SMT. VIJAYALAKASHMAMMA AND ANR. A

v.

B.T. SHANKAR

MARCH 26, 2001

[D.P. MOHAPATRA AND DORAISWAMY RAJU, JJ.] B

Hindu Law :

Hindu Adoptions and Maintenance Act, 1956—Sections 7, 8, 12 and 14—Adoption—By widow—Consent of co-widow—Necessity of—Plea that stipulation provided under Section 7 to be read into Section 8—Held, consent not required—Since omission to provide necessity to seek consent of co-widow indicates that the legislative intent was not to impose any such clog on the power specifically conferred upon the female Hindu—Reading of the stipulations provided under Section 7, into Section 8 would amount to legislation by Courts, which is impermissible. C D

Respondent-plaintiff filed a suit against the appellants, for declaration that he was the only son of 'A' and for his 3/4th share in the suit property. He claimed that the senior widow of the two widows of 'A' adopted the respondent after death of 'A', as he had no issues, as per the Adoption Deed. The junior widow, due to disputes between the widows and the respondent, in order to trouble the respondent, started projecting claim of adoption of petitioner No. 1. Petitioners-defendants, in their written statement, contended that the respondent-plaintiff was never adopted and the unregistered Adoption Deed was a fabricated one. Alternatively they contended that since the adoption of the respondent was only by the senior widow, without consent and participation of the junior widow, the adoption could not be for the estate of 'A' and alternatively at the most the adoption by the senior widow would be only in respect of her share in the property; and that adoption of the respondent could not be properly or legally made without the consent of both the widows. Trial Court decreed the suit. E F G

In appeal, High Court affirmed the finding of the Trial Court on the question of factum of adoption, while considering the alternative plea held that the adoption was for the estate of that widow who had adopted the respondent, and so he was entitled to inherit only her share. H

A In appeal to this Court, the appellants contended that the adoption of the respondent was neither proper nor valid in law, in view of Hindu Adoptions and Maintenance Act, according to which when there are two co-widows, one widow alone cannot adopt a son or daughter without the consent of the other co-widow; and that the proviso and explanation to B Section 7 should be read into Section 8 of the Act.

Dismissing the appeal, the Court

HELD : 1. To subject the exercise of power by the senior widow to adopt, conditioned upon the consent of the junior widow where a Hindu C male died leaving behind two widows with no progeny of his own, would render the exercise of power more cumbersome and paradoxical, leaving at times, such exercise of power to adopt only next to impossibility. Having regard to the provisions contained in proviso (c) to Section 12 of the Act which ensures that the adopted child shall not divest any person of any estate which vested in him or her before the adoption and consequent D protection of the rights vested with the junior widow in the property left behind by the deceased husband and the real and ultimate object of adoption by the widow, no injustice could be said to be caused to the junior widow on account of the legislature not making it obligatory for the senior widow to obtain the consent of the junior widow to adopt a child which E would be deemed to be not only for her but also to the deceased husband as envisaged in Section 12 of the Act. [789-C-E]

V.T.S. Chandrasekhara Mudaliar v. *Kulandaivelu Mudaliar & Ors.*, AIR (1963) SC 185; *G. China Ramasubbayya* v. *M. Chenchuramayya*, AIR (1947) PC 124; *Guramma Bhratar Chanbasappa Deshmukh & Ors., Etc.* v. *Mallappa* F *Chanbasappa & Anr. Etc.*, AIR (1964) SC 510; *Eramma and Others* v. *Muddappa*, AIR (1966) SC 1137; *Tehsil Naidu and Anr.* v. *Kulla Naidu and Ors.*, AIR (1970) SC 1673 and *K. Varadamma* v. *Kanchi Sankara Reddi & Ors.*, AIR (1957) A.P. 933, referred to.

G 2. When Parliament resolved to provide for and insist upon the obtaining of the consent of the wife or if there are more than one living wives the consent of all of them, unless they or any one of them suffered any of the enumerated infirmities rendering such consent unnecessary, the conscious and positive as well as deliberate omission to provide for a female Hindu seeking or obtaining any such consent from a co or junior H widow is a definite pointer to indicate that the legislative intent and deter-

mination was not to impose any such clog on the power specifically conferred upon the female Hindu-may be for the obvious reason that under the scheme of the Act the Hindu female has been enabled and empowered to adopt not only to herself but to her husband and also in tune with the changed and modern concept of equality of women and their capabilities to decide independently statutorily recognised and the very reason for insisting upon such an authority or consent from the husband or the sapindas under the old Hindu law having lost its basis and thereby ceased to be of any relevance or valid purpose whatsoever. In such circumstances, acceding to the submission to read into Section 8 the stipulation in the proviso to Section 7 with the Explanation thereto would amount to legislation by Courts on the lines as to what in its view the law should be, which is wholly impermissible for Courts, *dehors* any justification or necessity for such a provision. There is no necessity even for such a provision in the context of the changed circumstances brought about by the various alterations and amendments to the Hindu Code regulating hitherto the personal law of the Hindus. [788-E-H]

G. Appaswami Chettiar & Anr. v. *R. Sarangapani Chettiar & Ors.*, AIR (1978) SC 105, referred to.

3. A compendious reading of Sections 7, 8, 12 and 14 of the Act, harmoniously with due regard to the purpose sought to be achieved will inevitably lead to certain inescapable consequences. They are (i) a female unmarried or if married but satisfying the requirements of clause (c) of Section 8, conferred with a right to adopt subject to the other provisions of Chapter-II, and (ii) since, unlike the position in the old Hindu Law a Hindu female is not only adopting for the husband but rendered eligible and entitled to adopt a son or a daughter in her own right and to herself also if unmarried, it has become necessary for the Legislature to enact a fiction to the extent that the 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 adoption, with certain enumerated consequences also flowing from the same, one of such being that the adopted child shall not divest any person of any estate which vested in him or her before the adoption. [785-C-D]

Sawan Ram v. *Mst. Kalawanti and Ors.*, AIR (1967) SC 1761 and *N. Hanumantha Rao* v. *N. Hanumayya*, ILR (1966) A.P. 140, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5473 of 1998.

A From the Judgment and Order dated 29.5.98 of the Karnataka High Court in R.F.A. No. 14 of 1989.

T.L. Viswanatha Iyer, G.V. Chandrashekar and P.P. Singh for the Appellants.

B Dr. Sushil Balwada and Devendra Singh for the Respondent.

The Judgment of the Court was delivered by

RAJU, J. The appellants (defendants) have filed the above appeal against the judgment and decree dated 29.5.1998 of a Division Bench of the C Karnataka High Court in R.F.A. No.14 of 1989 partly allowing their appeal but in other respects affirming the judgment and decree dated 7.10.1988 of the Civil Judge, Madhugiri, in Original Suit No.83 of 1987, decreeing the suit for partition and separate possession, as prayed for.

D The case of the respondent-plaintiff is that he has been adopted on 22.6.1970 as per the customs prevalent in the community by Sharadamma, wife of one A.T. Nanjappa Rao, who died in the year 1968 leaving behind him the suit schedule properties and also two widows, Smt. Sharadamma, the first wife, and Smt. Neelamma, the second wife. It was urged for the plaintiff that since late Nanjappa Rao had no issues through his wives, named above, E the plaintiff, the son of Nanjappa Rao's elder brother, came to be adopted by both the widows and the factum of adoption was also evidenced by an Adoption Deed written on the same day and, therefore, he became the absolute owner of the suit schedule properties. The adoption so made was claimed to have been acted upon by entering the name of the plaintiff in the F revenue records as a son of late Nanjappa Rao and that he had been managing all the properties thereafter. Sharadamma, the senior widow, died on 25.5.1984 after prolonged illness. Since disputes arose between the plaintiff and Sharadamma on one hand and the junior widow, Neelamma, on the other hand, the junior widow in collusion with another brother of Nanjappa Rao by name B.S. Krishnaoji Rao and his wife started giving trouble to the G plaintiff by projecting a claim of adoption of their daughter by name Vijayalakshmamma in the year 1970 when she was nine years old but reduced into writing and affirmed under a registered deed dated 26.3.1984, and further said to be fortified by a Will dated 28.3.1984 jointly claimed to have been executed by late Sharadamma and Neelamma. After asserting a claim for H partition of his share of the properties by issuing a notice preceding the filing

of the suit, the respondent filed Original Suit No.83/87 praying for a decree for declaration that he is the only adopted son of late Nanjappa Rao and for partition of his 3/4th share in the suit schedule properties by metes and bounds and for delivery of separate possession of his share and for future mesne profits from the date of suit till the date of delivery of separate possession to be determined under Order 20 Rule 12 of the C.P.C. The stand of the plaintiff also was that after the death of Sharadamma, the Appellants-defendants herein with the help of their men were able to dispossess the plaintiff from some of the properties necessitating the suit claim as noticed above,

The junior widow of late Nanjappa Rao was impleaded as the second defendant and the proclaimed adopted daughter Vijayalakshmamma was impleaded as the first defendant to the suit. The defendants filed a common written statement disputing the facts averred as well as claims made by the plaintiff by contending that there was no adoption of the plaintiff by Sharadamma as claimed; that the unregistered deed of adoption was a fabricated one and no rights can be claimed on the basis of such a document. The further stand was that the adoption of the first defendant as evidenced by the registered document dated 26.3.1984 (Exb. D.2) and the Will dated 28.3.1984 (Exb. D.1) fortified the claim of adoption projected by the defendants and at no point of time the plaintiff was the owner of the properties in question. As an alternate plea, it was projected that in any event the second defendant-junior widow of late Nanjappa Rao, having not either accorded her consent or participated in the so-called adoption of the plaintiff by Sharadamma, the senior widow, the adoption of the plaintiff, if at all, could be for Sharadamma only and not for or the estate of her husband, late A.T. Nanjappa Rao, and that no adoption could have been properly or legally made of the plaintiff without the consent of both the widows of late Nanjappa Rao.

In support of the claim of the plaintiff, PWs. 1 to 8 were examined of whom P.W.1 being himself, P.W.2, the Purohit, who was said to have performed the adoption ceremony, P.Ws. 7 & 8 the natural parents, P.W.6, the natural maternal grand father of the plaintiff and P.Ws. 3 to 5 neighbours of the plaintiff, who were said to have attended the adoption ceremony. P.Ws. 4 & 5 were also said to have attested the adoption deed Exb. P.1, the unregistered deed of adoption of the plaintiff. Exbs. P.1 to P.5 were also marked as material documentary evidence. To prove the claim of the defendants, D.Ws. 1 to 5 were examined in addition to marking Exbs. D.1 to D.7.

A On a consideration of the oral and documentary evidence on record, the learned Trial Judge decreed the suit as prayed for, after adverting to in great detail the overwhelming materials and evidence on record, rejecting at the same time the perfunctory evidence placed on record by the defendants.

B Aggrieved, the appellants pursued the matter in appeal before the High Court and, as noticed earlier, the Division Bench affirmed the findings of the learned Trial Judge on the question of factum of adoption of the plaintiff while equally confirming the findings that the defendants miserably failed to prove the case projected by them of adoption of the first defendant. The registered deed of adoption (Exb.D.2) and the Will (Exb. D.1) were held to C have not been proved in respect of their genuineness and due execution as well by examining either the Attestors or by taking any steps for proving the signature of Sharadamma, the senior widow, on them. At the same time while considering the alternate plea of the appellants, the High Court held that since the adoption of the plaintiff was shown to have been made only by Sharadamma, D the senior widow, without the actual consent and participation of the junior widow, who was alive at that time, the adoption was held to be for Sharadamma, the senior widow, alone and not on behalf of both the widows of late Nanjappa Rao. Keeping in view the legal position that on the death of Nanjappa Rao in the year 1968 under the provisions of the Hindu Succession Act, 1956, the widows came to inherit the suit schedule properties with equal E share, it was held the adoption of the plaintiff by Sharadamma alone without the consent of the second wife did not affect the share of Neelamma in the properties and the plaintiff would be entitled to inherit only the share of late Sharadamma alone. To that extent, the judgment and decree passed by the Trial Court came to be modified into one for an half share in favour F of the plaintiff as against the 3/4th share granted by the Trial Court. Not satisfied with the partial relief granted, the appellants have come before this Court.

Mr. T.L. Viswanatha Iyer, learned senior counsel, while inviting our attention to the relevant provisions of the Hindu Adoptions and Maintenance G Act, 1956 (hereinafter referred to as 'the Act') contended that when there are two co-widows, one widow alone cannot adopt a son or daughter without the consent of the other co-widow, for or the estate of the late husband. The reason, according the learned counsel, being that as per Section 12 of the Act the adopted son or daughter shall be deemed to be the child of his or her H adoptive father or mother for all purposes with effect from the date of

adoption. Argued the learned senior counsel further that the proviso to Section 7 and the Explanation thereto must necessarily be read into Section 8 providing for adoption by a female Hindu and in case where there are more than one wife, the right to adopt in such cases has to or can be exercised only either jointly by both the widows acting together or not at all. Hence, it was urged that the so-called adoption of the plaintiff-respondent was neither proper nor valid in law to clothe him with any rights, as the adopted son of and that too in the properties left behind by late Nanjappa Rao. The judgment of the Courts below was challenged only on these legal submissions and not based on any challenge to the factum of proof of adoption of the plaintiff or on the question or proof or the legality and propriety of the adoption of first defendant projected by the appellants but rejected concurrently by the Courts below. The learned counsel appearing for the respondent adopted the reasoning of the Courts below to justify the conclusions arrived at and sought to sustain the decree passed in favour of his client. There has been no cross appeal on the part of the plaintiff to challenge the modification in the decree allowed by the High Court by reducing the share of the plaintiff from 3/4th to one half only.

To have a proper appreciation of the legal submissions of the principles of law pleaded on behalf of the appellants, it becomes necessary to have a proper perspective of the position of law governing the matter as on the date of coming into force of the Hindu Adoption and Maintenance Act, since the Act in question was not only to amend but also codify the law relating to adoption and maintenance comprehensively dealing with every phase and aspect of the law specifically dealt with and further more with a provision of the nature in Section 4 of the Act giving an overriding effect to the provisions of the Act over any text, rule or interpretation of Hindu Law or any custom or usage as part of that law or any other law in force with respect to which any provision has been made in the Act or insofar as it is inconsistent with any or the provisions of the Act. The need to delve at length with the various principles governing adoption under the Shastric Hindu Law based on the ancient texts is considerably averted due to the law laid down by this Court on more than one occasion, after an exhaustive review of the case law rendered by the Judicial Committee of the Privy Council and some of the High Courts.

Every male Hindu who is of sound mind and has attained the age of discretion though he be a minor was held entitled to, subject to the provisions

A of any law for the time being in force, take a son in adoption provided he has no son, grandson or great grandson, natural or adopted living at the time of such adoption. When a Hindu makes an adoption during his life time, his wife would necessarily join him in the essential religious ceremonies to be performed therefor and, therefore, he was not obliged to take the consent of the wife and the assent of the wife has never been considered to be a B condition precedent for the exercise of the right by the husband. The nature and character as also the purport and object of an adoption came to be considered in great detail while dealing with the capacity or a right of a Hindu woman to adopt, in *V.T.S. Chandrasekhara Mudaliar* v. *Kulandaivelu Mudaliar & Ors.*, AIR (1963) SC 185, K.Subba Rao, J., as the learned Judge then was, C on an elaborate consideration of the relevant case law, held as follows:

> "12. It is common place that a widow adopts a boy to her husband and that nobody except a widow can make an adoption to her husband. The reason is that Hindu law recognises her not merely as an agent of her husband but, to use the felicitous Hindu metaphor, as D his surviving half; see Brihaspati XXV, II and Yagnavalkya I, 156. In Sarkar Sastri's Hindu Law, 8th Edn. Pp 161-162 it is stated that though according to the commentaries the widow adopts in her own right, the modern view is that she acts merely as a delegate or representative of her husband, that is to say, she is only an instrument E through whom the husband is supposed to act. Mulla in his book "Principles of Hindu Law" stated that she acts as a delegate of her husband. The Judicial Committee in *Balusu Gurulingaswami* v. *Balusu Ramalakshmamma*, ILR 22 Mad. 398 at p.408 (PC), pointed out that if the consent of the husband's kinsmen has been obtained, F the widow's power to adopt is co-extensive with that of her husband. It is, therefore, clear that a Hindu widow in making an adoption exercises a power which she alone can exercise, though her competency is conditioned by other limitations which we shall consider at a later stage. Whether she was authorised by her husband to take a boy in adoption or whether she obtained the assent of the sapindas, G her discretion to make an adoption, or not to make it, is absolute and uncontrolled. She is not bound to make an adoption and she cannot be compelled to do so. But if she chooses to take a boy in adoption there is an essential distinction between the scope of the authority given by her husband and that of the assent given by the sapindas. H As the widow acts only as a delegate or representative of her husband,

her discretion in making an adoption is strictly conditioned by the terms of the authority conferred on her. But in the absence of any specific authorization by her husband, her power to take a boy in adoption is coterminus with that of her husband, subject only to the assent of the sapindas. To put it differently, the power to adopt is that of the widow as the representative of her husband and the requirement of assent of the sapindas is only a protection against the misuse of it. It is not, therefore, right to equate the authority of a husband with the assent of the sapindas. If this distinction is borne in mind, it will be clear that in essence the adoption is an act of the widow and the role of the sapindas is only that of advisers."

As to what is the object of an adoption, the learned Judge proceeded further to observe that it would be unnecessary and even be pedantic to consider the old Hindu Law texts at such a late stage in the evolution of the Hindu law when the subject was fully and adequately considered from time to time by the Judicial Committee of the Privy Council and came to be categorically held that the substitution of a son of the deceased, for the failure of a male issue, for spiritual reasons is the essence of adoption and the devolution of property is a mere accessory to it. Reference has also been made to the decision in *G. China Ramasubbayya* v. *M. Chenchuramayya*, AIR (1947) PC 124, wherein the two-fold object of adoption was stated to be (a) to secure the performance of the funeral rites of the person to whom the adoption is made; and (b) to preserve the continuance of his lineage and reiterated the position that the validity of the adoption has to be judged by spiritual rather than temporal considerations and that devolution of property is only of secondary importance.

While adverting to the question as to why does the Hindu Law insist upon the assent of the sapinda as a pre-requisite for the validity of an adoption made by a widow, the learned Judge, on an elaborate consideration of the principles laid down in the various texts and the catena of case law, held as follows:

"17. It will be seen that the reason for the rule is not the possible deprivation of the proprietary interests of the reversioners but the state of perpetual tutelage of women, and the consent of kinsmen was considered to be an assurance that it was *bona fide* performance of a religious duty and a sufficient guarantee against any capricious action by the widow in taking a boy in adoption."

A In *Guramma Bhratar Chanbasappa Deshmukh & Ors., etc.* v. *Mallappa Chanbasappa & Anr. etc.*, AIR (1964) SC 510, the very learned Judge had an occasion to deal with the object of adoption and the limitations, if any, on the said power and held as follows:

> B 8. ..... These texts ex facie do not equate a son in existence with a son in the womb. If the authors of the said treatises intended to equate the one with the other, they would not have left in the doubt, for such an extension of the doctrine would introduce an element of uncertainty in the matter of adoption and defeat, in some cases, the religious object underlying adoption. It is now well settled that the C main object of adoption is to secure spiritual benefit to the adopter, though its secondary object is to secure an heir to perpetuate the adopter's name. Such being the significance of adoption, its validity shall not be made to depend upon the contingencies that may or may not happen. It is suggested that an adoption cannot be made unless D there is certainty of not getting a son and that if the wife is pregnant, there is a likelihood of the adopter begetting a son and, therefore, the adoption made is void. The texts cited do not support the said proposition. Its acceptance will lead to anomalies. Suppose a husband who is seriously ill and who had no knowledge of the pregnancy of his wife, makes an adoption; in such an event, the existence of a E pregnancy, of which he has no knowledge, invalidates the adoption, whether the pregnancy turns out to be fruitful or not. If he has knowledge of the pregnancy, he will not be in a position to take a boy in adoption, though ultimately the wife may have an abortion, or deliver a still-born child or the child born may turn out to be a girl. F Further, as it is well settled law that a son includes a son's son and a grandson of the son, the pregnancy of a son's widow or a grandson's widow, on the parity of the said reasoning, will invalidate an adoption. We cannot introduce such a degree of uncertainty in the law of adoption unless Hindu law texts or authoritative decisions compel us to do so. There are no texts of Hindu law imposing a condition of non- G pregnancy of the wife or son's widow or a grandson's widow for the exercise of a person's power to adopt. The decisions of the High Courts on the subject discountenance the acceptance of any such condition. But there is a decision of Sudr Adalut in *Narayana Reddi* v. *Varadachala Reddi*, S.A. No.223 of 1859 MSD 1859, p. 97 wherein H it was observed that it was of the essence of the power to adopt that

the party adopting should be hopeless of having issue. Mr. Mayne commenting upon the said observation drew a distinction between a husband taking a boy in adoption knowing that his wife was pregnant and doing so without the said knowledge and stated:

> "If a wife, known to be pregnant at the time of adoption, afterwards brought forth a son, it might fairly be held he was then in existence to the extent of precluding an adoption ....."

A Division Bench of the Madras High Court in *Nagabhushanam* v. *Seshammagaru*, ILR 3 Mad. 180 criticised the opinion of the pandits as well as the observation of Mr. Mayne, and came to the conclusion that an adoption by a Hindu with knowledge of his wife's pregnancy was not invalid. The Bombay High Court in *Shamavahoo* v. *Dwarkadas Vasanji*, ILR 12 Bom. 202 (note) accepted the said view. A Division Bench of the Allahabad High Court in *Daulat Ram* v. *Ram Lal*, ILR 29 All. 310 followed the Madras and Bombay decisions. No other decision has been brought to our notice either taking a different view or throwing a doubt thereon. All textbooks-Mayne, Mulla, Sarkar Sastri-accepted the correctness of the said view without any comment."

The question as to how the adoption could or ought to be made when a Hindu male dies leaving behind more than one widow came to be considered by this Court in *Eramma and others* v. *Muddappa*, AIR (1966) SC 1137, with particular reference to the Mysore Hindu Law Women's Rights Act 1933, stipulating that in the absence of an express prohibition in writing by the husband, his widow, or where he has left more widows than one, the seniormost of them shall be presumed to have his authority to make an adoption, and this position was also found to be in conformity with law in the Bombay State. In *Tehsil Naidu and another* v. *Kulla Naidu and others*, AIR (1970) SC 1673, this Court held that the requirement of consent from a sapinda for adoption by a widow was considered to be necessitated only when the widow has not obtained the consent of her husband in his lifetime. While dealing with the necessity or otherwise to obtain the consent of the female sapinda in addition to male sapinda of the deceased husband, this Court observed that if the consent of the husband or sapinda was held to be necessary for the reason that a woman is incapable of exercising independent judgment in the matter of deciding whether she should adopt a son to her deceased husband, she can hardly be a competent adviser to another widow on the same matter and, therefore, it was held that the absence of consent

A of a female sapinda would not invalidate the adoption in a given case.

Speaking for a Division Bench of the Andhra Pradesh High Court, in a decision reported in *K. Varadamma* v. *Kanchi Sankara Reddi & Ors.*, AIR (1957) A.P. 933, K. Subba Rao, CJ., as the learned Judge then was, has meticulously and exhaustively analysed the case law on the subject pertaining
B to adoption made by a senior widow without obtaining the consent of the junior widow and observed as hereunder :-

> "11. It is therefore clear that the presumed incapacity of a woman to arrive at a balanced and independent judgment connected with
C matters of adoption was the foundation of the doctrine of consent. It is futile to enquire at this stage whether there was any justification for that assumption. It was considered that the advice of the nearest sapindas would enable the widow to act without any caprice in the discharge of her religious duty. If that be the reason for the rule, it would obviously be incongruous to hold that a widow incompetent
D to act independently can, relying upon another woman suffering from the same infirmity, make a valid adoption. It would be more anomalous if it were to be held that a senior widow with a presumed mental incapacity could sustain her act by invoking the aid of the junior widow who by the same party of reasoning would be mentally
E deficient to a higher degree.
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> 12. But it is said that, as the proprietary interests of the junior widow would be affected by the adoption, it is just and equitable that she should be consulted before the remoter sapindas are consulted. It is true that at one time greater emphasis was laid on the proprietary
F interests affected by reason of the adoption. But that question was finally and authoritatively decided in *Amarendra Nath Man Singh* v. *Sanatan Singh*, ILR 12 Pat 642; AIR (1933) PC 155 E, by the Judicial Committee.
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> 14. The Judicial Committee in ILR (1948) Mad. 362: AIR (1947) PC 124 B, accepted ILR 12 Pat. 642: AIR (1933) PC 155 E, as laying down the correct position on this aspect of the case. It is therefore
H clear that the doctrine of consent is based upon the presumed

incompetency of a widow rather than upon the idea of any interference with the proprietary rights of the sapindas. A

15. But it is contended that the word 'sapinda' has a comprehensive meaning so as to take in a widow and there is no justification for excluding her when the decided cases do not in terms do so. In the Mitakshara, the term 'sapinda' is used in the sense of, one of the same body, i.e., a blood relation. But, according to the Hindu mode of computation, this includes relations within the seventh degree. The term 'sagotra sapinda' was used in respect of relations of the same gotra and binnagotra sapinda for bandhus. Lawfully wedded wives of the sapindas were also brought under that category. See Gopalchandra Sarkar Sastri's Hindu Law, 8th edition, p. 69. There is, therefore, justification for the contention that the word 'sapinda' takes in the widow of the last male holder. But the principle underlying the doctrine of consent cannot sustain any such wide interpretation in the present context. The acceptance of this argument would destroy the principle itself. Indeed all decisions which form landmarks in the development of the doctrine, either expressly or impliedly use the word in the sense of male sapindas. In 12 Moo Ind App 397 (PC)(A), the widow of a divided member took a boy in adoption with the consent of her father-in-law. Their Lordships, in dealing with that question, observed at p. 441: B C D E

"In such a case, therefore, their Lordships think that the consent of the father-in-law to whom the law points as the natural guardian and venerable protector of the widow would be sufficient."

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22. Learned counsel for the appellant relied upon a long catena of cases wherein the preferential right of the senior widow to take a boy in adoption was recognised. See *Ranjit Lal* v. *Bijoy Krishna*, ILR 39 Cal 582 (L), *Chukkamma* v. *Punnamma*, 28 Mad LJ 72: AIR (1915) Mad 775 M, *Muthuswami Naicken* v. *Pulavaratal*, ILR 45 Mad 266: AIR (1922) Mad 106 2 N, *Byra Goudu* v. *Muniammal*, 1939-2 Mal LJ 805: AIR (1940) Mad 5 O. These cases lay down a principle applicable to a different situation altogether. A Hindu with two or more wives may take a boy in adoption or after his death one of his G H

A widows may take a boy in adoption. In such cases in a competition between two or more wives or two or more widows, Courts were called upon to decide on the preferential right of the one or other of them. Invariably, they accepted the doctrine that the elder of the two being the dharmapathni is entitled to take a boy in adoption unless the husband expressly or by necessary implication directed otherwise. When once the preferential right of the senior widow is conceded it follows that the junior widow cannot take a boy in adoption unless the senior widow agrees. The decisions in 28 Mad LJ 72: AIR (1915) Mad 775 *M and Rajah Venkatappa Nayanim Bahadur* v. *Ranga Rao*, ILR 39 Mad 772: AIR (1916) Mad 919 2 P, where it was held that an adoption by the junior widow with the consent of sapindas but without consulting the senior widow was invalid, can be supported on the aforesaid principle. As the senior widow who had a preferential right in the matter of adoption was not consulted, the adoption was held to be invalid. Those decisions have obviously no bearing on the doctrine of consent evolved by Hindu Law.

23. Before closing we should refer to the decision of a Division Bench of the Madras High Court in *Narayanaswami Naick* v. *Mangammal*, ILR 28 Mad 315 (Q), which is the only direct decision on the point. There the senior widow took a boy in adoption after having obtained the consent of his sapindas but without consulting the junior widow. The learned Judges, Davies and Benson, JJ., held that the adoption was good. At p. 319, the learned Judges observed:

"The junior widow is bound, as a matter of duty, to consent and if as their Lordships of the Privy Council say (12 Moo Ind App 397 (A)) the consent of kinsmen is required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose interest in the estate would be defeated by the adoption it would seem that the omission to consult the co-widow though no doubt improper, would not be a sufficient reason for holding the adoption to be invalid."

24. We entirely agree with the aforesaid observations. While for family peace and good relationship ordinarily a senior widow should do well to consult the younger one before introducing a boy into the family, there is nothing in law which compels her to do so. We

therefore hold agreeing with the learned Judge that the adoption in the present case is valid." A

The said decisions not only succinctly and correctly stated the law on the subject but seem to accurately accord with the basic principles of law laid down in the judgments of this Court, noticed supra.

B

Coming to the position of law, as found codified, in the Hindu Adoptions and Maintenance Act, 1956, it is found that apart from the overriding effect given to the provisions of the Act, Section 5 mandates that no adoption shall be made after the commencement of this Act by or to a HIndu except in accordance with the provisions contained in Chapter-II, and proclaims the consequences any contravention thereof to render such adoption void, thereby neither creating any rights in the adoptive family nor destroying the rights in the family of birth. While Section 6 lays down the requisites of a valid adoption, the provisions of Section 7 deals with the capacity of a male Hindu to take in adoption whereas Section 8 deals with the capacity of a female Hindu to take in adoption. It is necessary to set out those provisions to properly consider the claim made on behalf of the appellants. Section 7 reads as follows :- C D

"*Capacity of a male Hindu to take in adoption.*- Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption: E

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. F

Explanation.- If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso."

G

Section 8 reads, thus -

"*Capacity of a female Hindu to take in adoption.* — Any female Hindu —

(a) who is of sound mind, H

A (b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,

B

has the capacity to take a son or daughter in adoption."

A reference to Sections 12 and 14 also become necessary and Section 12 reads as hereunder :-

C

"12. *Effects of adoption.*-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 :

D

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;

E

(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;

F

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

Section 14 reads, thus -

G

"14. *Determination of adoptive mother in certain cases.*-(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior- most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

H

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child. A

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child." B

A compendious reading of all the above provisions harmoniously with due regard to the purpose sought to be achieved will inevitably lead to certain inescapable consequences. They are (i) a female unmarried or if married but satisfying the requirements of clause (c) of Section 8, conferred with a right to adopt subject to the other provisions of Chapter-II, and (ii) since, unlike the position in the old Hindu Law a Hindu female is not only adopting for the husband but rendered eligible and entitled to adopt a son or a daughter in her own right and to herself also if unmarried, it has become necessary for the Legislature to enact a fiction to the extent that the 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 adoption, with certain enumerated consequences also flowing from the same, one of such being that the adopted child shall not divest any person of any estate which vested in him or her before the adoption. This Court also in *Sawan Ram* v. *Mst. Kalawanti & Ors.*, AIR (1967) SC 1761 after adverting to Section 5 of this Act, has held as follows :- C D E

"7.....It is significant that, in this section, the adoption to be made is mentioned as "by or to a Hindu". Thus, adoption is envisaged as being of two kinds. One is adoption by a Hindu, and the other is adoption to a Hindu. If the view canvassed on behalf of the appellant be accepted, the consequence will be that there will be only adoptions by Hindus and not to Hindus. *On the face of it, adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. It is only in such a case that it can be said that the adoption has been made to that other person. The most common instance will naturally be that of adoption by a female Hindu who is married and whose husband is dead, or has completely and finally renounced the world, or has been declared by a court of competent jurisdiction to be of unsound mind. In such a case, the actual adoption would be by the female Hindu, while the adoption will be not only to herself,* F G H

but also to her husband who is dead, or has completely and finally renounced the world or has been declared to be of unsoundmind."

[Emphasis supplied]

Adverting to Section 12 of the Act and as to the correctness of the view taken by the Andhra Pradesh High Court in *N. Hanumantha Rao* v. *N. Hanumayya*, ILR (1966) Andh. Pra. 140, it was observed as hereunder:-

"8. The second provision, which was ignored by the Andhra Pradesh High Court, is one contained in S. 12 itself. The section, in its principal clause, not only lays down that the 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, but, in addition, goes on to define the rights of such an adopted child. It lays down that 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. A question naturally arises what is the adoptive family of a child who is adopted by a widow, or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive. *It is well recognised that, after a female is married, she belongs to the family of her husband. The child adopted by her must also, therefore, belong to the same family. On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow.* Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family. The right, which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth, is, thus, clearly to be replaced by similar rights in the adoptive family, and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow, or the married female, taking him in adoption. *This provision in S. 12 of the Act, thus, itself makes it clear that, on adoption by a Hindu female who has been married, the adopted son will, in effect, be the adopted son of her husband also.* This aspect was ignored by the Andhra Pradesh High Court when dealing with the effect of the language used in other parts of this section.

[Emphasis supplied]

It was also emphasised by this Court that the ultimate decision given in *N. Hanumantha Rao* v. *N. Hanumayya* (supra) by the Andhra Pradesh High Court is not in any way rendered incorrect while making it clear at the same time that the restriction placed upon the adopted child under clause (c) of Section 8 cannot lead to the inference that a child adopted by the widow will not be deemed to be the adopted son of her deceased husband.

The legality of the adoption in this case is challenged on the ground of want of consent of the junior widow (the second wife/second appellant). Though under Section 7 of the Act, a restriction has been specifically engrafted on the exercise of power and right of the male Hindu not to adopt, if he has a wife living, except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind and the Explanation further enjoins the necessity of taking the consent of all the wives, if the person has more than one wife living at the time of adoption, unless the consent of any one of them has been rendered unnecessary for any of the reasons specified in the main proviso itself. The question that now requires to be considered is as to whether the plea on behalf of the appellants that the proviso and Explanation thereto engrafted in Section 7 can and also should be dovetailed or read into Section 8, for any justifiable reason or purpose, deserves or merit our acceptance.

The nature, object and purpose of the Act in question has already been noticed supra. The Parliament has consciously and deliberately effected certain vital and substantial changes in the personal law of the Hindus on several branches including the law relating to adoptions. The statement of objects and reasons, so far as it pertains to the law on adoption reads as follows:-

> "1. This part of the Hindu Code deals with the subject of adoptions and maintenance among Hindus.
>
> 2. With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, it has now become possible to simplify the law of adoption among Hindus. The Bill provides for the adoption of boys as well as girls. *There is no longer any justification for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a Hindu widow will hereafter be in her own right.* No person need be divested of any

property which has vested in him by reason only of the fact that subsequent to such vesting an adoption has been made. This rule of divesting has been the cause of many a ruinous litigation."

[Emphasis supplied]

This Court also endorsed the said position in the decision reported in *G. Appaswami Chettiar & Anr.* v. *R. Sarangapani Chettiar & Ors.*, AIR (1978) SC 1051 vide Para 13. The extent to which and the areas and aspects or facets of old Hindu Law which required modernisation, modification and alteration are matters of legislative policy and merely because a particular change has been brought into effect in respect of one facet of law in force and a provision has been made specifically only to that limited extent, the Courts neither by means of an interpretative process nor under the guise of ensuring parity in what it may seem to Court would be desirable to achieve uniformity (an area once again exclusively pertaining to policy of legislation) add to or alter the language, structure and content of a provision by reading into it what was not specifically intended or what perhaps was deliberately and consciously avoided by the Parliament itself. Section 7 bears the caption 'Capacity of a male Hindu to take in adoption' in the same manner the immediately following Section 8 bears the heading 'Capacity of a female Hindu to take in adoption'. When the Parliament resolved to provide for and insist upon the obtaining of the consent of the wife or if there are more than one living wives the consent of all of them, unless they or any one of them suffered any of the enumerated infirmities rendering such consent unnecessary, the conscious and positive as well as deliberate omission to provide for a female Hindu seeking or obtaining any such consent from a co or junior widow is a definite pointer to indicate that the legislative intent and determination was not to impose any such clog on the power specifically conferred upon the female Hindu - may be for the obvious reason that under the scheme of the Act the Hindu female has been enabled and empowered to adopt not only to herself but also to her husband, and also in tune with the changed and modern concept of equality of women and their capabilities to decide independently statutorily recognised, and the very reason for insisting upon such an authority or consent from the Husband or the sapindas under the old Hindu Law having lost its basis and thereby ceased to be of any relevance or valid purpose whatsoever. In such circumstances, acceding to the submission to read into Section 8 the stipulation in the proviso to Section 7 with the Explanation thereto would amount to legislation by Courts on the lines as to what in its view the law should be, which is wholly impermissible for

Courts, dehors any justification or necessity for such a provision. In our view, there is no necessity even for such a provision in the context of the changed circumstances brought about by the various alterations and amendments to the Hindu Code regulating hitherto the personal law of the Hindus.

We are also of the view that either having regard to state of law prevailing on the eve of coming into force of the Act or the nature and extent of the changes and alterations effected in the then existing personal law envisaged by the Parliament could there be any justification whatsoever for Courts to re-write Section 8 of the Act by doing violence to the language by adding something which has been consciously and deliberately omitted by the Parliament itself. To subject the exercise of power by the senior widow to adopt, conditioned upon the consent of the junior widow where a Hindu male died leaving behind two widows with no progeny of his own, would render the exercise of power more cumbersome and paradoxical, leaving at times, such exercise of power to adopt only next to impossibility. Having regard to the provisions contained in proviso (c) to Section 12 of the Act which ensures that the adopted child shall not divest any person of any estate which vested in him or her before the adoption and consequent protection of the rights vested with the junior widow in the property left behind by the deceased husband and the real and ultimate object of adoption by the widow, no injustice could be said to be caused to the junior widow on account of the legislature not making it obligatory for the senior widow to obtain the consent of the junior widow to adopt a child which would be deemed to be not only for her but also to the deceased husband as envisaged in Section 12 of the Act.

For all the reasons stated above, we find no error of law or infirmity of any kind in the ultimate decision of the High Court to call for any interference at our hands. The appeal fails and is dismissed. No costs.

K.K.T. Appeal dismissed.