Under the present law all this have been done away with and the only qualification of the child is that he should be a Hindu.

5. Under the old law only the parents could give a child in adoption. Now even a guardian with the permission of the court can give the child in adoption.
6. Before the Act of 1956, except in Bombay School where adoption of a married person was also valid, the adoption of a son among the twice born classes was valid if made before the performance of upanayanana ceremony and among the Surdas if made before marriage. Under the Act, a child who is not married and who has not completed the age of fifteen years can be adopted unless a custom or usage permits such adoption.
7. Old law empowered a Hindu male to adopt a son who had attained the age of discretion. Under the present Act a person under the age of eighteen cannot adopt.
8. Under old Hindu law the religious ceremony of Datta Homa was a necessary ceremony. Under the present Act the only necessary ceremony is giving and taking of a child.
9. Under the present Act, where the adopter and adoptee child are of different sexes, there should be an age difference of at least 21 years. However, there was no such express restriction under the old law[26].
10. Under the old law, where a widow adopted a child he stood exactly in the same position as if he had been born to his adoptive father and his title related back to the death of his father so that he would divest the estate of any person in possession of the property to which he would have had a preferable title, if he had been in existence at his adoptive father's death[27]. This rule of divesting had been the cause of many a ruinous litigation. Now this rule stands abrogated and under Section 12 an adopted child does not divest any person of any estate which vested in him or her before the adoption.

In ***Lakshmikant Pandey v. Union of India***[28], the petitioner, an advocate of the Supreme Court addressed a letter in public interest to the Court, complaining of malpractices indulged in by social organization and voluntary agencies engaged in the work of offering Indian Children in adoption to foreign parents, the petitioner alleged that not only Indian Children of tender age, in the cases of pseudo-adoption being "exposed to the long horrendous journey to distant foreign

[26] Section 11 (iii) & (iv) of the Act
[27] Babu Anoji v. Ratnoji, (1897) 21 Bom. 319
[28] 1984 AIR 469, 1984 SCR (2) 795

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countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Houses, they in course of time become beggars or prostitutes for want of proper care from their alleged foster parents." The petitioner therein sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India and other government agencies to carry out their obligations in the matter of adoption of Indian Children by Foreign parents.

The **Supreme Court** in this case gave various directions the essence of these directions is as follows:

(1)Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, i.e. 'inter-country adoption' should be acceptable.

(2) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organizations or individuals activating themselves in the field of inter-county adoption with a view to trafficking in children.

(3) Following are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned:

Every application from a foreigner desiring to adopt a child must be **sponsored by a social or child welfare agency licensed by the government of the country** in which the foreigner is resident. No direct dealing is allowed in such cases due to following:

1. There the application is made directly, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.
2. As per record, in every foreign country where children from India are taken in adoption, there are social land child welfare agency licensed or recognised by the government and therefore there would be no difficulty if adoption is required to be sponsored by asocial or child welfare agency licensed or recognised by the government of the county in which the foreigner resides.
3. There may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognized by the government of the foreign country and a foreigner could not be appointed as guardian unless satisfactory

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application has been sponsored by such agency.

VI. CONCLUSION

According to the present law the adopted child is deemed to have merged with the family of the adoptive parents after severing all his or her relations with the natural family and he acquires all the rights and privileges with respect to marriage inheritance, partition, in the adoptive family.

He is divested of all the rights in the natural family, from the date of adoption. It is presumed as if he had been born in the adoptive family. Under the Smriti law the adoption had the following two purposes:—

(a) To perform the funeral, rites of the adoptive parents;

(b) To perpetuate the family lineage of the adoptive father.

Thus primary object of adoption was to extend spiritual benefit and the secondary object was to continue the lineage of the family. Now, under the present Act the object of adoption is irrelevant. The legal effect of adoption cannot be avoided simply on the fact that the adoption was made with intent to deprive the adopted child of the right to inherit property in the family of birth.

Section 12 of the Act lays down the consequences of the adoption as under:

"*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 who 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 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.

This is one of the most important sections of the Act as it deals with the effect of adoption. The result of an adoption by either spouse is that the child adopted becomes the child of both the

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spouse according to the scheme and intent of the Act.

The adopted son occupies the position of a natural born son is the adoptive family for all purposes, except for the purpose of marriage and adoption and adoptive father becomes his father and adoptive mother becomes his mother. The present Act has abrogated the old rule of "relation back".

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