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ADOPTIONS UNDER THE HINDU ADOPTIONS & MAINTENANCE ACT, 1956 AND ITS PROOF

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Adoption changes the course of succession, depriving the natural heirs of their rights and it transfers property to comparative strangers. No son has a right to choose a father but sonship has had a great importance in Hindu law and every Hindu was enjoined to have his own natural born son, failing which he could have an adopted son. The law relating to adoptions is amended and codified by The Hindu Adoption & Maintenance Act, 1956 (hereinafter referred as "the Act").

OVERRIDING EFFECT OF THE ACT:

Section 4 of 'the Act' gives an overriding effect to the provisions contained in it and extinguishes all customary laws inconsistent with the provisions of the Act. In ***Laxmi v. Krishna, AIR 1968 Mysore 288*** it is held that if any rule of Hindu law of adoption is not covered by the provisions of "the Act" then such rule will still be enforceable. If "the Act" provides for adoption then there is no room for customary adoption. (***Kartar v. Surjan Singh, A.I.R. 1974 S.C. 2161***). Section 5 of 'the Act' provides that all adoptions by or to a Hindu shall be governed by the provisions of 'the Act'. Adoptions made in contravention of the provisions 'the Act' are void. In ***M. Muttaiah v. Controller of Estate Duty, A.I.R. 1986 S.C. 1863*** it is verdicted that 'the Act' does not apply to adoptions made prior to commencement of the Act.

CONDITIONS OF VALID ADOPTIONS "

Section 6 of 'the Act' says that adoption can be made by competent and capable persons. Bother, person adopting and one giving in adoption should be capable of doing so. Under section 7 of 'the Act' a major and sane Hindu can adopt a son or daughter with his wife's consent. Consent of all wives, if more than one, is necessary. A bachelor, widower or divorcee, if sane and of sound mind can make adoption. Section 8 of the Act empowers an unmarried or widow or divorcee woman of sound mind and

major to take a son or daughter into adoption. A married woman whose husband is alive has no right to make an adoption. The natural parents or guardian are entitled to give a child in adoption. The guardian is required to take District Court's permission before giving a child in adoption. The Family Court has no jurisdiction to accord such permission. (***Cana Bank Relief Vs. Welfare Society, A.I.R. 1991 Karnataka 6***). Step-mother can not give step-son into adoption (***Dhanraj v. Suraj, A.I.R. 1973 Rajasthan 7***). An orphan can be adopted only if such adoption is permitted (***Sukhbir v. Manleisai, A.I.R. 1927 Allahabad 251***).

Section 10 of 'the Act' oussed qualifications of the child to be adopted. The child to be adopted must be Hindu, unmarried, not already adopted and should be below fifteen years. The adoption of a total stranger is held to be valid in ***Chandra Shekar Vs, Kulandaivela, A.I.R. 1963 S.C. 185***. Adoption of an only child is held to be valid in ***Waman Raghupati v. Krishnaji Kashiraj, I.L.R. 22 Madras 398*** whereas in ***A. Raghavamma v. A. Chanchamma, A.I.R. 1964 S.C.*** it is pointed out that an only son is neither given nor taken in adoption. The child to be adopted must be actually given and taken. The age difference between the child and adoptive parents should at least be 21 years.

PROOF OF ADOPTION:

Adoption must be established like any other question of fact (***Raghavamma v. Chanchamma, A.I.R. 1964 S.C. 136***). School record is held to be relevant for proving adoption in ***Babulal v. Dwarikabai, 19613 J.L.J. 196*** but the school record is not conclusive for proving adoption as per the verdict in ***Narain Singh v. Sunderlal, 1996 J.L.J. 158***. The Court can take out consideration the circumstances either prior or subsequent to adoption (***Govind v. Chimabai A.I.R. 1968 Mysore 309***). The evidence to support adoption must be free from all suspicions of fraud (***Kishorilal v. Mt. Chattibai, A.I.R. 1956 S.C. 505***) When old adoption is challenged the variety of transactions of open life and conduct on the footing of adoption has to be considered (***Gouranga v. Bhaga Sahu, A.I.R. 1976 Orissa 43***). It is settled that the person who seeks to displace natural succession by alleging adoption must prove the factum of adoption as well as its

validity.

CONSEQUENCES OF ADOPTION:

Under Hindu law, both old and new adoptions means that the child is totally uprooted from the natural family and transplanted into new family. If a Dayabhaga coparcener is given in adoption, he would continue to retain his share in the coparcenary property (***Vasant v. Lattu, A.I.R. 1987 S.C. 398***). The adopted child is deemed to be child of adopter for all purposes (***Kesharpal v. State of Maharashtra, A.I.R. 1981 Bom. 115***). The doctrine of Relating Back makes the deceased husband as an adoptive father of the child adopted by his widow (***Sawan Ram v. Kalawati, A.I.R. 1967 S.C. 1761***). The coparcenary interest is vested interest and so remains alive even after adoption as held in ***Y. Nayudamma v. Government of A.P., A.I.R. 1981 1.0. 19***. The adopted son cannot divest property vested in others before his adoption (***Kishen Baburao Vs. Surest Sadhu, A.I.R. 1996 Bom. 50***). Adopted person can institute a suit for partition and possession of separate share as held in ***D.S. Angallawe v. R.M. Agalave, A.I.R. 1988 S.C. 854***. Section 13 of the Act recognizes rights of adoptive parents to dispose of their properties. The adoptive father has full right to hold and dispose of his property (***Nandkishore v. Bipindra, A.I.R. 1966 Calculla 181***). If the adoptive father makes an agreement to the contrary it may operate a restriction on his power to transfer his properties (***Chirangilal v. Jasjit Singh, A.I.R. 2001 S.C. 266***). The adopted son is not prevented from challenging an improper alienation made by his adoptive father (***Tarachand Vs. Ramavtar, A.I.R. 1975 P&H20***). If the adoptive father has more than one wife the senior most wife (senior by marriage and not be age) becomes the adoptive mother and rests become step-mothers.

Section 15 provides that adoption cannot be cancelled and adopted child cannot return to the family of his or her birth. An adoption made before the commencement of 'the Act', is governed by the old law and so can be cancelled (***Dyniraj v.. Chandra Prabha, A.I.R. 1975 S.C. 784***), See also ***Gopal Vs, Kanta, A.I.R. 1972 M.P. 193***). Section 16 of 'the Act' says if a registered deed of adoption is executed the court shall presume that an adoption has taken place in compliance with the provisions of 'the

Act'. The presumptions U/s 16 of the Act' is held to be mandatory in ***Sushil Chandra v. Rupkuwar, A.I.R. 1977 Allahabad 441***. The presumption can be rebutted by evidence of fraud, undue-influence and non-performance of essential ceremonies (***Ramjagat v. Kanchiedi, A.I.R 1984 Allahabad 44***). Mere absence of registered deed of adoption is not sufficient to reject adoption as held in ***Chandrani v. Pradeep, A.I.R. 1991 M.P. 286.*** The recital of adoption made in a proved will is admissible for proving the fact of adoption (***Banwarilal v. Trilok Chand, A.I.R. 1980 S.C. 419***). Section 17 of 'the Act' prohibits the passing of any type of consideration for adoption from either side.

Summing up after the commencement of 'the Act', 1956 the old Hindu Law is codified and statutory provisions are made for adoption. 'The Act', 1956 finally settles the requirements of valid adoption and capabilities of persons to participate in the ceremony of adoption.

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INTERCOUNTRY ADOPTION

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'Adoption' as defined in International Encyclopedia of Social Science (volume I page 96) 'is an institutionalized practice through which an individual belonging by birth to one kinship group acquires new kinship ties that are socially defined as equivalent to the congenital ties'. As per Law Lexicon (by P. Ramanatha Aiyer, 2nd edition) adoption is 'the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of a parent in respect to such minor.' Intercountry or transnational adoption is one in which parents domiciled in one nation adopt a child domiciled in another nation in accordance with the laws of the child's nation. Adoption may be either to fulfill the natural desire for a son/daughter as an object of affection and a protector in old age or for humanitarian motive for caring and bringing up an abandoned or destitute child.

Adoption is an important facet of Hindu Law. However, it is an alien concept to Muslim Law. The practice of adoption is also obtainable among the continent nations of Europe but it was unknown to common law of England prior to 1926 when Adoption of Child Act, 1926 gave this concept statutory recognition.

Intercountry adoption first became popular after World War II and escalated after the Korean Conflict because of the efforts of humanitarian programs working to find homes for children left orphaned by the wars. More recently, prospective parents from Western countries have turned to intercountry adoption as the number of healthy babies domestically available for adoption has steadily declined. According to the available statistics, in year 2000 around 18,000 children from other countries were adopted by persons living in U.S.A.. While the maximum number of children have been adopted from China, India finds itself in the list of such countries at eighth place. From 1991 to 1996 around 6,300 Indian children were adopted by foreign nationals.

No doubt the concept of intercountry adoption basically proceeds on the ground that an orphaned, deprived and destitute child should find a comfortable home and surroundings for his growth, however, it has been found that undesirable organizations or individuals are also active in the field of intercountry adoption with a view to trafficking of children and their misuse for inhuman purposes leading to their exploitation.

Article 39 (f) of the Constitution of India (as amended by 42nd Amendment of 1976) ordains the State to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

National Policy for the Welfare of the Children declares quite unequivocally that – 'The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally

healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve out larger purpose of reducing inequality and ensuring social justice.

Declaration regarding rights of the child adopted by General Assembly of the United Nations on 20th November, 1959 in its preamble says that – "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" and that "mankind owes to the child the best it has to give.". Principle 9 of the Declaration states that – 'the child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be subject of traffic in any form'.

A convention on protection of children and co-operation in respect of intercountry adoption was held at Hague in 1993(commonly known as Hague Adoption Convention). In this convention a multilateral treaty was approved by 66 nations on 29th May, 1993 which aimed at protecting the children, the birth parents and adoptive parents in intercountry adoption and to prevent child trafficking and other abuses. By now many countries including the U.S.A. (Intercountry Adoption Act, 2000) have enacted law to govern and regulate intercountry adoptions.

Despite all these pro-child provisions and declarations in national and international arena, exploitation of children still continues unabated and one of the forms, most heinous in its nature, is trafficking of children under the veil of intercountry adoptions.

STATUTORY LAW :

It is apposite to state that In India efforts to enact a comprehensive law relating to adoption of children were started as early as in 1972. Adoption of Children Bill, 1972, which was introduced in Rajya Sabha in that very year, could not be passed because there was some opposition on the ground that it was considered to be an attempt to interfere with the Muslim personal law. Thereafter, another bill – Adoption of Children Bill, 1980 was introduced in Lok Sabha in December 1980 which contained an express provision that it will not apply to Muslims. This bill also could not take the shape

of enacted law.

In the aforesaid background, Hindu Adoption and Maintenance Act, 1956, Guardians and Wards Act, 1890 and Juvenile Justice (Care and Protection of Children) Act, 2000 are required to be examined for considering the legal position regarding intercountry adoption.

As far as Hindu Adoption and Maintenance Act, 1956 is concerned, it basically deals with and regulates adoption of a Hindu child below 15 years of age provided he/she has not already been adopted. The adoptive parents must be Hindu. From the provisions of this Act it is quite clear that the Act may not apply in a situation where a foreign national who is not a Hindu wants to adopt a destitute or orphaned child about whom it is also not clear that he or she is Hindu. Therefore, this Act may not be of any utility as far as intercountry adoptions are concerned.

Guardians and Wards Act, 1890 basically does not provide anything about adoption or intercountry adoption, rather it provides for appointment of guardian of the person or property of the minor and confers this jurisdiction on District Court as defined in Section 4 (5) (a) of the Act. Sections 7, 17 and 26 of this Act are relevant in this respect. Section 6 provides that where the Court is satisfied that it is for the welfare of the minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the Court may make an order accordingly. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. Section 26 provides that a guardian of the person of a minor appointed, by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed. The leave to be granted by the court may be special

or general. The practice which has hitherto prevailed is to get oneself appointed as guardian of a child, and then with the permission of the court to accompany him or her to the country of destination.

Juvenile Justice (Care and Protection of Children) Act, 2000 in Section 41 provides for adoption of such children who are orphaned, abandoned, neglected or abused. Section 41 starts with the Clause that primary responsibility for providing care and protection for the child shall be that of his family. Sub- section 2 thereof says that – 'Adoption shall be resorted to for the rehabilitation of the children who are orphaned, abandoned, neglected or abused through institutional and non-institutional methods. Elaborate provisions to govern and regulate the process of adoption have not been made in the Act, therefore, Sub- section 3 of Section 41 provides that the adoption can be in accordance with various guidelines issued from time to time by the State Governments. Jurisdiction to give child in adoption have been conferred on the Juvenile Justice Board which after carrying out such investigations as are required for giving children in adoption in conformity with guidelines issued by the State may pass appropriate order. Sub- section 5 and 6 of Section 41 stipulate other important conditions regarding adoption.

The aforesaid parameters laid down in Section 41 are not at all comprehensive; therefore, one is required to look into judicial pronouncements on this point.

JUDICIAL PRONOUNCEMENTS :

The Apex Court took cognizance of the issue relating to intercountry adoption in ***Lakshmikant Pandey v. Union of India, (1984) 2 SCC 244*** on the basis of a letter written by one Laxmi Kant Pandey,who complained of mal-practices indulged in by some social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The Court considered the problem at great length. The decision has referred to three classes of children:

(i) children who are orphaned and destitute or whose biological parents cannot be traced;

(ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and

(iii) children living with their biological parents.

The third category has been expressly excluded from consideration as far as the decision is concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents". The reason being no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child.

The directions which have been given in the aforesaid decision are limited to the first and second categories of children with more stringent requirements being laid down in respect of children in the first category of cases. As far as adoption of children falling within the second category is concerned, the requirements are not so stringent. All that is required is that they (viz., the biological parents) should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. In the aforesaid case it has further been mandated by the Apex Court that the biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter, there can be no question of once again consulting the biological parents whether they wish to give the

child in adoption or they want to take it back.

To ensure the compliance of the various directions issued by the Apex Court regarding inter country adoption, Central Adoption Resource Agency (CARA) was set up in June, 1990 by the Government of India under Ministry of Welfare. CARA functions as an autonomous agency and is required to eliminate all sorts of malpractices which may be there in inter country adoption. For initiating the process of intercountry adoption a no objection Certificate from CARA has to be obtained. A Home Study Report is also required to be enclosed with an application for adoption to be routed through a foreign and enlisted agency, which must be an enlisted agency in India with a copy of CARA. The Home Study Report is required to contain the following particulars:

(a) Social Status and family background;

(b) Description of Home;

(c) Standard of living as it appears in the Home;

(d) Current relationship between husband and wife;

(e) Current relationship between the parents and children (if any);

(f) Development of already adopted children (if any);

(g) Current relationship between the couple and the members of each other's family;

(h) Employment status of the couple;

(i) Health details such as clinical test, heart condition, past illness etc. (medical certificate etc.);

(j) Economic status of the couple;

(k) Accommodation for the child;

(l) Schooling facilities;

(m) Amenities in the Home;

(n) Reasons for wanting to adopt an Indian child;

(o) Attitude of grand-parents and relatives towards Adoption;

(p) Anticipated plans for the adoptive child;

(q) Legal status of the prospective adopting parents.

The report is required to be notarised which must in turn be attested either by an Officer of the Ministry of External Affairs or an Officer of the Justice or Social Welfare Department of the foreign country concerned or by an Officer of the Indian Embassy or High Commission or Consulate in that country.

The guidelines and directions issued by the Apex Court from time to time though to a large extent have reduced the malpractices involved in intercountry adoptions, still the need for a comprehensive legislation on the lines suggested by the Hague Convention is need of the hour. Till such a law is enacted, it is the duty of the Courts that the aforesaid guidelines should be complied with in letter and spirit so that the larger interests of the children are safeguarded in accordance with the constitutional requirements.

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