XXIII
ADOPTION

LAW PRIOR TO THE HINDU ADOPTIONS AND MAINTENANCE ACT 1956

Note.— Material and important alterations and modifications in the law relating to adoptions have been brought about by legislation, embodied in the Hindu Adoptions and Maintenance Act 1956. Overriding application has been given to that Act. Adoptions made after the commencement of that Act must be in accordance with the provisions contained in it and any adoption made in contravention of those provisions will be void. Validity of adoptions previously made is not affected in any manner. The rules in the following paragraphs of this Chapter state the law before coming into operation of that Act.

> He whom his father and mother give to another as his son...is considered as a son given the gift being confirmed by pouring water.[1]

> But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord.[2]

> The aged parents, a virtuous wife, and an infant child must be maintained even by doing a hundred misdeeds.[3]

This chapter has been discussed under the following heads:

I. *Persons who may lawfully take in adoption*— §§ 449–73.
II. *Persons lawfully capable of giving in adoption*— §§ 474–79A.
III. *Persons who may be lawfully taken in adoption*— §§ 480–87.
IV. *Act to adoption and ceremonies incidental to it*— §§ 488–93.
V. *Results of dattak adoption*— §§ 494–500.
VI. *Divesting of estate on adoption by widow*— §§ 501–506.

1 Manu.
2 Vasistha.
3 Manu cited in *Mitakshara*.

VII. *Alienations made prior to adoption*— §§ 507–509.
VIII. *Surrender prior to adoption*— § 509A.
IX. *Effects of invalid adoption*— §§ 510- 511.
X. *Mode of proof and estoppel*— §§ 512-514.
XI. *Kritrima adoption*— § 515.
XII. *Illatom adoption*— § 515A.
XIII. *Customary adoption in Punjab* — § 515B.

§ 445. ADOPTION IN OTHER SYSTEMS OF LAW

Adoption is not recognised by Mohammedan law,[4] nor is it recognised by the Parsi law. It is recognised by the Hindu law, but even in that system of law, there may be a family,[5] or caste,[6] custom prohibiting adoption, and if such custom is proved, effect will be given to it by the courts.

§ 446. DIFFERENT FORMS OF ADOPTION

The ancient Hindu law recognised five kinds of adopted sons. The modern Hindu law recognises only two namely, the *dattaka* and the *kritrima*. The *dattaka* form is in use all over India. The *kritrima* form is prevalent in Mithila and the adjoining districts.

The ancient Hindu law recognised 12 kinds of sons, of whom five were adopted sons: Of these 12 only three are now recognised, namely *aurasa* or legitimate son, *dattaka* or son given in adoption and *kritrima* or son made. The whole of this chapter deals with *dattaka* adoption except § 515, which deals with *kritrima* adoption, and § 515A, which deals with *illatom* adoption.

For *dvyamushyayana*, see § 486. For custom of *goda dattaka*, see *Vallabhalaji v Mahalaxmi Bahuji*.[7] For *putrika putra*, which is obsolete, see *Shyam Sunder v State of Bihar*.[8]

§ 447. OBJECT OF ADOPTION

The objects of adoption are twofold: the first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of waters to the soul of

4 *Muhammad Allahbad v Muhammmad Ismail* (1888) 10 All 289, 340.
5 *Fanindra v Rajeswar* (1885) 11 Cal 463, 12 IA 72.
6 *Verabhai v Bai Hiraba* (1903) 27 Bom 492, 30 IA 234.
7 AIR 1962 SC 356, 64 Bom LR 433.
8 AIR 1981 SC 178.

the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name.[9]

The Supreme Court, agreeing with earlier decisions of the Privy Council, has expressed the view that the validity of an adoption is to be determined by spiritual rather than temporal considerations, and that devolution of property is only of secondary importance.[10]

When a Hindu gives a boy in adoption, his act is, according to the Hindu *shastras*, in the nature of a sacred gift voluntarily made. It is on that account, that Manu requires the gift to be 'confirmed by pouring water'. A daughter given in marriage, which is called *kanyadan* and a son given in adoption, which is called *putradan*, stand in this respect on the same footing. Both are gifts for religious and secular purposes.[11]

§ 448. REQUIREMENTS OF A VALID ADOPTION

No adoption is valid unless:

(1) the person adopting is lawfully capable of taking in adoption (§§ 449–73);
(2) the person giving in adoption is lawfully capable of giving in adoption (§§ 474–79);
(3) the person adopted is lawfully capable of being taken in adoption (§§ 480–87);
(4) the adoption is completed by an actual giving and taking (§ 489); and
(5) the ceremony called *datta homam* (oblation to fire) has been performed. It is however, doubtful, whether the *datta homam* ceremony is essential in all cases to the validity of adoption (§ 490).

I. Persons Who May Lawfully Take in Adoption

§ 449. WHO MAY ADOPT

Every male may adopt, provided he is otherwise competent to do so (§ 450). A wife can also adopt to her husband, but no other female can adopt to any other male; thus, a mother cannot adopt to her son, nor a sister to her brother. A wife cannot adopt during her husband's lifetime, except with his express consent.[12] After his death, she may adopt, in

9 *Sitaram v Haribar* (1911) 35 Bom 169, 179–180, 8 IC 625; *Bal Gangadhar Tilak v Shrinivas* (1915) 42 IA 135, 154, 39 Bom 441, 470, 29 IC 639, AIR 1951 PC 7; *Lal Hukum Tej Pratap Singh v Collector of Etah* (1952) 1 All 60, AIR 1953 All 766.

10 *Chandrasekhara v Kulandaivelu* AIR 1963 SC 185, 193.

11 *Sitaram v Haribar* 35 Bom 169, 179, 180, 8 IC 625.

12 *Narayan v Nana* (1870) 7 Bom HCAC 153.

certain parts of India, only if he has expressly authorised her to adopt, and in other parts of India, even without such authority (§ 452). However, in no case, can a wife or a widow adopt a son to herself; the adoption must be made to her husband. An adoption by a woman of a son to herself is invalid and it confers no legal rights upon the person adopted.[13]

It will be seen that adoption can be made by the wife to the husband. It is true that if the husband had made an adoption during his lifetime, his wife would have joined him. The wife in such a case is described as *pratigrihitrimata* (adopted mother). Such an adoption, though in an academic sense, may perhaps be called joint adoption, is not an adoption by the wife to herself but the adoption is to the husband.[14]

It will also be seen from the above, that a Hindu may either himself adopt, or delegate the power to adopt to his wife. However, he cannot delegate the power to any other person. Though, a Hindu widow cannot under Hindu law, adopt to herself, yet when she is domiciled in French India, she can, under French law, which, as the law of domicile, determines her capacity to adopt a son, as well as the status of the adopter, adopt a son to herself, and the son so adopted can succeed to her estate.[15] By a special custom, proved to exist amongst a particular community, an adoption can be made to a person after his and his widow's death by the father or other agnates of the adoptive father.[16]

§ 450. ADOPTION BY MALE

(1) Subject to the provisions of any law for the time being in force, every male Hindu, who is of sound mind,[17] and has attained the age of discretion, even though he may be a minor,[18] may lawfully take a son in adoption, provided he has no son, grandson, or great-grandson, natural or adopted,[19] living at the time of adoption.

The High Court of Bombay has held that a Hindu, who has a son, grandson or great-grandson living at the time, cannot adopt even if the

13 *Chowdry Pudum Singh v Koer Oodey Singh* (1869) 12 MIA 350, 356; *Narendra v Dina Nath* (1909) 36 Cal 824, 3 IC 996.

14 *Kasturi v Ponnammal* AIR 1961 SC 1302.

15 *CS Nataraja Pillai v CS Subbaraya Chettiar* AIR 1950 PC 34.

16 *Kasiviswanathan v Somasundaram* 51 CWN 374, PC.

17 *Tayammaul v Sashachalla* (1865) 10 MIA 429, pp 434–35; *Seshamma v Padmanabha Rao* (1917) 40 Mad 660, 33 IC 578, AIR 1917 Mad 265.

18 *Rajendro Narain v Saroda* (1871) 15 WR 548; *Jumoona Dassya v Bamasoondari* (1876) 1 Cal 289, 295–96, 3 IA 72, 83–84; *Patel Manilal* (1891) 15 Bom 565; *Sattiraju v Venkataswami* (1917) 40 Mad 925, 928–29, 40 IC 518, AIR 1918 Mad 1072; *Kashinath Balkrishna v Anant Murlidhar* (1942) Bom 782, 203 IC 352, AIR 1942 Bom 284.

19 *Gopee Lall v Chundraolee* (1872) IA Supp Vol 131; *Krushna Kohali v Narana Kohali* AIR 1991 Ori 134.

son, grandson or great-grandson, is disqualified from inheriting on any of the grounds mentioned in § 98(1),[20] eg, if he is a congenital idiot.[21] The High Court of Madras has dissented from that view and held that he can adopt.[22] Even according to the Madras view, such an adoption would, since the Hindu Inheritance (Removal of Disabilities) Act 1928, be invalid, unless the son, grandson, or great-grandson was a lunatic or idiot from birth (see § 98(2)).

(2) The fact that the adopter is a bachelor,[23] or a widower,[24] or that his wife does not consent to the adoption,[25] or that she is at the time of adoption, pregnant to his knowledge,[26] does not prevent him from taking a son in adoption.

Illustration

A, who has an adopted son *B*, adopts *C*. The adoption is not valid, for a Hindu cannot have two adopted sons at the same time.[27]

Minor

Under the Indian Majority Act 1875, minority extends to the end of the 18th year, except in cases where a guardian has been appointed by a court of justice, or where the minor is under the jurisdiction of the Court of Wards, in which case, it lasts till the end of the 21 year. The Indian Majority Act 1875, does not apply to Hindus in matters of adoption. Therefore, even a minor may adopt or authorise his widow to adopt, provided he has attained the age of discretion, ie, has completed the age of 15 years.[28]

Consent of Court of Wards

There are local Acts which constitute Courts of Wards. These Acts contain provisions, prohibiting a ward of the court from adopting without the consent of the court.

20 *Bharmappa v Ujjangauda* (1922) 46 Bom 455, 65 IC 216, AIR 1922 Bom 173.
21 *Krishnaji Hanmant v Raghavendra Keshav* (1942) Bom 486, 201 IC 401, AIR 1942 Bom 178.
22 *Nagammal v Sankarappa* (1931) 54 Mad 576, 131 IC 9, AIR 1931 Mad 264.
23 *Gopal v Narayan* (1888) 12 Bom 329; *Durga Das v Santosh* (1945) 1 Cal 17.
24 *Chandvasekharudu v Brambhanna* (1869) 4 Mad HC 270.
25 *Rungama v Atchama* (1846) 4 MIA 1.
26 In *Guramma v Mallappa* AIR 1964 SC 510, 66 Bom LR 284, decided by the Supreme Court, the whole question was examined *Nagabhushanam v Seshammagaru* (1881) 3 Mad 180; *Daulat Ram v Ram Lal* (1907) 29 All 310; *Hanmant v Bhimacharya* (1888) 12 Bom 105.
27 *Rungama v Atchama* (1846) 4 MIA 1; *Mohesh v Taruck* (1893) 20 Cal 487, 20 IA 30.
28 *Sattiraju v Venkataswami* (1917) 40 Mad 925, 928–29, 931–22, 40 IC 518, AIR 1918 Mad 1072.

Illegitimate son

The existence of an illegitimate son is no bar to an adoption.[29]

Deformity

A person who has become blind after he was born, is not disqualified from taking a son in adoption.[30] Nor is a person who is suffering from leprosy, which is not of a virulent form.[31] Reference may be made to the Hindu Inheritance (Removal of Disabilities) Act 1928.

§ 451. ADOPTION BY WIFE

A wife cannot adopt a son to her husband during her husband's lifetime except with his express consent.[32]

An unmarried woman cannot adopt a son.[33]

§ 452. ADOPTION BY WIDOW

The law as to adoption by a widow is different in different states:[34]

(1) in Mithila, a widow cannot adopt at all, not even if she has the express authority of her husband;

(2) in Bengal,[35] Benares,[36] and Madras, a widow may adopt under an authority from her husband in that behalf. Such authority may be express or implied. It cannot be implied from the mere absence of a prohibition to adopt.[37] Nor would such authority be implied from the facts that the widow went through the ceremonies of adoption and executed a deed of adoption containing a recital that her husband had expressed his desire that she would adopt the respondent and that she had made an application for appointment of herself as guardian of the respondent;[38]

(3) in Madras state, a widow may also adopt without her husband's authority, where the husband was separate at the time of his death, she obtains the consent of his *sapindas*, and where he

29 *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497.
30 *Fakirnath v Krushanchandra* AIR 1954 Ori 176.
31 *Malojirao v Tarabai* AIR 1956 Bom 397.
32 *Narayan v Nana* (1870) 7 Bom HCAC 153.
33 *Asoke Naidu v Raymond S Mulu* AIR 1976 SC 272.
34 *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397, 435–36.
35 *Biswanath v Dhapu* AIR 1966 Cal 13 (proof of authority—facts to be considered).
36 *Babu Motising v Durgabai* (1929) 53 Bom 242, 114 IC 379, AIR 1929 Bom 57.
37 *Balasubrahmanya Pandya Thalaivar v Subbaya Thevar* (1938) 65 IA 93, (1938) Mad 551, 40 Bom LR 704, 72 IC 724, AIR 1938 PC 34.
38 *Shanti Bai v Miggo Devi* AIR1980 SC 2008 (Benaras school).

well-recognised in judicial decisions, that except in Madras and Punjab, the onus of proof no longer lies on those who assert it, but upon those who assert an exception to it.

Adoption By Widow Under Express Authority From Her Husband

§ 453. WHO MAY GIVE AUTHORITY TO ADOPT

Every Hindu of sound mind, who has attained the age of discretion,[47] may authorise his wife (except in Mithila) to adopt a son to him after his death, even if he has not attained the age of majority.[48]

The authority to adopt may be given by the husband, even if he was a member of a Mitakshara joint family at the time of his death.[49] As to adoption by a minor, see notes to § 450.

§ 454. AUTHORITY TO WIDOW TO ADOPT

Authority can be given to widow alone.—The authority to adopt can be given to the widow alone, and not to any other person, nor can it be given to the widow conjointly with another.[50]

Joint Authority to Widow and Another

Where the authority to adopt is given to the widow conjointly with another person, the authority is void and an adoption made in pursuance of such authority is invalid.[51]

Authority to Widow to Adopt with Consent of a Specified Person

Though a Hindu cannot join any other person except his wife in making an adoption, he may direct his wife to adopt with the consent of a specified person, or he may direct her not to adopt without the consent of a specified person. Where the direction is to adopt with the consent of a specified person, and it appears from the context and surrounding circumstances that the consent was to be a condition precedent, as where the wife is very young and the paramount intention shown by the

47 Reference may be made to *Aravamudha Iyengar v Ramaswami* (1953) Mad 123, AIR 1952 Mad 245.

48 *Patel Vandravan v Patel Manilal* (1891) 15 Bom 565.

49 See *Bachoo v Mankorebai* (1907) 31 Bom 373, 34 IA 107.

50 *Amrito Lal v Surnomoye* (1900) 27 Cal 996, 27 IA 128; *Bhagvandas v Rajmal* (1873); 10 Bom HC 241 (Jains). As to effect of provisions of s 37 of the Court of Wards Act; *Thakurji v Parmeshwar Dayal* AIR 1960 All 339.

51 *Amrito Lal v Surnomoye* (1900) 27 Cal 996, 27 IA 128.

was joint, she obtains the consent of his undivided coparceners (see § 462);

Where the husband had given authority to adopt, no question of consent of *sapindas* can arise.[39]

(4) in Bombay state, a widow may adopt even without any authority (see § 463).

In all parts of India except Madras and Punjab, the Jains observe the custom, by which a widow is entitled to adopt to her husband without his authority. The rule is so well-known and so well-established by judicial decisions, that it is no longer necessary to plead and prove it in any part of India except Madras and Punjab.[40] Such custom prevails amongst the Agarwals of Marwar, who generally adhere to Jainism.[41] In *Munnalal v Rajkumar*,[42] the Supreme Court pointed out that this custom has become a part of the law applicable to Jains in India (except in Madras and Punjab) by a long and uninterrupted course of acceptance and held that it governed Digamber Jains of the Porval sect residing in Madhya Pradesh.

In Mysore, the law in respect of the authority of a widow to adopt under Mysore Act 10 of 1933 was in line with the law in the Bombay state.[43]

Among the Raghubansi Rajputs, who immigrated from Ayodhya to Chindwara, a widow may adopt without authority of her husband.[44]

The difference of opinion between the various schools of Hindu law noted above arises from different interpretations put upon a text of Vasistha, which says: 'Nor let a woman give or accept a son, unless with the assent of her lord.'

Adoption by Jain Widow

A Jain widow cannot adopt a son to her husband without the authority of her husband or the consent of his *sapindas*,[45] in the absence of proof of custom to the contrary.[46] However, the custom is so universal and so

39 *Vallabhalalji v Mahalaxmi Bahuji* AIR 1962 SC 356, 64 Bom LR 433.

40 *Prem Raja v Mulchand Karwar* (1947) 74 IA 254; *Mangibai v Suganchand* AIR 1948 PC 177, 53 CWN 112; *Laxmibai v Pushpabai* AIR 1953 MB 193.

41 *Govindram v Sheoprasad* (1948) Nag 98.

42 AIR 1962 SC 1493.

43 *Eramma v Muddappa* AIR 1966 SC 1137.

44 *Mst Kesarbai v Indarsingh* (1945) Nag 1, 71 IA 190.

45 *Peria Ammani v Krishnasami* (1893) 16 Mad 182; *Gettappa v Eramma* (1927) 50 Mad 228, 97 IC 503, AIR 1927 Mad 228.

46 *Lakshmi Chand v Gatto Bai* (1886) 8 All 319; *Manohar Lal v Banarsi Das* (1907) 29 All 495; *Asharfi Kunwar v Rup Chand* (1908) 30 All 197; *Harnabh Pershad v Mandil Dass* (1900) 27 Cal 379.

§ 455. AUTHORITY TO CO-WIDOW

Where there are two or more widows, and the authority to adopt is given to one of them only, she may adopt without consulting the other widows, and she alone, it seems, can adopt.[58]

In *Narasimha v Parthasarathy*,[59] a case from Madras, their Lordships of the Privy Council left it an open question, whether if a power to adopt is given to two or more widows jointly, such power would be valid, but they held that even if it were so, it must be exercised by them all and that it could not be exercised after the death of any one of them.

Apart from cases of authority given to two widows or custom to that effect, the general rule would seem to be that the law does not contemplate adoption by two co-widows.[60]

Where the authority to adopt is given to the widows severally, the senior widow has the prior right to exercise the power of adoption. The junior widow has no right to adopt unless the senior widow refuses to do so.[61] A widow cannot adopt when her co-widow has validly adopted and the adopted son is living.[62]

§ 456. FORM OF AUTHORITY

The authority to adopt may be given verbally,[63] or in writing. If it is in writing, it must be registered, unless the authority is given under a will.[64]

If the authority is contained in a will, the will must be executed in accordance with the formalities required by s 63, Indian Succession Act 1925. Although, a will made by an undivided member of a joint Mitakshara family cannot take effect on the testator's interest on the joint estate, yet a power of adoption contained in a testamentary document properly executed would be a perfectly operative provision.[65]

58 *Strange's Hindu Law* Vol II, P 91, *Mayne's Hindu Law*, P 118.

59 (1914) 37 Mad 199, 220–21, 41 IA 51, 69–70, 23 IC 166, *Lachmi v Mst Parbati* (1920) 42 All 266, 54 IC 910, AIR 1920 All 166. See also *Sarada Prasad v Rama Pati* (1912) 17 CWN 319, 16 IC 817.

60 *Vithal v Ansabai* AIR 1977 Bom 298; *Yamunabai v Jamunabi* AIR 1929 Nag 211.

61 *Bijoy v Ranjit* (1911) 38 Cal 694, 12 IC 460; *Mondakini Dasi v Adinath Dey* (1891) 18 Cal 69; *Ranjit Lal v Bijoy Krishna* (1912) 39 Cal 582, 14 IC 17.

62 See §§ 462 (8), 463 (4), and 470. *Shivappa Rudrappa v Rudrrava Chanbasappa* (1933) 57 Bom 1, 142 IC 164, AIR 1932 Bom 410.

63 Oral authority must be strictly proved—*Ramnath v Ramgopal* (1951) Nag 294, AIR 1951 Nag 434; *Sumantrabai v Rishabkumar* (1953) Nag 69, AIR 1952 Nag 295.

64 *Mutasaddi Lal v Kundan Lal* (1906) 28 All 377, 33 IA 55. Section 17 (3), Registration Act 1908. See *Rawat v Beni Bahadur* (1926) 1 Luck 403, 93 IC 567, AIR 1926 PC 97.

65 *Om Prakash Goela v Mt Chandar Kala* AIR 1950 EP 35, whether a document is to be read as a will or a mere authority to adopt, must be a matter of construction.

document giving authority to adopt is not to obtain the spiritual benefits arising from the adoption, but to have a son to inherit, an adoption made without the consent of the person named is invalid, whether such person be alive or dead at the time of adoption.[52]

Where the boy to be adopted was to be chosen by four executors and one of the executors selected the boy after consulting the co-executors, who did not express their disapproval either before or at the time of adoption, the adoption was held to be valid.[53] Where the direction is that she should not adopt without the consent of a specified person, an adoption made without such consent is invalid in every case, whether such person be alive or dead at the time of adoption.[54] However, where she is merely directed to consult or take the advice of certain persons before making an adoption, such direction is merely recommendatory and not mandatory, and an adoption made without consulting such persons is valid.[55]

Illustrations

(a) A Hindu by his will appoints five persons as executors and trustees, and authorises his widow to make an adoption with the consent of those persons. Four of the trustees prove the will and undertake the trust, but the fifth declines to do so. An adoption by the widow with the consent of the four who prove the will is valid.[56]

(b) *A*, by his will, authorises his wife to adopt a son and directs that she must adopt only a boy approved by five persons named as trustees. One of them declined to act and three others died. Adoption by the widow with the consent of the remaining trustee is valid.[57]

52 *Rajendra Prasad v Gopal Prasad* (1930) 57 IA 296, 10 Pat 187, 127 IC 743, AIR 1930 PC 242, reversing SC in (1928) 7 Pat 245, 108 IC 545, AIR 1929 Pat 51; *Radha Madhab Jiu v Rajendra Prasad Bose* (1933) 12 Pat 727, 149 IC 890, AIR 1933 Pat 250.

53 *Rattan Lal v Baij Nath* (1938) Lah 1, PC, 169 IC 902, AIR 1937 PC 292.

54 *Rangubai v Bhagirthibai* (1878) 2 Bom 377, *Amrit Lal v Surnomoye* (1900) 27 Cal 996, 1002, 27 IA 128, 132; *Bal Gangadhar Tilak v Shriniwas* (1915) 42 IA 135, 39 Bom 441, 29 IC 639, AIR 1915 PC 7.

55 *Surendra Nandan v Sailaja* (1891) 18 Cal 385, cited with approval in *Suryanarayana v Venkataramana* (1906) 29 Mad 382, 633 IA 145; *Om Prakash Goela v Mt Chandar Kala* AIR 1950 EP 35.

56 *Bal Gangadhar Tilak v Shriniwas*. (1915) 42 IA 135, 39 Bom 441, 29 IC 639, AIR 1915 PC 7.

57 *Kotturuswami v Veeravva* AIR 1959 SC 577.

Minor's Will

If an authority to adopt is given by a minor in writing purporting to be a will, the document must be registered. The reason is that a minor cannot make a will,[66] and the writing can only be treated as non-testamentary, in which case, it must be registered as required by law.[67]

§ 457. CONDITIONAL AUTHORITY

The authority to adopt may be conditional, but the condition must not be illegal.

An authority to adopt in case of a disagreement between the widow and the natural born son, even if the son should then be living, is invalid;[68] the reason is that a Hindu cannot adopt while he has a son living (§ 450). However, an authority to adopt in case of the natural born son dying under age and unmarried, is valid.[69]

§ 458. AUTHORITY MUST BE STRICTLY FOLLOWED

The authority to adopt must be strictly obeyed.[70]

The duty of the widow is to obey such directions as her husband may have given as to the way in which she should exercise the power of adoption to him,[71] or as to the boy to be adopted.[72] Where the husband directed that the widow should adopt a boy from his family or of his *gotra*, the adoption of any other boy is invalid.[73] Thus, where the authority to the widow is to adopt within a specified period, she cannot adopt after the expiration of that period.[74]

Where the widow is authorised by her husband to adopt, 'if no male or female child should be born to him' she cannot adopt if a daughter

66 Section 59, Indian Succession Act 1925.

67 *Vijayaratnam v Sudarsana* (1925) 48 Mad 614, 52 IA 305, 89 IC 733, AIR 1925 PC 196.

68 *Solukhna v Ramdolal* (1811) 1 Beng SD 324 (second edn, 434).

69 *Vellanki v Venkata Rama* (1976) 1 Mad 174, 4 IA 1.

70 *Chowdry Pudum Singh v Koer Oodey Singh* (1869) 12 MIA 350, 356, 2 Beng LR, 101, PC 12 WR 1 PC; *Surendro Keshab v Doorgasoondery* (1892) 19 IA 108, 122, 19 Cal 513; *Rajendra Prasad v Gopal Prasad* (1930) 57 IA 296, 303, 10 Pat 187, 196, 127 IC 743, AIR 1930 PC 242.

71 *Sitabai v Bapu* (1920) 47 IA 202, 205, 47 Cal 1012, 1018, 57 IC 1, AIR 1921 PC 88; *Yadao v Namdeo* (1921) 48 IA 513, 522, 49 Cal 1, 12, 64 IC 536, AIR 1922 PC 216. See *Rajendra Prasad v Gopal Prasad* (1928) 7 Pat 245, 108 IC 545, AIR 1929 Pat 51.

72 *Kalawati Devi v Dharam Prakash* (1933) 55 All 78, 60 IA 90, 142 IC 1, AIR 1933 PC 71; *Rajgopalachari v Venkat Chudamma* AIR 1956 Hyd 153.

73 *Sundarasiviudu v Adinarayana* (1940) Mad 233, 189 IC 303, AIR 1939 Mad 909.

74 *Mutasaddi Lal v Kundan Lal* (1906) 28 All 377, 33 IA 55.

is born to him, although, she may be born after his death.[75] Where the widow is authorised by her husband to adopt a boy named by him, and she adopts the boy, she is not precluded from adopting another boy after the death of the adopted boy, unless there is a direction prohibiting her from adopting any other boy. Such a direction to operate as a prohibition must be explicit and absolute.[76]

Illustrations

(a) *A* authorised his widow to adopt 'one of the sons' of *B*. The authority to adopt will be deemed to have been strictly pursued, if any one of *B*'s sons is adopted, whether he was in existence at the date of the authority or was born thereafter. Such an authority does not limit the widow's choice to a son of *B* who was in existence at the date of the authority.[77]

(b) *A* directs by his will that his widow *W* should 'so far as possible adopt *S*, the second son of my elder brother, if he cannot be obtained, any other boy should be adopted with the advice of the trustees'. In consequence of ill feelings arising between *W* and *S* and his family, *W* adopts, with the consent of the trustees, her sister's son. The adoption is invalid. The words, 'so far as possible', mean that unless there are conditions outside the will preventing the possibility of the adoption, the widow, when she does adopt, is to exercise her power in favour of *S*. The boy could be obtained and mere ill-feeling between *W* and *S* and his family could not justify *W* in disobeying the mandatory directions of her husband.[78]

§ 459. EXERCISE OF AUTHORITY TO ADOPT DISCRETIONARY: NO LIMIT OF TIME

A widow who is authorised by her husband to adopt may or may not adopt at her discretion. She is under no legal obligation to adopt,[79] even if she has been expressly directed by her husband to do so. Her rights to the husband's estate are not in any way affected by her omission or refusal to adopt.[80] Nor is there any limit to the time during which she

75 *Bhagwat Koer v Dhanukhdari* (1919) 46 IA 259, 47 Cal 466, 53 IC 347, AIR 1919 PC 75.

76 *Yadeo v Namdeo* (1921) 48 IA 513, 49 Cal 1, 64 IC 536, AIR 1922 PC 216; *Lakshmibai v Rajaji* (1898) 22 Bom 996.

77 *Mutasaddi Lal v Kundan Lal* (1906) 28 All 377, 33 IA 55.

78 *Sitabai v Bapu* (1920) 47 IA 202, 47 Cal 1012, 57 IC 1, AIR 1921 PC 88.

79 *Chandrasekhara v Kulandavelu* AIR 1963 SC 185, 192.

80 *Mutasaddi Lal v Kundan Lal* (1906) 28 All 377, 33 IA 55; *Shamavahoo v Dwarkadas* (1888) 12 Bom 202; *Uma Sundari v Sourobinee* (1881) 7 Cal 288; *Narayana Ayyangar v Vengu Ammal* (1938) Mad 621.

may act upon the authority given to her (§ 471 (4)), see however, §§ 471–72.

As the widow is under no obligation to make an adoption. She can postpone making an adoption, till the boy indicated by her husband, whom she may not like is no longer available, and an adoption of another boy after the one selected by her husband ceases to be available, is not invalid on that ground.[81]

§ 459A. AGREEMENT NOT TO ADOPT IS CONTRARY TO PUBLIC POLICY

An agreement by a widow with a reversioner or any other person not to adopt a son to her husband, or which imposes on her power to adopt, a restraint absolute or partial, is void as opposed to public policy and is not binding on her, even if there is valuable consideration for the agreement. Such an agreement is also repugnant to Hindu law.[82]

§ 460. REVOCATION OF POWER TO ADOPT

(1) An authority to adopt may be revoked either expressly or impliedly.

(2) If the authority is contained in a will to which the provisions of the Indian Succession Act 1925 apply, it can only be revoked in the manner provided by s 70 of that Act.

Illustration

A Hindu disposes of his ancestral property by a will made in 1889. At the date of the will, he was the sole surviving coparcener with regard to that property, and as such entitled to dispose of the property by will (§ 255). The will contains an authority to the widow to adopt, *V* if he did not adopt him in his lifetime, and in the event of *V*'s death, in the wife's lifetime, to adopt *P*. The testator adopts *V* in 1890, the legal result of which is that he admits *V* as a coparcener in the family. He then makes another will, which contains a disposition of property inconsistent with the first will but contains no express revocation of the earlier will nor of the authority to adopt therein contained. The testator dies leaving his widow and *V*. *V* dies next without issue. After *V*'s death, the widow adopts *P*. The adoption of *P* is valid, for though the second will is invalid in so far as it purports to dispose of the coparcenary property (the testator not then being

81 *Vanka Lakshminarayana v Mangalappalli* AIR 1950 Mad 601, (1950) 1 MLJ 537; *Hari Rao v Venkaiah* (1953) Mad 624, AIR 1953 Mad 661.

82 *Punjabrao v Sheshrao* AIR 1962 Bom 175.

the sole coparcener), it does not revoke the authority to adopt contained in the first will.[83]

(*Note.*— As to the termination of a widow's power to adopt, even under the authority of her husband, see §§ 471 and 472.)

Adoption by Widow Without Husband's Authority

§ 461. ADOPTION BY WIDOW WITHOUT HUSBAND'S AUTHORITY

The only parts of India where a widow may adopt without an express authority from her husband are Madras and Bombay states.

§ 462. IN MADRAS

In Madras state, a widow may adopt without authority from her husband, subject to the following conditions [§ 452(3)]:

(1) she cannot adopt, if there is an express or implied prohibition from her husband. A prohibition ought not to be inferred from the mere fact that the husband and wife were living separate;[84]

(2) if her husband was separated at the time of his death, she must obtain the consent of her father-in-law, and his consent as the head of the family is sufficient. If the father-in-law is then dead, she must obtain the consent of her husband's *sapindas*, but need not obtain the consent of the daughter's son,[85] although, he is the next heir;[86]

However, the consent necessary to validate the adoption is not the consent of every *sapinda*, however remote.[87] The starting point relating to the doctrine of consent of the *sapindas* was first enunciated by the Privy Council in the case of *Collector of Madura* popularly known as the *Ramnad* case. It was developed by decisions of the Privy Council and the Madras High Court and culminated in the decision of the Supreme Court in *Tahsil Naidu v Kulla Naidu*.[88] The consent required is that of a substantial majority of the nearest *sapindas*, who are capable of forming

83 *Venkatanarayana v. Subbammal* (1916) 43 IA 20, 39 Mad 107, 32 IC 373; AIR 1915 PC 37.

84 See § 463(1) *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397 (known as the *Ramnad* case); *Muthusami v Pulavaratal* (1922) 45 Mad 266, 66 IC 504, AIR 1922 Mad 106.

85 *Seshamma v Narasimharao* (1940) Mad 454, 188 IC 250, AIR 1940 Mad 356.

86 *Ghanta China v Moparthi* 51 CWN 875, PC.

87 *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397; *Viswasundara v Somasundra* (1920) 43 Mad 876, 59 IC 609, AIR 1920 Mad 451 (consent of daughter's son not necessary).

88 See *Appaswami v Sarangpani* AIR 1978 SC 1051.

an intelligent and honest judgment in the matter.[89] For instance, where the consent of the nearest divided *sapindas* was sought on the ground that the only undivided *sapinda* was insane and some of them refused to consent alleging that he was sane, while he was really insane, it was held that their refusal may be ignored.[90] Where the nearest *sapindas* have capriciously withheld their consent, all that is necessary is a preponderance of opinion among the reversioners in favour of the adoption. There need be no family council in the order of the degree of relationship, nor is it necessary that all of them should be consulted. The widow need not consult her stepdaughter.[91] The absence of consent on the part of the nearest *sapindas* cannot be made good by the authorisation of distant relatives whose assent is more likely to be influenced by improper motives.[92] This does not mean that the consent of a near *sapinda*, who is incapable of forming a judgment on the matter, such as a minor or a person who being dumb, is partially incapacitated,[93] or a lunatic, is either sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, or refuses his consent without exercising an honest judgment in breach of his duty,[94] his dissent may be disregarded. Nor does it contemplate cases where the nearest *sapinda* happens to be in a distant country, and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. Save in exceptional cases such as those mentioned above, the consent of the nearest sapindas must be asked,[95] and if it is not asked, it is no excuse to say that they would certainly have refused.[96] A widow who has not been authorised by her husband has to consult all the nearest *sapindas*. Where out of five such *sapindas*, she had approached only three of them and obtained their consent, it was held that it was not enough to validate the adoption.[97] In short:

89 *Adusumilli v Adusumilli* (1902) 47 IA 99, 43 Mad 650, 56 IC 391, AIR 1920 PC 4; *Venkatakrishnamma v Annuapurnamma* (1900) 23 Mad 486.

90 *Chellathammal* alias *Ammamuthammal v Kalitheertha Pillai* (1943) Mad 107, 202 IC 747, AIR 1942 Mad 606.

91 *Brahma Sastri v Sumitramma* (1934) 57 Mad 411, 151 IC 200, AIR 1934 Mad 191; *Subba Rao v Venkata Satyanarayana* (1953) 2 MLJ 97, AIR 1953 Mad 755.

92 *Veera v Balasurya* (1918) 45 IA 265, 41 Mad 998, 48 IC 706, AIR 1918 PC 97.

93 AIR 1970 SC 1673.

94 *Chandrasekhara v Kudondaivelu* AIR 1956 Mad 370; *Narasimham v Venkata Narasimha Rao* AIR 1963 AP 78; *Kotial v Sitaramayya* AIR 1960 AP 578; *Somiah v Rattamma* AIR 1959 AP 244; *Subbayya v Ramkoteswara Rao* AIR 1958 AP 479.

95 *Adusumilli v Adusumilli* (1920) 47 IA 99, 102, 43 Mad 650, 654, 56 IC 391, AIR 1920 PC 4.

96 *Venkamma v Subrahmaniam* (1907) 26 Mad 34 IA 22, 30 Mad 50, 53 affirming (1903) 26 Mad 627.

97 *CSV Sarma v C Ramalakshmamma* AIR 1972 AP 270.

> ...there should be ...of of assent on the part of the *sapindas* as should be suffi... support the inference that the adoption was made by the w... not from capricious or corrupt motives or in order to defeat the ...erest of this or that *sapinda*, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.[98]

The assent of the *sapindas* is necessary because of the supposed incapacity of the widow for independent action, and not by reason of the effect of adoption upon the proprietary rights of the coparceners or reversioners; property considerations are no more paramount in the case of an undivided family than in the case of divided family.[99] In the absence of agnate reversioners, the widow can adopt with the consent of the nearest cognate reversioner, eg, the father's sister's son.[1] However, the consent of cognates will be sufficient only when there are no agnate reversioners.[2] It was held in Rangoon that, if there were no *sapindas*, the widow had an unrestricted power to adopt.[3] However, this view seems to be opposed to principle and authority.[4]

Since the motive of the widow in making an adoption is irrelevant, the refusal of consent by *sapindas* on the ground that the motive of the widow is improper would amount to improperly withholding the consent.[5]

In *Tahsil Naidu v Kulla Naidu*,[6] the Supreme Court held that a Hindu widow, even if she happens to be the nearest *sapinda*, would not be a competent adviser, and, consequently, there is no requirement that her consent must be obtained for validating the adoption. The consent must be obtained from the nearest male *sapindas*. This conclusion was founded on the principle that if a widow cannot exercise an independent judgment in the matter of making an adoption herself, it would follow that she would not be able to exercise an independent judgment in the matter of giving consent to adoption by another widow.

Where the nearest *sapinda* consents to an adoption, but dies before the adoption, the adoption is nevertheless valid, provided there has been

98 *Vellanki v Venkata Rama* (1876) 1 Mad 174, 190–91, 4 IA 11; *Subba Rao v Satyanarayana* AIR 1953 Mad 755, (1953) 2 MLJ 97.

99 *Chandrasekhara v Kullandaivelu* AIR 1963 SC 185, 194; *Venneti Sundara Rama Rao v Satyanarayanamurthi* (1949) 2 MLJ 199, AIR 1950 Mad 74, (1950) Mad 461.

1 *Kesar Singh v Secretary of State* (1926) 49 Mad 652, 95 IC 651, AIR 1926 Mad 881.

2 *Chandrappa v Gyanamma* AIR 1953 Hyd 275, FB.

3 *Patnaloo Appalswamy v E Moosalaya* (1934) 12 Rang 22, 147 IC 716, AIR 1933 Raj 334.

4 *Balasubrahmanya Pandya Thalaivar v Subbayya Thevar* (1938) 65 IA 93, (1938) Mad 551, 40 Bom LR 704, 172 IC 724, AIR 1938 PC 34.

5 *Appaswami v Sarangpani* AIR 1978 SC 1051.

6 AIR 1970 SC 1673.

no material change of circumstances during the interval and there are no other grounds on which the adoption when actually made, could be objected to by the then nearest *sapindas*. A widow may adopt with the authority of the nearest *sapinda* though no particular boy was mentioned, within a reasonable period and when the circumstances have not materially changed.[7] The requirement of consent is not a matter of form, but of substance.[8] A *sapinda* having duly given his consent cannot arbitrarily or capriciously withdraw it.[9]

Where a Hindu dies leaving a widow and son, the widow, even with his consent cannot adopt to her husband while the son is living. However, the son may consent to an adoption by the widow (his own mother) by his will, and such consent will validate an adoption made after his death. The fact that the son could have no interest in the estate after his death, does vitiate the consent. Nor is the adoption vitiated by the fact that the consent of *sapindas* living at the time of adoption has not been obtained.[10]

If the husband was joint at the time of his death, the widow must obtain the consent of her father-in-law, and such consent is sufficient. If the father-in-law is then dead, the consent of all the husband's brothers or other coparceners in whom the interest of the deceased has vested by survivorship, would probably be required, since, it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will.[11]

Where the husband dies leaving undivided coparceners and divided *sapindas*, the widow should obtain the consent of the undivided coparceners. An adoption with the consent of divided *sapindas*, but without the consent of the undivided coparceners is, it seems, invalid.[12] However, when the undivided coparcener refused his assent, because it might injuriously affect his coparcenary rights, or for other improper reasons, such refusal might be disregarded by the widow; and in such circumstances, an adoption made with the consent of the divided paternal grandfather of the widow's husband has been held to be valid.[13] The

7 *Vasireddi Venkayya v Gopu Sreeramulu* (1942) Mad 163, AIR 1941 Mad 935 (FB). The consent can be in general terms and it is not necessary that the person to be adopted should be specified.

8 *Bado v Dondo* AIR 1952 Ori 307, 311.

9 *Sivasuryanarayana v Audinarayana* (1937) Mad 347 (FB), 166 IC 339, AIR 1937 Mad 110.

10 *Annapurnamma v Appayya* (1929) 52 Mad 620, 119 IC 389, AIR 1929 Mad 577, FB overruling *Mami v Subbarayar* (1913) 36 Mad 145, 19 IC 663.

11 *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397, 441–42. See *Venkatakrishnamma v Annapurnamma* (1900) 23 Mad 486, 487–88; and *Narayanasami v Mangammal* (1905) 28 Mad 315, 319.

12 *Sri Raghunada v Brozo Kishoro* (1876) 1 Mad 69, 3 IA 154.

13 *Venneti Sundara Rama Rao v Satyanarayanamurthi* AIR 1950 Mad 74, (1949) 2 MLJ 199.

widow of a member of a joint family can adopt a son to her deceased husband with the assent of the nearest divided *sapindas*, when the only surviving coparcener is insane.[14]

Though, the husband was joint at the time of his death, and the coparceners afterwards separate, the widow can adopt with their consent. In this case, the widow was in enjoyment of her father's property as heir and the father's reversioners questioned the validity of the adoption.[15]

(3) the scope, nature and manner of the exercise of the power of *sapindas* to give consent to adoption by a widow was reviewed by the Supreme Court in *Chandrasekhara v Kulandaivelu*.[16] It was held that a *sapinda* has no right to refuse to give his consent or impose a condition that the widow should take a *sapinda* in preference to a non-*sapinda* in adoption. Such a condition would be entirely extraneous to the question of selection.

Where the consent is obtained by the widow by a misrepresentation, as, for instance, that her husband had authorised her to adopt, but no such authority was in fact given, the adoption is invalid.[17]

Where the consent is given by the husband's kinsmen from interested motives, the adoption is invalid.[18] It is also invalid, where the consent is purchased, ie, obtained by the widow in exchange for a sum of money or other valuable consideration.[19] However, there is nothing improper in a coparcener making it a condition of his consent that his own share should not be reduced by the adoption.[20]

Where the consent of the husband's kinsmen has been obtained, the widow's power to adopt is co-extensive with that of the husband. She may, therefore, adopt even an only son (though non-religious, is not illegal), just as much as her husband could have done.[21]

An adoption made by the senior widow with the consent of the *sapindas* is valid, though made without the consent of the junior widow.[22] However, an adoption made by a junior widow without the consent of

14 *Chellanthammal alias Ammamuthummal v Kalitheertha Pillai* (1943) Mad 107, 202 IC 747, AIR 1942 Mad 606.

15 *Panyam v Ramalakshmamma* (1932) 55 Mad 581, 138 IC 170, AIR 1932 Mad 227.

16 AIR 1963 SC 185.

17 *Ganesa v Gopal* (1880) 2 Mad 270, 7 IA 173; *Venkamma v Subrahmaniam* (1907) 30 Mad 50, 34 IA 22; *Arvamudha Iyengar v Ramaswami* (1953) Mad 123, AIR 1952 Mad 245. Reference may be made to *Gopalaswami v Siddammal* AIR 1958 Mad 488.

18 *Ganesa v Gopal* (1880) 2 Mad 270, 7 IA 173.

19 *Danokoti v Balsundara* (1913) 36 Mad 19, 18 IC 980; explaining *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397, 443.

20 *Srinivasa v Rangasami* (1907) 30 Mad 450.

21 See § 481. *Sri Balusu Gurulingaswami v Sri Balsu Ramalakshmamma* (1899) 22 Mad 393, 408, 26 IA 113, 128.

22 *Narayanasami v Mangammal* (1905) 28 Mad 315; *K Varadamma v Kanchi Shankara Reddi* AIR 1957 AP 933.

the senior widow is invalid, though made with the consent of her husband's *sapindas*.[23]

As to widow's motive in making an adoption, see *Tahsil Naidu v Kulla Naidu*.[24]

§ 463. IN BOMBAY

In Bombay state, a widow may adopt without authority from her husband, subject to the following conditions (§ 452(4)):

> She cannot adopt, if there be an express or implied prohibition from her husband.[25] A mere refusal by her husband to adopt does not of itself amount to such a prohibition.[26] Further, she cannot dispute an adoption made by her husband,[27] nor can she adopt during the lifetime of a son adopted by her husband, though the validity of the adoption by her husband is doubtful.[28] The power of a widow to adopt after her husband's death, is subject only to such restrictions, if any, as he may have imposed upon her.[29]

As a Hindu widow in Bombay has an inherent power to adopt, a prohibition or restriction, by the husband must be explicit. Where the husband prohibited the adoption of a son of *V* or *K*, but recommended that the son of one of his nephews should be adopted and the parents of the nephews were all dead, it was held that the adoption of a son of a nephew was valid.[30] The statement by the testator, who gave all his property for charity that he is not going to adopt and that he is not going to give authority to his wife to adopt, does not amount to an implied prohibition by him of an adoption by the widow in respect of *watan* property. The adoption by the widow after his death (which in Bombay requires no authority) is valid as regards that property.[31]

23 *Rajah Venkatappa v Benga Rao* (1916) 39 Mad 772, 30 IC 106, AIR 1916 Mad 919; *Muthusami v Pulavaratal* (1922) 45 Mad 266, 66 IC 504; AIR 1922 Mad 106.

24 AIR 1970 SC 1673, 1677. See § 469.

25 *Gopal v Vishnu* (1899) 23 Bom 250, 256; *Lakshmibai v Sarasvatibai* (1899) 23 Bom 789, 795–97; *Malgauda v Babaji* (1913) 37 Bom 107, 17 IC 746.

26 *Sitabai v Govindrao* (1927) 51 Bom 217, 101 IC 46, AIR 1927 Bom 151; *Ishwar Dodu v Gajabai* (1926) 50 Bom 468, 537, 96 IC 712, AIR 1926 Bom 435, FB. See *Bayabai v Bala* (1870) 7 Bom HC App I discussed in *Sitabai*'s case.

27 *Chimabai v Mallappa* (1922) 46 Bom 946, 67 IC 654, AIR 1922 Bom 397.

28 *Bhau v Narasogouda* (1922) 46 Bom 400, 64 IC 614 L, AIR 1922 Bom 300; affirming *Bhujangouda v Babu* (1920) 44 Bom 627, 57 IC 573, AIR 1920 Bom 115. Also see *Vaijoba v Vasant* AIR 1974 Bom 111.

29 *Jagannath Rao Dani v Rambharosa* (1933) 60 IA 49, 141 IC 520, AIR 1933 PC 33.

30 *Damodar Vishnu v Shriram Laxman* (1941) Bom 170, 193 IC 413, AIR 1941 Bom 56.

31 See § 462(1). *Vithagouda v Secretary of State* (1932) 34 Bom LR 818, 140 IC 242, AIR 1932 Bom 442.

The law in respect of authority of a widow in Mysore state was in line with the law in Bombay state.[32]

If the husband was separate at the time of his death, and the widow had succeeded to his estate as his heir, she could take a son in adoption without the consent of her husband's *sapindas*.[33]

The law relating to the power (to adopt) of a widow, where husband was joint at the time of his death, has been the subject of fluctuations. Four distinct landmarks may be recognised.

(i) **(1879–1921).** In 1879, a Full Bench of the Bombay High Court held that such a widow cannot adopt, when she has not the authority of her husband or the consent of his undivided coparceners.[34] In 1891, it was held that the consent of the father-in-law at the time of adoption is sufficient.[35]

(ii) **(1921–1925).** In the case of *Yadao v Namdeo*, which went up on appeal to the Judicial Committee from the Madhya Pradesh High Court, the parties were Hindus to whom the Hindu law applicable to Hindus of the Maharatta country of the State of Bombay applied.[36] The facts were that one Pundlik, his cousin Namdeo, and Namdeo's sons Rambhau and Pandurang were members of a joint family.

Pundlik died childless in 1905. Soon after, Namdeo gave his son Pandurang in adoption to Pundlik's widow. The adoption was evidenced by a deed. Pandurang died unmarried in 1907, and the widow adopted a stranger without the consent of Namdeo. The Judicial Commissioner of Nagpur held that Pandurang and Namdeo's family were undivided at the time of Pandurang's death and that the adoption, having been made without the consent of Namdeo and his son, was invalid. The Judicial Committee reversed the decision and held that the adoption was valid.

They observed:

> Their Lordships find as a fact and hold in law that on the date of that deed Namdeo and his son Rambhau had separated from Pandurang, and had ceased to be members with

32 *Eramma v Muddappa* AIR 1966 SC 1137.

33 *Rakhmabai v Radhabai* (1868) 5 Bom HCAC 181; *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397; *Punjabi v Shamrao* (1954) Nag 805, AIR 1955 Nag 293 (parties governed by Bombay law).

34 *Ramji v Ghamau* (1879) 6 Bom 498, FB; *Dinkar v Ganesh* (1876) 6 Bom 505, FB.

35 *Vithoba v Bapu* (1891) 15 Bom 110; *Lakshmibai v Vishnu* (1905) 29 Bom 410 (consent of father-in-law cannot operate after his death).

36 (1921) 48 IA 513, 49 Cal 1, 64 IC 536, AIR 1922 PC 216.

Pandurang of the joint family, although no partition of the family property had been effected.

(iii) **(1925–1932).** In *Ishwar Dadu v Gajabai* decided by the Bombay High Court in 1925, it was contended, on the basis of the above observations of the Judicial Committee, that the decision in *Ramji v Ghamau*,[37] and the decisions that followed it, were overruled by the Judicial Committee.[38] The question was referred to a Full Bench. The Full Bench held, by a majority of four against one, that the observations of the Judicial Committee were obiter and that the earlier decisions of the Bombay High Court beginning with *Ramji v Ghamau* were not overruled. In a later case, where the coparcener was still in his mother's womb at the date of adoption, it was held that the adoption was invalid.[39]

(iv) **(After November 1932).** The facts of an appeal which arose from the Dharwar District of Bombay and which was decided by the Judicial Committee in 1932 were these: *N*, *J* and *K* were three brothers of whom *N* and *J* were undivided and *K* was divided from them. *K* died in 1932 leaving a son *G*. *J* died in 1913 leaving his widow *B*. *N* died in 1915 leaving his son *D*. In 1919, *D* died leaving his son *D.T.*, who was born in 1918. During the lifetime of *D.T.*, *J*'s widow, *B*, adopted Narayan in 1919. Afterwards, in 1920 *D.T.* died. *G* brought the suit questioning the validity of Narayan's adoption. The High Court of Bombay, following the Full Bench judgment in *Ishwar Dadu*'s case,[40] held that the adoption was invalid as the joint family had not ceased, and *B* could not adopt without the consent of the sole coparcener (*DT*). The Judicial Committee held that *Ramji v Ghamau*,[41] was overruled by *Yadao*'s case,[42] and that the decision in *Ishwar Dadu*'s case was erroneous, and reversing the High Court's judgment held that the adoption was valid.[43] The rule was regarded as firmly established in a later decision of the Judicial Committee from Bombay.[44]

37 (1879) 6 Bom 498.

38 (1926) 50 Bom 468, 96 IC 712, AIR 1926 Bom 435, FB.

39 *Bala Anna v Akubai* (1926) 50 Bom 722, 99 IC 417, AIR 1926 Bom 584.

40 (1926) 50 Bom 468, 96 IC 712, AIR 1926 Bom 435, FB.

41 (1879) 6 Bom 498.

42 (1921) 48 IA 513, 49 Cal 1, 64 IC 536, AIR 1922 PC 216.

43 *Bhimabai v Gurunathgauda* (1933) 57 Bom 157, 60 IA 25, 141 IC 9, AIR 1933 PC 1.

44 *Vijayasangji v Shivasangji* (1935) 62 IA 161, 59 Bom 360, 155 IC 493, AIR 1935 PC 95; *Dhondi Dnyantoo v Rama Bala* (1936) 60 Bom 83, 38 Bom LR 94, 161 IC 849, AIR 1936 Bom 132; *Balu Sakharam v Lahoo Sambbaji* (1937) Bom 508, FB, 39 Bom LR 382, 170 IC 393, AIR 1937 Bom 279; *Punjabi v Shamrao* (1954) Nag 805, AIR 1955 Nag 293 (parties governed by Bombay law).

The subject matter of §§ 462 and 463 should be carefully distinguished from that of §§ 471 and 472. The former sections deal with the question whether the widow can have a power to adopt when the husband has not given an authority; the latter deal with the question as to how a widow's authority (whether from the husband, or *sapindas* or inherents as in Bombay) may terminate on the happening of certain events. The latter sections are not confined to Madras and Bombay, but apply to the whole of India.

Case of Two Widows

Where there are two or more widows, the senior widow may adopt without the consent of the junior widow or widows;[45] but the junior widow cannot adopt without the consent of the senior widow, unless she has an express authority to adopt from her husband.[46] Where the senior widow relinquished her right of adoption in favour of the junior widow for consideration, an adoption by her on the ground that the junior widow has not exercised the right is invalid.[47]

If the husband was joint with his father at the time of his death, the junior widow may adopt with the consent of her husband's father, and such adoption is valid, even if it is made without the consent of the senior widow.[48]

As to the termination of the senior widow's power to adopt, when the junior widow has a son, who dies and is succeeded by the junior widow as his heir, see § 472.

The primary object of adoption being religious and not secular, the validity of adoption must be considered as at the date of adoption. In a case decided by the Bombay High Court, it was held that the adoption by a senior widow when the junior widow was pregnant is valid.[49]

General Rules as to Adoption By Widows

§ 464. EXTENT OF WIDOW'S POWER TO ADOPT

A widow has no larger powers of adoption than what her husband would have, if alive.[50]

45 *Rakhmabai v Radhobai* (1868) 5 Bom HCAC 181; *Basappa v Sidramappa* (1919) 43 Bom 481, 50 IC 736; *Amava v Mahadgauda* (1868) 22 Bom 416; *Dundoobai Anandrao v Vithalrao Anandrao* (1936) 60 Bom 498, 38 Bom LR 193, 162 IC 780, AIR 1936 Bom 182.

46 *Basappa v Sidramappa* (1919) 43 Bom 481, 50 IC 736; *Padajirav v Ramrav* (1889) 13 Bom 160.

47 *Sadashiv Waman v Reshma* (1938) Bom 84, 39 Bom LR 1115, 73 IC 509, AIR 1938 Bom 1.

48 *Dnyanu v Tanu* (1920) 44 Bom 508, 57 IC 113.

49 *Melappa v Guramma* AIR 1956 Bom 129.

50 *Gopee Loll v Chundraolee* (1873) 11 Beng LR 391, (1872) IA Supp Vol 131.

Thus, a widow cannot adopt so long as there is in existence, a son, grandson or great-grandson natural or adopted, of her husband (see § 463).

§ 465. MINOR WIDOW

A minor widow may adopt in the same circumstances as an adult widow, provided she has attained the age of discretion and is able to form an independent judgment in selecting the boy to be adopted.[51]

According to Bengal writers, the age of discretion is reached at the beginning of the 16th year; according to Benares writers, at the end of the 16th year. The former view was taken in a Madras case.[52] All authorities agree in holding that the widow must have attained competence for independent judgment. However, no such judgment is required when the boy to be adopted is named by the husband in the authority to adopt. In such a case, she can adopt, though she has not attained the age of discretion.[53]

§ 466. UNCHASTE WIDOW

An unchaste widow living in concubinage is incompetent to adopt a son, as she is incapable of performing the religious ceremonies.[54]

There is no such disability in the case of a Sudra widow, as no religious ceremonies are essential in the case of Sudras.[55] It has been held by the Bombay High Court, that even amongst regenerate classes, a widow, though unchaste or otherwise impure, can make a valid adoption, provided she performs herself the physical act of taking the boy in adoption and delegates to somebody else, the performance of religious ceremonies, which are duly performed by the latter.[56]

§ 467. REMARRIAGE OF WIDOW

A widow cannot, after remarriage, adopt a son to her first husband.[57]

51 *Sattiraju v Venkataswami* (1917) 40 Mad 925, 40 IC 518 (12-year-old cannot adopt); *Basappa v Sidramappa* (1919) 43 Bom 481, 50 IC 736 (15-year old can adopt); *Murgeppa v Kalawa* (1920) 44 Bom 327, 55 IC 361 (12-year old cannot adopt); *Parvatava v Fakimaik* (1922) 46 Bom 307, 64 IC 899; AIR 1922 Bom 105 (12 and a half year old cannot adopt). Also see *Paryanibai v Bajirao* AIR 1963 Bom 25, (1961) Bom 936, 64 Bom LR 86.

52 *Sattiraju v Venkataswami* (1917) 40 Mad 925, 929, 40 IC 518.

53 *Mondakini v Adinath* (1891) 18 Cal 69.

54 *Sayamalal v Saudamini* (1870) 4 Beng LR 362.

55 *Basvant v Mallappa* (1921) 45 Bom 459, 59 IC 800, AIR 1921 Bom 301; *Annapurnamma v Manikyamma* (1946) Mad 755; *Bhimabai v Duttatraya* AIR 1956 Nag 231; *Deorao v Raibhan* (1954) Nag 558, AIR 1954 Nag 357.

56 *Partap v Bai Suraj* (1946) Bom 1; *Govind v Godubai* AIR 1946 Bom 439.

57 *Panchappa v Sanganbasawa* (1990) 24 Bom 89, 94; *Faikirappa v Savtrewa* (1921) 23 Bom LR 482, 62 IC 318, AIR 1921 Bom 1 (FB); *Kishni v Ratna* AIR 1964 All 17.

§ 468. SUCCESSIVE ADOPTION

A widow may adopt several sons in succession, one after the death of another, unless there is a specific limitation placed on her power to adopt.[58]

§ 469. MOTIVE OF ADOPTION

The motive of a widow in making an adoption is not material upon the question of its validity.[59] The court can enquire into the movies of the husband's *sapindas* in giving [§462(6)] or refusing consent to an adoption to a widow.[60] Refusal by *sapindas* on the ground that the motive of the widow in adopting a son is improper, would amount to improperly withholding consent.[61]

Money paid to a widow to induce her to adopt a son is in the nature of a bribe, which is condemned by *smriti* writers as an illegal payment.[62]

§ 470. CO-WIDOWS

Where a Hindu dies leaving two or more widows, the adoption by the widows, where an express authority is left by the husband to adopt, is governed by the rules laid down in § 455. above. Where no such authority is given, the adoption by the widows in Madras is governed by the rule laid down in § 462(8) and in Bombay by the rule laid down in § 463(3).

The only schools which allow an adoption by a widow without her husband's authority are the Dravida (Madras) School and the Maharashtra (Bombay) school.

Termination of Widow's Power to Adopt

§ 471. GENERALLY

(1) A widow's power to adopt continues all her lifetime:

58 *Suryanarayana v Venkataramana* (1906) 29 Mad 382, 33 IA 145; *Yadao v Namdeo* (1921) 48 IA 513, 49 Cal 1, 64 IC 536, AIR 1922 PC 216.

59 *Ramchandra v Mulji* (1898) 22 Bom 558 (FB); *Mahableshwar v Durgabai* (1898) 22 Bom 199; see also *Raja Makund Deb v Sri Jagannath* (1923) 2 Pat 469, 485–86, 72 IC 230, AIR 1923 Pat 423; *Kandulapati Kanakaratnam v Kandulpati Narasimha Rao* (1942) Mad 173, 198 IC 236, AIR 1941 Mad 937, FB; *Vanka Lakshminarayana v Mangalappalli* AIR 1950 Mad 601, (1950) 1 MLJ 537; *Govinda v Shenfad* (1949) Nag 416; *Ganu v Shinram* (1954) Nag 646, AIR 1954 Mad 353; *Ramamma v Lakshminarasimham* AIR 1953 Mad 676; *Venkalakshmi Ammal v Jagannathan* AIR 1963 Mad 316; CVC *Chetty v PLD Chetty* AIR 1972 Mad 233.

60 *Vellanki v Venkata* (1876) 1 Mad 174, 190–91, 4 IA 1, 14; *Krishnayyya Rao v Raja of Pittapur* (1928) 51 Mad 893, 116 IC 673, AIR 1928 Mad 994, FB.

61 *Appaswami v Sarangapani* AIR 1978 SC 1051.

62 *Shri Sitaram v Haribar* (1911) 35 Bom 169, 8 IC 625.

(i) in all cases, where husband has died without leaving any son [see *Explanation I* and Illust (a)–(c)];

(ii) in cases where her husband has left a son, if the son dies leaving her (his mother) as his nearest heir[63] [see Illust (d) and (e); also see *Explanation I* and Illust (g)].

In the first case, the widow succeeds to the estate as her husband's heir; in the second case, she succeeds to the estate as the heir of her son (as his mother). In either case, the estate vests in her, in the one case, immediately on the death of her husband, in the other, immediately on the death of her son. By adoption, she divests no estate except her own. Nevertheless, vesting or divesting is no longer of any importance. See *Amarendra Mansingh*'s case[64] and the decision of the Supreme Court in *Gurunath v Kamalabai*.[65] See also the Hindu Women's Rights to Property Act 1937, under which it seems the adopted son would take a moiety of the interest which vests in the adopting widow.

In the second case, the mere fact that the son had attained majority (which would be at the age of 18), or had attained ceremonial competence (which would be at the age of 15), does not extinguish the widow's power to adopt to her husband.[66]

(2)(a) If the son dies leaving a son or a wife, the widow's power to adopt comes to an end at his death, and she cannot thereafter exercise it, though, she may have been expressly authorised by her husband to adopt in the event of the son's death. The reason is that the estate then vests in an heir of the deceased son and the widow cannot adopt to her husband so as to divest the estate taken by that heir.[67]

63 *Verabhai v Bai Hiraba* (1903) 30 IA 234, 27 Bom 492; *Gavadappa v Girimallappa* (1895) 19 Bom 331; *Mallappa v Hanmappa* (1920) 44 Bom 297, 55 IC 814; *Sahebrao v Rangrao* AIR 1962 Bom 1, (1961) Bom 768, 63 Bom LR 411.

64 [1933] 60 IA 242, 12 Pat 642, AIR 1933 PC 155.

65 [1955] 1 SCR 1135, 57 Bom LR 694, AIR 1955 SC 206.

66 *Tripuramba v Venkataratnam* (1923) 46 Mad 423, 72 IC 517, AIR 1923 Mad 278; explaining *Madana Mohana v Purushothama* (1918) 45 IA 156, 41 Mad 855, 46 IC 481; *Venkappa v Jivaji* (1901) 25 Bom 306; *Suryanarayana v Venkataramana* (1906) 33 IA 145, 154, 29 Mad 382, 389–90; *Verabhai v Bai Hiraba* (1903) 30 IA 234; *Anjirabai v Pandurang* (1924) 48 Bom 492, 80 IC 185, AIR 1924 Bom 441; *Shashankabhooshan Chaudhuri v Brajendranarayan Mandal* (1936) 63 Cal 385, 159 IC 437, AIR 1935 Cal 716.

67 See Illust (f) and (g) *Mst Bhoobun Moyee v Ram Kishore* (1865) 10 MIA 279; *Padma Kumari v Court of Wards* (1882) 8 Cal 302, 8 IA 229; *Thayammal v Venkatarama* (1887) 10 Mad 205, 14 IA 67; *Tarachum v Sureschunder* (1890) 17 Cal 122, 16 IA 166; *Amava v Mahagauda* (1898) 22 Bom 416; *Ramkrishna v Shamrao* (1902) 26 Bom 526 (FB); *Anandibai v Kashibai* (1904) 28 Bom 461; *Faizuddin v Tincowri* (1895) 22 Cal 565; *Draupadi v Sambari* AIR 1958 Ori 242; *Neelawwa v Kallappa* AIR 1972 Mys 218; *Venkatalakshmi Ammal v Jagannathan* AIR 1963 Mad 316 (son predeceasing father); *Neelamma v Kallappa Nani* AIR 1972 Mys 218.

In *Amarendra Mansingh*'s case, the true reason is said to be that: 'where the duty of providing for the continuance of the line which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or the son's widow, the mother's power is gone.'[68]

In *Gurunath v Kamalabai*,[69] the Supreme Court cited with approval the following observations of Chandavakar J in a Bombay decision:

> When a son dies before attaining full legal competence and does not leave either a widow or a son or an adopted son, then the power of the mother which was in abeyance during his lifetime revives, but the moment he hands over that torch to another, the mother can no longer take it.

The decision in *Gurunath*'s case was explained and followed in *Ashabai Kate v Vithal Bhika Nade*,[70] which took the view that a mother's power to adopt does not to revive and is extinguished permanently even on remarriage of her deceased son's widow.

(b) If the son dies leaving a daughter, it has been held in Bombay, that the adoption is valid.[71]

(c) If the son is a stepson of the widow having the power to adopt and dies leaving his own mother (or, the mother having predeceased him, grandmother) it was held (before *Amarendra Mansingh*'s case) that the adoption was invalid.[72] However, as the son's mother or grandmother cannot discharge the duty of providing for the continuance of the line, these decisions cannot be supported and must be deemed to be overruled.[73]

The Bombay and Calcutta High Courts held in the cases noted below that the power to adopt, once it comes to an end becomes extinguished for ever, and it does not revive even when, on the death of the son's nearer heirs, the estate reverts to the widow and becomes vested in her.[74] However, the Nagpur High Court took the view that on the remarriage of the son's widow, the property came back to the mother and then the

68 See Illust (f), (h), (i) and (j). *Amarendra Mansingh v Sanatan Singh* (1933) 12 Pat 642, 60 IA 242, 143 IC 441, AIR 1933 PC 155.

69 [1955] 1 SCR 1135, 55 Bom LR 694, AIR 1955 SC 206 in *Vaijoba v Vasant* (1973) 75 Bom LR 633, the son's widow had remarried.

70 *Ashabai Kate v Vithal Bhika Nade* AIR 1990 SC 670.

71 *Chanbasappa v Madiwalappa* (1937) Bom 642, 39 Bom LR 591, 170 IC 999, AIR 1937 Bom 337.

72 *Anandibai v Kasibai* (1904) 28 Bom 461; *Faizuddin v Tincowri* (1895) 22 Cal 565; *Drobomoyee v Shama Churn* (1886) 12 Cal 246.

73 *Maruti v Ganu* (1947) ILR Bom 677.

74 *Mrishnarav v Shankarrav* (1893) 17 Bom 164; *Ramkrishna v Shamrao* (1902) 26 Bom 526; *Shamrao v Bhimrao* (1949) Bom 296, AIR 1949 Bom 311; *Manikyamala v Nanda Kumar* (1906) 33 Cal 1306.

mother could adopt—the power being only suspended and not extinguished.[75] Similarly, the Chief Court of Oudh held that the power of the widow to adopt which is suspended during the lifetime of an unmarried son, revives, if the son marries and dies leaving a widow who too dies issueless and without making an adoption.[76]

The Supreme Court in *Gurunath v Kamalabai*,[77] after a review of the leading decisions on the subject, affirmed and restated the following propositions:

(i) that the interposition of a grandson, or the son's widow, competent to continue the line by adoption brings the mother's power of adoption to an end;

(ii) that the power to adopt does not depend upon any question of vesting or divesting of property; and

(iii) that a mother's authority to adopt is not extinguished by the mere fact that her son had attained ceremonial competence.

The Supreme Court observed in this case that the Nagpur and Oudh decisions referred to above were based on an erroneous apprehension of the true reasons for the rule [Illust (g)].

(3) Subject to the above provisions, a widow may adopt at any time she pleases, unless there is a direction to the contrary.[78]

Thus, in one case, an adoption made by a widow 71 years after her husband's death, was upheld.[79] It was held by the High Court of Madras that an adoption by a widow was not invalidated by the fact that the adoptee was not the boy directed by her father-in-law, or the fact that it was made many years after the requisite consent was obtained.[80] As to reopening of partition see §§ 336–39.

(4) The provisions of this section apply to all cases governed by Dayabhaga law, whether the husband was divided or undivided at the time of his death, and to those cases governed by Mitakshara law, where the husband was divided at the time of his death. The next section applies to cases governed by Mitakshara law, where the husband was undivided at the time of his death.

Explanation I.— 'Son' in this section means a son, grandson, or great-grandson, natural or adopted.

75 *Bapuji v Gangaram* (1941) Nag 178, 195 IC 282, AIR 1941 Nag 116; foll in *Govinda v Shenfad* (1949) Nag 416.

76 *Prem Jagat Kuer v Haribar* 21 Luck 1.

77 [1955] 1 SCR 1135, AIR 1955 SC 206.

78 *Girjowa v Bhimaji* (1885) 9 Bom 58; *Mutassaddi Lal v Kundan Lal* (1906) 28 All 377, 33 AI 55; *CVC Chetty v PLD Chetty* AIR 1972 Mad 233.

79 *Raje v Javavantrav* (1867) 4 Bom HCAC 191; *Hari Rao v Venkaiah* (1953) Mad 624, AIR 1953 Mad 661.

80 *CVC Chetty v PLD Chetty* AIR 1972 Mad 233.

Explanation II.— A son adopted by a widow to her husband after his death, is a son left by the husband within the meaning of sub-s (1), cl (ii) [see ill (d)].

(5) §§ 471 and 502 may be read together.

Illustrations

(a) *A* dies leaving a widow as his only heir. The widow may adopt a son to *A*. (Sub-§(1), cl (i).)

(b) *A* dies leaving a widow and a daughter. The widow may adopt a son to *A*. It does not matter that *A* has left a daughter. The daughter is not entitled to succeed until after the widow, and she has no voice in the matter of the adoption. (Sub-§ (1) cl (i)).

(c) *A* dies leaving two widows in whom his property vests as his heirs. The widow having authority to adopt or, in Bombay, the senior widow without any authority adopts without the consent of the co-widow. The adoption is valid.[81]

(d) *A* dies leaving a widow *W* and a son. On *A*'s death, the son succeeds to the estate. The son then dies unmarried. On this death, *W* succeeds to his estate as his heir (ie, as his mother). *W* may adopt a son either under an authority from *A*,[82] or in Madras, with the consent of *A*'s *sapindas*,[83] or in Bombay, without any authority.

In the above case, if the adopted son dies unmarried, *W* may again adopt with proper authority, if necessary or in Bombay, without authority.[84]

(e) *A* dies leaving a widow and two sons. The sons die unmarried. The mother's power to adopt does not come to an end and she can adopt.

(f) If in the above case, one son dies married, then a few days later his widow dies and then the second son dies, the mother's authority to adopt is terminated and she cannot adopt.[85]

(g) *A* dies leaving a widow and a grandson *B*. On *A*'s death, *B* succeeds to the estate as *A*'s grandson. *B* then dies without leaving any wife or children. On *B*'s death, the widow succeeds

81 *Mondakini v Adinath* (1891) 18 Cal 69; *Rakmabai v Radhabai* (1868) 5 Bom HCAC 181.

82 *Amarendra Mansingh v Sanatan Singh* (1933) 12 Pat 642, 60 IA 242, 143 IC 441, AIR 1933 PC 155.

83 *Vellanki v Venkata Rama* (1876) 1 Mad 174, 190–91, 4 IA 1 14.

84 *Ram Soondur v Surbance Dossee* (1874) 22 WR 121.

85 See sub-§ (2); *Shamrao v Bhimrao* (1949) Bom 296, AIR 1949 Bom 311. Some earlier decisions to the contrary are not good law and must be deemed to have been overruled.

to the estate as *B*'s grandmother. The widow may adopt a son to her husband *A*.[86] But if *B* dies leaving a wife or child, the widow's power to adopt comes to an end. (sub-§(1), cl (ii), also Expl I).

(h) *A* dies leaving a widow and a son *B*. On *A*'s death, the estate vests in *B*. *B* dies leaving his wife *C*, who succeeds to the estate. *A*'s widow then adopts a son to *A* during the lifetime of *C*.

(i) under the authority of husband—*Chunderbulle*'s case;[87]

(ii) (in Madras) with the assent of *A*'s *sapindas*—*Thayammal v Venkatrama*;[88]

(iii) (in Bombay) under her inherent power — *Keshav v Govinda*.[89]

In all the above cases, the adoption is invalid. Even if *B* is an adopted son, the same result follows.[90]

The result will be the same whether the widow adopts before or after the death of *C*.[91]

(i) *A* dies leaving two widows *R* and *G* and a son *D* by the latter. *D* dies leaving a widow *S* and a son *J*. *S* dies shortly after D and there after followed by *J*. After about 30 years, *G* adopts the plaintiff. The adoption is valid.[92]

(j) *A* dies leaving a widow *W* and a son *B*. On *A*'s death, *B* succeeds to the estate. *B* then dies leaving a son *C*. On *B*'s death, *C* succeeds to the estate as *B*'s son. *C* dies unmarried leaving *W*, his grandmother, as his next heir. On *C*'s death, his estate vests in *W* as his heir. *W* then adopts a son to *A*. The adoption is not valid.[93] It is clear that the widow would not, by adoption, divest any estate but her own.

The subject matter of this section is closely connected with another subject, namely, divesting of estate by adoption, as to which see § 502. As to adoption by a widow with the consent of the person in whom the estate is vested, see § 503.

86 *Narbar v Balwant*. (1924) 48 Bom 559, 80 IC 435, AIR 1924 Bom 437.

87 *Bhoobun Moye v Ram Kishore* (1865) 10 MIA 279; *Padma Kumari v Court of Wards* (1882) 8 IA 229, 8 Cal 302.

88 (1887) 10 Mad 205, 14 IA 67.

89 (1885) 9 Bom 94.

90 *Madana Moban v Purushotama* (1918) 45 IA 156, 41 Mad 855, 46 IC 481.

91 *Krishanrav v Shankarrav* (1893) 17 Bom 164; *Manikyamala v Nanda Kumar* (1906) 33 Cal 1306; *Shamrao v Bhimrao* (1949) Bom 296.

92 *Gurunath v Kamalabai* [1955] 1 SCR 1135, 57 Bom LR 694, AIR 1955 SC 206.

93 *Ramakrishna v Shamrao* (1902) 23 Bom 526, approved in *Madana Mohana v Purshothama* (1918) 45 IA 156, 41 Mad 855, 46 IC 481.

§ 472. IS THERE A LIMIT TO THE POWER OF THE WIDOW TO ADOPT WHEN THE HUSBAND WAS A MEMBER OF THE JOINT FAMILY AT THE TIME OF HIS DEATH

(1) So long as there is a male member in the coparcenary, the power to adopt is not effected and the adoption made is valid (Illust (a), (b) and (c)).

(2) It was at one time supposed that where the last surviving coparcener died and the property passed to his heir, such as a widow or collateral, the power of the widow of a predeceased coparcener was at an end.[94] But such cases were overruled by the decision of the Privy Council in *Anant v Shankar*,[95] that was reaffirmed in *Neelangouda v Ujjangouda*.[96]

It is now firmly established that the rights of the adopted son relate back to the date of the adoptive father's death, and the adopted son must be deemed by a fiction of law to have been in existence as the son of the adoptive father at the time of the latter's death. If, therefore, there was a coparcenary in existence, when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an adoption validly made by the widow of the deceased coparcener would have the effect of devesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second and enabling the adopted son to claim a share in the family properties as if they were still joint.[97]

This principle of relation back is subject to the exception that any lawful alienation effected by a male or female heir, since the death of the adoptive father, and before the date of adoption, would be binding on the adopted son.[98]

The principle of relation back is also subject to another limitation or exception, which is to the effect that if property by inheritance goes to a collateral and a son is adopted after the death of the collateral, the

94 *Chandra v Gojarabai* (1890) 14 Bom 463; *Adivi Suryaprakasa Rao v Nidamarty Gangaraju* (1910) 33 Mad 228.

95 (1944) Bom 116, 70 IA 232, AIR 1943 PC 196.

96 (1948) 50 Bom LR 682, AIR 1948 PC 165.

97 Cited with approval in *Shripad v Dattaram* AIR 1974 SC 878, 881. Some observation of the Supreme Court in *Lunithanalli Ammal v Ramalingam* AIR 1970 SC 1730 were characterised as obiter and wider than justified in *Shripad's* case *Tatya Shantappa v Ratnabai* (1949) FLJ 123, AIR 1949 FC 101; *Ramchandra v Ramkrishna* (1952) 54 Bom LR 636, AIR 1952 Bom 463.

98 See 'Alienations Made Prior to Adoption' §§ 507–509. *Jivaji v Hammant* (1950) Bom 510, 52 Bom LR 527, AIR 1950 Bom 360 (FB); *Vishnu Pandu v Mahadu* (1950) Bom 487, 52 Bom LR 599, AIR 1951 Bom 170 (a surrender by a widow in favour of the reversioner would not rank as an alienation). See § 509A.

adoption does not divert the property, which has vested in the heir of the collateral. This limitation is also stated to be that the principle of relation back applies only when the claim is made in respect of the estate or interest of the adoptive father, and does not apply when the claim relates to the estate of a collateral. There was some conflict of opinion as to the precise scope of this limitation. After a review of cases, the Supreme Court, in *Srinivas v Narayan*,[99] approved the view taken by the Bombay High Court in *Jivaji v Hanmani*,[1] and dissented from the contrary view taken by the Privy Council in *Anand v Shankar*[2] on this point.

'Collateral' means descended from the same stock, but not in the same line.[3]

(3) §§ 471 and 472 may be read with § 502, which deals with 'divesting'.

In *Shrinivas v Narayan*, the Supreme Court observed:

> It (the view expressed in *Anant v Shankar* on this point) is not in consonance with the principle well established in Indian jurisprudence that an inheritance could not be in abeyance, and that the relation back of the right of an adopted son is only quoad the estate of the adoptive father. Moreover, the law as laid down therein leads to results, which are highly inconvenient. When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate. Thus, transfers from limited owners whether they be widows or coparceners in a joint family, are amply protected. However, no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that

99 [1955] SCR 1, 57 Bom LR 678, AIR 1954 SC 379. Also see *Ramanna v Sambammorty* AIR 1961 AP 361; *Ganeshrao v Ramchandra* AIR 1958 Bom 141; *Somasekharappa v Basappa* AIR 1961 Mys 141 (transferee from heir of last surviving coparcener). *Jhuparibahu v Phoolchandra* AIR 1958 MP 261; *Pardhasaradhi v Srinivasa* AIR 1959 AP 512.

1 (1950) Bom 510, 52 Bom LR 527, AIR 1950 Bom 360, FB; *Dattatraya v Vaman* (1950) Bom 358, 52 Bom LR 283, Similar view was taken in *Raju v Lakshmi* (1955) Mad 247, AIR 1954 Mad 705; also, see *Ramakrishnayya v Narasaya* AIR 1957 AP 109.

2 (1943) 70 IA 232.

3 AIR 1962 SC 59.

title and that of all persons claiming under him. The alienees from him would have no protection, as their could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened—in this case, it was 41 years thereafter— and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations. We must hesitate to subscribe to a view of the law, which leads to consequences so inconvenient. The claim of the appellant to divest a vested estate result in a legal fiction, and legal fictions should not be extended so as to lead to unjust results. We are of opinion that the decision in *Anant v Shankar*, in so far as it relates to properties inherited from collaterals, is not sound.

In *Krishnamurthi v Dhruwaraj*, the Supreme Court summarised the principles deducible from its decision in *Shrinivas v Narayan*:

(i) an adopted son is entitled to take in defeasance of the rights acquired prior to his adoption, on the ground that in the eye of the law his adoption relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in the position of a posthumous son;

(ii) as a preferential heir, an adopted son: (a) divests his mother of the estate of his adoptive father; (b) divests his adoptive mother of the estate she gets as an heir of her son, who died after the death of her husband;

(iii) a coparcenary continues to subsists so long as there is in existence a widow of a coparcener capable of bringing a son into existence by adoption; and if the widow made an adoption, the rights of the adopted son are the same, as if he had been in existence at the time when his adoptive father died and that his title as coparcener prevails as against the title of any person claiming as heir to the last coparcener;

(iv) the principle of relation back applies only when the claim made by the adopted son relates to the estate of his adoptive father. The estate may be definite and ascertained, as when he is the sole and absolute owner of the properties, or it may be fluctuating, as when he is a member of a joint Hindu family, in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father, which the adopted son is entitled to take as on the date of his death. This principle of relation back, however, does not apply when the claim made by the adopted son relates to the estate of a collateral. With respect to the estate of a collateral,

he governing principle is that inheritance can never be in abeyance, and that once it devolves on a person who is the nearest heir under the law, it is thereafter not liable to be divested. In such a case, the principle applicable is not that of relation back, but that inheritance once vested cannot be divested;

(v) the estate continues to be the estate of the adoptive father in whosoever's hands it may be, ie, whether in the hands of one who is the absolute owner or one who is a limited owner. Any one who inherits the estate of the adoptive father is his heir, irrespective of the inheritance having passed through a number of persons, each being the heir of the previous owner.

Applying the principle enunciated in paragraph (iv) above, it was held by the Supreme Court, that when the father of the adoptee had died many years before a partition between the adoptee's father's father and uncle, the adoptee would not be entitled to more than one-third share. This was on the ground that if his adoptive father had been alive at the date of the partition, he could not have obtained more than one-third share. It was pointed out, that the adopted son could ignore the partition effected prior to his adoption by relying on the doctrine of relation back, but where succession to the property of a person other than the adoptive father was involved, the severance in status effected by the partition between the adoptee's father's father and uncle could not be ignored.[4] By parity of reasoning, a modified share was given to the adopted son in *Sripad v Dattaram*, on equitable considerations.[5]

Illustrations

(a) *A* and *B* are undivided brothers governed by Mitakshara law. *A* dies leaving authority to his widow to adopt a son to him. On *A*'s death, his undivided half share in the coparcenary property passes to *B*, the surviving coparcener. While *B* is still alive, *A*'s widow adopts a son to *A*. The effect of the adoption is that a coparcenary interest is created in the joint property, co-extensive with that which *A* had in the property (ie, one-half), and it vests in the adopted son.[6]

(b) *A* and *B*, two brothers, are members of a joint family. *A* dies leaving a widow who is pregnant at the time of his death. *B* then dies leaving a will, whereby, he authorises his widow to adopt

4 *Govind Hanumantha v Nagappa* AIR 1972 SC 1401, overruling to this extent *Ramchandra v Ramkrishna* AIR 1952 Bom 463 .

5 AIR 1974 SC 876, 882–83 (the principle of the doctorine of 'relation back' was once again considered by the Supreme Court in this case and it was inter alia observed 'legal fictions have legal frontiers', p 882).

6 *Surendra Nandan v Sailaja* (1891) 1 Cal 385.

a son to him. The day next after *B*'s death, *A*' widow delivers a son. After three months, *B*'s widow adopts a son to *B*. The adoption is valid, and *A*'s son and the adopted son will take the property as coparceners.[7]

(c) Where one branch of a joint family divided amongst themselves, and the widow of another branch of the family (being its sole surviving member) made an adoption, it was held that the adoption was valid and the adopted boy was entitled to reopen the partition, as a step towards getting his own share.[8]

The Nagpur High Court has held that adoptions by two widows of the members of the joint family after the death of all the male members are valid.[9]

(d) One *Krishnappa* had five sons, Keshav, Anappa, Bimrao, Apparao and Mahadev. Krishnappa died first, and his two sons, Bimrao and Apparao, died without male issue. Some time later, while the family was still joint, the three remaining brothers then divided the joint property among themselves. On Keshav's death, his son *Vishnu* became entitled to his one-third share. Anappa died in 1901 leaving him surviving his widow Tungabai. On Vishnu's death, in 1918, his share in the *watan* property, although Keshav had a daughter, went to the nearest male heir who was at that time Hanmant, a collateral of Keshav. In 1922, Tungabai adopted Jivaji as son to her husband. Hanmant then filed a suit against *Jivaji* claiming to recover certain properties of Vishnu, which were in possession of Jivaji. It was held that Jivaji could not claim against Hanmant the separate property of Vishnu, which devolved on Hanmant in 1918. This was a case in which the adopted son laid a claim to the properties, not on the ground that they belonged to the joint family into which he had been adopted, but that they belonged to a collateral (Vishnu also was in position of a collateral,) to whom he was entitled to succeed as a preferential heir. As already pointed out, the Supreme Court approved of this decision on the ground that the relation back of the right of an adopted son did not touch property inherited from a collateral (*Jivaji v Hanmant,* see above).

(e) *S* and *K*, two brothers were members of a joint family. *K* died in 1897, leaving his widow *R*. *S* died in 1899 leaving his son *G*, who died in 1901 leaving his widow *L*. In 1901, *L* adopted *D*, who died in 1935 leaving three sons defendants 1 to 3, and his widow defendant 4. In 1944, *R* adopted the plaintiff and soon

7 See Illust (b) to § 497. *Bachoo v Mankorebai* 1907 31 Bom 373, 34 IA 107.

8 *Bajirao v Ramkrishna* (1941) Nag 707, 198 IC 581, AIR 1942 Nag 19.

9 *Mst Draupadi v Vikram* (1939) Nag 88.

thereafter, the plaintiff sued the defendants for partition, claiming a half share in the family property. The main dispute related to certain properties, which had been inherited by *D* in 1903 from Swamirao, a collateral who represented one of the two branches of a Kulkarni *Watan* family. *S* and *K* represented the other branch of that family. It was held that the plaintiff was not entitled to any claim to the properties inherited by *D* from the collateral Swamirao (*Srinivas v Narayan*, see above).

(f) *B* died in 1882, pre-deceasing his father *N*, and leaving behind his widow *T*. *N* died in 1892 leaving behind *K*, who succeeded to his property as full owner. *K* died in 1933, and her son *V*, who had succeeded to her property, also died in 1934 leaving behind two sons, the appellants. *T* adopted *D*, the respondent in 1945. *D* thereupon brought a suit for recovery of the property from the appellants on the basis that his adoption had the effect of divesting them of the property. It was held that *D* was entitled to succeed. The title of *K*, the daughter of *N*, as also the title of the appellants, was defeasible on the adoption of a son by *T*. The fact that *K* inherited the property of her father absolutely, did not change the character of the property from coparcenary property to self-acquired property of *K*, so long as *T* existed and was capable of adopting a son to her husband *B*. This was not a case of an adopted son claiming to divest the heir of a collateral of property belonging to the collateral. The adopted son was claiming property, which originally belonged to the adoptive father (*Krishnamurthi v Dhruwaraj*, see above).

(g) *A*, the *zamindar* of the impartible estate Chinnakimidy in Madras, died leaving his brother *R* and a widow *K*. The widow adopted *B* under the authority of her husband. The adoption is valid, though the *zamindary* was not vested in her. The result of the adoption is that a new coparcener is introduced into the senior line. The adopted son divests *R* and becomes *zamindar*. The last result is a special result on account of the impartibility of the estate.[10]

(h) *B*, the *zamindar* of Dompara Raj in Orissa, who had previously in 1898 given to his widow an authority to adopt, died in 1903. In 1902, a son *C* was born to him. *C* succeeded his father and died in 1922 unmarried. *B*'s widow then adopted. At the time of *C*'s death, the *zamindary* was vested in junior branch. The Judicial Committee reversing the judgment of the Patna High Court held that the adoption was valid.[11]

10 *Raghunanda v Brozokishoro* (1876) 1 Mad 69, 3 IA 154.

11 *Amarendra Mansingh v Sanaan Singh* (1933) 12 Pat 642, 60 IA 242, 143 IC 441, AIR 1933 PC 155.

(i) *C*, the *talukdar* of the impartible estate of Ahima in Bombay, died in 1899 leaving his brother *B*, his son *D* and his widow *K*. In 1915, *D* was given away in adoption and then *K* adopted *M* in 1917. The Judicial Committee reversing the judgment of the High Court, held that the adoption was valid.[12]

(j) *K*, a junior member of the family of the *Thakore* of Gumph in Bombay, while in possession of a village granted to his ancestors, a *jivai* grant for maintenance on condition that it should revert to the *Thakore* on failure of the male line, died in 1903 leaving a widow *D*. *D* adopted *P* in 1904. Reversing the judgment of the High Court, the Judicial Committee held that the adoption was valid and that the *Thakore* was not entitled to the village. They considered the case to be similar to the Berhamprore case, thus implying that the village held in *Jivai* grant must be regarded as the joint family property of both the branches, though in actual enjoyment of the junior branch.[13]

Watan Property

A, a *watandar* in Bombay, died leaving a widow. She adopted a son *C*. *C* then died and the *watan* devolved on a collateral *G*. *G* then gave his son *S* in adoption to the widow. *S* died leaving daughters. The widow then made a third adoption. It was held that the widow's power to adopt was not extinguished by reason of the *watan* vesting in *G* or by reason of *S*'s leaving daughters.[14] In the light of *Bimabai*'s case,[15] the decision in *Bhimabai v Tayappa*, [16] must be regarded as overruled.

A, a Hindu, died leaving his widow *G* and son *K*. *K* then died and the watan property of the family passed to a remote collateral *S*. The widow, *G*, then adopted a son. The Privy Council held that the adoption was valid and divested *S* of the *watan* properties,[17] overruling the full bench decision of the Bombay High Court.[18] A similar decision had been previously arrived at by the Bombay court.[19]

12 *Vijaysangji v Shivasangji* (1935) 37 Bom LR 562, 155 IC 438, AIR 1935 PC 95, reversing the judgment of the High Court.

13 *Pratapsingh v Agarsingji* (1919) 46 IA 97, 43 Bom 778, 50 IC 457.

14 *Chanbasappa v Madiwalappa* (1937) Bom 642, 39 Bom LR 591, 170 IC 999, AIR 1937 Bom 337.

15 (1933) 57 Bom 157, 60 IA 25, 141 IC 9, AIR 1933 PC 1.

16 (1913) 37 Bom 598.

17 *Anant Bhikappa v Shankar Ramchandra* (1944) Bom 116, 70 IA 232, AIR 1943 PC 196. See *Shripatrao v Parvatibai* (1949) Bom 1; *Ramchandra Balaji v Shankar Apparao* (1945) Bom 353.

18 *Balu Sakharam v Lahoo Sambhaji* (1937) Bom 508, FB; AIR 1937 Bom 279. The cases of *Tejrani v Sarupchand* (1920) 44 Bom 483, 55 IC 96 and *Irappa Lokappa v Rachayya Madiwalayya* (1940) Bom 42, 187 IC 504, 41 Bom LR 1300, AIR 1940 Bom 118 must be regarded as overruled.

19 *Lingappa alias Rayappa v Kadappa Bapurao* (1940) Bom 721, 191 IC 504, AIR 1941 Bom 345.

Taluqdar: Oudh Estates Act

The position assigned to the widow of a *talukdar* in the matter of adoption is peculiar. The doctrine of relation back is not applicable to an adoption made by the widow of a *talukdar* governed by the Act.[20]

§ 473. ADOPTION BY WIDOW SUCCEEDING AS *GOTRAJA SAPINDA* IN BOMBAY

An adoption by a widow which is prima facie valid, cannot be affected by the fact that certain property has devolved upon her as *gotraja sapinda* of the last male holder. It was held in a number of cases, that in such circumstances, though the adoption is valid, it couldn't affect the course of devolution of the property, which she obtained as *gotraja sapinda.*[21] These cases must he held to have been undoubtedly overruled by the decision of the Privy Council in *Anant v Shankar.*[22] The position now is that if the widow who succeeds as *gotraja sapinda,* is a member of the joint family, an adoption by her would have the effect of displacing any title based merely on inheritance from the last surviving coparcener and conferring it on the adopted son.[23]

Illustration

On the death of *A*, the last surviving male coparcener of joint family, the property devolved on *W*, who was *A*'s grandfather's brother's widow, or a *gotraja sapinda. W* then adopted *M.* It was held that the adoption was valid and would confer on the adopted son, the right to the property, which was held by *A.*

II. Persons Lawfully Capable of Giving in Adoption

§ 474. WHO MAY GIVE IN ADOPTION

The only person who can lawfully give a boy in adoption are his father and his mother.[24]

Thus, one brother cannot give another brother in adoption. Similarly, a stepmother cannot give her stepson in adoption.[25] Nor can a grandfather

20 *Mohan Singh v Pasupatinath* AIR 1969 SC 135.

21 *Mrishnaji Raghunath v Rajaram Trimbak* (1938) Bom 679, AIR 1938 Bom 383, FB; *Madhavsang Haribhai v Dispang Jijibhai* (1942) Bom 812, 202 IC 648, 44 Bom LR 661, AIR 1942 Bom 280.

22 70 IA 232.

23 *Bai Faiba v Chudasma* (1948) Bom 845; *Ganapati Maruti v Anandrao* (1954) 56 Bom LR 317, AIR 1954 Bom 384.

24 *Putlabai v Mahadu* (1909) 33 Bom 107, 1 IC 659.

25 *Haribhau v Agabrao* (1946) Nag 978.

give his grandson in adoption. A woman is incompetent to give in adoption her illegitimate son, born of adulterous intercourse.[26]

§ 475. RIGHT OF FATHER

The primary right to give in adoption is that of the father.[27]

§ 476. RIGHT OF MOTHER

The mother cannot give her son in adoption, while the father is alive and capable of consenting, without his permission. But she may do so, if he has become incapable of giving his consent, eg by reason of lunacy, or if he has renounced worldly affairs and entered a religious order, or after his death, provided there be no express or implied prohibition from him.[28]

It was held by the High Court of Bombay, that a widow has no power after her remarriage to give in adoption her son by her first husband, unless she has been expressly authorised by him to do so.[29] In a later case, the same High Court expressed the opinion that remarriage did not deprive a widow of her right to give such son in adoption.[30] Agreeing with a Full Bench decision of the same High Court,[31] the High Court of Allahabad has held, that a widow is not entitled to give in adoption her son by her first husband after her remarriage.[32]

§ 477. DELEGATION OF POWER

The power to give a boy in adoption belongs exclusively to his parents, and it can be exercised by them alone. Neither parent, therefore, can delegate that power to another person.[33] However, the physical act of giving the son in adoption may be delegated to another, as such act involves no exercise of discretion.[34]

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26 *Tirkangauda Mallangauda v Shivappa Patil* (1943) Bom 706, 45 Bom LR 992, AIR 1944 Bom 40; *Apya Shetthaya v Rammanakka Apya* (1941) Bom 350, 196 IC 42, AIR 1941 Bom 222, 43 Bom LR 314.

27 *Narayanasami v Kuppusami* (1888) 11 Mad 43, 47.

28 *Jogesh Chandra v Nrityakali* (1903) 30 Cal 956; *Raja Makund Deb v Sri Jagannath* (1923) 2 Pat 469, 72 IC 230, AIR 1923 Pat 423; *Shivprasad v Natwarlal* (1949) Bom 318; *Nago v Sukya* AIR 1953 Nag 239.

29 *Panchappa v Sanganbasawa* (1900) 24 Bom 89.

30 *Putabai v Mahadu* (1909) 33 Bom 107, 1 IC 657.

31 See § 467.

32 *Kisnbi v Ratna* AIR 1964 All 17; Also see *Ram Sakhi Kuer v Daroga Prasad* AIR 1981 Pat 204.

33 *Basbetiappa v Shivligappa* (1873) 10 Bom HC 268.

34 See *Lakshman Singh v Rup Kanwar* AIR 1961 SC 1878. Also see *Ganga v Krishna Rao* AIR 1965 Mad 191 (mother present); *Jamnabai v Raychand* (1883) 7 Bom 225; *Shamsingh v Santabai* (1901) 25 Bom 551.

§ 478. RENUNCIATION OF HINDU RELIGION

A Hindu father, who has become a convert to Mohammedanism, does not, by reason of his conversion, lose his power of giving his son, who has remained a Hindu, in adoption. However, since the physical act of giving a son in adoption is accompanied by religious ceremonies, such act must be delegated to another person who is a Hindu.[35]

This decision is based on the provisions of the Caste Disabilities Removal Act 1850.

A Brahmo can give his Brahmo son in adoption. A Brahmo does not cease to be a Hindu by becoming a member of the Brahmo Samaj.[36]

§ 479. MENTAL CAPACITY

The person giving in adoption must have attained the age of discretion, and must be of sound mind.[37]

§ 479A. CONSENT OF GOVERNMENT

It is not necessary to validate an adoption that the consent of the government should have been obtained.[38]

III. Persons Who May Be Lawfully Taken in Adoption

§ 480. WHO MAY BE ADOPTED

Subject to the following rules, any person who is a Hindu,[39] may be taken or given in adoption:

(1) the person to be adopted must be a male;[40]

(2) he must belong to the same caste as his adopting father; thus, a Brahman cannot adopt a Kshatriya, a Vaisya or a Sudra; it is not necessary that he should belong to the same sub-division of the caste;[41]

(3) he must not be a boy, whose mother the adopting father could not have legally married;[42] but this rule had been restricted in

35 *Shamsing v Santabai* (1901) 25 Bom 551.

36 *Kusum Kumari v Satya Ranjan* (1903) 30 Cal 999.

37 *Bireswar v Ardha Chander* (1982)19 Cal 452, 461, 19 IA 101, 105, 106.

38 *Ramchandra v Nanji* (1871) 7 Bom HC (AC) 26; *Narbar v Narayan* (1877) 1 Bom 607.

39 See §§ 6 and *Kusum Kumari v Satya Ranjan* (1903) 30 Cal 999.

40 *Gangabai v Anant* (1889) 13 Bom 690; *Ganguly v Sarkar* AIR 1961 MP 173.

41 *Shib Deo v Ram Prasad* (1924) 46 All 637, 87 IC 938, AIR 1925 All 79.

42 *Minakshi v Ramananda* (1888) 11 Mad 49; *Bhagwan Singh v Bhagwan Singh* (1899)

continued on the next page

many cases to the daughter's son, sister's son, and mother's sister's son.[43] This prohibition, however, does not apply to Sudras.[44] Even as to the three upper classes, it has been held that an adoption, though prohibited under this rule, may be valid, if sanctioned by custom (see 'custom' below).

In *Abhiraj Kuer v Debendra Singh*,[45] the Supreme Court held that a wife's sister's daughter's son can be validly adopted to a person governed by the Benaras school.

(3A) a deaf and dumb person cannot be adopted.[46] A person who had become a *sanyasi*, but has renounced the order, can be taken in adoption;[47]

(4) there is a difference of opinion between the schools as to the age when a boy may be adopted:

(i) in Bengal, Benares, Bihar and Orissa, the adoption must be before *upanayana*, ie, before the boy is invested with the sacred thread;[48] it is immaterial that the adopted boy is older than the adopter;[49]

(ii) the above rule applies also in Madras state; but if the person to be adopted is of the same *gotra* as the adopter, the adoption may be made even after *upanayana*, provided it is made before marriage.[50] In one case, the Bombay High Court decided that among the Lingayits of North Kanara, a married man cannot be adopted as the law of the Madras

21 All 412, 418, 26 IA 153, 160; *Hari Das Chatterji v Manmatha Nath Maulik* (1937) 2 Cal 265, 160 IC 332, AIR 1936 Cal 1; *Priyanath v Indumati* AIR 1971 Ori 211.

43 *Ramchandra v Gopal* (1908) 32 Bom 619; *Ramkrishna v Chimnaji* (1913) 15 Bom LR 824, 21 IC 34; *Chandi Charan v Nabagopal* AIR 1957 Pat 365.

44 See § 635(1), *Raj Coomar v Bissessur* (1884) 10 Cal 688; *Lakshmappa v Ramava* (1875) 12 Bom HC 364; *Kahandas v Jivan* (1923) 25 Bom LR 510, 73 IC 1023, AIR 1923 Bom 427; *Subrao v Radha* (1928) 52 Bom 497, 113 IC 497, AIR 1928 Bom 295; *Bhagwan Singh v Bhagwan Singh* (1898) 21 All 412, 418, 26 IA 153, 160; *Chinna v Pedda* (1876)1 Mad 62; *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497; *Hanumaiah v Mallaya* AIR 1959 AP 177.

45 AIR 1962 SC 351. Also see *Damodar Lal v Lalli Lal* AIR 1985 Raj 55 (brother's daughter's son).

46 *Surendera Narayan Sarbhadhikari v Bhola Nath Ray Chaudhuri* (1944) 1 Cal 139.

47 *Gulabrao v Nagorao* (1952) Nag 591, AIR 1952 Nag 102.

48 *Ganga Sahai v Lekhraj* (1887) 9 All 253, 328; *Raja Makund Deb v Sri Jagannath* (1923)2 Pat 469, 72 IC 230, AIR 1923 Pat 423; *Chandreshwar v Bisheshwar* (1926)5 Pat 777, 101 IC 289, AIR 1927 Pat 61; *Gundicha v Eswara* AIR 1965 Ori 96; *Sura Bala Debi v Sudhir Kumar Mukherji* (1944)1 Cal 566; *Deoki Nandan v Madanlal* AIR 1958 AP 693, AIR 1957 Pat 607; *Sukdeo v Kapil Deo* AIR 1960 Cal 597 (Benares school).

49 *Chandreshwar v Bisheshwar* (1926) 5 Pat 777, 101 IC 289, AIR 1927 Pat 61.

50 *Viraragava v Ramalinga* (1886) 9 Mad 148, FB; *Pichuvayyan v Subbayyan* (1890) 13 Mad 128.

State is applicable to them;[51] but in a subsequent case, the same court held that among the Gaud Saraswar Brahmins and Daivadnya Brahmins of North Kanara, a married man can be adopted, as they are governed by the Bombay law;[52]

(iii) in the Bombay state, a person may be adopted at any age, though he may be older than the adopter and though he may be married and have children.[53] The adoption is not invalid, although it took place after the thread ceremony of the boy was performed;[54]

(5) it has been held in Madras,[55] Mysore,[56] Nagpur[57] and Allahabad[58] that the adoption of a married person is not valid even among Sudras. The adoption of an illegitimate son of a Sudra is not valid.[59]

Relationship of Adoptive Father to Natural Mother (Sub-§(3))

The rule laid down in sub-§ (3) refers to the relationship of the parties prior to marriage.[60] It is founded upon the fiction 'that the adopting father has begotten the boy upon his natural mother; therefore, it is necessary that she should be a person who might lawfully have been his wife.' For this reason, a man cannot adopt his daughter's son, or his sister's son, or his mother's sister's son, for he cannot marry his daughter, his sister, or his mother's sister; such an adoption cannot be validated by the application of the doctrine of *factum valet*.[61] If the prohibition referred to above, were to be interpreted literally, there would be many other

51 *Dattatraya Maruti v Laxman* (1942) Bom 584, 203 IC 139, AIR 1942 Bom 260.

52 *Shantaran v Mahableshwar* (1947) Bom 798.

53 *Balbai v Mahadu* (1924) 48 Bom 387, 80 IC 529, AIR 1924 Bom 349. See also *Dharma v Ramkrishna* (1886)10 Bom 80; *Gopal v Vishnu* (1899) 23 Bom 250.

54 *Champabai v Raghunath Rao* (1946) Nag 217.

55 *Vythilinga v Vijayathammal* (1883) 6 Mad 43; *Pichuvayyan v Subbayyam* (1890)13 Mad 128, 129; *Lingayya v Chengalammal* (1925) 48 Mad 407, 89 IC 923, AIR 1925 Mad 272; *Muthuswami Thevar v Chindambara Thevar* (1949) 75 IA 293, AIR 1949 PC 18, (1949) Mad 604.

56 *Nanjegowada v Channamma* AIR 1952 Mys 40.

57 *Himoti Bai v Manoharsingh* (1945) Nag 425. However, see *Vishwasrao v Sahebrao* AIR 1958 Bom 375, (1958) Bom 531, 60 Bom LR 413.

58 *Jhunka v Nathu* (1913) 35 All 263, 18 IC 960.

59 *Tatayya v Nakaraju* AIR 1958 AP 611.

60 *Sriramuthu v Ramayya* (1881) 3 Mad 15.

61 *Bhagwan Singh v Bhagwan Singh* (1899) 21 All 412, 26 IA 153; *Walbai v Heerbai* (1910) 34 Bom 491, 4 IC 277 (mother's sister's son cannot be adopted, though he may also happen to be father's brother's son), *Ishwari Prasad v Rai Hari Prasad* (1927) 6 Pat 506, 106 IC 620, AIR 1927 Pat 145.

relations incapable of being adopted. However, this prohibition has been confined to the specific instance of the daughter's son, sister's son, and mother's sister's son, and it has been held that it does not extend to other relations. It has thus been held that a Hindu may adopt his half-brother,[62] his brother's son's son,[63] his paternal uncle's son,[64] father's first cousin,[65] his wife's brother,[66] his wife's brother's son,[67] his wife's sister's son,[68] his father's sister's son,[69] or his daughter's husband.[70] In a Patna case, where a widow was authorised by her husband to take his stepbrother in adoption, with liberty to her to adopt another boy, if there was 'any obstacle to take the stepbrother in adoption according to the *shastras*,' it was held that the '*shastras*' included the *Dattaka Mimansa*, and since *Dattaka Mimansa* prohibited the adoption of a stepbrother, the widow was justified in not adopting him and in adopting another boy, even though adoption of a stepbrother was sanctioned by judicial decisions.[71] The Allahabad High Court has held that the adoption of a father's brother's daughter's son is prohibited and therefore invalid.[72]

A widow adopting to her husband has no greater power than what the husband had. Thus, she cannot adopt her husband's daughter's son or his sister's son or his mother's sister's son, these being persons whom the husband himself could not have adopted. At the same time, her power of adoption is not less extensive than that of her husband. Thus, she may adopt her husband's brother, as the husband himself could have done.[73] Similarly, she may adopt her own brother's son as the husband himself could have done. The adoption is valid on the ground that she could not have been lawfully married to her own brother. The rule that no one can be adopted as a son, whose mother the adopter could not have legally married, does not apply *e converso*.[74]

62 *Gajanan v Kashinath* (1915) 39 Bom 410, 28 IC 978, AIR 1915 Bom 99.
63 *Haran Chunder v Hurro* (1881) 6 Cal 41.
64 *Virayya v Hanumanta* (1891) 14 Mad 459.
65 *Mallappa v Gangava* (1919) 43 Bom 209, 49 IC 517, AIR 1919 Bom 85.
66 *Ruve Bhudr v Roopshunkur* (1823) 2 Bom 656; *Chanpabai v Raghunath Rao* (1, Nag 217.
67 *Sriamulu v Ramayya* (1881) 3 Mad 15.
68 *Ragavendra v Jayaram* (1897) 20 Mad 283; *Saraswati v Debendra* AIR 1956 Pat 340 (wife's sister's daughter's son).
69 *Ramkrishna v Chimnaji* (1913) 15 Bom LR 824, 21 IC 34.
70 *Sitabai v Parvatibai* (1922) 47 Bom 35, 69 IC 172, AIR 1922 Bom 239.
71 *Rajendra Prasad v Gopal Prasad* (1928) 7 Pat 245, 108 IC 545, AIR 1929 Pat 51.
72 *Babu Ram v Kishen Dei* AIR 1963 All 509, (1963) All 102.
73 *Shripad v Vithal* (1925) 49 Bom 615, 89 IC 197, AIR 1925 Bom 399.
74 *Bai Nani v Chunilal* (1898) 22 Bom 973; *Jai Singh v Bijai Pal* (1905) 27 All 417; *Puttu Lal v Parbati Kunwar* (1915) 42 IA 155, 37 All 359, 29 IC 617, AIR 1915 PC 15.

CUSTOM

An adoption, though prohibited by the rule laid down in sub-§ (3), may be valid, if recognised by custom. Thus, the adoption of a daughter's son, though prohibited by this rule, has been held to be valid among the Deshastha Smartha Brahmans of the Southern Maratha country.[75] The adoption of a daughter's son is also recognised by custom among Telugu Brahmans in the Madras state,[76] and among Khatris of Amritsar,[77] also the adoption of a brother's daughter's son, a daughter's son and a sister's son among Tamil Brahmins,[78] of a brother's daughter's son among South Kanara Rajputs,[79] and of a sister's son among the Bhora Brahmans of Uttar Pradesh.[80] By reason of custom prevailing in the Madras state, the adoption by a Kshatriya, whose *gotra* is the same as that of the natural mother of the adopted boy, is valid.[81] Similarly, the adoption of a sister's son amongst Vaisyas is allowed by custom;[82] and of a brother's son amongst Marwari Jains, who have migrated from certain places.[83] In Punjab, generally, a daughter's son and sister's son have by custom been considered worthy of adoption.[84] The custom of adopting a daughter's son must be established by sufficient evidence and all the conditions for a valid custom must be satisfied. The onus cannot be discharged by merely contending that the parties can be classified only as Sudras.[85]

The basis of the rule being the marriage between agnates is prohibited, wherever the basis is ignored in the most prominent cases, namely, the sister's son and the daughter's son, it is submitted that the rule must be regarded as destroyed by the exceptions, in all cases where the adopted boy's mother is an agnate of the adopter.

For the applicability of the doctrine of *factum valet*, see notes under § 434.

§ 481. ONLY SON

An only son may be given and taken in adoption.[86]

75 *Chandrabai v Hanuman Gurnath* (1932) 56 Bom 298, 140 IC 235, AIR 1932 Bom 398.
76 *Visu asundara v Somasundara* (1920) 43 Mad 876, 59 IC 609, AIR 1920 Mad. Also see *KS Gopalacharlar v Krishamacharlar* AIR 1955 Mad 559, (1955)1 MLJ 523.
77 *Parma Nand v Shiv Charan* (1921) 2 Lah 69, 59 IC 256, AIR 1921 Lah 147; *Roshan Lal v Samar Nath* (1938) Lah 173, AIR 1973 Lah 626.
78 *Vayidinada v Appu* (1886) 9 Mad 44.
79 *Sooratha v Kanaka* (1920) 43 Mad 867, 59 IC 585, AIR 1920 Mad 648.
80 *Chain Sukh Ram v Parbati* (1892) 14 All 53.
81 *Simhadari v Satyanarayana* (1946) Mad 475.
82 *Navaneethammal v Kamalammal* (1947) Mad 510.
83 *Mt Gigi v Mt Panna* AIR 1956 Assam 100.
84 *Deoki Nandan v Rikhi Ram* AIR 1960 Punj 542.
85 *Mariammal v Govindammal* AIR 1985 Mad 5.
86 *Sri Balusu Gurulingaswami v Sri Balusu Ramalakshmamma* (1899) 22 Mad 398, 26 IA 113; *Vyas v Vyas* (1900) 24 Bom 367; *Krishna v Paramshri* (1901) 25 Bom 537.

In considering the factum of adoption, however, the court keeps it in mind that ordinarily an only son is neither given nor taken in adoption.[87] For the applicability of the doctrine of *factum valet*, see notes under the same head to § 434.

§ 482. ORPHAN

The adoption of an orphan is not valid,[88] except by custom.[89]

The reason of the rule is that a boy can be given in adoption only by his father or his mother, which cannot be done in the case of an orphan. The doctrine of *factum valet* cannot be invoked to validate such an adoption.[90]

§ 483. STRANGER

A stranger may be adopted, though there are near relations.[91] For the applicability of the doctrine of *factum valet* see notes under § 434.

§ 484. ADOPTION OF SAME BOY BY TWO PERSONS

Two persons cannot adopt the same boy, even if the persons adopting are brothers. In such a case, the adoption by each of them is invalid.[92]

§ 485. SIMULTANEOUS ADOPTION

The simultaneous adoption of two or more persons is invalid.[93]

Illustration

A has two wives, *B* and *C*, but has no son. *A* being desirous to give a son to each of them, authorises them to adopt two sons

87 *Raghavamma v Chenchamma* AIR 1964 SC 138.

88 *Basheliappa v Shivlingappa* (1873) 10 Bom HC 268; *Vaithilingam v Natesa* (1914) 37 Mad 529, 15 IC 299, AIR 1914 Mad 460; *Mareyya v Ramalakshmi* (1921) 44 Mad 260, 60 IC 141, AIR 1921 Mad 331.

89 *Ramkishore v Jainarayan* (1921) 48 IA 405, 49 Cal 120, 64 IC 782, AIR 1922 PC 2 (Dhusars of Punjab); *Parshottam v Venichand* (1921) 45 Bom 754, 11 IC 492, AIR 1921 Bom 147 (Jains of Idar state); *Sukhbir v Mangeisar* (1927) 49 All 302, 100 IC 778, AIR 1927 All 252 (*Jagir* situated in Gwalior); *Kunwar Basant Singh v Kunwar Brij Raj Saran Singh* (1935) 62 IA 180, 57 All 494, 37 Bom LR 805, 156 IC 864, AIR 1935 PC 132 (Jats of Ballabgarh).

90 *Mareyya v Ramalakshmi* (1921) 44 Mad 260, 60 IC 141, AIR 1921 Mad 331.

91 *Srimati Womma v Gokoolanund* (1878) 3 Cal 587, 5 IA 40; *Dharma v Ramkrishna* (1886) 10 Bom 80.

92 *Raj Coomar v Bissessur* (1884) 10 Cal 688, 696–97.

93 *Akhoy Chunder v Kala Pahar* (1886) 12 Cal 406, 12 IA 198; *Surendro Keshub v Doorgasoonder* (1892) 19 Cal 513, 19 IA 108.

simultaneously, one to be adopted by *B* and the other by *C*, the authority to adopt is invalid, and the adoptions (if any) made pursuant to such authority are also invalid.

Sastri G Sarkar does not approve of these decisions, and observes in his work on Hindu law, that notwithstanding these decisions, such adoptions are made and recognised by Hindu society. As to successive adoptions, see § 468.

§ 486. *DVYAMUSHYAYANA* OR SON OF TWO FATHERS

(1) Where a person gives his son to another under an agreement that he should be considered to be the son of both the natural and the adoptive fathers, the son so given in adoption is called *dvyamushyayana*. In this form of adoption, it is essential to prove such an agreement and it should also be proved that there was the ceremony of giving and taking of the adoptive son.[94]

(2) A *dvyamushyayana* inherits both in his natural and adoptive families.[95] In the case of a person adopted in the *nitya dvyamushyayana* form, his sons born after the adoption are entitled to participate in the inheritance of the adopter.[96]

(3) Where a person gives his only son in adoption to his brother, the adoption must be presumed to be in the *dvyamushyayana* form, unless a stipulation is proved that the adoption was to be in the ordinary form. In Bombay, however, it has been held that there is no such presumption, and that a person alleging that an adoption was in the *dvyamushyayana* form, must prove that there was an agreement to that effect, even if the person adopted was the only son of a brother.[97] However, it is not necessary that the adoptive father and the natural father should be brothers.[98]

(4) Where a *dvyamushyayana* dies, his property is taken jointly and equally by the adoptive mother and the natural mother. If, after this, the adoptive mother adopts another son, the natural mother is not divested of the property inherited.[99]

94 *Dhani Bai v Neem Kanwar* AIR 1972 Raj 9.

95 *Srimati Wooma v Gokoolanund* (1878) 3 Cal 587, 598, 5 IA 40, 50–51; *Krishna v Paramshri* (1901) 25 Bom 537; *Bebari Lal v Shib Lal* (1904) 26 All 472; *M Muthiah v Collector of Estate Duty* (1986) SC 1863.

96 *Ganpatrao Shipatrao v Balkrishna Gururao* (1942) Bom 340, 201 IC 633, AIR 1942 Bom 193, 44 Bom LR 333. As to succession to a *dvyamushyayana* son, see § 43(7).

97 *Laxmipatirao v Venkatesh* (1917) 41 Bom 315, 38 IC 552, AIR 1916 Bom 68; *Huchrao v Bhimarao* (1918) 42 Bom 277, 44 IC 851, AIR 1917 Bom 10.

98 *Malakappa v Mallappa* AIR 1976 Kant 32.

99 *Kantawa v Sangangowda* (1942) Bom 303, 20 IC 863, AIR 1942 Bom 143, 44 Bom LR 269.

§ 487. ADOPTION OF DAUGHTERS BY *NAIKINS* (DANCING GIRLS)

According to the Bombay and Calcutta decisions, the adoption of a daughter by a *naikin* or dancing girl is invalid, notwithstanding a custom to the contrary, such custom being regarded as immoral.[1] According to Madras decisions, it is valid, provided the adoption is not made to disposing of the girl for the purposes of prostitution.[2] Even two girls may be adopted, provided the practice is sanctioned by custom.[3]

IV. Act of Adoption And Ceremonies Incidental To It

§ 488. CEREMONIES RELATING TO ADOPTION

(1) The ceremonies relating to an adoption are:

(a) the physical act of giving and receiving, with intent to transfer the boy from one family into another (§ 489);
(b) the *datta homam*, ie, oblations of clarified butter to fire (§ 490); and
(c) other minor ceremonies, such as *putresti jag* (sacrifice for male issue).

(2) The physical act of giving and receiving is essential to the validity of an adoption (§ 489).

As to *datta homam*, it is not settled whether its performance is essential to the validity of an adoption in every case (§ 490).

As to the other ceremonies, their performance is not necessary to the validity of an adoption.[4]

(3) No religious ceremonies, not even *datta homam*, are necessary in the case of Sudras;[5] nor are religious ceremonies necessary amongst Jains[6] or in the Punjab.[7]

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1 *Mathura v Esu* (1880) 4 Bom 545; *Hira v Radha* (1913) 37 Bom 116, 17 IC 834; *Henouer v Hanscower* (1818) 2 Mori Dig 133; *Ghasiti v Umrao Jan* (1893) 20 IA 193, 201–202. However, see *Manjamma v Sheshagirirao* (1902) 26 Bom 491, 495, where the adoption was by a prostitute, who was not a *naikin* attached to any temple.

2 *Venku v Mahalinga* (1888) 11 Mad 393; *Muttukannu v Paramasami* (1889) 12 Mad 214. However, see *Guddati v Ganapati* (1912) 23 MLJ 493, 17 IC 422; *Venkatachallamma v Cheekati* (1953) Mad 741, AIR 1953 Mad 571.

3 *Gangamma v Kuppammal* (1938) Mad 789.

4 *Sheolotan v Hinrgun* (1917) 2 PLJ 481, 41 IC 375, AIR 1917 Pat 633; *Katki v Lakpati* (1915) 20 CWN 19, 27 IC 39, AIR 1915 Cal 214; *Raja Makund Deb v Sri Jagannath* (1923) 2 Pat 469, 482, 72 IC 230, AIR 1923 Pat 423; *Asita Mohan v Nirode Mohan* (1916) 20 CWN 901, 35 IC 127, AIR 1917 Cal 292 (Sudras).

5 *Shoshinath v Krishnosunderi* (1881) 6 Cal 381, 388, 7 IA 250, 255; *Indromoni v Beharilal* (1880) 5 Cal 770, 7 IA 24; *Bal Gangadhar Tilak v Shrinivas* (1915) 42 IA 135, 151, 39 Bom 441, 446, 29 IC 639, AIR 1915 PC 7; *Asita Mohan v Nirode Mohan* (1916) 20 CWN 901, 35 IC 127, AIR 1917 Cal 292 (*putresti jag* ceremony); *Sundari v Bhimraj* 52 CWN 339; *Deorao v Raibhan* (1954) Nag 558, AIR 1954 Nag 357; *Nago v Sukya* AIR 1953 Nag 239.

6 *Lakshmi Chand v Gatto Bai* (1886) 8 All 319. Also see *Gulab Devilal* AIR 1951 Raj 136 and see *Madhusudan Das v Narayan Bai* AIR 1983 SC 114, and see *Ranjit Kumar v Kamal Kumar* AIR 1982 Cal 493 (see Chapter on Jains).

7 *Hem Singh v Harnam Singh* AIR 1954 SC 581; *Ajit Singh v Fateh Singh* AIR 1962 SC 412.

§ 489. GIVING AND RECEIVING

(1) The physical act of giving and receiving is absolutely necessary to the validity of an adoption. This is not only in the case of the twice-born classes, but also in the case of Sudras.[8] This ceremony is of the essence of adoptions, and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption, though registered, but not accompanied by an actual delivery of the boy, does not operate as a valid adoption.[9] To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another.

No particular form is prescribed for the ceremony, but the law requires that the natural parent should hand over the adoptive boy and the adoptive parent should receive him. The nature of the ceremony may vary depending upon the circumstances of the case. However, the ceremony of giving and taking should necessarily be there.[10] In case of an old adoption, strict proof of the performance of the ceremonies may not be available. An adoption acquiesced in and recognised for a number of years by the person making the adoption and a long course of recognition on the part of persons who would be expected to know of the fact and who were best acquainted with the circumstances, can give rise to the inference that the conditions relating to the adoption were fulfilled.[11]

(2) Diverse circumstances may necessitate that the act of actual giving or taking should be delegated to a third person and therefore, the parents after exercising their volition to give and take the boy in adoption, can both or either of them delegate the physical act of handing over the boy or receiving him by way of adoption to a third party.[12]

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8 *Sosbinath v Krishnosunderi* (1881) 6 Cal 381, 7 IA 250; *Ranganayakamma v Alwar* (1890) 19 Cal 452, 19 IA 101; *Balak Ram v Nanun Mal* (1930) 11 Lah 503, 128 IC 532, AIR 1930 Lah 579.

9 *Shoshinath v Krishnasunderi* (1881) 6 Cal 381, 388, 7 IA 250, *Sreenaram v Sreemutty* (1873) 11 Beng LR 171, IA Supp Vol 149. Reference however, may be made to *Biradh Mal v Prabhavati* 41 Bom LR 1061, AIR 1939 PC 152; *Bhajandas v Nanuram* AIR 1954 Raj 17; *Dhani Bai v Neem Kanwar* AIR 1972 Raj 9; *Ramprasad v Pannalal* AIR 1954 Raj 36; *Ramji Das v Mangal Sen* AIR 1954 Pepsu 66; *Neeleva v Gursbiddappa* (1937) 39 Bom LR 211, AIR 1937 Bom 169; *Permanand v Laxminaram* AIR 1955 MB 129.

10 *Lakshman Singh v Rup Kanwar* (1962) SCJ 472, AIR 1961 SC 1378; *Debi Prasad v Tribeni Debi* AIR 1970 SC 1286; *Moolchand v Amritbai* (1976) MPLJ 382 (but the law does not prescribe any particular form or mode of giving and taking) *M Srinivasan v John Bentic* AIR 1989 Mad 334.

11 *Debi Prasad v Tribeni Debi* AIR 1970 SC 1286; *Pannalal v Chiman Parkas* AIR 1947 Punj 54; *Balinki v Gopalkrishna* AIR 1964 Ori 117.

12 *Lakshman Singh v Rup Kanwar*, (1962) SCJ 472, AIR 1961 SC 1378.

However, the power (or right) to give a son in adoption cannot be delegated to any person.[13] The delegation can only be of the physical act mentioned above. Accordingly, the father or mother may authorise another person to perform the physical act of giving a son in adoption to a named person,[14] and can delegate someone to accept the child in adoption on his or on her behalf.[15]

§ 490. *DATTA HOMAM*

(1) *Datta homam* is not essential in the case of an adoption in the twice-born classes when the adopted son belongs to the same *gotra* as the adoptive father.[16] There is a conflict of opinion whether the same is necessary in other cases.

In Madras, it was held in *Singamma v Venkatacharulu*,[17] a case decided in 1868, that neither *datta homam* nor any other religious ceremony was necessary even among Brahmans. This decision was followed in a later case where the parties were Kshatriyas,[18] and in another case in which the parties were Nambudri Brahmans.[19] The ruling in *Singamma*'s cases was, however, doubted by the same High Court in the undermentioned cases.[20] It is now held that *datta homam* is not necessary for the adoption of a daughter's son.[21] In an Allahabad case, where the parties were Dakhani Brahmans, it was held that when the boy was the son of a daughter or of a brother, mere giving and taking was sufficient.[22] In Bombay, it has been held that *datta homam* is necessary.[23] The Judicial Committee has not expressed any definite opinion on the question, but there is some indication of an inclination towards the view that *datta homam* is necessary.[24]

13 *Bhagvandas v Rajmal* (1873) 10 Bom HC 241; *Basbetippa v Shivlingappa* (1873) 10 Bom HC 268.

14 *Jamnabai v Raychand* (1883) 7 Bom 225; *Shamsing v Santabai* (1901) 25 Bom 551.

15 See § 477. *Behara Viyyamma v Ayyagari Veera Venkata Satya Suryaprakasa Rao* (1942) Mad 608, AIR 1942 Mad 379; *Govindram v Sheoprasad* (1948) Nag 98.

16 *Valubai v Govind* (1900) 24 Bom 218; *Bal Gangadhar Tilak v Shrinivas Pandit* (1915) 42 IA 135, 39 Bom 441, 29 IC 639, AIR 1915 PC 7; *Govindayyar v Dorasami* (1888) 11 Mad 5 (FB), (1915) 20 CWN 19, 27 IC 39, AIR 1915 Cal 214; *Velavelli v Mangamma* (1904) 27 Mad 538, 539.

17 (1868) 4 MHCR 165.

18 *Chandramala v Muktamala* (1883) 6 Mad 20.

19 *Shankaran v Kesavan* (1892) 15 Mad 6.

20 *Venkata v Subbadra* (1884) 7 Mad 548; *Govindayyar v Dorasami* (1888) 11 Mad 5, 9–10 (FB); *Ranganyakamma v Alwar* (1890) 13 Mad 214, 220 (Vaisyas); *Subbarayar v Subbammal* (1898) 21 Mad 497.

21 *Saminatha v Vageesan* (1940) Mad 98, 185 IC 37, AIR 1939 Mad 849.

22 *Atmaram v Madho Rao* (1884) 6 All 276 (FB).

23 *Govindprasad v Rindabai* (1925) 49 Bom 515, 87 IC 472, AIR 1925 Bom 289 (Kanoj Brahmans).

24 *Shosbinath v Krishnasunderi* (1881) 6 Cal 381, 388, 7 IA 250, 255, *Bal Gangadhar Tilak v Shrinivas Pandit* (1915) 42 IA 135, 149–50, 39 Bom 441, 29 IC 639, AIR 1915 PC 7.

(2) The *datta homam* may be performed at any time after the physical act of giving and receiving; it may be performed even after the death of the adoptive father,[25] or of the natural father of the boy.[26]

(3) The ceremony of *datta homam* may be performed by the parties who give and receive the boy in adoption, or the performance thereof may be delegated by them to others.[27]

Datta Homam

Datta homam is the sacrifice of the burning of clarified butter, which is offered as a sacrifice to fire by way of religious propitiation or oblation.[28]

Pollution

It follows from sub-§ (3), that pollution on account of the death or birth of a relation does not invalidate an adoption made during the period of such pollution. The secular formalities of giving and receiving may be performed by the adopter, though he may be in a state of pollution, while the religious part of the ceremony may be delegated to a priest or to a relation free from impurity. Even the physical act of giving in adoption may be delegated to another person. However, the right or the power to give in adoption can be exercised only by the father or the mother, and cannot be delegated to any person.

§ 491. FREE CONSENT

Every valid adoption implies the free consent to the adoption of the person giving and the person receiving in adoption, and also, it seems, of the person adopted, if he is a major at the date of adoption.[29]

Where the consent to an adoption is obtained by misrepresentation, coercion, fraud, undue influence, or mistake, the consent is not free, and the adoption is voidable at the option of the party whose consent was so obtained.[30] However, it may be ratified by such party, provided the ratification does not prejudice the rights of other persons.[31]

25 *Sabbarayar v Subbammal* (1898) 21 Mad 497; *Setharamamma v Suryanarayana* (1926) 49 Mad 969, 67 IC 615, AIR 1926 Mad 1184; *China Ana Muthuvayyangar v Thiruver gadammal* (1942) Mad 682, 204 IC 393, AIR 1942 Mad 395.

26 *Venkata v Subhadra* (1884) 7 Mad 548, 550.

27 *Lakshmibai v Ramchandra* (1898) 22 Bom 590; *Santappayya v Rangapayya* (1895) 18 Mad 397

28 *Bal Gangadhar Tilak v Shrinivas Pandit* (1915) 42 IA 135, 148, 39 Bom 441, 463, 29 IC 639, AIR 1915 PC 7.

29 *Sircar's Law of Adoption*, 2nd edn, pp 279, 280, *Strange's Hindu Law*, Vol 1, p 88.

30 *Bayabai v Bala* (1870) 7 Bom HC App 1; *Ranganakamma v Alwar* (1890) 13 Mad 214, 220–40; *Somasekhara v Subbadranaji* (1882) 6 Bom 524; *Sri Rajah Venkata v Sri Rajah Rangayya* (1906) 29 Mad 437; *Shri Sitaram v Shri Haribar* (1911) 35 Bom 169, 179–80, 8 IC 625; See also *Esban Kishor v Harris Chandra* (1874) 13 Beng LR App 42.

31 *Sri Rajah Venkata v Sri Rajah Rangayya* (1906) 29 Mad 437; Contra *Sattiraju v Venkatswami* (1917) 40 Mad 925, 930, 936–37, 40 IC 518, AIR 1918 Mad 1072.

§ 492. CONSIDERATION FOR ADOPTION

An adoption is valid merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption, though the promise to pay cannot be enforced in law.[32]

§ 493. ADOPTION CANNOT BE CANCELLED: RENUNCIATION BY ADOPTED SON OF RIGHT OF INHERITANCES

A valid adoption once made cannot be cancelled by the adoptive father,[33] or other parties thereto, nor can the adopted son renounce his status as such and return to his family of birth. However, there is nothing to prevent him from renouncing his right of inheritance in the adoptive family, in which case, the inheritance would go to the next heir.[34]

The *Goda-datta* form of adoption was a customary form prevalent in certain families and could, by custom, be revoked and annulled at the instance of either party.[35]

V. Results of *Dattak* Adoption

§ 494. RESULTS OF ADOPTION

(1) Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. It confers upon the adoptee, the same rights and privileges in the family of the adopter as the legitimate son, except in a few cases. Those cases relate to marriage and adoption (sub-s (3) below), and to the share on a partition between an adopted and after-born son.[36]

(2) But while the adopted son acquires the rights of a son in the adoptive family, he loses all the rights of a son in his natural family,

32 *Murugappa v Nagappa* (1906) 29 Mad 161; *Narayan v Gopalrao* (1922) 46 Bom 908, 67 IC 850, AIR 1922 Bom 382.

33 *Bhoopathi Nath Chakrabarti v Basanta Kumaree Debee* AIR 1936 Cal 556; *Asa Bai v Prabbu Lal* AIR 1960 Raj 304, 10 Raj 194; *Deoki Nandan v Rikhi Ram* AIR 1960 Punj 542; *Amar Nath v Mukhi Ram* (1983) 85 PLR 440.

34 *Ruye Bhudra v Roopshunkur* (1824) 2 Bor Rep 656; *Lakshmappa v Ramaya* (1875)12 Bom HC (AC) 364, 388; *Mahadu v Bayaji* (1895) 19 Bom 239; *Lunkurn v Birji* (1930) 57 Cal 1322, 130 IC 250, AIR 1931 Cal 219; *Gulkandi v Prablad* AIR 1968 Raj 51.

35 *Daniraiji v Vahuji Mabaraj Chandraprabba* AIR 1975 SC 784 (also see under Adoption and Maintenance Act 1956).

36 See § 497. *Pratapsing v Agarsingji* (1919) 46 IA 97, 43 Bom 778, 50 IC 457, AIR 1918 PC 192; *Nagindas v Bachoo* (1916) 43 IA 56, 67–68, 40 Bom 270, 287–88, 32 IC 403, AIR 1915 PC 41; *Haribhau v Hakim* AIR 1951 Nag 249, (1951) Nag 99, *Kalagouda v Annagouda* AIR 1962 Mys 65.

including the right of claiming any share in the 'estate of his natural father' or natural relations, or any share in the coparcenary property of his natural family. This follows from a text of Manu (IX, Verse 142).

Adoption does not under the Bengal School of Hindu law (Dayabhaga law), divest any property which was vested in the adopted son by inheritance, gift, or under any power of self-acquisition before his adoption.[37]

As regards cases governed by Mitakshara law, it has been held by the Madras High Court, that an adoption does not divest any property which has vested in the adopted son prior to the adoption; it has accordingly been held by that court that where coparcenary property has already vested in a person as the sole surviving coparcener, and such person is subsequently adopted into another family, he does not, by adoption, lose his rights in that property.[38] Following this decision, it has been held by the Bombay High Court that a Hindu does not, on his adoption, lose the share which he has already obtained on partition from his natural father and brothers in his family of birth, the reason given being that such share cannot be said to be 'the estate of his natural father'.[39] The same principle has been applied when the partition was between the grandfather and his son, and grandsons and one of the grandsons, who got a share on partition was subsequently adopted into another family.[40] However, it has been held by the same High Court that where property has vested in a person as the heir of his father, and such person is subsequently adopted into another family, he loses by adoption, his rights in that property, that property being 'the estate of his natural father'.[41] This view has not been accepted by the Calcutta High Court, which has all along taken the view that a son given in adoption will not be divested of any property of which he had become owner by inheritance before his adoption.[42] The Punjab[43] and Orissa[44] High Courts also have taken the latter view.

(3) Though adoption has the effect of removing the adopted son from his natural family into the adoptive family, it does not sever the tie of

37 *Bebari Lal v Kailas Chunder* (1896) 1 CWN 121; *Shyamcharan v Sricharan* (1929) 56 Cal 1135, 120 IC 157, AIR 1929 Cal 337; *Rakhalraj v Debendra* AIR 1948 Cal 356.

38 *Sri Rajah Narsimha v Sri Rajah Rangayya* (1906) 29 Mad 437; *Sarju Bai v Harriam* (1987) MP 143.

39 *Mahableshwar v Subramanya* (1922) 47 Bom 542, 72 IC 309, AIR 1923 Bom 297; *Manikabai v Gokuldas* (1925) 49 Bom 520, 87 IC 816, AIR 1925 Bom 363.

40 *Babinbai v Kisalal* 51 Bom LR 825, AIR 1950 Bom 47, (1949) Bom 587.

41 *Dattatraya v Govind* (1916) 40 Bom 429, 34 IC 423, AIR 1916 Bom 210.

42 *Rakhalaraj v Deebendra* AIR 1948 Cal 356, 52 CWN 771.

43 *Har Lal v Ganga Ram* AIR 1951 Punj 142, *Rampal v Bhagwandas* AIR 1954 Ajmer 11.

44 *Madhab Sabu v Hatkishore Sabu* AIR 1975 Ori 48. Also see *Har Chand v Ranjit* AIR 1987 P&H 259.

blood between him and the members of his natural family. He cannot, therefore, marry in his natural family within the prohibited degrees, nor can he adopt from that family, a boy whom he could not have adopted, if he had remained in that family.[45]

(4) The only cases in which an adopted son is not entitled to the full rights of a natural-born son are: (1) where a son is born to the adoptive father after the adoption; and (2) where he has been adopted by a disqualified heir. The first of these cases is dealt with in § 497 and the second in § 102.

(5) Where a married person is given in adoption and such person has a son at the date of adoption, the son does not, like his father, lose the *gotra* and right of inheritance in the family of his birth, and does not acquire the *gotra* and right of inheritance in the family into which his father is adopted. The wife passes with her husband into the adoptive family, because according to the *Shastras* husband and wife form one body.[46] In such a case, if the husband dies, the wife cannot adopt her son, because she has lost the power to give and she cannot be both giver and taker.[47] However, it has been held that when a married Hindu is given in adoption, and at the time of adoption, his wife is pregnant, and a son is born to him, the son on his birth, passes into the adoptive family and is entitled to inherit in that family, the reason given being that such a son is born into the adoptive family and should therefore be treated as a member of that family.[48]

Illustrations

(a) *A* has two sons *B* and *C*. *A* gives *C* in adoption to *X*. *C* is not entitled to inherit to *A* as his son.

(b) *A* and *B*, two brothers, and their respective sons, *C* and *D*, are members of a joint family. *A* gives his son *C* in adoption to *X*. *C* loses all his rights as a coparcener in his natural family. The coparcenary which consisted of four members before the adoption, will be reduced after *C*'s adoption to a coparcenary of three members only.

(c) *A* and his son, *C*, are members of an undivided family. *A* dies, and on his death, *C* becomes entitled to the whole of the coparcenary property, as sole surviving coparcener. *C*'s mother then gives *C* in adoption to *X*. *C* does not, by adoption, lose his rights in that property.

45 *Mootia v Uppon* (1958) Mad SD 117.

46 *Kalgavda v Somappa* (1909) 33 Bom 669, 3 IC 809; *Babarao v Baburao* AIR 1956 Nag 98; *Lekh Ram v Kishono* AIR 1951 Pepsu 99.

47 *Sarat Chandra v Shanta Bai* (1945) Nag 544.

48 *Advi v Fakirappa* (1918) 42 Bom 547, 46 IC 644, AIR 1918 Bom 168. Also see *Tarabai v Babgonda* AIR 1981 Bom 13.

§ 495. SUCCESSION *EXPARTE PATERNA*

Subject to the provisions of § 497, an adopted son is entitled to inherit in the adoptive family as fully as if he were a natural-born son, both in the paternal and in the maternal line. He is entitled to inherit to his adoptive father, and to the father and grandfather and other more distant lineal ancestors of the adoptive father. He is also entitled to inherit to the adoptive father's brothers, the adoptive father's brother's sons and other collateral relations.[49] Conversely, the adoptive father and his relations are entitled to inherit to the adopted boy, as if he were a son born in the adoptive family.

Illustration

A adopts *H* in conjunction with his wife *B*. After *B*'s death *A* marries *C* by whom he has a son *G* born to him. After *C*'s death, *A* marries *D*, there is no issue of this marriage. *A* then dies leaving *H*, *G* and *D*. Subsequently *D* dies leaving stridhana. Who is entitled to *D*'s stridhana? H and *G* as the sapindas of *A* are entitled in equal shares[50] (§ 147).

§ 496. SUCCESSION *EXPARTE MATERNA*

(1) An adopted son is entitled to inherit to his adoptive mother and her relations, as, for instance, her father and brothers. Conversely, the adoptive mother and her relations are entitled to inherit to him.[51]

(2) Even if the wife of the adopter was dead at the date of adoption, the adopted son becomes her son by virtue of the adoption, and is entitled as such to inherit to the relations in her father's family.[52] However, such an adopted son cannot divest the heirs of the deceased mother of property to which they had already succeeded before the adoption took place.[53]

(3) Where a Hindu, having two or more wives, makes an adoption in conjunction with one of them specially selected for the purpose, the wife

49 *Padma Kumari v Court of Wards* (1882) 8 Cal 302, 8 IA 229; *Chandreshwar v Bisheshwar* (1926) 5 Pat 777, 101 IC 209, AIR 1927 Pat 61 (Mithila).

50 *Gangadhar v Hira Lal* (1916) 43 Cal 944, 34 IC 10, AIR 1917 Cal 575.

51 *Kali Komul v Uma Sunker* (1884) 10 Cal 232, 10 IA 138; *Radha Prasad v Ranee Mani* (1906) 33 Cal 947; *Dattatraya v Gangabai* (1922) 46 Bom 54, 77 IC 17, AIR 1922 Bom 321; *Sowntharapandian Ayyangar v Periaveri Thevan* (1933) 56 Mad 759, 145 IC 534, AIR 1933 Mad 550.

52 *Sundaramma v Venkatasubba* (1926) 49 Mad 941, 97 IC 145, AIR 1926 Mad 1203.

53 *Sivagami Achi v Samasundaram* AIR 1956 Mad 323 overruling earlier decisions of the same High Court to the contrary. Also see *Ramakrishanayya v Narasayya* AIR 1957 AP 109.

so selected, ranks as the adoptive mother, and the other wives as mere stepmothers. The adopted son inherits only to the adoptive mother and to her relations, and she alone and her relations can inherit to him.

The same principle applies when an adoption is made by one of several widows in pursuance of an authority left to her alone.[54] In other cases, it is not settled whether the adopted son inherits to all the wives of the adoptive father and their relations.[55] The High Court of Madras has held that even if two wives are associated in the adoption ceremony, the senior wife by reason of the special status and priority given to her becomes the adoptive mother for tracing the line of succession *ex parte materna* from the adopted son.[56]

Illustration

A, who has two wives *B* and *C*, adopts a son *D* in conjunction with his wife *B*. *A* dies, and on his death, *D* succeeds to his estate. *D* then dies unmarried. *B* is entitled to inherit to *D* as his mother to the entire exclusion of *C*.[57] Where the adoptive father has remarried before adoption and has that wife living at the time of adoption, the deceased wife of the adoptive father cannot be designated or nominated as the adoptive mother of the adopted son.[58]

§ 497. SON BORN AFTER ADOPTION

(1) The statement of law in the above sections, that an adopted son is entitled to inherit just as if he were a natural born son, is subject to the exception mentioned below:

Where a son is born after adoption to the adoptive father: (a) the adopted son does not, on a partition between him and the after-born natural son, share equally with him as he would have done if he were a natural son, but he takes:

(i) in Bengal, one-third of the adoptive father's estate;
(ii) in Benares, one-fourth of the estate;[59] and
(iii) in the Bombay and Madras states, one-fifth of the estate;[60] and

54 *Annapurni v Forbes* (1899) 23 Mad 1, 26 IA 246.
55 *Mayne's Hindu Law*, s 167.
56 *Venugopala Reddiar v Krishanaswamy* AIR 1971 Mad 262.
57 *Annapurni v Forbes* (1900) 23 Mad 1, 26 IA 246.
58 *Thriumaleshwara v Ganapayya* AIR 1953 Mad 132, (1952) 2 MLJ 716.
59 A different view has been expressed in *Moti v Lachman* AIR 1960 Raj 122, 10 Raj 225.
60 *Giriappa v Ningappa* (1893) 17 Bom 100; *Melappa v Guramma* AIR 1956 Bom 129; *Ayyavu v Niladatchi* (1862) 1 Mad HC 45.

(b) if the estate is impartible, the *aurasa* son alone succeeds to it.[61]

Except as previously mentioned, an adopted son is entitled to the same share as a legitimate son (Illust (b)).

(2) Among Shudras in Madras and Bengal, an adopted son shares equally with the after-born natural son;[62] in Bombay, he takes one-fifth of the estate.[63] In Central Provinces and Rajasthan, where the Benares school prevails, he takes one-fourth of the estate.[64]

(3) The same rules apply on a partition in the lifetime of the father. Thus, in Madras, the father and the after-born natural son will each take four shares and the adopted son one share in the whole estate.

Illustrations

(a) *A*, a childless Hindu, adopts a son, *B*. A son *C* is then born to *A*. *A* dies leaving property worth Rs 3,000. In Bengal, *B* would take Rs 1,000 and *C* Rs 2,000. In Benares, *B* would take Rs 750, and *C*, Rs 2,250. In Bombay and Madras, *B* would take Rs 600, and *C*, Rs 2,400.

(b) *A* and *B* are two brothers. *A* has a son *C*. *B*, who has no son, adopts *D*. The parties are all members of a joint family governed by Mitakshara law. After the death of *A* and *B*, *D* sues *C* for a partition. *D* is entitled to a share equal to that taken by *C*, ie, *D*'s adoptive father's brother's son;[65] where the court overruling the Calcutta and Bombay decision noted below,[66] that *D* was entitled not to a share equal to that taken by *C*, but to the smaller shares as if *C* was after-born son.

§ 498. RIGHTS OF ADOPTED SON IN SEPARATE PROPERTY: POWER OF ADOPTIVE FATHER TO DISPOSE OFF SEPARATE PROPERTY

(1) A Hindu adopting a son does not thereby deprive himself of the power he has, to dispose of his separate property by gift or will. There is no implied contract on the part of the adoptive father, in consideration

61 *Sabebgouda v Shiddarayadu* (1939) Bom 314.

62 *Perrazu v Subbarayadu* (1921) 48 IA 280, 44 Mad 656, 61 IC 690, AIR 1922 PC 71; *Asita v Nirode* (1916) 20 CWN 901, 35 IC 127, AIR 1917 Cal 292.

63 *Tukaram v Ramchandra* (1925) 49 Bom 672, 89 IC 984, AIR 1925 Bom 425; *Guramma v Mallappa* AIR 1964 SC 510, 66 Bom LR 284.

64 *Laxman v Bayabai* (1955) Nag 656, AIR 1955 Nag 241; *Anandi Lal v Onkar* AIR 1960 Raj 251, 10 Raj 160.

65 *Nagindas v Bachoo* (1915) 43 IA 56, 40 Bom 270, 32 IC 403, AIR 1915 PC 41.

66 *Raghubanund Doss v Sadhu Churn* (1878) 4 Cal 425; *Bachoo v Nagindas* (1914) 16 Bom LR 263, 23 IC 912, AIR 1914 Bom 38. See also *Raja v Subbaraya* (1888) 7 Mad 523.

of the gift of his son by the natural father, that he will not dispose of his property by gift or will.[67]

(2) An adopted son does not stand in a better position, with regard to the separate property of his adoptive father, than a natural born son; and there is nothing in Hindu law to prevent a father from disposing of by will his separate property, and so defeating the rights of inheritance of his son.[68] However, where the boy is given in adoption under an express agreement that the adoptive father shall not dispose of his property to the prejudice of the adopted son, the adoptive father cannot dispose of the property to the boy's prejudice.[69]

(3) Alienation by way of gift by the adoptive father of his separate property before the adoption is binding on the adopted son.[70]

The will of a Hindu disposing of his separate property is not revoked by the subsequent adoption of a son by him.[71]

Where a Hindu disposes of his separate property by will, and an adoption is made to him by his widow after his death, the disposition by will is not affected by the adoption, for the will speaks as at the death of the testator, and the property is carried before the adoption takes place.[72] The same principle applies when the last surviving coparcener of a joint family makes a testamentary disposition of his property,[73] or alienates the property in any way before the adoption takes place.[74] The adopted son takes subject to the provisions of the will,[75] or the previous alienations.

This section applies also to property held by a father in Bengal, he having an absolute power to dispose of his property, whether ancestral or self-acquired (§ 274).

67 *Sri Raja Ras Venkata Surya v Court of Wards* (1899) 22 Mad 383, 26 IA 83; *Surendra Nath v Kala Chand* (1907) 12 CWN 668; *Purshotam v Vasudeo* (1871) 8 Bom HCOC 196.

68 *Purshotam v Vasudeo* (1871) 8 Bom HCOC 196; *Subba Reddi v Doraisami* (1907) 30 Mad 369.

69 *Surendroo Keshub v Doorgasoondery* (1892) 19 Cal 513, 536, 19 IA 108, 132; *Nanda Krishna v Bhupendra* AIR 1966 Cal 181.

70 See *Kalyanasundaram v Karuppa* (1927) 54 IA 89, 50 Mad 193, 100 IC 105, AIR 1927 PC 42 (gift before adoption).

71 See *Vinayak v Govindrav* (1969) 6 Bom HCA 224, 229.

72 *Krishnamurthi v Krishnamurthi* (1927) 54 IA 248, 262, 50 Mad 508, 101 IC 779, AIR 1927 PC 139; *Udhao v Bhaskar* (1946) Nag 425; *Lalitha Kumari v Raja of Vizianagram* AIR 1954 Mad 19; *Ramachandra v Anasuyabai* AIR 1969 Mys 64; *Mahadeo v Rameshwar* AIR 1968 Bom 323; Cf *Motilal v Sardar Mal* AIR 1976 Raj 40. Also see *K Venkata Somaiah v Ramasubhamma* AIR 1984 AP 313.

73 *Narayan v Padmanabh* (1950) Bom 480, AIR 1950 Bom 319, 52 Bom LR 313; *Vithalbai v Shivabai* 52 Bom LR 301, AIR 1950 Bom 289; *Bhimaji v Hanmanrao* 52 Bom LR 290, AIR 1950 Bom 271.

74 *Prahlad v Seth Gendalal* (1948) Nag 271.

75 *Venkatanarasimha v Subba Rao* (1923) 46 Mad 300, 73 IC 991, AIR 1923 Mad 376; *Lakshminarasimham v Rajeswari* AIR 1955 AP 278.

§ 499. RIGHTS OF ADOPTED SON IN COPARCENARY PROPERTY

(1) An alienation of coparcenary property, which was valid when it was made, is binding upon a son adopted after the date of alienation (§ 270(3)).[76] Also, see § 336 for the rights of a son adopted after partition.

An alienation by a coparcener of his share in the coparcenary property made without legal necessity or in excess of his interest in the coparcenary property, is binding upon a coparcener adopted after the date of the alienation.[77]

(2) Where an adoption is made by a member of a joint family governed by *Mitakshara* law, the adopted son becomes a member of the coparcenary from the moment of his adoption, and the adoptive father has no power either by deed or will, to interfere with the rights of survivorship of the adopted son in the coparcenary property. The same principle applies where an adoption is made by a sole surviving coparcener, subject, however, to any agreement binding the adopted son such as is mentioned in § 368.[78]

This section applies to ancestral property in cases governed by *Mitakshara* law. Just as the father cannot by deed or will defeat the rights of survivorship of a natural born son, so he cannot defeat the rights of survivorship of an adopted son.

Where the last male owner makes a valid bequest of his property and also gives his widow power to adopt, the adopted son is bound by the disposition in the will. If, under the will, the widow is entitled to a life estate in the property, and the adopted son to a vested remainder and to a certain sum for his maintenance, it is competent to him to convey his interest to the widow and thus enlarge the life-estate into an absolute estate in consideration of the increase of the amount of maintenance.[79]

Where a Hindu *A* adopted a son and by a registered deed of adoption, provided that his wife should enjoy the property in her own right for her life, it was held that the deed did not affect the rights of a son adopted by the widow of A's pre-deceased undivided brother, as it could not be regarded as a family arrangement, as far as the second adopted son is concerned and he was entitled to his share.[80]

76 *Veerana v Sayamma* (1929) 52 Mad 398, 118 EC 821, AIR 1929 Mad 296; *Brij Raj Saran v Aliance Bank of Simla* (1936) 17 Lah 686, AIR 1936 Lah 946; *Puttappa v Basappa* AIR 1953 Mys 113; *Ramchandra v Anasuyabai* AIR 1969 Mys 64.

77 *Basawantappa v Mallappa* (1939) Bom 245, AIR 1939 Bom 178.

78 See also § 500. *Vitla Butten v Yamenamma* (1874) 8 Mad HC 6; *Venkatanarayana v Subbammal* (1915) 43 IA 20, 39 Mad 107, 32 IE 373, (1917) 2 Lah 39, 59 IC 256, AIR 1921 Lah 147.

79 *Basantkumar Basu v Ramshankar Ray* (1932) 59 Cal 859, 138 IC 882, AIR 1932 Cal 600; *Ramachandra v Anasuyabai* AIR 1969 Mys 64.

80 *Laxmibai v Keshavrao* (1941) Bom 306, 197 IC 192, 43 Bom LR 214, AIR 1941 Bom 193.

§ 500. AGREEMENTS CURTAILING RIGHTS OF ADOPTED SON

(1) Where the adopted son was a major at the time of the adoption, he may by an agreement with the adoptive father or the adopting widow made before the adoption consent to a limitation of his rights in the property of his adoptive father.[81]

(2) Where the adopted son is a minor, the question arises whether it is competent to his natural father to enter into an agreement with the adoptive father or the adopting widow limiting his son's rights in the property of the adoptive father. This question came up before the Judicial Committee in *Krishnamurthi v Krishnamurthi*,[82] where it was held that having regard to a consensus of judicial decisions (excepting that in *Jagannadha v Papamma*),[83] an arrangement made on the adoption of a minor, whereby the widow of the adoptive father is to enjoy his property during her lifetime, or for a less period, that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom.[84]

As soon, however, as the arrangements go beyond that, that is, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of Hindu law.

An agreement or consent by the natural father is not effectual in law or by custom to validate any other disposition taking effect after the adoption and curtailing the rights of the adopted son in property in which he acquires a present and an immediate interest by virtue of the adoption.

The High Courts of Madras and Andhra Pradesh,[85] however, have held that an agreement between the adopting mother and the natural father, whereby a portion of her husband's estate is settled upon her for her

81 *Kashbai v Tatya* (1916) 40 Bom 668, 36 IC 546, AIR 1916 Bom 312; *Pandurang v Narmadabai Ramkrishana* (1932) 56 Bom 395, 140 IC 200, AIR 1932 Bom 571; *Punjabrao v Sheshrao* AIR 1962 Bom 175, 62 Bom LR 126.

82 (1927) 54 IA 248, 50 Mad 508, 101 IC 779, AIR 1927 PC 139. See also *Bhasba Rabidat Singh v Indar Kunwar* (1888) 16 IA 53, 59, 16 Cal 556, 564; *Chitko v Janaki* (1874) 11 Bom HC 199; *Ravji v Subramanaya* (1889) 12 Mad 577; *Balwant Singh v Joti Prasad* (1918) 40 All 692, 47 IC 599, AIR 1918 All 115; *Durgi v Kanhaiya Lal* (1927) 49 All 579, 101 IC 678, AIR 1927 All 387.

83 (1893) 16 Mad 400.

84 *Hemendranath v Jnanendra* (1936) 63 Cal 155, 159 IC 1101, AIR 1935 Cal 702; *Banari Das v Sumat Prasad* (1936) 58 All 1019, 164 IC 1047, AIR 1936 All 641.

85 *Raju v Nagammal* (1929) 52 Mad 128, 113 IC 449, AIR 1928 Mad 1289. Reference may be made to *Venkatarao v Venkateshwararao* AIR 1956 AP 1. See *Purnananda v Purnanadam* AIR 1961 AP 435; and see *Ramchandra v Rajaram* AIR 1975 Bom 170.

absolute use and enjoyment with powers of alienation is valid and binding on the adopted son, if the agreement is fair, reasonable and beneficial to him.

(3) Though an agreement going beyond the sanctioned custom does not bind the minor, it is not void, and it may be ratified by the adopted son on attaining majority, in which case he will be held bound by it.[86]

Illustrations

(a) *A*, the sole surviving member of a joint Hindu family, makes a will whereby he bequeaths part of the joint family property to a son, whom he is about to adopt, part to kindred and part to charity. Before the adoption takes place, the natural father of the adopted boy executes a deed by which he consents to the provisions of the will. Immediately thereafter, the testator adopts the son with all due ceremony. The will is not binding upon the adopted son.[87]

(b) A grant of an annual sum for the purpose of lighting lamps in a temple made by the adoptive father at the time of adoption out of joint family property does not bind the adopted son, though, it may be made with the consent of the natural father, unless such grant is recognised by custom as a grant that can be properly made at the time of adoption.[88]

(c) The following agreements are also invalid:

(1) an agreement providing that the widow should have all the rights to which she would have been entitled in the absence of a son;[89]

(2) an agreement enabling the widow to make a gift of a part of her husband's property to her brother;[90]

(3) an agreement enabling the widow to settle immovable property forming part of her husband's estate in favour of her daughter.[91]

In *Krishnamurthi v Krishnamurthi* referred to above, it was held by their Lordships of the Privy Council, that the consent of the natural father as such cannot affect the rights of the boy, for those rights do not arise

86 *Ramasami v Venkataramaiyan* (1879) 2 Mad 91, 101, 6 IA 196, 208; *Kali Das v Biyai Shanker* (1891) 13 All 391, 393; *Subramania Chettiar v Velayudam Chetiar* (1932) 55 Mad 408, 135 IC 311, AIR 1931 Mad 808.

87 *Krishanamurthi v Krishnamurthi* (1927) 54 IA 248, 50 Mad 508, 101 IC 779, AIR 1927 PC 139.

88 *Balkrishna v Shri Uttar* (1919) 43 Bom 542, 50 IC 912, AIR 1919 Bom 101.

89 *Purshottam v Rakhmabai* (1914) 16 Bom LR 57, 23 IC 599, AIR 1914 Bom 28.

90 *Venkappa v Fakirgowda* (1906) 8 Bom LR 346.

91 *Vyasachrya v Venkubai* (1913) 37 Bom 251, 17 IC 741.

until after his rights as a natural father becomes non-existent. It was also held that the natural father cannot bind his son by his consent given as guardian and manager of the estate of his son, for 'the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person'. The only ground on which even an agreement limiting the enjoyment by a widow of her husband's property during her lifetime could be upheld, was that, such an agreement was sanctioned by custom established by the consensus of judicial decisions.

VI. Divesting of Estate on Adoption By Widow

Preliminary note

The question of divesting of estate by adoption can only arise when the adoption is made by a widow after her husband's death. It can never arise when an adoption is made by a man in his lifetime; for, in that case, his estate vests, on his death, in the adopted son as his nearest heir, and it cannot vest in any other person. However, when an adoption is made by a widow after her husband's death, it may be that his estate, at the date of adoption, vested in the widow as his heir or it may be that it has passed to others and vested in them as in ill (c) to § 502. The question then arises whether the adopted son is entitled to the estate of his adoptive father in whosoever's hands it may be at the date of adoption. The answer is in the negative; he is entitled to it in certain cases only, these being the cases set forth in § 502.

Again, if the adoptive father was a member of a joint family governed by *Mitakshara* law at the time of his death, it may be that his interest which passed to his coparceners by survivorship is still vested in them at the date of adoption by the widow, or it may be that it has passed from the sole surviving coparcener on his death to his heirs. In the former case, the adoption vests in the adopted son, the coparcenary interest of his adoptive father. As to the latter case, there was a conflict of opinion. The subject is dealt with in § 506.

The subject matter of § 502 is closely connected with that of § 471, namely, 'Termination of Widow's Power to Adopt'. The two sections relate to the same subject in different forms.

§ 501. VESTING AND DIVESTING OF ESTATE

A valid adoption by a widow, if her husband was divided at the time of his death, may divest an estate of inheritance. It may, if her husband was a member of a joint family governed by *Mitakshara* law, divest rights acquired by survivorship. The question as to what estate of

inheritance is divested by adoption, is dealt with in §§ 502 and 503. The question is in what cases adoption can divest rights acquired by survivorship, the same is dealt with in § 506. (Also, see notes to §§ 471 and 472).

§ 501A. VESTING ON ADOPTION BY WIDOW

There can be divesting not only when adoption is made by a widow, but also when it is made by a widower after the death of his wife. In such cases, the adopted son gets the *stridhana* property of his adoptive mother by divesting the person in whom it had vested in the meantime, eg, the mother or father of the deceased wife of the adopter.[92]

§ 502. DIVESTING OF ESTATE OF INHERITANCE

Where a widow adopts, one of the objects of adoption is to perpetuate the adoptive father's name by securing an heir (§ 447). It now remains to be seen how far this object is attained. §§ 471, 472 and this paragraph may be read together.

In the cases mentioned in § 471(1), the adoption is valid. The widow divests herself, and the adopted son gets the property (vide Illust (a)–(e) and (g) of § 471).

In the cases mentioned in § 472(2)(a), the adoption is invalid. No question of divesting the estate arises (vide Illust (f), (h), (i) and (j) of § 471).

In the cases mentioned in § 471(2)(b), the adoption is valid and divests the property. In the case mentioned in § 471(2)(c) the same result ought to follow.

However, a valid adoption does not divest the estate of a person other than the adoptive father, which had passed to his heir prior to his adoption, even if the adopted son might have succeeded to it if the adoption had been made earlier, ie, prior to the opening of the succession.[93] In *Ramchandra v Balaji*[94] a Full Bench of the Bombay High Court held that if on the death of a sole surviving coparcener or the last male owner, his property has devolved upon his heir by inheritance and on his death, it has vested in his own heir, the subsequent adoption in the family of the sole surviving coparcener or the last male owner will not divest it from such heir. This decision was overruled by the Supreme Court in *Krishnamurthi v Dhruwaraj*.[95]

92 *Subramanian v Muthiah Chettiar* (1945) Mad 638.

93 *Shrinivas v Narayan* [1955] SCR 1, 57 Bom LR 678, AIR 1954 SC 379. Also see § 472.

94 (1955) 57 Bom LR 491 (FB).

95 AIR 1962 SC 59, (1961) 2 SCJ 582, 64 Bom LR 165 overruling 57 Bom LR 491 (FB); see § 472.

Illustrations

(a) *A* dies leaving three widows, and *SW*, the widow of a predeceased son. On *A*'s death, his estate vests in his widows. *SW* then adopts a son to her husband. The adoption does not divest the estate vested in *A*'s widow.[96]

(b) *A* dies leaving a widow *W* and a brother *B*. On *A*'s death, his estate vests in *W* as his heir. *B* then dies leaving a widow *BW* with authority to her to adopt a son. On *B*'s death, his estate vests in *BW* as his heir. While *W* is still alive, *BW* adopts a son *X* to her husband *B*. The adoption is valid, but it will only divest the estate of *B* vested in *BW* so as to vest it in *X*. It cannot divest the estate of *A* vested in *W*.

(i) In the case put in ill (b), *BW* adopts *X* after the death of *W*, and after the estate of *A* has passed on *W*'s death to *A*'s *sapindas*. The adoption will not divest the estate of *A* vested in his *sapindas*.[97]

(ii) *A* dies leaving a widow *W*, and two brothers *B* and *B1*. On *A*'s death, his estate vests in *W* as his heir. *B* dies leaving a son *BS*. Then *B1* dies leaving a widow *B1W* with authority to her to adopt a son to him. While *W* is alive, *B1W* adopts a son *X* to her husband *B1*. The adoption is valid; it will divest the estate of *B1* vested in *B1W* and vest it in *X*, but it will not divest the estate of *A* vested in *W*. On *W*'s death, however, the heirs to the estate of *A* will be his brothers' sons *BS* and *X*, and they will inherit the property in equal shares. However, if *B1W* adopts *X* after *W*'s death and after the estate of *A* has vested in *BS* as his brother's son, *X* cannot on his adoption, demand from *BS* half the property of *A*, not even if the adoption was delayed beyond *W*'s lifetime by the fraud of *BS*.[98] Reference was made to *Shrinivas v Narayan*.[99] Also, see the Patna case cited below.[1]

In a case decided by the Madras High Court, the decision on the question of relation back and divesting of estate was founded on the theory of spiritual benefit.[2]

It is clear from §§ 471 and 472, that adoption made by the widow relates back to the death of the adoptive father. The rights of an adopted son are not affected by reason of the fact that the joint status of the

96 *Dharnidhar v Chinto* (1896) 20 Bom. 250.
97 *Kally Prosonno v Gocool Chunder* (1877) 2 Cal 295.
98 *Bhubaneswari Devi v Nilcomul* (1886) 12 Cal 18, 12 IA 137.
99 AIR 1954 SC 379, 57 Bom LR 678, [1955] SCR 1.
1 *Chandrachoor Deb v Bibhutiabhushan Deva* (1944) 23 Pat 763.
2 *Venkalakshmi Ammal v Jagannathan* AIR 1963 Mad 316.

family, which he seeks to enter by virtue of his adoption, has become terminated either by a prior partition between the surviving coparceners or by the death of the sole surviving coparcener. Reference may be made to the decision of the Supreme Court in *Govind Hanumantha v Nagappa*.[3]

§ 503. FURTHER CASE OF DIVESTING OF ESTATE IN BOMBAY

It is clear from § 471 that the widow's power to adopt is at an end in some cases. If she does adopt in such a case, the adoption is invalid, and it does not divest the estate vested in another. It is now settled law that the power to adopt does not depend upon any question of vesting or divesting.

It has, however, been held by the High Court of Bombay,[4] that if the widow in such cases adopts with the consent of the person in whom the estate was vested, the adoption is not only valid, but it divests the estate vested in the consenting party. The High Court of Bombay stands alone in holding this view which cannot be supported. The High Court of Madras has expressly dissented from it.[5]

§ 504. *STRIDHANA* NOT DIVESTED

Adoption by a widow does not divest her *stridhana*.[6]

§ 505. MAINTENANCE OF WIDOW ON DIVESTING OF ESTATE

Subject to any agreement that may have been made by the widow prior to adoption (§ 500), a widow, whose estate is divested by adoption, is entitled only to maintenance out of her husband's property.[7]

In fact, her rights are reduced to what they would have been if the husband had left a son.

§ 506. ADOPTION BY WIDOW IN A JOINT FAMILY

When a member of a joint family governed by Mitakshara law dies and the widow validly adopts a son to him (§§ 462(2), 462(3), 472 and 473),

3 AIR 1972 SC 1401. Reference has been made to this decision in § 472.

4 *Babu v Ratnoji* (1897) 21 Bom 319; *Payapa v Appanna* (1899) 23 Bom 327; *Bhimappa v Basawa* (1905) 29 Bom 400; *Siddappa v Ningangavda* (1914) 38 Bom 724, 27 IC 51, AIR 1914 Bom 107. Reference may be made to *Veman v Venkaji* (1921) 45 Bom 829; *Vasudeo v Ramchandra* (1898) 22 Bom 551, 555, RB.

5 *Annammah v Mabbu Bali Reddy* (1875) 8 Mad HC 108.

6 West and Buhler, fourth edn, 1033.

7 *Jamnabai v Raychand* (1883) 7 Bom 225; *Dalel v Ambika* (1903) 25 All 266.

a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which the deceased coparcener had, and it vests at once in the adopted son.

Reference may again be made to Illust (a)–(g) to § 472.

The fact that only one member of the joint family survives at the time of adoption as in Illust (a) and (b), is no bar to an adoption in the joint family. The family continues to be joint so long as any widow remains in it with a power to adopt. *A* and *B*, two brothers, were members of joint family. *A* died leaving a widow. *B* afterwards adopted *D* and relinquished the property to *D*. *A*'s widow now adopted. It was held that the adoption was valid and that the adopted son could claim a repartition of the property in the hands of *D*, but was not entitled to the *watan* that belonged to the family.[8]

The joint family does not in the present context come to an end on the death of the last male coparcener. It continues to exist so long as a widow of a coparcener remains. If there is even one widow, she can adopt, and the adopted son will divest the property, whether it is vested at the time.[9]

If there is more than one widow, both can adopt; both adoptions are valid,[10] except when the two widows are in the relation of mother-in-law and daughter-in-law. In the last case, only the first adoption is valid.

VII. Alienations Made Prior to Adoption

§ 507. ADOPTED SON'S RIGHTS DATE FROM ADOPTION

The rights on an adopted son arise for the first time on his adoption. He may, by virtue of his rights as adopted son, divest other persons in whom the property vested after the death of the adoptive father, but all lawful alienations made by previous holder would be binding on him.[11] His right to impeach previous alienations would depend upon the capacity of the holder, who made the alienations as well as on the nature of the action of alienation. When the holder was a male who had unfettered right of transfer, eg, the last surviving member of a joint family, the adopted son could not impeach the transfer.[12] In case of females, who had restricted rights of transfer even apart from any adoption, the transfer would be valid only when they are supported by legal necessity (§ 509).

8 *Ramchandra Balaji v Sankar Apparao* (1945) Bom 353.

9 *Umabai v Nani* (1936) 60 Bom 102, 38 Bom LR 100, 162 IC 133, AIR 1936 Bom 135.

10 *Mst Draupadi v Vikram* (1939) Nag 88.

11 *Jivaji v Hanmant* 52 Bom LR 527, AIR 1950 Bom 360; *Prahad v Seth Gendalal* (1948) Nag 271.

12 *Veeranna v Sayamma* 52 Mad 398; *Prahad v Seth Gendalal* (1948) Nag 271.

The doctrine of relation back has no application to the case of any lawful alienation effected by a male or female heir since the death of the adoptive father and before the date of adoption [§ 472 (2)]. This would seem to be well-settled law.

A contrary view, however, has been taken in *Mahadevappa v Chanabasappa*, a decision of the Mysore High Court.[13] In a later decision, the Bombay High Court has expressed disagreement with that view[14] and held that a son adopted after the alienation by a sole surviving coparcener of the family would not be entitled to divest the alienee in whom the property has vested in any such case.

§ 508. ALIENATIONS BY ADOPTIVE FATHER PRIOR TO ADOPTION

An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural born son would be (§§ 498(3), 499(1)).

§ 509. ALIENATIONS BY WIDOW BEFORE ADOPTION

(1) The rights of an adopted son spring into existence at the moment of adoption, and displace the rights of the widow and of all persons claiming under a title derived from her. The result of the adoption being to divest the widow's estate, the widow cannot, after adoption, alienate any portion of her husband's estate for any purpose whatever.

(2) As regards alienations made by the widow before the adoption, if they are made for a legal necessity (§§ 181A, 181B), or with the consent of the next reversioners (§ 183), the adopted son is as much bound by them as the reversioners would be.[15] However, if the alienation was made without legal necessity or without the consent of the reversioners, the alienation is valid to the extent only of the widow's interest in the estate up to the date of adoption. After adoption, the alienee has no power to retain the property as against the adopted son, unless the claim of the adopted son has become barred by limitation. The rights of the adopted son do not await the determination of the widow's estate by her death as in the case of reversioners.[16] Reference

13 *Mahadevappa v Chanabasappa* AIR 1966 Mys 15; *Nandappa v Shingouda* AIR 1964 Mys 217.

14 *Babgonda v Anna Nemgonda* AIR 1968 Bom 8; *Mahadeo v Rameshawar* AIR 1968 Bom 323.

15 *Lakshmana Rau v Lakshmi* (1882) 4 Mad 160; *Lakshman Bau v Radhabai* (1887) 11 Bom 609; *Antaji v Dattaji* (1895) 19 Bom 36; *Motro Narayan v Balaji* (1895) 19 Bom 809.

16 *Lakshman Bau v Radhabai* (1887) 11 Bom 609; *Antagi v Dattagi* (1895) 19 Bom 809; *Ranakrishana v Tripurabai* (1909) 33 Bom 88, 1 IC 245, AIR 1918 Mad 469,

continued on the next page

may be made to the observations of the Supreme Court in *Natvarlal v Dadubhai*,[17] and the Full Bench decision of the Bombay High Court referred to in § 509A.

Alienation with Consent of Reversioners

If the alienation was made by the widow with the consent of the next reversioners, but under circumstances which do not raise a presumption of legal necessity, the court will upon proof of those circumstances, set aside the alienation as against the adopted son.[18]

Limitation

The period of limitation for a suit by an adopted son against an alienee from the widow is 12 years from the date when the possession of the alienee becomes adverse to him; see Indian Limitation Act 1908, art, 144. Where a sale is not for legal necessity, the adopted son is entitled to treat it as a nullity, and he may sue for possession without suing to have the sale set aside[19]; hence art 91 of the Indian Limitation Act 1908, will not come in his way. See notes to § 209.

Now see arts 65 and 59 of the new Limitation Act 1963.

A son adopted by a widow after the death of the first adopted son divests the adoptive mother of the estate inherited by her from her first adopted son and is unaffected by alienations made by her without necessity.[20]

VIII. Surrender Prior to Adoption

§ 509A. SURRENDER PRIOR TO ADOPTION

If prior to his adoption, a valid surrender is effected by his adoptive mother, the subsequently adopted son can divest the property, which has already vested in the surrenderee. This view was taken by a Full Bench of the Bombay High Court,[21] overruling a number of earlier decisions of

FB overruling *Sreeramulu v Kristamma* (1903) 26 Mad 143, *Pilu v Babaji* (1910) 34 Bom 165, 4 IC 584 (invalid surrender—subsequent adoption); *Sakharam v Thama* (1927) 51 Bom 1019, 107 IC 265, AIR 1928 Bom 26 (invalid surrender—subsequent adoption).

17 (1954) SC 61, [1954] SCR 339.

18 See § 183. *Ramkrishana v Tripurabai* (1911) 13 Bom LR 940, 12 IC 529.

19 *Hanamgowda v Irgowda* (1924) 48 Bom 654, 84 IC 374, AIR 1925 Bom 9.

20 *Hanmant v Krishna* (1925) 49 Bom 604, 89 IC 62, AIR 1925 Bom 402; *Pattu Achi v Rajagopala Pillai* (1941) Mad 970, AIR 1941 Mad 699; *Govinda v Shenfad* (1949) Nag 416, AIR 1952 Nag 199, Reference may be made to *Dugginallksh v D Lakshmi Katamma* AIR 1973 AP 302.

21 *Babubali v Gundappa* (1954) ILR Bom 1026, 56 Bom LR 50 (FB); *Tukaram v Mt Gangi* AIR 1957 Nag 28.

that court. The question had been expressly left open, when it had been referred to a Full Bench of the same court in an earlier case.[22]

IX. Effects of Invalid Adoption

§ 510. EFFECT OF INVALID ADOPTION

As a general rule, it may be laid down that where there has been an adoption in form, but such adoption is invalid, the adopted son does not acquire any rights in the adoptive family, nor does he forfeit his rights in his natural family.[23]

§ 511. GIFT TO A PERSON WHOSE ADOPTION IS INVALID

Where a gift or bequest is made to a person who is described as an adopted son, but such person was not adopted at all, or if he was adopted, his adoption is held to be invalid, the validity of the gift or bequest depends on the intention of the donor or testator to be gathered from the language of the deed of gift or will and from the surrounding circumstances.[24]

If the intention is to benefit the donee as *persona designata* (ie, a designated person), the addition of his supposed relationship is merely a matter of description, and the gift prevails, though the description is incorrect.[25] However, if the assumed fact of adoption is 'the reason and motive of the gift and indeed a condition of it', then the gift cannot take effect if the adoption is pronounced invalid.[26] Reference may be made to *Ranganathan v Periakaruppan*, a decision of the Supreme Court.[27]

22 See § 197(6). *Pandu Mari Lote v Shripati* (1954) Bom 169 (FB), 55 Bom LR 647, AIR 1953 Bom 428.

23 *Bawani v Ambabay* (1863) 1 Mad HC 363; *Lakshmappa v Ramava* (1875) 12 Bom HC 364, 397; *Vaithilingam v Natesaa* (1914) 37 Mad 529, 15 IC 299, AIR 1914 Mad 460; *Dalpatsingji v Raisingji* (1915) 39 Bom 528, 29 IC 943, AIR 1915 Bom 93; *Vaman v Venkaji* (1921) 45 Bom 829, 61 IC 460, AIR 1921 Bom 55; *Hari Das Chatterji v Manmatha Nath Maulik* (1937) 2 Cal 265, 160 IC 332, AIR 1936 Cal 1.

24 *Fanindra Deb v Rajeswar* (1885) 11 Cal 463, 12 IA 72; *Panchksharamma v Chinnabbayi* AIR 1967 SC 207.

25 *Nidhoomoni v Saroda* (1876) 26 WR 91, 3 IA 253; *Bireswar v Ardha Chander* (1892) 19 Cal 452, 19 IA 101l; *Subbarayor v Subbammal* (1901) 24 Mad 214, 27 IA 162; *Murari Lal v Kandan Lal* (1909) 31 All 666, 52 IC 311, AIR 1919 All 391; *Bai Dhondubai v Laxmanrao* (1923) 47 Bom 65, 68 IC 504, AIR 1922 Bom 352.

26 *Fanindra Deb v Rajeswar* (1885) 11 Cal 463, 12 IA 72; *Surendra Keshub v Doorgasoondery* (1892) 19 Cal 513, 19 IA 108; *Karamsi v Karsandas* (1899) 23 Bom 271, l; *Pralhad v Shantabi* (1947) Nag 211.

27 [1958] SCR 214.

Illustrations

(a) *A* bequeaths a legacy 'to Koibullo whom I have adopted,' and directs his wife 'to perform the ceremonies according to the *Shastras* and bring him up.' The ceremonies are not performed, and the adoption is held invalid. The bequest, however, to Koibullo is valid, for it cannot be said in this case that the assumed fact of adoption was the reason and motive of the gift, or that it was a condition of the gift. The intention is to benefit the individual, named Koibullo. The addition of his supposed character (of adopted son) is simply a matter of description. His identification is complete, and the gift will therefore take effect, though the description (of his being an adopted son) is incorrect. In such a case, it is said that Koibullo takes as a *persona designata*.[28]

(b) *A* adopts a son *B*. He then executes a writing, whereby he authorises *B* to offer oblations of *pinda* and water to him and his ancestors 'by virtue of his (*B*) being my adopted son', and then makes a bequest to him of all his property. It is found that the adoption is invalid. The bequest to *B* does not take effect, for the words 'by virtue of *B* being my adopted son' show clearly that it was the intention of *A* to give his property to *B* as his adopted son.[29]

X. Mode of Proof And Estoppel

§ 512. BURDEN OF PROOF AND EVIDENCE

The fact of adoption must be proved in the same way as any other fact. There are no special rules of evidence to establish an adoption.[30] However, the evidence in support of an adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to

28 See s 76, Indian Succession Act 1925. *Nidhoomoni v Saroda* (1876) 26 WR 91, 3 IA 253.

29 *Fanindra Deb v Rajeswar* (1885) 11 Cal 463, 12 IA 72.

30 See *Huradhun v Muthoranath* (1849) 4 MIA 414, 425 (acquiescence); *Chandra Kunwar v Narpat Singh* (1906) 34 IA 27, 29 All 184 (admission); *Ajabsing v Nanabhau* (1898) 26 IA 48, 3 CWN 130 (pedigree); *Lal Achal Ram v Kazim Husein* (1905) 32 IA 113, 27 All 271 (tradition in a *wajib-ul-arz*); *Rup Narain v Gopal Devi* (1909) 36 IA 103, 36 Cal 780, 3 IC 382 (lapse of time); *Prem Devi v Shambhu Nath* (1920) 42 All 382, 76 IC 601, AIR 1920 All 322 (lapse of time); *Puttu Lal v Parbati Kunwar* (1915) 42 IA 155, 37 All 359, 29 IC 617, AIR 1915 PC 15 (aged adopter); *Diwakar v Chandanlal* (1917) 44 Cal 201, 39 IC 6, AIR 1916 PC 81 (absence of deed and of entries of expenditure in ceremonies); *Gokul Chandra v Biswanath* AIR 1964 Ori 160; *Jagdeo Singh v Shivadeni Singh* AIR 1965 Pat 351.

displace the natural succession by alleging an adoption.[31] It is well-settled that in any such case, the burden lies upon him to prove factum of adoption and its validity. The evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth, though of course, the factum of adoption must be proved in the same way as any other fact.[32] Onus,[33] is particularly heavy, where the adoption is made a long time after the date of the alleged authority to adopt.[34] However, when there is a lapse of a very long period between the adoption and its being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained.[35] It stands to reason that after many years, and a variety of transactions of open life and conduct upon the footing that the adoption was a valid act, the burden must rest heavily upon him who challenges its validity.[36]

Failure to produce accounts may, in the facts of a particular case, be a very suspicious circumstance.[37] The absence of any registered document, may, in the totality of the facts and circumstances of a case, be an important factor disproving the alleged adoption.[38]

31 For instance, see *Ragavamma v Chinchamma* AIR 1964 SC 136 (distinction between burden of proof and onus of proof explained). Also see, *Daulatrao v Harishchandra* AIR 1972 SC 2446 practice—findings of fact). Also see *Govinda v Chimabai* AIR 1968 Mys 309; and see *Shiddappa v Channabasappa* AIR 1973 Mys 245.

32 *Madhusudan Das v Narayani Bai* AIR 1983 SC 114. As to deed of adoption (document), reference may also be made to *Krishna Chandra v Pradipta Das* AIR 1982 Ori 171.

33 Reference may be made to *Rahara Pandiani v Gokulananda* (1987) 2 SCC 338 (oral evidence—court's approval).

34 *Dal Bahadur Singh v Bijai Bahadur Singh* (1930) 57 IA 14, 52 All 1, 122 IC 8, AIR 1930 PC 79; *Devakka v Giraddi* AIR 1956 Bom 99; *Sumantrabai v Rishabhkumar* (1953) Nag 69, AIR 1952 Nag 295; *Hariharsingh v Deonarayan* (1954) Nag 692, AIR 1954 Nag 319; *Balak Ram v Nanun Mal* (1930) 11 Lah 503, 129 IC 532, AIR 1930 Lah 579; *Biswanath v Dhapu* AIR 1966 Cal 13.

35 *Debi Prasad v Tribeni Debi* AIR 1970 SC 1286 (lapse of 54 years); *Voleti Venkata Ramarao v K Bhaskararao* AIR 1969 SC 1359 (lapse of 50 years); *Ramakrishna Pillai v Tirunarayana Pillai* (1932) 55 Mad 40, 139 IC 684, AIR 1932 Mad 198; *Roshan Lal v Samar Nath* (1938) Lah 173, AIR 1937 Lah 626; *Venkata Rama v Bhaskararao* AIR 1962 AP 29; *Surajbai v Sadashiv* AIR 1958 MP 100; *Sawney Majhi v Duli Dei* AIR 1985 Ori 22; *Sitaram Nair v Puranmal* AIR 1985 Ori 171.

36 *Venkata Seetharama Chandra Raw v Kanchumarthi Raju* AIR 1925 PC 201; *V Ramarao v K Bhaskarrao* AIR 1969 SC 1359; *Nagayasami v Kochadai* AIR 1969 Mad 329; *Nandkishore v Brijbehari* AIR 1935 Raj 65; *Permanand v Laxminarain* AIR 1955 MB 129; *Venkateratnam v Venkatanarasayamma* AIR 1964 AP 109; *Godawari Devi v Subh Karan* AIR 1954 Ajmer 57. Also, see cases cited under § 489(1); *Gauranga v Bhaga* AIR 1976 Ori 43.

37 See *Kishori Lal v Chaltibai* (1959) SCJ 560, AIR 1959 SC 504 and the cases cited at p 510 of the report, also see *Chotibai v Ganeshlal* AIR 1964 MP 302 (As to shifting of onus of proof) see for instance, *Thirumal v Koppiah* (1966) 11 MLJ 155.

38 *Divakar v Chandanlal* (1917) 44 Cal 201; *Rahasa Pandiani v Gokulananda* AIR 1987 SC 962.

The performance of the funeral rites of a deceased, by the person who claims to have been adopted to him thereafter by the widow of the deceased, does not necessarily sustain an adoption, unless it clearly appears that the adoption itself was performed under circumstances as would render it valid.[39] So also, the performance of the marriage of the son alleged to have been taken in adoption by the alleged adoptive mother is a circumstance of neutral value, when the alleged adoption is otherwise disproved.[40]

An ex parte statement made by a widow in mutation proceedings that she had authority from her husband to adopt, is not admissible in evidence against the reversioners in a subsequent suit challenging the adoption either under ss 32(3) or 33, Indian Evidence Act 1872.[41]

Although, no writing is necessary, the court would critically scrutinise all the relevant facts and circumstances of the case, particularly, where the property involved is large and having regard to the position of the parties, the way in which an execution of a deed of adoption would normally take place. The onus is heavy, and the mere bold assertion in a deed of adoption that the adoptee had been taken in adoption will not suffice. In a case of exceptional character, the Supreme Court also held that the High Court could interfere with a finding of fact in any such case.[42] The Supreme Court, while reversing the decision of the High Court, analysed the position in law and reiterated the principles touching the matter of proof and relationship of witnesses.[43]

Statements made by a testator in his will to the effect that the legatee was the adopted son of the testator, can be used as evidence by the legatee in a suit for a declaration of adoption.[44] However, there is no rule of law or prudence, that any such statement in a will must be regarded as determinative of the matter.[45] The description of a legatee in a will as an adopted son, may be mere description and not necessarily as a motivation for the execution of the will.[46]

§ 513. ESTOPPEL

(1) A person who is otherwise entitled to dispute an adoption may, by his declaration, act or omission, be estopped from disputing it. The rule of estoppel is laid down in s 115, Indian Evidence Act 1872.[47]

39 *Tayammaul v Sashchalla* (1865) 10 MIA 429.
40 *Kishori Lal v Chaltibai* (1959) SCJ 560, AIR 1959 SC 504.
41 *Dal Bahadur Singh v Bijai Bahadur Singh* (1930) 57 IA 14, 52 All 1, 122 IC 8, AIR 1930 PC 79.
42 *Madanlal v Gopi* AIR 1980 SC 1754.Also see *Rabasa Pandiani v Gokulananda* AIR 1987 SC 962.
43 *Madhusudan Das v Narayani Bai* AIR 1983 SC 114.
44 *Chandreshwar v Bisheshwar* (1926) 5 Pat 777, 101 IC 289, AIR 1927 Pat 61.
45 *Banwarilal v Trilok Chand* AIR 1980 SC 419.
46 *Ranganathan v Periakaruppan* AIR 1957 SC 815.
47 *Dharam Kunwar v Balwant Singh* (1912) 39 IA 142, 148, 34 All 398, 15 IC 673

continued on the next page

(2) Estoppel operates merely as a personal disqualification, and does not bind any one who claims by an independent title.[48]

(3) Estoppel does not confer status. It rules out denials of adoptions by the concerned persons on this issue. Therefore, if both the parties are equally conversant with the true state of facts, the doctrine of estoppel can have no application.[49]

(4) A person may be so estopped, although he was acting in good faith, or without a full knowledge of the circumstances, or was under a mistake or misapprehension.[50]

(5) The misrepresentation to operate as an estoppel must be of a matter of fact. An erroneous expression of opinion, that an adoption was valid in law, cannot lead to an estoppel.[51]

(6) Mere acquiescence in an adoption, or mere presence at an adoption, does not create an estoppel,[52] or even subsequent conduct recognising the adoption.[53]

J and *R* are two Hindu brothers. In 1908, *J* executes a deed purporting to adopt *D* as a son to him; *J* dies in 1912. *R* dies in 1914 leaving a daughter *S*. On *R*'s death, *D* takes possession of his estate claiming to be entitled to it as *R*'s brother's adopted son. *S* sues *D* for a declaration that she is entitled to *R*'s property as his heir. *D* alleges that he was validly adopted by *J*, and that there was a giving and taking in adoption, and further, that if there was no giving or taking, *R* was estopped from disputing his adoption by reason of certain acts and representations of his, and *S*, claiming through *R*, was also so estopped. The acts and representations alleged to lead to estoppel are: (1) that *R* had brought *D* from his village and been a witness to the deed of adoption; (2) that *R* had allowed *D* to perform the cremation ceremony of *J*, and (3) that at the time of *D*'s marriage, *R* had represented that he was the adopted son

(representation by a widow that she had power to adopt); *Surendro Keshub v Doorgasoondery* (1892) 19 IA 108, 128, 19 Cal 513, 532 (no misrepresentation); *Hari Shankar v Raghuraj* (1907) 34 IA 125, 29 All 519 (denial of adoption by person adopted); *Dharam Prakash v Kalawati* (1928) 50 All 885, 110 IC 665, AIR 1928 All 459 (adoption challenged by adoptive mother); *Laxman v Babai* AIR 1935 Nag 241.

48 *Dharam Kunwar v Balwant Singh* (1912) 39 IA 142, 148, ILR 34 All 398, 15 IC 673; *Dhanraj v Soni Bai* (1925) 52 IA 231, 243, ILR 52 Cal 482, 496, 87 IC 357, AIR 1925 PC 118; *Gopee Loll*'s case (1872) IA Supp Vol 131, 133.

49 *Kishori Lal v Chaltibai* AIR 1959 SC 504; *Eullamoni v Netranand* AIR 1967 Ori 103; *Jagdeo Singh v Shivadeni Singh* AIR 1965 Pat 351.

50 *Surat Chunder v Gopal Chunder* (1892) 19 IA 203, 215, 20 Cal 296, 310.

51 *Gopee Loll v Chundraolee* (1872) IA Supp Vol 131, 133, 11 Beng LR 391; *Dhanraj v Soni Bai* (1925) 52 IA 231, 242–43, ILR 52 Cal 482, 495, 87 IC 357, AIR 1925 PC 118.

52 *Gurulingaswami v Ramalakshmamma* (1895) 18 Mad 53, 60; *Vaithilingam v Murugaian* (1914) 37 Mad 529, 15 IC 299, AIR 1914 Mad 460.

53 *Tirkangauda Mallangauda v Shivappa Patil* (1943) Bom 706, 45 Bom LR 992, AIR 1944 Bom 40.

of *J*. No giving or taking in adoptions was proved to have taken place. (If so, though there was an adoption in fact, as shown by the deed of adoption, there was no valid adoption in law.) It was held by the Judicial Committee, that no estoppel arose under s 115, Indian Evidence Act 1872. No estoppel can arise unless there was a misrepresentation as to a matter of fact. It is clear that there was no misrepresentation on the part of *R* as to the fact of the adoption. An adoption in fact was there. However, *R* may have believed, though wrongly, that the adoption was also valid in law; but that creates no estoppel at all.[54] (Another point taken in the case was that an estoppel in cases of adoption was purely personal, so that if *R* was estopped, his daughter *S* could not be estopped. Their Lordships were inclined to this view, but they did not base their decision on that argument).

A situation can arise, in which a previous award declaring an adoption to be invalid, and acceptances of benefit under that award by the alleged adopted son and acting upon the award by the adoptive mother may create an estoppel against them from contending that the mother had not lost her right of adoption and asserting that she could adopt the same person as a son to her deceased husband. In such a case, the estoppel is available to prevent fraud.[55]

A decision as to validity to an adoption in an earlier suit is not binding on persons not parties to it.[56]

§ 513A. THE DOCTRINE OF *FACTUM VALET* IN RELATION TO ADOPTION

The texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption, are mandatory. Hence, the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provisions of those texts.[57]

§ 514. LIMITATION

(1) The period of limitation for a suit to obtain a declaration that an alleged adoption is invalid, or never in fact took place, is six years from

54 *Dhanraj v Soni Bai* (1925) 52 IA 231, ILR 52 Cal 482, 87 IC 357, AIR 1925 PC 118.

55 *Sunderabai v Devaji* (1953) 2 MLJ 782, AIR 1954 SC 82.

56 *Srinivasa Iyengar v Shrinivasa* (1973) 2 SCC 327.

57 *Lakshmappa v Ramava* (1875) 12 Bom HC 364, 398, *Sri Balusu Gurulingaswami v Balusu Ramalakshmana* (1899) 22 Mad 398, 26 IA 113, 144; *Ganga v Lekhraj* (1887) 9 All 253, 296–97; *Gopal v Hamant* (1879) 3 Bom 273, 293–94; *Padajirav v Ramrav* (1889) 13 Bom 160, 167, *Dadisheth v Ravji* (1898) 22 Bom 812; *Tirkangauda Mollangauda v Shivappa Patil* (1943) Bom 706, 45 Bom LR 992, AIR 1944 Bom 40; *Bhanwar Lal v Mangi Bai* (1955) 5 Raj 625.

the date when the alleged adoption becomes known to the plaintiff (the Indian Limitation Act 1908, Sch 1, art 118).

(2) The period of limitation for a suit to obtain a declaration that an adoption is valid six years from the date when the rights of the adopted son, as such, are interfered with (the Indian Limitation Act 1908, Sch 1, art 119).

(3) Now see arts 57, 58 and 65 of the new Limitation Act 1963.

Article 118 applies only to a suit under s 42, Specific Relief Act 1877, for a declaratory decree that an adoption is invalid or did not take place. The article applicable to a suit by a reversioner for possession of immovable property on the death of a Hindu female is art 141 (see § 209), even if it is necessary to decide in the suit whether an adoption was or was not valid.[58]

XI. *KRITRIMA* ADOPTION

§ 515. *KRITRIMA* FORM OF ADOPTION

The *kritrima* form of adoption is prevalent in Mithila and the adjoining districts, and it is recognised by law. Either a man or a woman can adopt in this form. The following are the main points of distinction between *dattaka* adoption and *kritrima* adoption:

(1) the consent of the adopted son is necessary to the validity of the *kritrima* adoption. However, a minor, it would seem, may be adopted with the parent's consent.[59] The word '*kartaputra*' indicates *kritrima* and not *dattaka* adoption;[60]

(2) the adopted son must belong to the same caste as the adoptive father. His age and his relationship to the adoptive father are immaterial;

(3) no ceremonies are necessary to the validity of a *kritrima* adoption, nor is a document necessary;[61]

(4) a wife can adopt a *kritima* son to herself, though her husband has adopted a son to himself. Similarly, a widow can adopt a *kritrima* son to herself.

However, neither a wife nor a widow can adopt a *kritrima* son to her husband, even when expressly authorised by him to do so. A wife

58 *Kalyanadappa v Chanbasappa* (1924) 51 IA 220, ILR 48 Bom 411, 79 IC 971, AIR 1924 PC 137.

59 *Umesh Bhagat v Ram Kumari Devi* AIR 1963 Pat 362; *Lalita Prasad v Sarnam Singh* (1933) 9 IC 491, AIR 1933 Pat 165.

60 *Re Lalita Prasad* (1933) 9 IC 491.

61 *Kamla Prasad v Murli Manohar* (1934) 13 Pat 550, 152 IC 446, AIR 1934 Pat 398.

adopting a *kritrima* son to herself, does not require the consent of any person, not even that of her husband. A widow may adopt a *kritrima* son to herself without the consent of her husband's *sapindas*.

(5) a *kritrima* son does not lose his rights of inheritance in his natural family. In his adoptive family, however, he can only inherit to the person actually adopting him and to no one else.[62]

Kartaputra

As to *kartaputra* and his rights, see *Kanhaiya Lal v Mst Suga Kuer*.[63]

XII. *Illatom* Adoption

§ 515A. *ILLATOM* ADOPTION

The custom of affiliating a son-in-law and giving him a share, which is called *illatom* adoption, has been in vogue in certain communities of the old Madras presidency (now mainly States of Madras and Andhra Pradesh). The institution is purely the result of custom and now judicial recognition has been given to it.[64] The two essential conditions of this adoption are that the adoptee must marry the daughter of the adopter, and there should be an agreement to give him a share. Both the conditions must be fulfilled.

Merely living in the house of the father-in-law and helping him in the management of property would not result in affiliation. There must be the requisite agreement. However, it is not necessary that the marriage should take place before he is admitted into the family.[65] A specific agreement is the basis of this affiliation, but in case of a very old adoption, the fact may be proved by clear evidence of the course of conduct of the parties and circumstances of the case.[66]

62 *Lakshmi Reddy v Lakshmi Reddy* AIR 1957 SC 314; *Sarkar's Hindu Law*, Seventh edn, p 293; *Mayne's Hindu Law*, s 226, *Trevelyan's Hindu Law*, pp 159–61 and pp 205–206.The rules stated here are now well-established. *Gokhul Rai v Janki Kuer* AIR 1955 Pat 487.

63 *Kanhaiya Lal v Suga Kuer* (1925) 4 Pat 824, 90 IC 26, ILR 65 AP 90.

64 *Kirstnamma v Veikatasubbayya* AIR 1919 PC 162 (the custom is the same in the Kamma caste and the Reddi caste); *Hanumantamma v Rami Reddi* (1881) 4 Mad 272; *Narasayya v Ramchandrayya* AIR 1956 AP 209; *Venkayya v Satyanarayana* AIR 1959 AP 360; *Nalluri v Kamepali* (1919) 46 IA 168, AIR 1919 PC 162.

65 *Narasayya v Ramachandrayya* AIR 1956 AP 209, 210.

66 *Pathuri Venkateshwarlu v D Chinna Raghuvalu* AIR 1957 AP 604; *Subbrao v Muthalashmamma* AIR 1930 Mad 883, 893 (claims of this nature should be very carefully scrutinised).

The incidents of this custom have now been crystallised into certain rules and no extension of those incidents is permissible, unless established by a special custom.[67] The son-in-law does not become an adopted son in the strict or real sense of adoption. He does not lose his right of inheritance in his natural family.[68] Neither he, nor his descendants, become coparceners[69] in the family of adoption, though on the death of the adopter, he is entitled to the same rights and the same share as against any subsequently born natural son or a son subsequently adopted in accordance with the ordinary law.[70] He cannot claim a partition with the father-in-law and the incidents of a joint family, such for instance, as right to take by survivorship, do not apply. In respect of the property or share that he may get, he takes it as if it were his separate and self-acquired property.[71] An *illatom* son in law cannot be equated with a major son or an adopted son.[72]

XIII. Customary Adoption in Punjab

§ 515B. INFORMAL ADOPTION IN PUNJAB

A customary adoption in Punjab is ordinarily no more than a mere appointment of an heir creating a personal relationship between the adoptive father and the appointed heir only. There is no tie of kinship between the appointed heir and the collaterals of the adoptive father. The incidents of an informal adoption of the above type as well as those of a formal customary adoption, were examined by the Supreme Court in *Kehar Singh v Diwan Singh*.[73]

A Hindu governed by customary law in Punjab is not disentitled to make a formal adoption according to Hindu rites and ceremonies,[74] or a formal customary adoption.

As to Jats of Ludhiana, see *Inder Singh v Gurdial Singh*.[75]

67 *Narasayya v Ramachandrayya* AIR 1956 AP 209 (custom does not extend to marriage with foster daughter), *Muthala v Sankarappa* AIR 1935 Mad 3; *Subbarao v Mathalakshmamma* AIR 1930 Mad 883.

68 *Sivada Balarami v Sivada Pera Reddi* (1883) 6 Mad 267; *Ramakrishna v Subbakka* (1889) 12 Mad 442, 444; *Papamma v Malappa* AIR 1993 Kant 24.

69 *Chenchamma v Subbayya* (1886) 9 Mad 114; *Muthala v Sankarappa* AIR 1935 Mad 3 (no reversionary right or right of collateral succession).

70 *Hanumantamma v Rami Reddi* (1881) 4 Mad 272.

71 *Mall Reddi v Padmamma* (1894) 17 Mad 48.

72 *Narayanappa v Govt of Andhra Pradesh* AIR 1992 SC 135.

73 AIR 1966 SC 1555; *Hem Singh v Karnam Singh* AIR 1954 SC 581; *Sohan Singh v Gurtej Singh* AIR 1972 P&H 152.

74 *Mukund Singh v Wazir Singh* (1972) 4 SCC 178.

75 AIR 1967 SC 119.

As to Brahmins and Khatris of Amritsar district, see *Salig Ram v Mushi Ram*.[76]

Customary adoptions have, however been now abolished by the Hindu Adoption and Maintenance Act 1956.[77]

76 AIR 1961 SC 1374.

77 *Kartar Singh v Sujan Singh* (1974) 2 SCC 59. As to customary adoption in Jullunder district, reference may be made to *Gurdev Singh v Kehar Singh* AIR 1982 P&H 289.

XXIV

MINORITY AND GUARDIANSHIP

LAW PRIOR TO THE HINDU MINORITY AND GUARDIANSHIP ACT 1956

The king shall protect the inherited (and other property) of a minor, until he has returned (from his teacher's house) or until he has passed his minority.[1]

Till the eighth year, a child is comparable (for legal purposes) to one in its mother's womb. Till he attains the age of sixteen, he is called a minor (poganda). Then he becomes sui juris (vyvaharagna).[2]

Note.—Some material changes and modifications in the rule of Hindu law relating to minority and guardianship have been brought about by legislation, embodied in the Hindu Minority and Guardianship Act 1956. The Act abrogates all the rules of the law of minority and guardianship previously applicable to Hindus, whether by virtue of any text or rule of Hindu law, or any custom or usage having the force of law, in respect of all matters dealt with in the Act. It also supersedes any other law, contained in any Central or state legislation in force, immediately before it came into operation, in so far as such legislation is inconsistent with the provisions contained in it. The rules in the following paragraphs of the chapter, state the law before the coming into operation of that Act.

§ 516. AGE OF MAJORITY

There is a difference of opinion among the Hindu writers as to the age of majority under Hindu law. According to some writers, minority terminates at the completion of the 15th year, according to others, at the completion of the 16th year. The former view is held in Bengal;[3] the latter view, in

1 Manu, VIII, 27.

2 Narada, III 35, 36.

3 *Cally Churn v Bhuggobutty* (1873) 10 Beng LR 231 (FB); *Mothoormohun v Soorendro* (1876) 1 Cal 108.

other parts of India.[4] This difference has lost much of its importance since the passing of the Indian Majority Act 1875, which applies to all persons domiciled in India, and to all matters except marriage, dowry, divorce and adoption. According to that Act, every minor or whose person or property a guardian has been appointed by any court, and every minor of whose property, the superintendence has been assumed by a Court of Wards, is deemed to have attained his majority at the completion of the 21st year; and in all other cases, at the completion of the 18th year.

Marriage

See § 427. Also see s 5, Hindu Marriage Act 1955.

Adoption

See §§ 450 and 465. Also ss 3 (c), 10 and 11, Hindu Adoptions and Maintenance Act 1956.

§ 517. GUARDIANS

Guardians may be divided into three classes, namely:

(1) natural guardians (§§ 518–31);
(2) guardians appointed by a father by will (§ 532); and
(3) guardians appointed:
  (i) under the Guardians and Wards Act, 8 of 1890, by a district court or by a Chartered High Court in the exercise of its ordinary original civil jurisdiction; or
  (ii) by a Chartered High Court in the exercise of its inherent powers (§§535–37).

See ss 6 and 9, Hindu Minority and Guardianship Act 1956.

I. Natural Guardians

§ 518. GUARDIANSHIP OF PERSON AND OF SEPARATE PROPERTY OF MINOR

(1) The father is the natural guardian of the person and of the separate property of his minor children,[5] and next to him the mother,[6] unless the

4 *Shivji v Dattu* (1875) 12 Bom HC 281, 290; *Reade v Krishna* (1886) 9 Mad 391, 397–98.

5 *Nanabhai v Janardhan* (1888) 12 Bom 110, 120; *Venkateswaran v Sardambai* (1935) Rang 590, 160 IC 878, AIR 1936 Raj 67.

6 *Kaulesra v Jorai* (1906) 28 All 233; *Rangubai v Gopal* (1903) 5 Bom LR 542.

father has by his will, appointed another person as the guardian of the person of his children (§ 532).

(2) No relation except the parents, is entitled as of right to the guardianship of a minor.[7] Failing the father and mother, the court may appoint the nearest male paternal relative, and, failing paternal relatives, the nearest male maternal relative as guardian of the minor.[8] However, the court is not bound to do so. It may appoint a maternal relation in preference to a paternal relation, or it may even appoint a stranger, if the welfare of the minor requires it.[9]

(3) The court has no power to appoint a guardian of the person of a minor, whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor.[10]

(4) The provisions of this section apply:

(i) to the custody of the person of a minor, whether governed by Mitakshara law or Dayabhaga law;

(ii) to the custody of the separate property of a minor, as distinguished from his undivided interest in coparcenary property, in cases governed by Mitakshara law; and

(iii) to the custody of the separate property of a minor, as well as his undivided interest in coparcenary property in cases governed by Dayabhaga law (§ 279).

As to the custody of the undivided interest of a minor in cases governed by Mitakshara law, see § 519. Also see s 6, Hindu Minority and Guardianship Act 1956.

Father's Right

As in this country (England), so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime, substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children requires it, he can, notwithstanding any

7 *Subbarami Reddi v Chenchuraghava Reddi* (1945) ILR Mad 714; *Ethilavulu v Pethakkal* AIR 1950 Mad 390; *Kalipada v Furnabala* (1948) 2 Cal 485, AIR 1948 Cal 269.

8 *Re Gulbai* (1908) 32 Bom 50.

9 *Kristo Kissor v Kadermoye* (1878) 2 Cal LR 583; *Mst Bhikuo Koer v Chamela Koer* (1897) 2 CWN 191, (1908) 32 Bom 50; *Thayammal v Kuppanna* (1915) 38 Mad 1125, 26 IC 179, AIR 1915 Mad 659; s 17, Guardians and Wards Act 1890; *Emperor v Sital Prasad* (1920) 42 All 146, 54 IC 402, AIR 1919 All 36 (kidnapping).

10 Section 19, cl (b), Guardians and Wards Act 8 of 1890; *Besant v Narayaniah* (1914) 41 IA 314, ILR 38 Mad 807, 822, 24 IC 290, AIR 1914 PC 41.

contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants, which would be undesirable in their interests to disturb or disappoint, such court will interfere to prevent its revocation.[11]

Mother's Right

When the father is alive, he is entitled to the custody of his minor child, however young he may be, in preference to the mother.[12] In a Madras case, where the father had taken a second wife, the custody of a minor girl of very tender age was given to her mother.[13]

Capacity of Minor to Act as Guardian

A minor is incompetent to act as guardian of any minor except his own wife (s 21, Guardians and Wards Act 1890).

Adoptive Father

Where a widow adopts a son to her husband, under an authority given to her by his will, the natural father should not, on the death of the adoptive mother, be appointed guardian of the person of his son, where there are other suitable members of the adoptive father's family available and where the effect of appointing the natural father would be to frustrate the intention of the adoptive father expressed by him in his will.[14]

§ 519. GUARDIANSHIP OF PROPERTY WHERE FAMILY IS JOINT

If the minor is a member of a joint family governed by Mitakshara law, the father as *karta* (manager), is entitled to the management of the whole coparcenary property including the minor's interest. After the father's death, the management of the property, including the minor's interest therein, passes to the eldest son as *karta* (§ 236). The mother is not entitled to the custody of the undivided interest of her minor son in the joint property, because such property is not separate property, though

11 *Besant v Narayaniah* (1914) 41 IA 314, 320–21, ILR 38 Mad 807, 819, 24 IC 290, AIR 1914 PC 41; *Sukhdeo v Ram Chandar* (1924) 46 All 706, 83 IC 24, AIR 1924 All 622.
12 *Empress v Prankrishna* (1882) 8 Cal 969.
13 *Re Muruga* (1950) ILR Mad 85.
14 *Monomohini Dasi v Hari Prasad* (1925) 4 Pat 109, 81 IC 1045, AIR 1925 Pat 444.

she is entitled to the custody of his person and of his separate property, if any.[15]

If all the sons are minors, the court may appoint a guardian of the whole of the joint property, until one of them attains majority,[16] specially when the widows of the father were fighting among themselves.[17] On any one of the sons attaining majority, the guardianship of the property constituted by the court ceases, and the court is bound to hand over the joint family property to the adult son, notwithstanding the fact that the other sons are minors.[18]

Illustrations

(a) *H*, a Hindu governed by Mitakshara law, dies leaving two sons, *A* and *B* and a widow, the mother of *B*. *A* is an adult, but *B* is a minor. After the death of *H*, it is competent to *A* and *B* to live as members of a joint Mitakshara family, or to partition the property inherited by them from their father. If they adopt the former course, *A* as the senior male member, is entitled to manage the whole of the joint property, including the minor's undivided interest therein. *B*'s mother is not entitled to be appointed guardian of the undivided interest of her son *B* in the joint property, for such interest is not separate property. However, she may be appointed guardian of *B*'s person and of his separate property, if any. If *A* and *B* partition the property inherited by them from their father, then *B*'s mother is entitled to the custody of the share allotted to *B* on partition, such share being his separate property (§ 223, sub-§(4)).[19]

As per Illust (a), *A* also is a minor, the court may appoint a guardian of the whole of the joint property under the Guardians and Wards Act 1890, and the court may in such a case, appoint even *B*'s mother as such guardian.[20] However, the guardianship of the individual appointed by the

15 *Gharib Ullah v Kalak Singh* (1903) 25 All 407, 30 IA 165; *Gourab v Gujadhar* (1880) 5 Cal 219; *Virupakshappa v Nilgangava* (1895) 19 Cal 301 (FB); *Sham Kuar v Mohanunda* (1892) 19 Cal 301; *Ayodhya Sah v Jt Director of Consolidation* AIR 1992 Pat 97.

16 *Bindoji v Mathurabai* (1906) 30 Bom 152; *Narasamma v Satyanarayana* (1951) 1 MLJ 436, AIR 1951 Mad 793.

17 *Seethabai v Narasimha* (1945) ILR Mad 568; *Rakhmabai v Sitabai* (1952) 54 Bom LR 55, (1952) Bom 455, AIR 1952 Bom 160.

18 *Ramchandra v Krishnarao* (1908) 32 Bom 259; *Chandrapal Singh v Sarabjit Singh* (1936) 11 Luck 67, 154 IC 855, AIR 1935 Ori 334; *Rajah Yenumula v Chitrapu Buchi Venkayya Pantulu* (1949) 2 MLJ 774, AIR 1951 Mad 792. See §§ 535–37; s 12, Hindu Minority and Guardianship Act 1956.

19 *Gourab v Gujandhur* (1880) 5 Cal 219.

20 *Bindaji v Mathuraba* (1905) 30 Bom 152.

court ceases, when *A* attains majority and the management of the whole property will then vest in him as *karta*.[21]

Capacity of Minor to Act as Guardian

There is no rule of Hindu law that the managing member of an undivided family should be an adult. He may be a minor, in which case, he is competent to act as guardian not only of his own wife and children, but also the wife and children of another minor member of the family (s 21, Guardians and Wards Act 1890).

§ 520. GUARDIANSHIP OF A MARRIED FEMALE

See § 443. Also see s 6(c), Hindu Minority and Guardianship Act 1956.

§ 521. GUARDIANSHIP OF AN ADOPTED SON

The guardianship of an adopted son, who is a minor, passes on his adoption, from his natural father and mother to his adoptive father and mother.[22]

§ 522. GUARDIANSHIP OF ILLEGITIMATE CHILDREN

The mother is the lawful guardian of her illegitimate children.[23] It was held by the High Court of Lahore that where the father is known, he has the preferential right.[24] This view has been dissented from by the High Court of Madras.[25] Also, see s 6(b), Hindu Minority and Guardianship Act 1956.

§ 523. REMARRIAGE OF MOTHER

A Hindu widow, does not, by the mere fact of her remarriage, lose her right of guardianship, in any case where remarriage is recognised by the custom of the caste to which she belongs.[26]

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21 *Ramchandra v Krishnarao* (1908) 32 Bom 259.

22 *Sreenarain v Kishen* (1873) 11 Beng LR 171, IA Supp Vol 149, 163; *Lakshmibai v Shridhar* (1879) 3 Bom 1; *Nirvanaya v Niryanaya* (1885) 9 Bom 365.

23 *Venkamma v Saviramma* (1889) 12 Mad 67, 68; *Re Saithri* (1891) 16 Mad 307, 317.

24 *Prem Kaur v Banarsi Das* (1934) 15 Lah 630, 156 IC 87, AIR 1934 Lah 1003.

25 *Rajlakshmi v Ramachandran* AIR 1967 Mad 113; *Dorai Raj v S R Lakshmi* AIR 1947 Mad 172.

26 See ss 3 and 5, Hindu Widow's Remarriage Act 1856. *Ganga v Jhalo* (1911) 38 Cal 862, 10 IC 69; *Mst Indi v Ghania* (1920) 1 Lah 146, 53 IC 783, AIR 1919 Lah 40; *Putlabai v Mahadu* (1909) 33 Bom 107, 144, 1 IC 659; *Panchappa v Sanganbasawa* (1900) 24 Bom 89, 91; *Mt Ram Labhai v Durga Das* (1934)15 Lah 28, 147 IC 19, AIR 1933 Lah 817.

§ 524. LOSS OF CASTE

Under the Hindu law, loss of caste entailed a loss of the right of guardianship of the person and property of minors.[27] However, it is no longer so, since the passing of the Caste Disabilities Removal Act 1850.[28]

§ 525. CHANGE OF RELIGION BY FATHER

The fact that a father has changed his religion, is of itself no reason for depriving him of the custody of his children.[29]

However, if at the time of conversion, the father voluntarily abandons his parental rights, and entrusts the custody of his child to another person, in order that it may be maintained and educated by him, the court will not restore back the custody of the child to the father, if such a course is detrimental to the interests of the child. In such a case, the court should be guided by what it conceives to be best for the welfare and well being of the child.[30]

§ 526. CHANGE OF RELIGION BY MOTHER

A child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social status; and it is, therefore, ordinarily and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion. Therefore, where a Hindu mother changes her religion, the court may, if it deems to be in the interest of the minor, remove the child from the custody of the mother, and place the child under a Hindu guardian.[31]

Also see proviso (a) to s 6, Hindu Minority and Guardianship Act 1956.

§ 527. CHANGE OF RELIGION BY MINOR

Where a Hindu child, who has become a convert to Christianity or any other religion, leaves his parents, and proceedings are instituted by the parents of the custody of the child, the question arises as to what is the

27 *Strange's Hindu Law*, Vol I, p160.

28 *Kanahi Ram v Biddya Ram* (1878) 1 All 549; *Kaulesra v Jorai* (1906) 28 All 233. As to change of religion, see §§ 525–26.

29 *Mucboo v Arzoon* (1866) 5 WR 235; *Shamsingh v Santabai* (1901) 25 Bom 551–55.

30 *Mokoond v Nobodip* (1898) 25 Cal 881; *Re Josby Assam* (1896) 23 Cal 290. See notes to § 524. Also, see proviso (a) to s 6, Hindu Minority and Guardianship Act 1956.

31 *Skinner v Orde* (1871) 14 MIA 309, 323.

true principle by which the courts should be guided is such cases. Is it that the minor, if he is old enough to form an intelligent preference, should be allowed to exercise his own discretion as to where he will go? Alternatively, is it that the parents are entitled as of right to the custody of the child, irrespective of his wishes? On the other hand, is it that the court should in each case do what it conceives to be for the welfare and interest of the child? The first view was taken in the earliest decisions on the subject. Then came a series of cases in which the second view was taken.[32] The last view is the one now taken by the High Court of Bombay,[33] Calcutta,[34] and Allahabad.[35]

I. Powers of Natural Guardian

§ 528. ALIENATIONS BY NATURAL GUARDIAN

The natural guardian of a Hindu minor has power in the management of his estate, to mortgage or sell any part thereof in a case of necessity or for the benefit of the estate.[36] If the alienee does not prove any legal necessity or that he made reasonable inquiries, the sale is invalid.[37] The power of a manager of a joint family to make a suitable provision in connection with the marriage of a daughter of the family in the shape of a gift of a small portion of the family property cannot be exercised by a widow, acting as guardian of her son, who is the owner of the property.[38] During the father's lifetime, the mother cannot act as a legal

32 *The Queen v Nesbitt* (1853) Perry's OC 103; *Reade v Krishna* (1886) 9 Mad 391.

33 *Re Saithri* (1891) 16 Bom 307.

34 *Re Joshy Assam* (1896) 23 Cal 290; *Mokoond v Nodip* (1898) 25 Cal 881.

35 *Sarat Chandra v Forman* (1890) 12 All 213.

36 *Hunooman Persaud v Mussumat Bobooee* (1856) 6 MIA 393, 412 (mortgage by mother upheld); *Soonder Narian v Bennud Ram* (1879) 4 Cal 76 (sale by mother for legal necessity upheld); *Bai Amrit v Bai Manik* (1875)12 Bom HC 79 (sale by mother upheld); *Murari v Tayana* (1895) 20 Bom 286 (sale by mother of two plots of land—sale of one upheld and that of the other set aside as not being one for legal necessity); *Kandhia Lal v Muna Bibi* (1898) 20 All 135 (mortgage by mother not upheld as not being one for necessity); *Raghubans v Indarjit* (1923) 45 All 77, 69 IC 683, AIR 1922 All 526 (mortgage by mother upheld in part); *Ragho v Zaga* (1929) 53 Bom 419, 118 IC 555, AIR 1929 Bom 251 (sale by guardian of his own property and that of minor's property—one piece of land purchased with sale proceeds of both properties—sale of minor's property not upheld); *Nagalinga Konar v Modothi* AIR 1950 Tr & Coch 30; *Balakrishna v Ganesa* AIR 1954 Tr & Coch 209, FB; *Re Rangaswami Moroppa* (1925) 2 MLJ 506, AIR 1953 Mad 230 (gift held invalid); *Keluni Dei v Kanhei Sabu* AIR 1972 Ori 28; *Jaganath Sabar v Gana Bewa* AIR 1990 Ori 164 (sale by mother upheld).

37 *Mallappa v Anant Balkrishna* (1936) 38 Bom LR 941, 166 IC 154, AIR 1936 Bom 386.

38 *Palaniammal v Kothandarama Goundan* (1944) ILR Mad 216.

guardian and hence, a sale by her of minor's share in land would be void.[39]

In *Hunooman Persaud v Mussumat Babooee*,[40] which is the leading case on the subject, the Judicial Committee said:

> The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. However, they think that if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see to the application of the money.

Alienation by Natural Guardian: Legal Necessity

Where the mother of a minor as his natural guardian, mortgages the minor's property for a legal necessity, and afterwards sells the property before the due date of payment of the mortgage amount, the sale itself is one without legal necessity, though she applies part of the purchase money in payment of the mortgage debt. The minor, therefore, is entitled to set aside the sale, subject, however, to payment to the purchaser of the amount applied towards payment of the mortgage debt, his estate having benefited to that extent.[41] The minor will be liable in equity to make good to the purchaser the portion of the consideration by which he was benefited. The decree to be passed in favour of the minor would be a conditional decree for possession, on condition that he should pay to the purchaser the amount of consideration which has been found to be either for the benefit of his estate or for the purpose of legal necessity.[42] In the case of a mortgage by the guardian of the minor's estate for the purpose of defraying the expenses of the minor's marriage performed in

39 *Aurobindo Society v Ramadoss Naidu* AIR 1980 Mad 216. Also see s 8, Hindu Minority and Guardianship Act 1956.

40 (1856) 6 MIA 393, 423.

41 *Palaniammal v Ramchandra* (1931) 33 Bom LR 104, 130 IC 594, AIR 1931 Bom 157.

42 *Ramnath v Deoraj* AIR 1957 Pat 495.

violation of the Child Marriage Restraint Act, it was held that there was no legal necessity to support the mortgage.[43]

Where the mother as natural guardian of her minor son, sold the only house already burdened with a mortgage debt created by her husband, as there was no possibility of being able to redeem the mortgage, it was held that the sale was for legal necessity.[44] In the absence of her husband, whose whereabouts are not known, a mother can alienate for legal necessity, the joint family property of her minor son, who is the *karta* of the family.[45]

For the Benefit of the Estate

Mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is 'for the benefit of the estate' within the meaning of this rule, which could hardly have been intended to include cases of speculative development of estate of minors.[46]

When the only circumstance relied on, in justification of the sale, is that the price realised is much more than the normal value of the property, the sale cannot be regarded as one for the benefit of the estate.[47] A mortgage by a mother of the property of her minor son to secure a loan to carry on a trade on behalf of the minor, which was not ancestral, is not a transaction for the benefit of the minor.[48] Nor is a sale for the sole purpose of investing the price so as to bring in a larger income.[49] Alienation by a guardian to pay the barred debts of the father of the minor is not binding on the minor's interest.[50] However, alienation of movable property in danger of deterioration in value, or lands barren and yielding no income to invest proceeds in income yielding land, may be regarded as for the benefit of the estate.[51]

The Calcutta High Court has held that an unauthorised sale or mortgage of the ward's property may be validated by subsequent ratification by the ward on his attaining majority.[52]

43 *Ram Jash Agarwala v Chand Mondal* (1937) 2 Cal 764.
44 *Keshavlal v Nagarathnam* AIR 1964 Mad 374; *Subbakhal v Subba Gounder* AIR 1965 Mad 371; *Kesavalu v Nagarathnam* AIR 1964 Mad 374.
45 *Trutia Mirdha v Basudev Singh* AIR 1964 Ori 123.
46 *Kristna Chandra v Ratan Ram* (1915) 20 CWN 645, 647, 35 IC 673, AIR 1916 Cal 840; *Hemraj v Nathu* (1935) 59 Bom 525, 157 IC 406, AIR 1935 Bom 295 (FB).
47 *Hemraj v Nathu* supra; *Thota Appanna v Nakkava* AIR 1963 AP 418.
48 *Punnayyah v Viranna* (1922) 45 Mad 425, 70 IC 668, AIR 1922 Mad 273.
49 *Ragho v Zaga* (1929) 53 Bom 419, 118 IC 555, AIR 1929 Bom 251.
50 *Sudhanya Kumar v Haripada* AIR 1960 Cal 34.
51 See § 243A. *Palanippa v Harvey* AIR 1953 Tr & Coch 481; *Rabi Narayan v Kanak Prova Devi* AIR 1965 Cal 444.
52 *Ramlal R & Co v BC Patel & Sons* 64 Cal WN 126, AIR 1960 Cal 546.

Burden of Proof

The burden of proof on the alienee is the same as that in the case of an alienation by the manager.[53]

The Guardians and Wards Act 1890

Where a guardian is appointed of the property of a Hindu minor under the Guardians and Wards Act 1890, he cannot alienate the immovable property of the minor without the sanction of the court, not even in a case of necessity. If he does so, the alienation is voidable at the option of the minor.[54] Where a court has sanctioned the alienation under the Guardians and Wards Act, the alienee can rely upon the order of the court and need not prove the actual legal necessity. The omission of the mention of any legal necessity in the order is only an irregularity.[55] The powers, however, of the natural guardian of a Hindu minor are larger than those of a guardian appointed under that Act, a natural guardian may alienate the minor's property even without the sanction of the court, provided the alienation is one for necessity for the benefit of the estate. The Guardians and Wards Act 1890, does not alter or affect the rights of natural guardians under the Hindu law.[56] However, once a guardian has been appointed by the court, the rights of the natural guardian are extinguished.[57]

Limitation

A suit by a ward, who has attained majority to set aside a transfer of property by his guardian must be brought within three years from the date when the ward attains majority.[58] A transfer by a guardian is not void, but voidable at the instance of the ward[59]. Reference may be made

53 See § 244. *Kandhia Lal v Muna Bidi* (1898) 20 All 135; *Raghubans v Inderjit* (1923) 45 All 77, 69 IC 683, AIR 1922 All 526; *Nathu v Ganpat* AIR 1958 Bom 25; *Dhobani Dei v Lingaraj* AIR 1971 Ori 224.

54 Section 29–30, Guardians and Wards Act 1890; *Sinaya v Munisami* (1899) 22 Mad 289; *Tejpal v Ganga* (1903) 25 All 59 (where the guardian appointed by the court was also the natural guardian).

55 *Balaji Vasudeo v Sadashiv Kashinath* (1937) Bom 1, 38 Bom LR 796, 165 IC 530, AIR 1936 Bom 389.

56 *Ram Chunder v Brojonath* (1879) 4 Cal 929 (FB); *Kanti Chunder v Bishesuar* (1898) 25 Cal 585 (FB); *Manishankar v Bai Muli* (1888) 12 Bom 686; *Sham Das v Umer Din* (1930) 11 Lah 312, 126 IC 788, AIR 1930 Lah 497.

57 *Arunmugam v Duraisinga* (1914) 37 Mad 38, 12 IC 586, AIR 1914 Mad 648.

58 The Indian Limitation Act 1908, Sch 1, art 44.

59 *Laxmaya v Rachappa* (1918) 42 Bom 626, 46 IC 22, AIR 1918 Bom 180; *Fakirappa v Lumanna* (1920) 44 Bom 742, 58 IC 257, AIR 1920 Bom 1; *Pran Nath v Bal Kishan* AIR 1959 Punj 313; *Brojendra v Prosanna Kumar* (1920) 24 CWN 1016, 59 IC 589, AIR 1920 Cal 776; *Labha Mal v Malak Ram* (1925) 6 Lah 447, 89 IC 602, AIR

continued on the next page

to *Ganapati v Ramachandra*, for distinction between alienation of joint family property by *karta* and alienation of minor's property by guardian.[60] Now see art 60 (a) Limitation Act 1963.

Alienation by Manager of Joint Family of Undivided Interest of Minor Coparceners

See §§ 242–244.

§ 529. CONTRACT BY NATURAL GUARDIAN

(1) A natural or even a de facto guardian has always the power to charge, mortgage or sell the properties of the infant on grounds of necessity of benefits to the minor. The law is well-settled by a long course of decisions, since *Hunooman Persaud Panday*'s case.[61] There is a conflict of opinion, however, on the point as to whether the same principle applies to cases of simple loans contracted by a natural or de facto guardian of a minor, either under a suitable bond or a promissory note.

In *Waghela v Sheikh Masludin*,[62] it was held by the Privy Council that a guardian cannot contract in the name of the ward, so as to impose on the latter, any personal liability, and this view was affirmed by the subsequent decision of the Judicial Committee in *Indur Chunder v Radhakrishore*.[63] On the strength of these pronouncements, it has been held, by the Bombay High Court, that a minor is not only exempted from personal arrest and detention in execution of a money decree, but that no decree, can be passed against him on the basis of a contract entered into on his behalf by his guardian, in execution of which, his general assets could be attached and sold.[64] On the other hand, it has been held by the Madras and Patna High Courts, that the principle laid down by the Privy Council in *Waghela*'s case,[65] cannot and does not affect the rule of Hindu law, which confers a power upon the guardian to bind the minor's estate for purposes of necessity or protection of the minor's interests.[66]

1925 Lah 619; contra *Bachchan Singh v Kamta Prasad* (1910) 32 All 392, 5 IC 585; *Rangaswami v Marappa* AIR 1953 Mad 230, (1952) 2 MLJ 506.

60 AIR 1985 Kant 143.

61 6 MIA 393.

62 Illustration (a). 14 IA 89, 11 Bom 551.

63 19 Cal 507.

64 *Maharana Shri Ranmalsinghji v Vadilal* ILR 20 Bom 61; *Keshav v Baloji* (1932) 34 Bom LR 996; *Sankar v Nathu* (1932) 34 Bom LR 1001; *Nagindas v Bhimrao* ILR 43 Bom 117; Wall's CJ in *Ramajogayya v Jagannadhan* ILR 42 Mad 185.

65 14 IA 89.

66 *Ramajogayya v Jagannadhan* ILR 42 Mad 185; *Venkitaswami v Muthusamy* (1919) 34

continued on the next page

The conflicting decisions on the subject were reviewed by the Federal Court of India in *Kondamudi v Myneni; Tadavarti v Myneni*.[67] The views expressed by the learned judges on the points of law involved in the case are not quite identical. However, the propositions of law receiving the largest measure of support from the pronouncements of the learned Judges of the Federal Court may be summarised as follows:

(i) a guardian of a Hindu minor either de jure or de facto has no authority to impose a personal obligation upon the minor or his estate by an unconditional undertaking to pay a debt on loan not contracted for legal necessity or benefit of minor;

(ii) a guardian de jure or even de facto, provided is not an intruder on the estate of the minor, can borrow money for the protection or benefit of the minor, so as to make the minor's estate liable for the same, but in such cases, the creditor can have a decree against the estate of the infant only, on the principle of subrogation to the right of indemnity or reimbursement, which the guardian may have against the ward's properties. This right of subrogation can be availed of, when the guardian is personally liable for the debt, and no question arises of making out a contract directly between the creditor and the infant;

(iii) the same principle is applicable to moneys borrowed on the security of negotiable instruments. A minor cannot be made liable on a pronote executed by the guardians either *de jure* or *de facto* in the name of the minor.

(2) It is not within the competence of a guardian of a minor to bind the minor's estate by a contract for the purchase of immovable property for the minor. As the minor is not bound by the contract, the minor cannot claim specific performance of the contract. This was laid down by the Privy Council in *Mir Sarwarjan v Fakhruddin*,[68] and the principle has been followed in number of subsequent cases by the different High Courts in India.[69]

A distinction has thus been drawn between a completed transfer of minor's property by the guardian, on grounds of legal necessity or benefit to the minor, and an executory contract of transfer entered into by the guardian on behalf of the infant for the same purpose, and specific performance has been held not to be available in the latter case

MLJ 177; *Meenakshi v Ranga* AIR 1932 Mad 696; *Annamalai v Muthuswami* ILR 39 Mad 891; *Satyanarayana v Mallayya* ILR 58 Mad 735; *Suchit v Harnandan* ILR 12 Pat 112.

67 (1949) 11 FCR 65; *Ramalinga v Srinivasalu* AIR 1955 Mad 657, (1955) 2 MLJ 173.

68 Illustration (b). 39 IA 1, 39 Cal 232.

69 *Mala v Muhammad Sharif* 8 Lah 212; *Soban Lal v Atal Nath* 56 All 142; *Chodavarapu v Chennuru* AIR 1920 Mad 423.

because of want of mutuality. In *Subramanayam v Subba Rao*,[70] the Privy Council had to deal with a case, where the mother of an infant as his natural guardian entered into a contract for the sale of the minor's property to a stranger. The contract was for the benefit of the minor and in pursuance of the agreement, the transferee was put in possession of the property. No sale deed was however executed, and the minor, through his guardian, instituted a suit for recovery of possession of the property contracted to be sold, on the ground that the contract was not binding on him. It was held by the Privy Council that the defendant was protected under s 53 (A), Transfer of Property Act (doctrine of part performance), and the minor for whose benefit the contract was entered into, answered most aptly the description of the transferor, in the sense in which the expression was used in the section.

On the strength of this decision, it has been held by Viswanath Shastri J of the Madras High Court,[71] that when the mother of a Hindu minor entered into a contract for sale of the minor's property for purposes considered under Hindu law as necessary, and there was no doubt about the competency of the guardian to act on behalf of the minor, the contract could be specifically enforced against the minor, and the line of authorities beginning with *Mir Sarwarjan*'s case had no application to such circumstances.

It has been held by the Allahabad High Court,[72] that although in general, a claim for specific performance of a contract to sell the joint family property entered into by the manager will not be decreed against the minors, yet, if fresh property has been purchased with the amount realised and the minor takes a share in the property so acquired, he will not be allowed to repudiate the contract.

As to specific performance of a contract to purchase immovable property by a competent guardian acting within his authority, see *Popat Namdeo v Jagu*.[73]

(3) No act done by a person, who is the guardian of minor, binds the minor, unless the act was done by him in his capacity of guardian. It is a question of fact in each case, whether a particular act done by a person was done by him in his capacity of guardian or on his own behalf and on his account. In the former case, the act binds the minor, provided, it was otherwise within the power of the guardian; in the latter case, it does not. The mere fact that the name of the minor is not mentioned in a contract, or in a deed of sale or mortgage, is not conclusive proof

70 75 IA 115.

71 *Ramlingam v Babanambal* AIR 1951 Mad 431; *Suryaparkasam v Gangaraju* AIR 1956 AP 33 (FB).

72 *Soban Lal v Atal Nath* (1934) 56 All 142, 148 IC 229, AIR 1933 All 846.

73 AIR 1969 Bom 140.

that the transaction was not entered into on behalf of the minor. In each case, the language of the document and the circumstances in which it was executed must be considered.[74]

(4) See s 8, Hindu Minority and Guardianship Act 1956.

Illustrations

(a) The mother of a Hindu boy, *M*, acting as his guardian, sells property belonging to the minor for purposes of necessity, free of all government claims for revenue. The deed of sale contains a covenant binding the minor and heirs to indemnify the purchaser against any claims for revenue, which the government might make at any future time. Some time after the sale, the government assessed the land. The purchaser sues *M*, who has then attained majority, upon the covenant, contained in the deed. *M* is not liable on the covenant, the covenant being a personal one. Such a covenant is not valid and binding on a minor, either under the English law or the Indian law.[75]

(b) *A*, as guardian of the estate of a minor, *B*, agrees to purchase immovable property from *C*, on behalf of *B*. *B*, on attaining majority, sues *C* for specific performance. *B* is not entitled to specific performance, nor is *C*. See subs-§ (2).

(c) A dies leaving a widow, *W*, and a minor son, *M*. After *A*'s death *W* enters into possession of the property left by *A*, and manages the same as guardian of *M*. After some time, in consequence of certain disputes, *G* applies to the court to be appointed guardian of the person and property of *M*, and he is appointed such guardian. Before *G* can obtain possession of *M*'s property from *W*, *W* sells the property to *P* for Rs 400 and conveys the property to *P as her own property and not as that of the minor*. Out of the Rs 400, she applies Rs 200 in satisfying a decree against the estate of her deceased husband, and the rest she spends for her own maintenance. *M* attains majority, and sues P to recover the property from him. The sale is void altogether, and *M* is entitled to recover the property. The sale being absolutely void, *P* is not entitled to a return of any part of the purchase

74 Illustration (c). *Indur Chander v Radhakrishore* (1892) 19 Cal 507, 19 IA 90 (renewal of lease); *Nathu v Balwantrao* (1903) 27 Bom 390 (sale by mother); *Murari v Tayana* (1895) 20 Bom 286, 288; *Watson & Co v Sham Lal* (1887) 14 IA 178, 15 Cal 8; *Nandan Prasad v Abdul Aziz* (1923) 45 All 497, 74 IC 367, AIR 1923 All 581 (mortgage by mother as full owner); *Balwant Singh v Clancy* (1912) 39 IA 109, 34 All 296, 14 IC 629 (sale by brother).

75 *Waghela v Seikh Masludin* (1887) 11 Bom 551, 14 IA 89. See sub-§ (1).

money, not even of the Rs 200 applied by *W* in payment of debts binding on the estate and therefore on *M*.[76] See sub-§ (3).

§ 530. COMPROMISE BY NATURAL GUARDIAN

It is competent to a guardian to enter into a compromise on behalf of his ward.[77]

§ 531. ACKNOWLEDGEMENT OF DEBT BY GUARDIAN

The natural guardian of a minor, as well as a guardian appointed under the Guardians and Wards Act 1890, has the power to acknowledge a debt or to pay interest on a debt, so as to extend the period of limitation, provided the act was for the protection or benefit of the minor's property; but he had no power to revive a debt, which was barred by limitation. Section 20 (3) (a) of the Limitation Act 1963, includes a lawful guardian in the expression 'agent duly authorised in his behalf' occurring in ss 18 and 19 of the Act.

A *de facto* guardian has no authority to acknowledge a debt on behalf of the minor under s 18 read with s 20, Limitation Act 1963.[78] See ss 18–20, Limitation Act 1963, ss 18, 19 and 20 and s 25, Indian Contract Act 1872.

II. Testamentary Guardians

§ 532. GUARDIANS APPOINTED BY WILL

(1) A Hindu father may, by word of mouth or by writing, nominate a guardian for his children, so as to exclude even the mother from the guardianship.[79] The mother, however, has not the power to appoint a guardian by will,[80] but the court may have regard to her wishes, if any, expressed in her will.

(2) The power of testamentary guardian to deal with property belonging to his ward is subject to the restrictions imposed by the will.[81] The father

76 *Nathu v Balwantrao* (1903) 27 Bom 390.

77 *Nirvanaya v Nirvanaya* (1885) 9 Bom 365; *Sant Bhushan Lal v Brij Bhushan Lal* AIR 1967 Del 137.

78 *Bireswar v Ambika* ILR 45 Cal 630; *Ramaswamy v Kasinath* AIR 1928 Mad 226; *Chennappa v Onkarappa* (1940) ILR Mad 358; *Kondamudi v Myneni* (1949) 11 FCR 65.

79 *Deba Nand v Anandmani* (1921) 43 All 213, 59 IC 909, AIR 1921 All 346; *Jagannadha v Ramayamma* (1921) 44 Mad 189, 62 IC 437, AIR 1921 Mad 132 (guardian of son to be adopted); *Budhilal v Morarji* (1907) 31 Bom 413.

80 *Venkayya v Venkata* (1898) ILR 21 Mad; *Duraiswamy v Balasubramanian* AIR 1977 Mad 304.

81 Section 27, Guardians and Wards Act 1890.

can, by his will, appoint a guardian, both of the person as well as the property of his minor daughter. On the marriage of the daughter, the husband becomes the guardian of the person, but the testamentary guardian continues to be the guardian of her property.[82]

(3) As regards guardianship of joint family property, there is a conflict of opinion whether the father of a joint family consisting of himself and his minor sons has power to appoint a guardian by his will, of the joint property, during the minority of the sons. In an earlier Bombay case, it was held that he had no such power.[83] In a later Bombay case, it was held that he had the power to appoint such guardian and also to authorise him to alienate the joint property, and that, where an alienation was made, it was binding on the minor sons, provided it was within the scope of the authority conferred upon him by the will.[84] A Full Bench of the Bombay High Court has now adopted the earlier view.[85] In Madras, it has been held by a Full Bench that it is not competent to the manager of joint Hindu family, whether he is the father or uncle or an elder brother, to appoint a testamentary guardian to the joint property.[86] It is submitted that the father has no power to appoint a guardian by his will of joint family property. At the moment of his death, the property passes by survivorship to his minor sons, and he cannot, by any testamentary direction, authorise any person to deal with it during the minority of the sons. However, it has been held by the same High Court, that if the testator has no sons, he may by his will, authorise his widow to adopt a son to him, and appoint a guardian to manage his estate during the minority of the adopted son.[87] The decision would no doubt be correct, if the property disposed of by will was the self-acquired property of the testator. However, it would be questionable, if the property disposed of was ancestral.

(4) See ss 9 and 12 Hindu Minority and Guardianship Act 1956. Also see ss 6, 7, 17(2) and 39, Guardians and Wards Act 1890.

The court is bound, in appointing a guardian, to have regard to the wishes of the father contained in his will, although, probate of the will has not been obtained.[88]

82 *Rajarajeswari v Sankaranarayana* (1948) ILR Mad 351.

83 *Harilal v Bai Mani* (1905) 29 Bom 351.

84 *Mahableshwar v Ramchandra* (1914) 38 Bom 94, 21 AC 350, AIR 1914 Bom 300; *Soobah Pirthee Lal v Soobah Doorgah* (1867) 7 WR 73, 75; *Venkatraman v Janardhan* (1928) 52 Bom 16, 28, 30, 106 IC 79, AIR 1928 Bom 8.

85 *Brijbhukandas v Ghashiram* (1935) 59 Bom 316, 155 IC 12, AIR 1935 Bom 124 (FB).

86 *Chindambara v Rangasami* (1918) 41 Mad 561, 45 IC 905, AIR 1919 Mad 1046 (FB).

87 *Jagannadha v Ramayamma* (1921) 44 Mad 189, 62 IC 437, AIR 1921 Mad 132.

88 *Sarala Sundari v Hazari Dasi* (1915) 42 Cal 953, 28 IC 972, AIR 1916 Cal 324 (will made by husband containing directions about guardianship of his minor wife).

Transfer of Power of Management by Father

Where the father of a joint family consisting of himself and his minor sons, appointed his nephew to manage the joint family properly for a period of 13 years, and the manager was under the arrangement liable only to pay a fixed sum in lieu of actual income, and the father died before the expiry of the period, it was held that the sons were not bound by the arrangement and that the manager was liable to account for the whole of the income after the father's death.[89]

III. Guardians Appointed by the Court

§ 533. POWER OF COURT TO APPOINT GUARDIAN

(1) Where the court is satisfied that it is for the welfare of minor that an order should be made appointing a guardian of his person or property, or both, the court may make an order under the Guardians and Wards Act 1890, appointing a guardian (see ss 4 (4) and (5) and s 7 of the Act). Where the father has appointed a testamentary guardian, the court has no power to appoint a guardian under s 7 of the Guardians and Wards Act.[90]

A father being the natural guardian of his minor son, cannot be appointed guardian of the person of the son, and no order under s 7 is necessary.[91]

(2) Nothing in the Guardians and Wards Act 1890, shall affect, or in any way derogate from, or take away any power possessed by a Chartered High Court (see s 3 of the Act).

§ 534. GUARDIAN OF PERSON

(1) In appointing the guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject (§ 518), appears in the circumstances to be for the welfare of the minor. Reference may be made to s 13, Hindu Minority and Guardianship Act 1956.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age and sex of the minor, the character and capacity of the proposed guardian and his nearness of kinship 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.

89 *Venkatraman v Janardhan* (1928) 52 Bom 16, 106, IC 79, AIR 1928 Bom 8.
90 *Amirthavalliammal v Sironmani Ammal* (1938) ILR Mad 757.
91 *Venkateswaran v Saradambol* (1935) 13 Rang 590, 160 IC 878, AIR 1936 Raj 67.

(3) If the minor were old enough to form an intelligent preference, the court may consider that preference (see s 17, Guardians and Wards Act 1890).

§ 535. GUARDIAN OF MINOR'S SEPARATE PROPERTY

The only property of a minor of which a guardian can be appointed under the Guardian and Wards Act 1890, is the separate property of the minor. A guardian cannot be appointed under that Act of the undivided interest of a minor in coparcenary property in cases governed by Mitakshara law. The reason is that the interest of a member of a joint Mitakshara family is not separate or individual property.[92]

§ 536. ALIENATION BY GUARDIAN APPOINTED UNDER THE GUARDIANS AND WARDS ACT 1890

A guardian appointed by the court under the Guardians and Wards Act 1890, has no power to alienate the minor's property without the previous permission of the court. Alienation without such permission is voidable at the instance of the minor and other persons affected thereby (see ss 29 and 30 of the Act). Where alienation is made with the permission of the court, it cannot be impeached by the minor or any other person, except in a case of fraud or underhand dealing. The reason is that the alienee is entitled to trust the order of the court, and he is not bound to inquire as to the expediency or necessity of the alienation for the benefit of the minor's estate.[93]

§ 537. GUARDIAN OF MINOR'S UNDIVIDED COPARCENARY INTEREST

Although a guardian cannot be appointed of the undivided interest of a minor in a joint family property under the Guardians and Wards Act 1890, a Chartered High Court, may, in the exercise of its inherent power, appoint the managing member of the family to be guardian of such interest, where such appointment is clearly for the benefit of the minor,

92 *Gharib Ullah v Khalak Singh* (1903) 25 All 407, 416, 30 IA 165, 170; *Kajikar v Maru* (1909) 32 Mad 139, 1 IC 199; *Mulukh Raj v Dhanabanta* AIR 1957 Cal 322. See § 519. Also see s 12, Hindu Minority and Guardianship Act 1956.

93 See § 519. *Gangapershed v Meharani Pili* (1884) 11 Cal 379, 383–84, 12 IA 47, 49–50 (mortgage); *Sikher Chund v Dulputty* (1880) 5 Cal 363 (sale); *Venkatasami v Viranna* (1922) 45 Mad 429, 65 IC 964, AIR 1922 Mad 135; *Jugal v Ananda* (1895) 22 Cal 545 (suit for specific performance against minor—See § 441); *Mansaram Das v Ahmad* (1916) 21 CWN 63, 37 IC 380, AIR 1917 Cal 235.

with power to him to alienate the joint family property, including the minor's interest therein, and, where the property is to be sold, impose conditions upon the managing member to secure the minor's share of the proceeds of the sale. This is the practice in Bombay[94] and Calcutta.[95] In a Allahabad case, the High Court, while holding that it had the power to appoint a guardian, refused to do so on grounds of inexpediency and want of precedent.[96]

Illustrations

(a) *A*, and his minor son *B*, are members of a joint family governed by Mitakshara law. The only property, which the family possesses, is a house, which is in a very bad state of repair. Besides, there are family debts, which have to be paid, but the family has no means either to effect the repairs or to pay the debts. *C* offers to buy the house at Rs 40,000, provided *A* obtains the sanction of the High Court for the sale on behalf of his minor son *B*. *A* cannot apply for the sanction, unless he gets himself appointed as guardian of *B*'s property. *A* thereupon applies to the court that he may be appointed guardian of *B*'s property and that the sale be sanctioned by the court. It is proved to the satisfaction of the court that, if the sanction is not given, the property is not likely to realise a sum approaching Rs 40,000. This is a fit case for the appointment of *A* as guardian and for sanctioning the sale.[97]

(b) The facts are the same as in Illust (a) with the difference that *A* does not propose to sell the property, but to raise a loan on a mortgage of the property. It is proved to the satisfaction of the court, that if the mortgage is sanctioned by the court, better terms can be obtained from the mortgagee than without the sanction. The High Court may appoint *A* as guardian of *B*'s property, and sanction the mortgage.[98]

94 *Re Manilal Hurgovan* (1901) 25 Bom 353; *Re Jagannath Ramji* (1895) 19 Bom 96; *Re Jairam Laxman* (1892) 16 Bom 634; *Re Mahadev Krishna* (1937) Bom 432 (commenting upon the observation of Kania J); *Re Dattatreya Govind* (1932) 56 Bom 519, 141 IC 697, AIR 1932 Bom 537.

95 *Re Hari Narain Das* (1928) 50 Cal 141, 74 IC 244, AIR 1923 Cal 409; *Re Bijaykumar Singh Bunder* (1932) 59 Cal 570, 138 IC 739, AIR 1932 Cal 502.

96 *Re Govind Prasad* (1928) 50 All 709, 112 IC 873, AIR 1928 All 709. See § 519, s 12, Hindu Minority and Guardianship Act 1956.

97 *Re Manilal Hurgovan* (1901) 25 Bom 353.

98 *Re Jairam Laxman* (1892) 16 Bom 634.

IV. Guardian De Facto and Guardian Ad Hoc

§ 538. ALIENATIONS BY GUARDIAN DE FACTO AND GUARDIAN AD HOC

(1) A person who is not an ad hoc guardian and does not pose as a guardian for particular purpose, but manages the affairs of the infant in the same way as a de jure guardian does, could be described as a de facto guardian although he is not a natural guardian or a guardian appointed by the court.

(2) A de facto guardian has the same power of alienating the property of his ward as a natural guardian.[99] A bona fide mortgage executed by the de facto guardian of a Hindu minor for the benefit of his estate and with due regard to his interests, cannot be impeached on the sole ground that he is merely a de facto guardian,[1] for example, if it is effected for the marriage of the minor's sister.[2]

However, if the alienation is for a marriage in violation of the Child Marriage Restraint Act, the transaction can be challenged.[3] The High Courts of Bombay[4] and Madras[5] have held that a sale by a stepmother, though she was in each case the de facto manager of the minor's estate, is a sale by an unauthorised person, and is therefore void. The question as to the validity of a mortgage by a stepmother arose before the Judicial Committee in *Bunseedhur v Bindesree*,[6] where it was held that the transaction being fraudulent, the minor was not bound by it. However, the power of a stepmother to alienate the minor's as a de facto guardian was not questioned. The Bombay decision has since been overruled by

99 *Hunooman Persaud v Mst Badooee* (1856) 6 MIA 393, 412–13; *Seetharamanna v Appiah* (1926) 49 Mad 768, 92 IC 827, AIR 1926 Mad 457 (sale by maternal uncle upheld); *Mohanund v Nafur* (1899) 26 Cal 820 (sale by paternal grandmother upheld); *Boi Amrit v Bai Manik* (1875) 12 Bom HC 79, 81; *Lalla v Koonwar* (1866) 10 MIA 454 (mortgage by stepmother held not binding on the ground that it was fraudulent); *Nathuram v Shoma* (1890) 14 Bom 562 (mortgage by father's cousin upheld); *Kondamudi v Myneni* (1949) 11 FCR 65; *Palani Goundan v Vanjiakkal* AIR 1956 Mad 476; *Annapurnamma v Ramanajaneyaratnam* AIR 1949 AP 40; *Kasturi v SV Rao* AIR 1970 AP 440.

1 *Kundan Lal v Beni Pershad* (1932) 13 Lah 399, 137 IC 115, AIR 1932 Lah 293.

2 *Sheo Govind v Ram Adhin* (1933) 8 Luck 182, 140 IC 556, AIR 1933 Ori 31.

3 *Rambhau v Rajaram* AIR 1956 Bom 250; *Tatya Mohyaji v Rabha Dadaji* (1953) Bom 570, (1953) 55 Bom LR 40, AIR 1953 Bom 273; contra *Parasram v Naranini Devi* AIR 1972 All 357.

4 *Limbaji v Rahi* (1925) 49 Bom 576, 88 IC 6, 43, AIR 1925 All 499 (transferee entitled to benefit of s 51, Transfer of Property Act 1882).

5 *Narayanan v Ravunni* (1924) 47 MLJ 680, 84 IC 973, AIR 1925 Mad 260; commented upon in *Seetharamanna v Appiah* (1926) 49 Mad 768, 773–74, 92 IC 827, AIR 1926 Mad 457.

6 (1866) 10 MIA 454.

the Full Bench decision of the same court.[7] The view taken by the Bombay Full Bench is fully supported by the decision of the Federal Court in *Kondamudi v Myneni*.[8] The right to avoid the transaction is a personal right of the minor. It is a right to sue and is not heritable.[9]

(3) Alienation by a de facto guardian, which is neither for necessity, nor for the benefit of the estate of the minor is void ab initio in the sense that it confers no title on the alienee.[10]

(4) A sale by a guardian ad hoc, eg, by a separated uncle, who has never intermeddled or acted as a guardian, is void.[11]

(5) New s 11, Hindu Minority and Guardianship Act, lays down that no de facto guardian can deal with the minor's property.

§ 538A. DE FACTO GUARDIAN OF LUNATIC

The de facto manager of the estate of a lunatic has no power to alienate his property for necessity.[12]

V. Remedies

§ 539. PROCEDURE FOR RECOVERING CUSTODY OF MINORS

A guardian, who has been deprived of the custody of his ward, has the following remedies open to him:

(1) He may proceed by suit against the person alleged to be in wrongful possession of the ward.

In *Besant v Narayaniah*,[13] where a suit was brought by a Hindu father in the District Court of Chinglepat for the custody of his minor sons, their Lordships of the Privy Council said: 'A suit *inter partes* is not the form of procedure prescribed by the Act (ie, the Guardians and Wards Act 1890) for proceedings in a district court, touching the guardianship of infants.' Following this decision, it has been held by the Madras High Court, that the proper procedure in proceedings in a mofussil court,

7 *Tulsidas v Vaghela Raisingi* (1933) 57 Bom 40, 141 IC 17, AIR 1933 Bom 15; *Kali Charan v Sudhir Chandra* AIR 1985 Cal 66.

8 11 FCR 65.

9 *Palani Goundam v Vanjickkal* AIR 1956 Mad 476.

10 *Tatya Mohyaji v Rabha Dadaji* (1953) 55 Bom LR 40; contra *Seetharamanna v Appiah* (1926) 49 Mad 768, 92 IC 827, AIR 1926 Mad 457; *Hari Satya v Mahadev* AIR 1983 Cal 76.

11 *Harilal v Gordhan* (1927) 51 Bom 1040, 105 IC 722, AIR 1927 Bom 611.

12 *Narayan v Ramchandra* AIR 1957 Bom 146 (FB); *Kanhaiyalal v Harsingh* (1944) Nag 698.

13 (1914) 41 IA 314, 322, 38 Mad 807, 820, 24 IC 290, AIR 1914 PC 41.

touching the custody of a minor is by way of petition under s 25 of the Act, and not by way of suit.[14] On the other hand, it was held by the High Court of Bombay,[15] that the dictum of the Privy Council in *Besant's* case was not intended to be of such general application as to take away the right of suit in all cases, that the provisions of the Guardians and Wards Act 1890, were not exhaustive, and that a suit for the custody of a minor lies even in a mufassil court. The Chief Court of Punjab,[16] and the Allahabad High Court,[17] have held that a petition is the only form of procedure allowed in matters relating to the custody of minors.

(2) He may proceed by a writ of *habeas corpus* under art 226 of the Constitution.

For the case where a minor is confined under such circumstances that the confinement amounts to an offence, see s 100, Code of Criminal Procedure 1898. For the case, where a female minor has been detained for an unlawful purpose, see s 552 of that Code.

14 *Sathi v Ramandi* (1919) 42 Mad 647, 53 IC 399, AIR 1920 Mad 937 (FB); *Ibrahim v Ibrahim* (1916) 39 Mad 608, 33 IC 894, AIR 1917 Mad 612.

15 *Achratlal v Chimanlal* (1916) 40 Bom 600, 37 IC 215, AIR 1916 Bom 129, following *Sharifa v Munechan* (1901) 25 Bom 574.

16 *Ghasita v Wazira* (1896) Punj Rec No 41 (FB).

17 *Sham Lal v Bindo* (1904) 26 All 594; *Utma Kuar v Bhagwanta Kuar* (1915) 37 All 515, 29 IC 416, AIR 1915 All 199.

XXV

MAINTENANCE

LAW PRIOR TO THE HINDU ADOPTIONS AND MAINTENANCE ACT 1956

The aged parents, a virtuous wife, and a infant child must be maintained even by doing a hundred misdeeds[1]

Note.—Some material and important alienations and modifications in the rules of Hindu law relating to maintenance have been brought about by the Hindu Adoptions and Maintenance Act 1956. That enactment is not exhaustive of the law of maintenance, but in respect of all matters dealt with in the Act, it supersedes the rule of the law of maintenance previously applicable to Hindu by virtue of any text or rule of Hindu law or any custom or usage having the force of law. It also supersedes any other law contained in any Central or state legislation in force, immediately before it came into operation, in so far as such legislation is inconsistent with the provisions contained in it. The rules in the following paragraphs of this chapter state the law prior to the coming into operation of that Act. The alienations and modifications in the law brought about by that Act are pointed out in the notes under the provisions of that Act.

The Chapter has been discussed under the following heads:

I Nature and extent of right of maintenance—§§ 540–44A.
II Persons entitled to maintenance—§§ 545–65;
III Amount of maintenance—§§ 566–68;
IV Transfer of family property and its effect on right of maintenance—§§ 569–72;
V Transfer of family dwelling-house and its effect on the right of residence—§§ 573–75;
VI Right of maintenance not affected by will—§ 576;
VII Transfer and attachment of right of maintenance—§§ 577–78;
VIII Suit for maintenance—§§ 579–81.

1 Manu cited in Mitakshara.

I. Nature and Extent of Right of Maintenance

§ 540. PRIORITY OF DEBTS OVER MAINTENANCE

Debts contracted by a Hindu take precedence over the right to maintenance.[2] Section 26, Hindu Adoptions and Maintenance Act now deals with the question of property of debts. Reference may be made to the notes under that section.

§ 541. LIABILITY FOR MAINTENANCE OF TWO KINDS

The liability of a Hindu to maintain others arises in some cases from the mere relationship between the parities, independently of the possession of the property (§ 542). In other cases, it depends altogether on the possession of property (§§ 543–44).[3]

§ 542. PERSONAL LIABILITY: LIABILITY OF FATHER, HUSBAND AND SON

A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents, whether he possesses any property or not. The obligation to maintain these relations is personal in character and arises from the very existence of the relation between the parties.[4]

Section 18 and 20 of the Hindu Adoptions and Maintenance Act 1956, deal with the question of maintenance of wife, children and aged parents. Reference may be made to the notes under those sections.

§ 543. LIABILITY DEPENDENT ON POSSESSION OF COPARCENARY PROPERTY: LIABILITY OF MANAGER

(1) The manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children.[5] On the death of any one of the male members, he is bound to maintain his widow and his children (§ 545).[6] The obligation to maintain these persons arises from the fact that the manager is in possession of the

2 See § 570. *Adhirancee v Shonamalee* (1976) 1 Cal 365; *Lakshman v Satyabhamabai* (1878) 2 Bom 494, 505.

3 *Savitribai v Luxmibai* (1878) 2 Bom 573 (FB); *Kamalammal v Venkatalakshmin* AIR 1965 SC 1348.

4 (1878) 2 Bom 573, 597–98 (FB).

5 Manu, Chap 9, sec 108, Narada, Chap 13, ss 26, 27 28, 33; *Vaikuntam v Kallapiran* (1900) 23 Mad 512, 516; *Cheruty alias Vasu v Nangamparambil Ravi alias Kuttaman* (1940) Mad 830, AIR 1940 Mad 664.

6 *Bhagwan Singh v Mst Kewal Kaur* (1927) 8 Lah 360, 101 IC 201, AIR 1927 Lah 280.

family property. The liability to maintain a disqualified heir is governed by the same principle.[7]

(2) The same principles apply to cases governed by Dayabhaga law. However, in applying these principles, it is to be remembered that there can be no coparcenary according to that law between a father and sons (§ 277).

According to both the schools, a father is under a personal obligation to maintain his minor sons. However, where the father has ancestral property in his hands, then if the case is governed by the Mitakshara law, sons, even if adult, are entitled to maintenance out of the ancestral property (§ 545), but not if the case is governed by Dayabhaga law, for under that law, sons do not acquire by birth any interest in ancestral property (§ 273). As to impartible property, see § 589.

§ 544. LIABILITY DEPENDENT ON POSSESSION OF INHERITED PROPERTY: LIABILITY OF HEIRS

An heir is legally bound to provide, out of the estate which descends on him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The reason is that the estate is inherited, subject to the obligation to provide for such maintenance.[8]

Section 22 of the Hindu Adoptions and Maintenance Act 1956, deals with the question of liability of heir for maintenance of the dependents of a deceased person. Reference may be made to the notes under that section.

Illustrations

(a) *Sister.*—A Hindu is under no personal obligation to maintain his sister, but if he inherits his father's estate, he is bound to maintain her out of that estate, she being a person whom his father was legally bound to maintain as his daughter, provided of course, that she is unmarried (§ 542).

(b) *Stepmother.*—A stepson is under no personal obligation to maintain his stepmother; but if he inherits his father's estate, he is bound to maintain her out of the estate, she being a person whom his father was legally bound to maintain as his wife.[9]

(c) *Mother-in-law.*—*A* dies leaving a widow *B* and a mother *C*. *B* is under no personal obligation to maintain her mother-in-law *C*;

7 *Kamalammal v Venkatalakshmi* AIR 1965 SC 1349.

8 *Khetramani v Kashinath* (1869) 2 Beng LRAC 15, 34, 38 (FB); *Kamini v Chandra* (1890) 17 Cal 373, 376–78; *Mst Rupa v Mst Srivabati* AIR 1955 Ori 28.

9 *Bai Daya v Natha* (1885) 9 Bom 279; *Narbadabai v Mahadev* (1881) 5 Bom 99; *Judemma v Varadareddi* (1948) ILR Mad 803.

but if she inherits property from *A*, she is bound to maintain *C*, she (*C*) being a person whom *A* was legally bound to maintain as his mother.[10]

(d) *Daughter-in-law.*—*A* dies leaving a widow *W* and a father *F*. He leaves no property. Is *F* under any obligation to maintain his destitute daughter-in-law *W*? Yes, but the obligation is only a moral one, so that he may refuse to maintain her. Suppose now, that *F* dies leaving a widow *B*. On *F*'s death, *B* inherits his estate as his heir. *B* now comes under a legal obligation to maintain *W* out of the estate, she being a person who the late proprietor (*F*) was morally bound to maintain.[11]

§ 544A. LIABILITY OF THE GOVERNMENT

The obligation to maintain extends even to the government, when the government takes the estate by escheat or by forfeiture.[12]

II. Persons Entitled to Maintenance

Sons

§ 545. SONS

(1) A father is under a personal obligation to maintain his minor sons; therefore, he is bound to maintain them even out of his separate or self-acquired property. However, he is under no such obligation to his adult sons; therefore, he is not bound to maintain them out of property which belongs exclusively to him.[13]

If the father and sons are members of a joint family governed by the Mitakshara law, and there is joint family property, the sons, even if adult, are entitled to maintenance out of the joint property. The reason is that under the Mitakshara law, sons take a vested interest in joint family property by birth.[14] The liability to maintain an adult son is not limited

10 *Bai Kanku v Bai Jadav* (1884) 8 Bom 15.

11 See § 564. *Janki v Nand Ram* (1889) 11 All 194; *Rajanikanta Pal v Sajanisundaree Dasee* (1934) 61 Cal 221, 61 IA 29, 147 IC 438, AIR 1934 PC 29; *Ranagammal v Echammmal* (1899) 22 Mad 305; *Ganga Dei v Jagannath* 22 Luck 518; but see *Saran Bai v Abdul Rashid* AIR 1948 Sind 127.

12 *Mst Golab Koonwar v Collector of Benares* (1947) 4 MIA 246.

13 *Ammakannu v Appu* (1888) 11 Mad 91; *Premchand v Hulasbchand* (1869) 4 Beng LR App 23; *Ramchandra v Sakaram* (1878) 3 Bom 346, 350, 351; *Bhoopathi Nath Chakraborti v Basanta Kurmaree Debee* (1936) 63 Cal 1098, AIR 1936 Cal 556.

14 See *Savitribai v Laximibai* (1878) 2 Bom 573, 597 (FB); *Sartaj Kuari v Deoraj Kuari* (1888) 10 All 272, 288, 15 IA 51.

to the income of what would have been his share on a partition of the joint family property.[15]

However, the sons do not, in cases governed by Dayabhaga law, acquire any interest by birth in ancestral property (§§ 273, 274). A father therefore, under the Bengal school, is not bound to maintain his adult sons, either out of his separate or out of ancestral property.

(2) A son, who is entitled to sue for partition, can sue for maintenance.[16] Where he cannot sue for partition, without the consent of certain coparceners, as in Bombay,[17] he is entitled to maintenance out of the joint family property.[18]

(3) Section 20 of the Hindu Adoptions and Maintenance Act 1956, now provides that a Hindu father or mother is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and that a legitimate or illegitimate child can claim maintenance from his or her father or mother, so long as the child is a minor. Reference may be made to the notes under the section.

Daughter

§ 546. DAUGHTER

(1) A father is bound to maintain his unmarried daughters. On the death of the father, they are entitled to be maintained out of his estate.[19]

A daughter on marriage, ceases to be a member of her father's family, and becomes a member of her husband's family.[20] Henceforth, she is entitled to be maintained by her husband, and, after his death, out of his estate (§ 559). If the husband has left no estate, her father-in-law, if he has got separate property of his own, is morally, though not legally, bound to maintain her; but after his death, she acquires a legal right to be maintained out of his estate on the principle stated in § 544. If she is unable to obtain maintenance from her husband, or after his death from his family, her father, if he has got separate property of his own, is under a moral, though not a legal obligation, to maintain her. However, it is not settled whether, after the father's death, she acquires a legal right to be maintained by his heirs out of his estate. The High Court of

15 *Chanviravda v District Magistrate of Dharwar* (1927) 51 Bom 120, 100 IC 575, AIR 1927 Bom 91 (lunatic son—claim for maintenance of lunatic while in asylum—claim upheld, though in excess of lunatic's share of income).

16 *Cherutty alias Vasu v Nangamparambil Ravu* alias *Kuttaman* (1940) Mad 830, AIR 1940 Mad 664.

17 *Apaji v Ramchandra* (1891) 16 Bom 29.

18 *Bhupal v Tavanappa* (1922) 46 Bom 435, 4 IC 568, AIR 1922 Bom 292.

19 *Bai Mangal v Bai Rukhmini* (1899) 23 Bom 291; *Tulsha v Goipal Rai* (1884) 6 All 632.

20 *Kartic Chunder v Saroda Sundari* (1891) 18 Cal 642, 646.

Bombay has held that she acquires no such right.[21] On the other hand, the opinion has been expressed by the High Court of Calcutta, that she does acquire such right, provided she is unable to obtain maintenance from her husband's family.[22] The Madras High Court has held that a widowed daughter, who is without means and whose husband's family is unable to support her, is entitled to be maintained by her stepmother out of her father's estate.[23]

(2) See s 20, Hindu Adoptions and Maintenance Act 1956, and § 545(3). In addition, see ss 19 and 22 of that Act. Reference may also be made to the notes under those sections.

Grandchildren

§ 547. GRANDCHILDREN

(1) A grandfather is under no personal obligation to maintain his grandsons or granddaughters.[24]

It has been held by the Calcutta High Court, that a predeceased son's daughter comes under the description of *deena samasrita* (poor dependents) in Manu's text, and consequently, there is a moral obligation on the part of the grandfather to maintain her. This moral obligation becomes a legal obligation on the part of those who inherit the grandfather's property.[25]

(2) See ss 22 and 21(iv) and (v), Hindu Adoptions and Maintenance Act 1956.

Parents

§ 548. PARENTS

A son is under a personal obligation to maintain his aged father. He is also under a similar obligation to maintain his aged mother, and he is bound to maintain her, whether or not he has inherited property from his father.[26]

21 *Bai Mangal v Bai Rukhmini* (1899) 23 Bom 291; *Khanta Moni v Shyam Chand* AIR 1973 Cal 112.

22 *Mokhada v Nundo Lall* (1901) 28 Cal 278, 288.

23 See § 544. *Ambu Bai Ammal v Soni Bai Ammal* (1941) Mad 13, AIR 1940 Mad 804 (FB).

24 *Manmohini v Balak Chandra* (1871) 8 Beng LR 22; *Kalu v Kashibai* (1883) 7 Bom 127.

25 *Provash v Prokash* (1946) 2 Cal 164.

26 *Subbarayana v Subbakka* (1885) 8 Mad 236; *Satyanarayanamurthy v Ram Subbamma* AIR 1964 AP 105.

Stepmother

See § 544, Illust (b).

(2) Section 20 of the Hindu Adoptions and Maintenance Act 1956 provides for the maintenance by a son or daughter of his or her aged or infirm parents (reference can be made to the notes under that section).

Female Members of a Joint Hindu Family

§ 549. FEMALE MEMBERS OF A JOINT HINDU FAMILY

As to maintenance of female members of a joint Hindu family, see § 543.

Disqualified Heirs

§ 550. DISQUALIFIED HEIRS

(1) Where a son or other heir is excluded from inheritance by reason of disability (§ 98), he is entitled to maintenance for himself and his family out of the property which he would have inherited, but for the disability (§ 110).

(2) Section 298, Hindu Succession Act 1956, removes all disqualification from succession on the ground of any disease, defect or deformity.

Illegitimate Sons

§ 551. ILLEGITIMATE SONS

The illegitimate sons of a Hindu may be divided into four classes, namely:

(1) illegitimate sons of a Hindu belonging to one of the three higher classes by a *dasi*, ie, a Hindu concubine in the continuous and exclusive keeping of their putative father;

As to the meaning of the word '*dasi*' see § 43, nos 1-3 note (v);

(2) illegitimate sons of a Sudra by a *dasi*;

(3) illegitimate sons of a Hindu by a Hindu woman, who is not a *dasi*;

(4) illegitimate sons of a Hindu by a non-Hindu woman.

(1) The illegitimate son of a Hindu belonging to one of the three higher classes by a *dasi* is entitled only to maintenance and not to any share of the inheritance.[27] The right of maintenance attaches in the first

27 *Mitakshara*, Chapter I, s 12, v 3.

instance to the separate property of the father.[28] Where the father has left no such property, it attaches to property of the joint family of which the father was a member.[29] Such a son is entitled to maintenance for life.[30] When the father was the holder of an impartible estate, the illegitimate son has no right, apart from custom, to maintenance out of the estate.[31] Under the Mitakshara law, an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. He does not claim maintenance merely as a compassionate allowance.[32]

(2) The illegitimate son of a Sudra by a *dasi* is entitled to a share after his father's death in the separate property of his father.[33] Where the father has left no separate property, but was joint with his collaterals, at his death, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled, as a member of the family, to maintenance out of that property. His position in this respect is analogous to that of widows and disqualified heirs, to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and the court may, as in their case, award not only future, but also past maintenance, so far as it is not barred by the law of limitation and may direct the same to be secured by a charge on the joint family property. Such maintenance is payable to the illegitimate son for life.[34]

(3) The illegitimate son of a Hindu by woman who is not a *dasi* is entitled to maintenance, even if he be the result of a casual[35] or adulterous[36] intercourse. During his father's death, he is entitled to maintenance against him.[37] After the father's death, he is entitled to maintenance out of the separate property of the father. Where the father has left no such property, he is entitled to maintenance out of the estate of the joint

28 *Roshan Singh v Balwant Singh* (1900) 22 All 191, 27 IA 51; *Chuoturya v Purbilad* (1857) 7 MIA 18.

29 *Anathaya v Vishnu* (1893) 17 Mad 160; *Hiralal Laxmandas v Meghraj Bhickchand* (1938) Bom 779.

30 *Nilmoney Singyh v Beneshur* (1879) 4 Cal 91.

31 *Harisinhji v Ajitsinghji* (1949) ILR Bom 342.

32 *Mobtev Anja Ratna v Koney Narayana Rao* AIR 1953 SC 433, (1952) 2 MLJ 342.

33 *Mitakshara*, Chapter I, s 12 v 2.

34 *Vellaiyappa Chetty v Natarajan* (1931) 55 Mad 1, 58 IA 402, 134 IC 1084, AIR 1931 PC 294 affirming *Vellaiyappa v Natarajan* (1927) 50 Mad 340, 100 IC 655, AIR 1927 Mad 386.

35 *Mattuswamy Jagavera v Vencataswara* (1868) 12 MIA 203, 220.

36 *Rabi v Govind* (1876) 1 Bom 97; *Viramuthi v Singaravelu* (1877) 1 Mad 306; *Subramania v Valu* (1911) 34 Mad 68, 3 IC 919.

37 *Chana v Gereli* (1905) 32 Cal 479; *Kuppa v Singaravelu* (1885) 8 Mad 325.

family of which the father was a member.[38] However, the right of the illegitimate son to maintenance is personal to him; it does not descend on his death to his offspring. Thus, if *A* dies leaving an illegitimate son *B*, and *B* dies leaving a son *C*, *C* is not entitled to maintenance out of *A*'s property.[39]

According to the Dayabhaga school, the right of such a son to maintenance ceases to his attaining majority;[40] according to the Mitakshara school, it extends up to his death.[41]

(4) The illegitimate son of a Hindu by a non-Hindu woman is not entitled to maintenance under the Hindu law, but he may claim maintenance from his putative father under s 488, Code of Criminal Procedure 1898. The right under that section, however, cannot be enforced against estate of the father after the father's death; it can only be enforced during the lifetime of the father.[42]

In a Madras case, it was observed that the illegitimate son of a Sudra by a *dasi*, who was not entitled to inherit, should be allowed only a compassionate rate of maintenance.[43] In a later Madras case, it was said that this view was not correct and that regard should be had in every case to the income of the estate left by the putative father and to the mode of life to which the son was accustomed in the lifetime of the father.[44]

The illegitimate son of a Hindu, who is the result of an adulterous inter-course, is in no case entitled to maintenance higher than the amount of the income which he would have got out of his share, had he been a *dasiputra*.[45]

(5) Section 20, Hindu Adoptions and Maintenance Act 1956, now provides that a Hindu father or mother is bound during his or her lifetime to maintain his or her illegitimate children, and that an illegitimate child can claim maintenance from his or her father or mother, so long as the child is a minor. Reference may be made to the notes under that section.

38 (1911) 34 Mad 56, 5 IC 919, (1857) 7 MIA 18, (1868) 12 MIA 203 (where there was a remand); *Raja Parichcat v Zalim Singh* (1878) 3 Cal 214, 4 IA 159; *Hargobind v Dharam Singh* (1884) 6 All 329.

39 *Roshan Singh v Balwant Singh* (1900) 22 All 191, 27 IA 51.

40 *Nilmoney Singh v Baneshur* (1879) 4 Cal 91.

41 *Hargobind v Dharam Singh* (1884) 8 Mad 325.

42 *Lingappa v Esudasan* (1904) 27 Mad 13 (Christian woman); *Sitaram v Ganpat* (1923) 25 Bom LR 429, 73 IC 412, AIR 1923 Bom 284 (Mohammedan woman).

43 *Gopalasmi v Arunachelam* (1904) 27 Mad 32.

44 *Rathinasabapathi v Gopal* (1929) 56 Mad LJ 673, 121 IC 126, AIR 1929 Mad 545.

45 *Chamava v Iraya* (1931) 33 Bom LR 1082 1888, 134 IC 1158, AIR 1931 Bom 492.

Illegitimate Daughters

§ 552. ILLEGITIMATE DAUGHTERS

There is no provision in Hindu law for the maintenance of illegitimate daughters;[46] but they are entitled to claim maintenance from their putative father under s 488, Code of Criminal Procedure 1898.

This view is put on the ground that the expression *dasiputra* occurring in texts bearing on the subject applies only to an illegitimate son (*putra*), and not to an illegitimate daughter.

See s 20, Hindu Adoptions and Maintenance Act 1956, and § 551(5). Reference may be made to the notes under those sections.

Concubine

§ 553. CONCUBINE—*AVARUDDHASTRI*

(1) A Hindu is neither entitled to transfer joint family property to an *avaruddhastri* for her maintenance,[47] nor is he bound to maintain her.

He can discard her at any moment, and she cannot compel him to keep her to provide for her maintenance.[48] However, if she was in his exclusive keeping until his death, his estate, in the hands of those who take it, is liable after his death for her maintenance.[49] It is not a condition precedent to her right to maintenance that she could have resided in the same house as the deceased, together with his wife and his family.[50] However, her right to maintenance is conditional upon her continued chastity.[51]

Avaruddhastri

In a Bombay case, the High Court held that to constitute a concubine, an *avaruddhastree*, she must be a concubine with whom the connection of the deceased paramour was open and recognised and who was kept by him in his house practically as a member of the family. However, this

46 *Parvati v Ganpatrao* (1894) 18 Bom 177, 183; *Vellaiyappa v Natarajan* (1927) 50 Mad 340, 100 IC 655, AIR 1927 Mad 386; *Champabai v Raghunath Rao* (1946) ILR Nag 217, AIR 1946 Nag 253; *Pandurang v Sonabai* (1948) Nag 653; *Padumavati v Ramchandra* (1950) ILR Cut 532, AIR 1951 Ori 248.

47 *Thakur Rab Prasad Singh v Chhotay Munwan* (1937) 12 Luck 469, 164 IC 1000, AIR 1937 Ori 29.

48 *Ramangarasu v Buchamma* (1900) 23 Mad 282.

49 *Niragareddi v Lakshmawa* (1902) 26 Bom 163; *Vrandavandas v Yamunabai* (1875) 12 Bom HCAC 229 *Rama Raja v Popamnfal* (1925) 48 Mad 805, 90 IC 983, AIR 1925 Mad 1230; *Shiva Kumari v Uday Pratap* (1947) All 642.

50 *Bai Nagubai v Bai Monghibai* (1926) 53 IA 153, ILR 50 Bom 604, 96 IC 20, AIR 1926 PC 73, reversing (1923) 47 Bom 401, 69 IC 291, AIR 1923 Bom 130.

51 *Yashvantrav v Kashibai* (1888) 12 Bom 26.

view was rejected by the Judicial Committee on appeal, and it was held that residence in the same house with her paramour together with his wife and regular family was now not necessary, whatever may have been the case, when a concubine a was slave of the household.[52]

Kept Mistress whose Husband is Alive

It has been held by the Bombay High Court, that a married woman who left her husband and lived with another as his permanently kept mistress, may be regarded as *avaruddhastree*, if she remains faithful to him and she is entitled to maintenance from his estate so long as she preserves her sexual fidelity to him.[53] A Full Bench of the High Court of Andhra Pradesh has expressed the same view.[54] The Supreme Court has approved of the above view and held that her claim for maintenance cannot be defeated on the ground that she was a Brahmin and her paramour was a Sudra.[55]

Amount of Maintenance

In determining the amount of maintenance to be awarded to an *avaruddhastree*, the court should have regard to her age, her past mode of life, and the extent of the estate of the deceased paramour.[56]

(2) The law on the questions is now changed and an *avaruddhastree* cannot claim maintenance out of the estate of the deceased paramour, where his death took place after the coming into operation of the Hindu Adoptions and Maintenance Act 1956. She is not one of the persons within the definition of dependents given in s 21 of that Act. Reference may be made to ss 21 and 22 of that Act and notes thereunder.

Pre-existing rights of maintenance holders are not affected by that Act. A right of maintenance, which an *avaruddhastri* had acquired prior to the Act, is not nullified by the Act.[57]

Wife

§ 553A. STATUTORY RIGHT OF MAINTENANCE

The wife's right to separate maintenance and residence was regulated by the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946. That Act has now been repealed by s 29 of the Hindu Adoption

52 *Bai Nagubai v Bai Mongbiba* AIR 1926 PC 73. The decision in *Mst Haidri v Narindra* (1926) 1 Luck 184, 98 IC 677, AIR 1926 Ori 294, is no longer good law.
53 *Akku Prahlad v Ganesh Prahalad* (1945) Bom 217.
54 *Ramamoorty v Sitharamamma* AIR 1961 AP 131 (FB).
55 *Gopal Rao v Sitharamamma* AIR 1965 SC 1970.
56 (1875) 12 Bom HCAC 229.
57 *Ramamoorty v Sitharamamma* AIR 1961 AP 131 (FB).

and Maintenance Act 1956. Section 18 of that Act lays down that the wife, whether married before or after commencement of the Act, is entitled to be maintained by her husband during her lifetime, unless she is unchaste or has ceased to be a Hindu by conversion to another religion. Reference may be made to the notes under that section. In §§ 554, 555, 556(1) and 557(1), the law has been stated as it stood prior to the Act of 1946, under the decided cases.

§ 554. WIFE'S RIGHT OF MAINTENANCE

(1) A wife is entitled to be maintained by her husband whether he possesses property or not.[58] When a man knowingly marries a girl, accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style.[59] The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired.[60] The maintenance being a matter of personal obligation, she has no claim for maintenance against her husband's property in the hands of a transferee from him. Nor has she any claim against the government, if his property has been attached under ss 87 and 88, Criminal Procedure Code 1898, as the property of an absconder.[61]

Her remedy is to obtain a decree of a civil court creating a formal charge on the property.[62]

(2) A wife is not entitled, during her husband's lifetime, to be maintained either by her relations or by her husband's relations, even if she has been deserted by him, unless they have in their possession, property belonging to her husband.[63]

§ 555. SEPARATE RESIDENCE AND MAINTENANCE

(1) A wife's first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection.[64] She is not, therefore, entitled to separate residence or maintenance, unless she proves that, by reason of his misconduct or by his refusal to maintain her in his

58 *Narbadabai v Mahadeo* (1881) 5 Bom 99, 103.
59 *Prem Pratap Singh v Jagat Priap Kunwari* (1944) All 118.
60 *Jayanti v Alamelu* (1904) 27 Mad 45, 38.
61 *Chatru v The Crown* (1929) 10 Lah 265, 111 IC 435, AIR 1928 Lah 681.
62 *Secretary of State for India v Abalybai Narayan* (1938) Bom 454, 40 Bom LR 422, 176 IC 453, AIR 1938 Bom 321.
63 *Ramabai v Tribbak* (1872) 9 Bom HC 283.
64 *Sitanath v Haimbutty* (1875) 24 WR 377, 379.

own place of residence, or for other justifying cause, she is compelled to live apart from him.[65]

Neither unkindness not amounting to cruelty,[66] nor the fact that the husband has taken a second wife,[67] nor ordinary quarrels between husband and wife,[68] justify the wife in leaving her husband's house. However, she would be justified in leaving his house, and would be entitled to separate maintenance from him, if he kept a concubine in the house,[69] or habitually treated her with such cruelty as to endanger her personal safety.[70] She is neither bound to prove repeated violence; nor delay in bringing the suit a ground for refusing the relief.[71]

Where a husband who was on cordial terms with his wife, made a gift of his property to his wife, the ostensible purpose being her maintenance, it was held that the wife was not a creditor and that the gift in her favour could not prevail against the rights of the creditors.[72]

(2) A wife living apart from her husband for no improper purpose, may, at any time, return and claim to be maintained by him. Her right is not forfeited, but is only suspended so long as she commits a breach of duty by living apart from him.[73] So, where she subsequently comes back and offers to live with him, his refusal to take her back entitles her to demand maintenance.

The suspension ceases when the husband dies. He cannot, under the provisions of the Succession Act, execute a will to defeat such a right.[74] The amount of maintenance to which she would be entitled depends on various circumstances, such as the past relations between the parties, their social standards and the husband's property.[75] Where the wife lived with her father, who was in affluent circumstances and did not claim

65 *Sidlingapa v Sidava* (1878) 2 Bom 634; *Nitye v Soondaree* (1968) 9 WR 475 (refusal to maintain); *Sitabai v Ramchandrarao* (1910) 12 Bom LR 373, 6 IC 525 (abandonment of wife); *Shinappaya v Rajamma* (1922) 45 Mad 812, 69 IC 25, AIR 1922 Mad 399 (husband's leprosy); *Appibai v Khimaji Cooverji* (1936) 60 Bom 455, 38 Bom LR 77, 162 IC 188, AIR 1936 Cal 138; *Krishana Iyer v Ramu Ammal* AIR 1954 Tr & Coch 221; *Udayanath v Shivaprya* AIR 1957 Ori 199; *Ajaib Kaur v Uttam Singh* AIR 1960 Punj 117.

66 (1875) 24 WR 377.

67 *Virasvami v Appasvami* (1963) 1 Mad HC 375.

68 *Rajlukhy v Bhootnath* (1900) 4 CWN 488.

69 *Gobind v Dowlut* (1870) 14 WR 450; *Dular Koeri v Dwarkanath* (1905) 32 Cal 234, 239; *Mallawa v Shiddappa* (1949) Bom 732 (even though the concubine was kept in a separate house).

70 *Matangini v Jogendra* (1892) 19 Cal 84.

71 *Ude Singh v Mst Daulat Kaur* (1935) 16 Lah 892, 158 IC 223, AIR 1935 Lah 386.

72 *Brij Raj Kuar v Ram Dayal* (1932) 7 Luck 411, 135 IC 369, AIR 1932 Ori 40.

73 *Surampalli v Surampalli* (1908) 31 Mad 338.

74 *Periambal v Sundarammal* (1945) ILR Mad 486.

75 *Appibai v Khimji Cooverji* (1936) 60 Bom 455, 38 Bom LR 77, 162 IC 188, AIR 1936 Bom 138.

maintenance from her husband for a long time, and the husband had no property, arrears prior to the date of demand were refused.[76]

Where a husband turned his wife out of doors because he suspected her chastity and the wife obtained an order against him for maintenance under s 488, Code of Criminal Procedure 1989, and when she proceeded to execute the order, he filed a suit for restitution of conjugal rights, it was held that it was a proper case for refusing the husband a decree.[77]

§ 555A. STATUTORY RIGHT OF MAINTENANCE

(1) The Hindu Married Women's Right to Separate Maintenance and Residence Act (19 of 1946), which came into force on 23 April 1946, gave a statutory recognition to many of the principles discussed above, and at the same time, liberalised the law in certain respects in favour of married women.

Section 2 of the Act was as under:

> Notwithstanding any custom or law to the contrary, a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely:
>
> (1) if he is suffering from any loathsome disease not contracted from her;
> (2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him;[78]
> (3) if he is guilty of desertion, ie, of abandoning her without her consent or against her wishes;
> (4) if he marries again;
> (5) if he ceases to be a Hindu by conversion to another religion;
> (6) if he keeps a concubine in the house or habitually resides with the concubine;[79]
> (7) for any other justifiable cause.[80]
>
> Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband, if she is unchaste or ceases to be Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent court for the restitution of conjugal rights.

It will be noticed, that all the specific clauses were in the present tense. It was enough, therefore, for the purposes of the section that the grounds were in existence at the date when the claim for separate

76 *Sobhanadramma v Narsimbhaswami* (1934) 57 Mad 1003, 150 IC 597, AIR 1934 Mad 401.

77 *Babu Ram v Mst Kokla* (1924) 46 All 210, 49 IC 634, AIR 1924 All 391

78 *Shyamsundra v Shantamani* AIR 1962 Ori 50; *Kamala v Rathnavelu* AIR 1965 Mad 88.

79 *Venkataramana v Nookalamma* AIR 1956 AP 49.

80 *Malla Reddy v Subbama* AIR 1956 AP 237 (impotency in husband); *Gopal v Kallu* AIR 1960 Raj 60, ILR 9 Raj 725.

maintenance and residence was made by the wife, no matter whether they started before or after the passing of the Act.

With regard to ground (4), however, there was a difference of judicial opinion.[81]

(2) Section 18 of the Hindu Adoptions and Maintenance Act 1956, now lays down the grounds which entitle a Hindu wife to live separately from her husband without forfeiting her claim to maintenance. The grounds are substantially the same as under the repealed Act of 1946. Reference may be made to the notes under that section.

§ 556. UNCHASTITY OF WIFE

(1) A wife, who leaves her home for purposes of adultery, and persists in following a vicious course of life, forfeits her right to maintenance,[82] even though it is secured by a decree.[83] However, it would seem, that if she completely renounces her immoral course of conduct, her husband is liable to furnish her with a 'bare' (or what is also called 'starving') maintenance, ie, food and raiment just sufficient to support her life.[84] The burden of proving that the erring wife has returned to purity is on the wife herself.[85]

(2) Section 18(3) of the Hindu Adoptions and Maintenance Act 1956, lays down that a Hindu wife shall not be entitled to separate residence and maintenance from her husband, if she is unchaste. Reference may be made to the Notes under that section.

§ 557. CHANGE OF RELIGION BY HUSBAND

(1) A wife is entitled to maintenance, though her husband may abandon Hinduism.[86]

81 *Sukhribai v Pohkalsingh* (1950) ILR Nag 196, AIR 1950 Nag 33; *Kasubai v Bhaguan* AIR 1955 Nag 210; *Lakshmi Ammal v Narayanaswamy* (1950) 1 MLJ 63, AIR 1950 Mad 713, (1955) 1 MLJ 25; *Palaniswami v Devanai Ammal* AIR 1956 Mad 337 (FB); *Laxmibai v Wamanrao* (1953) Bom 1031, (1953) 55 Bom LR 357, AIR 1953 Bom 342; *Ram Parkash v Savitri Devi* AIR 1958 Punj 87 (FB); (1957) ILR Punj 1859; *Sarbo Gopain v Anta Lal* AIR 1958 Pat 613; *Satyanarayana v Seetharamamma* AIR 1963 AP 270 (FB); *Padamlochan v Sulochana* AIR 1959 MP 345; *Gopal v Kallu* AIR 1960 Raj 60, ILR 9 Raj 725; *Madanwali v Padmanna* AIR 1960 Mys 299; *Pancho v Ram Prasad* AIR 1956 All 41; contra *Ratan Chand v Kalawati* AIR 1955 All 364; *Kulamani Hota v Parbati Devi* AIR 1955 ILR Ori 77, (1955) ILR Ori 354; *Sashimukhi v Brindaban Das* AIR 1959 Ori 132; *Baijnath v Hiraman* AIR 1951 VP 10; *Sajjanbai v Prabhulal* AIR 1952 MB 140.

82 *Ilata v Narayanan* (1863) 1 Mad HC 372; *Debi Saran v Daulata* (1917) 39 All 234, 39 IC 10, AIR 1917 All 86; *Kandasami v Murugammal* (1896) 19 Mad 6.

83 (1896) 19 Mad 6.

84 See *Parami v Madadevi* (1910) 34 Bom 278, 5 IC 960, and the case cited in the preceding footnote.

85 See §§ 96 and 651. *Zuliv v Gopalia* (1946) Nag 619, AIR 1946 Nag 375.

86 *Monsha v Jiwan* (1884) 6 All 617.

(2) Where a marriage has been dissolved under the Native Convert's Marriage Dissolution Act 1866, at the suit of a husband, who has abandoned Hinduism, the court may, by its decree, ask the husband to make such allowance to his wife for her maintenance during the remainder of her life as the court thinks just. An allowance so ordered, ceases from the time of any subsequent marriage of the wife. See s 28, Native Convert's Marriage Dissolution Act 1866. See also § 411.

(3) Section 18(2)(f), Hindu Adoptions and Maintenance Act 1956, lays down that a wife is entitled to live separately from her husband without forfeiting her claim to maintenance, if the husband has ceased to be a Hindu by conversion to another religion.

§ 558. WIFE OF DISQUALIFIED HEIR

Where the husband is excluded from inheritance because of personal disability (§ 98), his wife is entitled to maintenance out of the property, which he would have inherited but for the disability. However, her right to maintenance is conditional upon her continued chastity.[87]

Maintenance of Widow

§ 558A. MAINTENANCE OF WIDOW: HINDU WOMAN'S RIGHTS TO PROPERTY ACT 1937

The right of a widow, when she did not succeed to her husband's property, was one of considerable importance and consequence. The position and right of a widow both under the Mitakshara and Dayabhaga law has been stated in the earlier chapters.

The rights of the three widows mentioned in the Hindu Women's Rights to Property Act 1937, to claim maintenance, were not abolished in express terms, but the effect of recognition of their rights by that Act was that there was little occasion for them to claim maintenance, since they were not excluded from inheritance and were entitled to a share on partition. There was nothing, however, in the Act to compel the widow to sue for partition, where the deceased husband was a member of a family and it was held that her right to claim maintenance had been preserved intact and she was entitled to sue for maintenance without having recourse to the remedy of partition.

The position and rights of a widow have been materially changed by the Hindu Succession Act 1956, and the question of a widow's right to claim maintenance must now be considered in the context of the provisions of that Act. Reference must also be made to the provisions of the Hindu

87 *Yashvantrav v Kashibai* (1888) 12 Bom 26, 28. *Mitakshara*, Chap II, sec 10, paras 14, 15; Dayabhaga, Chap V, para 19.

Adoptions and Maintenance Act 1956 (see notes under ss 21 and 22 of that Act).

In §§ 559–65, the law has been stated as it stood prior to the Hindu Women's Right to Property Act 1937, under the decided cases.

§ 559. WIDOW'S RIGHT OF MAINTENANCE

(1) A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance:

(i) out of her husband's separate property;[88] also

(ii) out of property in which he was a coparcener at time of his death.[89]

(2) A widow does not lose her right of maintenance out of the estate of her husband, although she may have lived apart from him on his lifetime without any justification and cause, and was living separate from him at the time of his death.[90]

(3) See § 558A.

Illustrations

(a) A Hindu governed by Mitakshara law, dies leaving a widow and male issue. He leaves self-acquired property. The male issue will inherit the property, subject to the obligation to maintain the widow out of that property.

(b) *A* and his father *F*, are members of a joint family governed by Mitakshara law. *A* dies leaving a widow and *F*. On *A*'s death, his undivided interest in the coparcenary property lapses, so leaving as to enlarge the interest of *F* in the property. *A*'s widows are entitled to be maintained by her father-in-law, *F*, out of the coparcenary property *quoad hoc* in interest of *A* in the property. If *F* refuses to maintain her, she may sue him to have her maintenance charged on a portion of the joint property, such portion not exceeding one half of the property, that being her husband's share in the property.

(c) *A* and his brother *B* are members of a joint family governed by Dayabhaga law. *A* dies leaving him surviving a widow *W*, a son *S*, and a brother *F*. *S* will succeed to *A*'s separate property as well as his undivided interest in the coparcenary property (§ 78),

88 *Brinda v Radhica* (1885) 11 Cal 492, 494; *Narbadabai v Mahadeo* (1881) 5 Bom 99, 106; *Bhagabai v Kanailal* (1871) 8 Beng LR 225.

89 *Devi Prasad v Gunwanti* (1895) 22 Cal 410; *Jayanti v Alamelu* (1904) 27 Mad 45; *Becha v Mothina* (1901) 23 All 86; *Adhibai v Cursandas* (1887) 11 Bom 199; *Shridar Bhagwanji Teli v Mst Sitabai* (1938) ILR Nag 289, AIR 1938 Nag 198.

90 *Surampalli v Surampalli* (1908) 31 Bom 388.

subject to the obligation to maintain *W* out of the property. If *A* dies without leaving a male issue, *W* will succeed to the whole of his property, joint as well as separate, in which case, she will take a widow's estate in *A*'s separate property, and will be a coparcener with *B* as to the joint property with the right of demanding a partition of such property against *B* (§ 348).

Nature and Extent of Widow's Right of Maintenance

The only person who is under a legal obligation to maintain out of his own property, the widow of a deceased Hindu, is her own son (§ 548). As regards others, her only right to maintenance is out of her husband's estate. That estate may be in the hands of his male issue as in Illust (a) and (c), or it may be in the hands of his coparceners as in Illust (b). However, whether it is in the hands of the one or the other, he is liable to maintain her, not because he is under a personal obligation to maintain her, but because he has in his hands, her husband's estate. The property is liable for her maintenance and a charge may be created on it, even if the property is attached and held by the government, on the ground that the present holder has absconded.[91] At the same time, it is to be remembered, that her maintenance is not *ipso facto* a charge upon her husband's estate (§ 569). The estate may be sold for her husband's debts, or, where it is the joint property of the family for debts binding on the family (§ 570). Even if it is sold without any justifying necessity, she cannot follow it in the hands of a bona fide purchaser for value, unless she has acquired a previous charge on the estate for her maintenance (§§ 569–70).[92]

Widow's Rights Against Joint Family Property: Widow able to maintain herself

A and *B* are two brother joint in food, worship and estate. *A* dies leaving a widow *W*. *W* has private property of her own out of which she is able to maintain herself. Is *W* entitled to maintenance out of the income of the joint property which passed into the hands of *B* by survivorship on *A*'s death? The Calcutta High Court answered in the negative,[93] while the Madras High Court answered in affirmative, subject to this that her private means should be taken into account in determining the quantum of maintenance to be decreed to her.[94] According to the Madras High

91 *Secretary of State for India v Ahyalyabai Narayan* (1938) ILR Mad 454, 40 Bom LR 422, 176 IC 453, AIR 1938 Bom 321.

92 *Kuloda Prosad v Jageshar* (1900) 27 Cal 194; *Somasundaram v Unnamalai* (1920) 43 Mad 800, 59 IC 398, AIR 1920 Mad 722.

93 *Ramawati v Manjhari* (1906) 4 Cal LJ 74.

94 *Lingayya v Kanakamma* (1915) 38 Mad 153, 28 IC 200, AIR 1916 Mad 444.

Court, the right of the widow of a coparcener in Hindu family to maintenance, is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself. She is, therefore, entitled to some maintenance out of her husband's estate. A Full Bench of the Andhra Pradesh High Court considered a number of decisions on the subject, which is in agreement with the Madras High Court.[95]

Where a widow suing her husband's coparceners for maintenance has, at the time the suit is brought, sufficient joint family funds to provide her with maintenance for several years, the court should refuse to decree maintenance to her, leaving her to file a fresh suit after that period.[96] The same principle applies, where she ought to have in her hands joint family funds, which however, are not available at the date of the suit, they having been dissipated by her before the suit.[97] A widow inheriting some of her husband's share of the joint family property under the Hindu Woman's Rights to Property Act 1937, is still entitled to maintenance with reference to the other properties, but in fixing the maintenance, the property inherited by her may be taken into consideration.[98] It was held by the High Court of Andhra Pradesh,[99] that a widow inheriting her husband's separate property, could sue for maintenance from the joint family estate in which her husband had interest.

A prior decree obtained by her against her husband during his lifetime for maintenance is no bar to her claiming a right of maintenance and residence against the heirs.[1]

Where a widow sues for maintenance after partition among the coparceners of the joint family, she is entitled to a decree only against those members who are in possession of her husband's share, such as her son (natural or adopted), and his sons and grandsons.[2] However, when a charge has been created by a maintenance decree prior to partition, in respect to the entire family estate, such charge is not affected by subsequent partition and the charge holder can proceed against any property covered by the charge.[3]

95 *Varahalu v Sitbamma* AIR 1961 AP 272 (FB).
96 *Dattatraya v Rukhmabai* (1909) 33 Bom 50, 1 IC 466.
97 *Srinivasa v Ammani* (1931) 61 Mad LJ 381, 134 IC 981, AIR 1931 Mad 668.
98 *Sarojinidevi v Subrahmanyam* (1945) ILR Mad 61.
99 *D Rangamma v D Chinnabbayi* AIR 1957 AP 598.
1 *Mt Sham Devi v Mohan Lal* (1934) 15 Lah 591, 152 IC 606, AIR 1934 Lah 167.
2 *Narasimbam v Venkatasubbamma* (1932) 55 Mad 752, 137 IC 949, AIR 1932 Mad 351; *Laxmibai Ganapatrao v Radhabai Krishnaji* (1945) ILR Bom 604; *Rangaiah v Chirinaiya* AIR 1970 AP 33.
3 *Savitribai v Radhakishan* (1947) ILR Nag 381.

§ 560. WIDOW RESIDING APART

(1) A wife cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere. However, the case of a widow is different. A widow is not bound to reside with her husband's family, and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, eg, in her parent's house.[4] All that is required of her is that she must not leave her husband's house for improper or unchaste purposes. She is entitled to separate maintenance, unless she is guilty of unchastity or other improper practices, after she leaves that residence.[5] Where the property is so small as not to admit of an allotment to her of a separate maintenance, the court may, in the exercise of its discretion, refuse separate maintenance to her.[6]

(2) Where the husband, by his will, makes it a condition that his wife would reside in the family house with his relatives, she is not entitled to separate maintenance, if she resides elsewhere without just cause.[7] Strained relations between herself and her husband's adopted son because of former litigation between them, may be a just cause.[8]

(3) See § 558A.

§ 560A. ARREARS OF MAINTENANCE

(1) A widow who has left the residence of her deceased husband, not for unchaste purposes, is entitled not only to maintenance, but also to arrears of maintenance from the date of her leaving her husband's residence, though, she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence.[9]

It is erroneous in law to fix the date of the widow's suit as the starting point of maintenance. The proper date is the date on which she left her husband residence. If after the husband's death, the widow has remained in his house and has accepted maintenance in fact and in kind, she is

4 *Dattatraya Maruti v Laxman Jettappayya* (1942) ILR Bom 584, 203 IC 139, AIR 1942 Bom 260; *Hari v Narmadabai* (1949) ILR Nag 964; *Guruswamy v Angaiskanni Ammal* AIR 1974 Mad 194 (12 years).

5 *Raja Prithee Singh v Rani Rajkooer* (1873) 12 Beng LR 238, 247, IA Sup Vol 203; *Narayanrao v Ramabai* (1879) 3 Bom 415, 421, 6 IA 114, 119; *Ekradeshwari v Homeshwar* (1929) 56 IA 182, ILR 8 Pat 840, 116 IC 409, AIR 1929 PC 128; *Kasturbai v Shivajiram* (1879) 3 Bom 372; *Gokibai v Lakhmidas* (1890) 14 Bom 490; *Siddessury v Janardan* (1902) 29 Cal 557.

6 *Godavaribai v Sagunabai* (1898) 22 Bom 52, (1879) 3 Bom 372; *Ramchandra v Sagunabai* (1880) 4 Bom 261.

7 *Mulji v Bai Ujam* (1889) 13 Bom 218; *Girianna v Honama* (1891) 15 Bom 236; *Tin Couri v Krishna* (1893) 20 Cal 15; *Ekradeshwari v Homeshwar* (1929) 56 IA 182, ILR 8 Pat 840, 116 IC 409, AIR 1929 PC 128.

8 *Jamuna Kunwar v Arjun Singh* (1940) All 739, 143 IC 27, AIR 1941 All 43.

9 (1929) 56 IA 182, ILR 8 Pat 840, 116 IC 409, AIR 1929 PC 128.

not entitled to arrears from the date of her husband's death, except perhaps in an extreme case, where she is kept under circumstances of extreme penury and oppression. Such a case, however, must be treated as most exceptional and would require unimpeachable proof. The judicial committee is extremely reluctant to interfere with the amount of a decree for maintenance, unless there has been some miscarriage in the way the amount has been arrived at.[10] Courts have large discretion in awarding arrears,[11] and may take into consideration the fact that a sudden demand for a large sum by way of arrears would be inequitable and embarrassing.[12] In this case, the High Court awarded arrears for 25 months against 12 years' claim. The court, may, for sufficient reasons, refuse to award any arrears, or it may award arrears at a rate lower than that fixed for her future maintenance.[13] Arrears at an enhanced rate should be allowed only from the date of the suit for enhancement.[14]

Where a widow was entitled under an agreement to maintenance at a certain rate to be paid on particular date in each year, and she dies some time before the time fixed for payment, her heir is entitled to recover the proportionate amount of maintenance due after the last payment till her death, for the right accrues from day to day.[15]

(2) See § 558A.

§ 561. UNCHASTITY OF A WIDOW

The right of a widow to maintenance is conditional upon her leading a life of chastity.

If she becomes unchaste, the burden of proving, which is on the opposite party,[16] the right is forfeited,[17] even if it has been secured by

10 *Ekradeshwari v Homeshwar* (1929) 56 IA 182, ILR 8 Pat 840, 116 IC 409, AIR 1929 PC 128.

11 *Gurushiddappa v Parwatewwa* (1937) Bom 113, 38 Bom LR 1293, 167 IC 973, AIR 1937 Bom 135; *Mani Lal v Sushila* AIR 1956 Bom 402; *Chundru Venkanna v Chundru Satyanarayanamma* AIR 1957 AP 652.

12 *Dattatraya Maruthi v Laxman Jettappayya* (1942) ILR Bom 584, 203 IA 139, AIR 1942 Bom 260; *Govardhan v Gangabai* AIR 1964 MP 168.

13 *Raghubans v Bhagwant* (1899) 21 All 183; *Karbasappa v Kallava* (1919) 43 Bom 66, 47 IC 623, AIR 1918 Bom 122; *Shridhar Bhagwanji Teli v Mst Sitabai* (1938) ILR Nag 289, AIR 1938 Nag 198; *Gurushiddappa v Parwatewwa* (1937) Bom 113, 38 Bom LR 1293, 167 IC 973, AIR 1937 Bom 135; *Krishnamurthy v Suryakantamma* AIR 1955 AP 5; *Rajamma v Varadarajulu* AIR 1957 Mad 198.

14 *Veerayya v Chellamma* (1939) Mad 234.

15 *Rangappava v Shiva* (1934) 57 Mad 250, 145 IC 961, AIR 1933 Mad 699.

16 *Lakshmi Chand v Anandi* (1935) 62 IA 250, ILR 57 All 672, 37 Bom LR 849, 157 IC 819, AIR 1935 PC 180.

17 *Raja Pirthee Singh v Rani Rajkooer* (1873) 12 Beng LR 238, 247, IA Sup Vol 203; *Moniram v Keri Kolitani* (1880) 5 Cal 776, 783, 7 IA 115; *Valu v Ganga* (1883) 7 Bom 84; *Rama Nath v Rajonimoni* (1890) 17 Cal 674; *Vishnu v Manjimma* (1885) 9 Bom 108.

a decree,[18] or by an agreement.[19] However, if she returns to a moral life, she is entitled to a 'bare', or what is also called a 'starving' maintenance, ie, to food and raiment just sufficient to support her life (§§ 96 and 556).[20]

A charge of unchastity, disentitling a widow to maintenance, must be specifically raised in the pleadings.[21]

Provision for Maintenance Under an Agreement

It often happens that a dispute arises between the widow and her husband's relations as to the amount of maintenance, and the amount is fixed amicably by an agreement between the parties. In such a case, if the husband's relations fail to pay the amount fixed by the agreement, and she sues them for maintenance under the agreement, she is not entitled to maintenance of any sort, if subsequent unchastity is proved.[22] However, if unchastity does not continue up to the date of the suit, and she has reformed her ways before the suit and reverted to a chaste life, she is entitled to bare maintenance.[23] These cases must be distinguished from the case, where the widow claims her husband's property as being his self-acquired property and the dispute is settled by an agreement between the parties, whereby her husband's relations agree to pay her a fixed sum of money monthly or annually in consideration of her releasing her claim to the property. In such a case, if the relations fail to pay the agreed amount, and the widow sues them for arrears due to her under the agreement, she is entitled to a decree for the full amount, notwithstanding her subsequent unchastity.[24]

Provision for Maintenance Under a Will

Where maintenance is given by a will, it is not forfeited by unchastity unless it is expressly provided that it should be so forfeited.[25]

18 *Vishnu v Manjimma* (1885) 9 Bom 108; *Daulta Kuari v Meghu* (1893) 15 All 382; *Ranmalsangji v Kundankuwar* (1902) 26 Bom 707.

19 *Nagamma v Virabhadra* (1894) 17 Mad 392.

20 *Honamma v Timannabhat* (1877) 1 Bom 559; *Sathyabhama v Kesavacharaya* (1916) 39 Mad 658, 29 IA 397, AIR 1916 Mad 464; *Bhikubai v Hariba* (1925) 49 Bom 459, 94 IC 665, AIR 1925 Bom 153; *Ram Kumar Dube v Bhagwanta* (1934) 56 All 392, 148 IC 625, AIR 1934 All 78 where Rs 15 per month were allowed, the estate paying a land revenue of Rs 35,000.

21 *Haji Saboo Sidick v Ayeshabai* (1903) 27 Bom 485, 30 IA 127.

22 *Nagamma v Virabhadra* (1894) 7 Mad 392; *Kisanji v Lakshmi* (1931) 33 Bom LR 510, 135 IC 477; *Shivlal v Bai Sankli* (1931) 33 Bom LR 490, 132 IC 444, AIR 1931 Bom 297.

23 *Sathyabhama v Kesavacharaya* (1916) 39 Mad 658, 29 IC 397, AIR 1916 Mad 464; *Bhikubai v Hariba* (1925) 49 Bom 459, 94 IC 665, AIR 1925 Bom 153.

24 *Bhup Singh v Lachman* (1904) 26 All 321, 325.

25 *Parami v Mahadevi* (1910) 34 Bom 278, 5 IC 960.

Provision for Maintenance Under a Decree

A decree obtained by a Hindu widow, declaring her right to maintenance, is liable to be set aside or suspended in its operation, on proof of subsequent unchastity given by her husband's relatives, either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's suit to enforce her right.[26]

If the decree is suspended in its operation, and she returns to a life of chastity, the court may award her bare maintenance.[27]

§ 562. RIGHT OF WIDOW TO RESIDE IN THE FAMILY HOUSE

(1) A Hindu widow is, in the absence of any special circumstances, entitled to reside in the family dwelling house in which she lived with her husband (see § 573).

A Hindu, who died in 1888, proved by his will that his elder wife should 'have the right of residence for the term of her natural life in the three-storied portion of a specified house'. Her son resided with her in that portion of the house continuously from his father's death. Upon a partition in 1898, that portion of the house was allotted to the son, subject to his mother's right of residence. In 1899, the right, title and interest of the son was sold in execution, but the purchaser did not attempt to take possession for over 12 years. The son claimed that the right of the purchaser was barred by adverse possession. It was held by the judicial committee, that upon the true construction of the will, the widow had an exclusive right of residence, not merely a Hindu widow's right of residence. The son's possession was by her licence, and not adverse to the purchaser.[28]

(2) Section 23, Hindu Succession Act 1956, lays down special provisions respecting dwelling-house wholly occupied by members of the family of a deceased Hindu.

§ 563. WIDOW REMARRYING

(1) A widow, by remarriage, forfeits her right of maintenance out of the estate of her first husband (s 21, the Hindu Widow's Remarriage Act 1856).

The High Court of Allahabad has held, that a widow, who is allowed to remarry according to the custom of her caste, existing from before the

26 *Vishnu v Manjamma* (1885) 9 Bom 108; *Daulta Kuari v Meghu* (1893) 15 All 382.
27 *Honamma v Timannabbat* (1877) 1 Bom 559; as explained in *Bhikubai v Haribai* (1925) 49 Bom 459.
28 *Annada Prashad v Ambika Prashad* (1926) 53 IA 201, 53 Cal 761, AIR 1926 PC 96.

passing of the Hindu Widow's Remarriage Act, and hence is not bound to take advantage of the provisions of the Act, does not, by reason of remarriage, forfeit her rights by inheritance to the estate of her first husband or to be maintained out of the same.[29] This view has been followed by the High Court of Madhya Bharat,[30] and the Chief Court of Oudh.[31] The other High Courts have held, that she does.[32] According to the Allahabad High Court, a custom of remarriage does not necessarily carry with it, as a legal incident thereof, a further custom of forfeiture upon marriage. Anybody, who claims there has been forfeiture because of remarriage, must prove affirmatively that such forfeiture is an incident of the custom, under which the remarriage took place.[33]

The whole point is whether the provisions of the Hindu Widow's Remarriage Act 1856, apply to the case of a remarriage, where such remarriage is allowed by the custom of the caste. If they do, a widow, by remarriage, forfeits all interest in her husbands property whether it be: (1) by inheritance to her husband; or (2) by way of maintenance out of his property. If they do not, she does not forfeit either of those rights. The Allahabad High Court holds the latter view. The other High Courts hold the former view, and they have accordingly decided, that a widow on remarriage, forfeits her interest in the estate inherited by her from her first husband, even though the remarriage is allowed by the custom of the caste (see notes to § 43, under the head 'Widow'). Reference may also be made to *Sankaribala v Asita Barani*.[34]

The Supreme Court has held, that if a widow remarries subsequent to the opening of the partition, the claim of the widow has to be determined on the basis of the time of death of the first husband and the opening of the partition.[35] If the partition is opened between the two terminal points; namely, if the partition opens between the death of the first

29 *Gajadhar v Kausilla* (1909) 31 All 161; *Mula v Partap* (1910) 32 All 489, 6 IC 116; *Mangat v Bharto* (1927) 49 All 203, 100 IC 734, AIR 1927 All 523; *Bhola Umar v Mst Kausilla* ILR 55 All 24; *Narain v Mohan Singh* AIR 1937 All 343; *Md Abdul Samad v Girdhari Lal* AIR 1942 All 175; *Jileba v Parmesra* AIR 1950 All 588.

30 *Ram Kunwar v Ochha Dhanpal* AIR 1951 MB 96.

31 *Ram Lal v Musammat Jwala* (1928) 3 Luck 610, 109 IC 791, AIR 1928 Ori 338; *Gajadhar v Mussammat Sukhdei* (1930) 5 Luck 689, 121 IC 899, AIR 1931 Ori 107.

32 *Vithu v Govinda* (1898) 22 Bom 321 (FB); *Ram Appa Patil v Sakhu Dattu Gharal* (1954) 56 Bom LR 227, AIR 1954 Bom 315; *Rasul v Ram Suran* (1895) 22 Cal 589; *Murugayi v Viramakali* (1877) 1 Mad 226; *Suraj v Attar* (1922) 1 Pat 706, 67 IC 550, AIR 1922 Pat 378; *Santala v Badaswari* (1923) 50 Cal 227, 75 IC 11, AIR 1924 Cal 98; *Manabai v Chandanbai* AIR 1954 Nag 284; *Hira Dei v Bodhi Sahu* AIR 1954 Ori 172; *Ram Kunawarbai v Ranibahu* AIR 1985 MP 73 (fact of remarriage should be properly established—old relinquishment deed held not sufficient).

33 *Bhola Umar v Kausilla* (1933) 35 All 24, 140 IC 631, AIR 1932 All 617; *Jileba v Parmesra* AIR 1950 All 700.

34 AIR 1977 Cal 289.

35 *Gajodhara Devi v Gokul* AIR 1990 SC 46.

husband of the widow and the remarriage of the widow, then she is entitled to her rights in the property and cannot be divested of the same. This is, of course, subject to the factum of the custom prevalent in the community as regards remarriage of widows. If the custom of the community stipulates that the widow would forfeit her rights on remarriage, then she could not claim as such, but in the absence of a custom, the rights of the widow would stand intact.

In view of the above ruling of the Supreme Court, the High Courts of Allahabad, Madhya Bharat and the Chief Court of Oudh have taken the correct view and the views expressed by the High Courts of Bombay, Madras, Calcutta and Orissa are erroneous. A detailed consideration of the decisions of various High Courts. however, would have proved useful in the ultimate analysis.

(2) Remarriage of a widow, now, is not under the Hindu Succession Act 1956, a ground for divesting the estate inherited by her from her husband (see notes under s 8 of the Act). The question of maintenance stands on a different footing, since by operation of ss 21 (iii) and 22, Hindu Adoptions and Maintenance Act 1956, a widow on remarriage, ceases to be dependent. Reference may be made to the notes under those sections.

§ 564. WIDOWED DAUGHTER-IN-LAW

What is stated in § 558A applies *mutatis mutandis* to a widowed daughter-in-law. Section 19, Hindu Adoption and Maintenance Act 1956, now deals with the question of maintenance of widowed daughter-in-law. Section 21(vii) of the Act includes a widowed daughter-in-law in the category of dependents, and s 22 lays down rules relating to maintenance of the dependents of a deceased person. Reference may be made to the notes under those sections. Maintenance under those provisions ceases upon remarriage. The law here has been stated as it stood prior to the Hindu Women's Rights to Property Act 1937, under the decided cases.

Where there is no property left by the husband, or where the property in which he was a coparcener at the time of his death, is not sufficient for the maintenance of the widow, the question arises whether she has a legal claim for maintenance either against her own relations or against her husband's relations. It has been held, that she has no such claim either against her father or against his estate in the hands of his heirs (§ 546). Nor has she any claim to maintenance against her husband's relations.[36]

36 *Ganga Bai v Sita Ram* (1876) 1 All 170; *Sivitrabai v Lukxmibai* (1878) 2 Bom 573 (husband's paternal uncle); *Apaji v Gangabai* (1878) 2 Bom 632 (husband's brother); *Bai Daya v Natbu* (1885) 9 Bom 279 (stepson).

Even her father-in-law is not under a legal obligation to maintain her.[37] However, if he has got separate property of his own, he is under a moral obligation to maintain her out of such property. On the death, however, of the father-in-law, his son, widow, or other heir inheriting his property, comes under a legal obligation to carry out this moral obligation, and to maintain her out of such property. In other words, on the death of the father-in-law, the moral obligation on him to maintain his daughter-in-law ripens into a legal obligation on his heirs inheriting his estate in accordance with the principle stated in § 544.[38] This is subject according to the decision of the Bombay High Court, to the condition that her husband was living at the time of his death in union with his father.[39] The Madras High Court had held, on the other hand, that this obligation exists even when the deceased husband of the widow was divided from his father and other coparceners.[40]

In a case, in which the father-in-law had disposed of his property by will, it was held by the High Court of Bombay, that the daughter-in-law was not entitled to maintenance out of the property in the hands of the devisee.[41] This decision has been followed by the Madras High Court,[42] but the Calcutta High Court has held the other way.[43] It has been held by High Court of Andhra Pradesh,[44] that where there is property in the hands of heirs or donee of the deceased father-in-law, he is under legal liability to provide maintenance to the widowed daughter-in-law, whether he takes the property by intestacy or by will or gift. The moral obligation of the deceased ripens into legal obligation on such person.

The daughter-in-law does not lose her right of maintenance out of the estate of her father-in-law, by declining to reside in her father-in-law's house.[45]

Under the Bengal law, in case of partition between a son and a grandson by a predeceased son of the deceased proprietor, the charge of maintaining the widow of the predeceased son must be placed on the

37 *Kalu v Kashibai* (1883) 7 Bom 127; *Meenakshi v Rama Aiyar* (1914) 37 Mad 396, 18 IC 34, AIR 1914 Mad 587.

38 *Janki v Nand Ram* (1889) 11 All 194 (FB); *Siddessury v Janardan* (1920) 29 Cal 557; *Kamini v Chandra* (1890) 17 Cal 373; *Yamundbai v Munubai* (1899) 23 Bom 608; *Adhibai v Cursandas* (1887) 11 Bom 199, 207; *Ammakannu v Appu* (1888) 11 Mad 91; *Jai Nand v Mst Paran* (1929) 4 Luck 491, 118 IC 419, AIR 1929 Ori 251 (FB); *Ranagammal v Echammal* (1899) 22 Mad 305.

39 *Yamunabai v Manubai* (1899) 23 Mad 608.

40 *Appavu v Tarwadi* (1949) ILR Mad 16.

41 *Bai Parvati v Tarwadi* (1901) 25 Bom 263.

42 *Sankaramuthy v Subbamma* (1939) ILR Mad 242.

43 *Fool Coomari Dasi v Debandra Nath Sil* (1942) 1 Cal 202, 202 IC 30, AIR 1942 Cal 474.

44 *TA Lakshmi Narasamba v Sandaramma* AIR 1981 AP 88 (FB).

45 *Siddessury v Janardan* (1902) 29 Cal 557.

share allotted to her son and not on the entire estate left by the father-in-law.[46]

§ 565. LOSS OF CASTE

Excommunication from caste does not deprive a Hindu wife of her right of maintenance.[47]

III. AMOUNT OF MAINTENANCE

§ 566. AMOUNT OF MAINTENANCE PAYABLE TO A WIDOW

Section 23, Hindu Adoption and Maintenance Act 1956, now lays down rules relating to the quantum of maintenance to be allowed inter alia to a widow, the considerations affecting the determination of the same. Reference may be made to the notes under that section.

The law as it stood prior to the Act of 1956 is stated below:

(a) the maintenance to be allowed to a widow should be such an amount as will enable her to live consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house,[48] unless there are circumstances which effect, one way or the other, her mode of living there. In other words, in determining the amount of maintenance the court should be have regard to the following circumstances:[49]

(i) the value of the estate, taking the debts for which it is liable also into consideration;[50]

(ii) the position and status of the deceased husband and of the widow;

(iii) the reasonable wants of the widow, including not only the ordinary expenses of living, but also what she might reasonably expend for religious and other duties incident to her position in life;[51]

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46 *Abani Mohan v Biswanath* (1950) 54 CWN 654, AIR 1950 Cal 142.

47 *Queen v Marimuttbu* (1882) 4 Mad 243. See Act 21 of 1850.

48 *Rajanikanta Pal v Sajanisundaree Dasee* 61 IA 29, 147 IC 438, AIR 1934 PC 29.

49 *Ekradeshwari v Homeshwar* (1929) 56 IA 182, ILR 8 Pat 840, 116 IC 409, AIR 1929 PC 128; *Nagendramma v Ramakotayya* (1955) 1 MLJ 25, AIR 1954 Mad 713; *Kirpal Singh v Chandrawati Devi* AIR 1951 All 507.

50 *Shridhar Bhagwanji Teli v Mst Sitabai* (1938) ILR Nag 289, AIR 1938 Nag 198.

51 *Nittokissoree v Jogendro Nauth* (1878) 5 IA 55; *Baisani v Rup Singh* (1890) 12 All 558; *Devi Persad v Ganwanti* (1895) 22 Cal 410; *Dalet Kaunwar v Ambika* (1903) 25 All 266; *Sundarji v Dabibai* (1905) 29 Bom 316; *Lalla Mahesbwari Prasad v Mst Sahdei Kunwar* (1938) 13 Luck 13, 165 IC 227, AIR 1937 Oudh 16.

(iv) the past relations between her and her husband;[52]

(b) in calculating the amount of maintenance, the widow's *stridhana* must be taken into account, unless it is of an unproductive character, such as clothes and jewels.[53] However, if the ornaments are of great value and are likely to be converted into money, that fact may be considered.[54] A Full Bench of the High Court of Andhra Pradesh had expressed the view that the widow's separate property, which is productive, cannot be taken into account.[55] A voluntary payment by a brother to which she has no claim, and which may be stopped at any moment ought not to be taken into account,[56] not her earnings by her own personal exertions.[57] There is a conflict of opinion, whether a widow is entitled to maintenance out of the property of the joint family to which her husband belonged, when the income from her *stridhana* is sufficient for her maintenance (see notes to § 559);

(c) the widow of a deceased coparcener is not entitled to maintenance in excess of the annual income of the share to which her husband would have been entitled on partition, if living.[58] Where the estate is heavily indebted, even one-fifth or one-sixth of the husband's income may be adequate maintenance.[59] No hard and fast rule can be laid down, that she is entitled to a particular fraction of the income. In fixing the rate of maintenance, the court takes into consideration the income of the joint family at the time of the institution of the suit and not as on the death of her husband;[60]

(d) a widow, who has once received a sufficient allotment for her maintenance, but has dissipated it, is not entitled to further maintenance.[61]

52 *Purushottamdas Harijivandas v Bai Ruxmani* (1938) Bom L 39 Bom LR 458, 170 IC 897, AIR 1937 Bom 358.

53 *Shib Dayee v Doorga Pershad* (1872) 4 NWP 63; *Savirtribai v Luximbai* (1878) 2 Bom 573, 584; *Gokibai v Lakhmidas* (1890) 14 Bom 490.

54 *Gurushiddappa v Parwatewwa* (1937) Bom 113, 38 Bom LR 1293, 167 IC 973, AIR 1937 Bom 135.

55 *Varahalu v Sithamma* AIR 1961 AP 272.

56 *Baburi Sraswati Kuer v Baburia Sheoratan Kuer* (1933) 12 Pat 869, 149 IC 738, AIR 1934 Pat 99.

57 *Jai Ram v Mst Shiv Devi* (1938) ILR Lah 352, AIR 1938 Lah 344; *Bai Jaya v Ganpatram Kalidas* (1941) ILR Bom 483, 196 IC 607, AIR 1941 Bom 305, 43 Bom LR 618.

58 *Madhavrav v Gangabai* (1878) 2 Bom 639; *Adhibai v Cursandas* (1887) 11 Bom 199, 209; *Jayanti v Alamelu* (1904) 27 Mad 45, 48.

59 *Srimati Sabitri Thakurain v FA Savi* (1933) 12 Pat 359, 145 IC 1, AIR 1933 Pat 306.

60 *Veeraju v Narayanamma* (1953) ILR Mad 22, 22, AIR 1953 Mad 159 (FB); *Krishnamurthy v Suryakantamma* AIR 1955 AP 5, (1954) 2 MLJ (Andh) 170.

61 *Savitribai v Luximbai* (1878) 2 Bom 573, 583.

Wants and Exigencies

The right to maintenance is one accruing from time to time according to the wants and exigencies of the widow.[62]

Value of the Estate

The amount of the property, doubtless, is an element in determining the maintenance, but it cannot be regarded as the criterion.[63]

Conduct of Widow

The conduct of the claimant to maintenance may also be taken into consideration.[64]

Funeral Expenses of the Widow

The funeral expenses of a widow are payable out of the estate of her husband. Her *stridhana* cannot be charged with such expenses.[65]

Maintenance of Wife Forsaken by Her Husband

Where a husband forsakes his wife without any justifying cause, she is entitled to one-third of the husband's property for her maintenance. It has been so held by the High Court of Bombay on the strength of a text of Yajnavalkya.[66]

§ 567. AMOUNT OF MAINTENANCE FOR OTHER FEMALES

The principles, upon which maintenance is allowed to a widow, are to be applied *mutatis mutandis* in determining the amount of maintenance to be awarded to other females; ie, the court must have regard to the value of the property, and it must take into consideration the independent means of support, if any, of the person claiming the maintenance.[67]

§ 568. AMOUNT MAY BE INCREASED OR DECREASED

The amount of maintenance, whether it is fixed by a decree or by agreement, is liable to be increased or diminished, whenever there

62 *Narayanrao v Ramabai* (1879) 3 Bom 415, 6 IA 114, 118; *Rangubai v Subaji* (1912) 36 Bom 383, 14 IC 821.
63 *Tagore v Tagore* (1872) 9 Beng LR 377, 413, IA Sup Vol 47, 82.
64 *Tagore v Tagore* supra; *Surampalli v Suramapalli* (1908) 31 Mad 338, 341.
65 *Ratanchand v Javbercband* (1898) 22 Bom 818.
66 *Ramabai v Trimbak* (1872) 9 Bom HC 283, Mayukha, Chap 20, para 1.
67 *Mabesh v Dirgpal* (1899) 21 All 232, 234; *Tagore v Tagore* (1872) 9 Beng LR 377, 413 IA Supp Vol 47, 82.

is such a change of circumstances, as would justify a change in the rate.[68]

Thus, the rate of maintenance may be enhanced, if the income of the estate has materially increased,[69] or there has been a material increase in the cost of living[70] provided this was not anticipated and allowed for at the time of the decree.[71] Similarly, the rate may be reduced, if the income of the estate has diminished,[72] unless the default or negligence of the person liable for maintenance has caused the diminution.[73] However, the rate of maintenance need not vary with every fluctuation in the income.[74] An agreement by a widow to receive a fixed maintenance per annum and not to claim any increase in future even in case of change of circumstances is binding upon her.[75]

Section 25 of the Hindu Adoption and Maintenance Act 1956, now lays down that the amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of the Act, may be altered subsequently, if there is a material change in the circumstances justifying such alteration. Reference may be made to the notes under that section.

Procedure

A separate suit must be brought to vary the rate of maintenance fixed by a decree, unless the decree contains a clause enabling the parties to apply for a modification of its terms, in which case, an application may be made to alter the rate in execution proceedings.[76]

§ 569. MAINTENANCE NOT A CHARGE

The claim, even of a widow, for maintenance, is not a charge upon the estate of her deceased husband, whether joint or separate (§ 559), until

68 *Sidlingapa v Sidava* (1878) 2 Bom 624, 630; *Rajender v Patto* (1878) 5 Cal LR 18; *Thakur Sheo Mangal Singh v Thakurain Bodhi Kuar* (1936) 11 Luck 607, 159 IC 356, AIR 1936 Ori 60; *Saraswati v Rupa* AIR 1962 Ori 193; *Sankaranarayana v Lakshmi Ammal* (1960) 1 Mad LJ 215, AIR 1960 Mad 294 (court can enhance the amount from the date of demand); *Sidlingapa v Sidav* (1878) 2 Bom 624; *Lala Maheshwari Prasad v Mst Sahdei Kunwar* (1938) 13 Luck 13, 165 IC 227, AIR 1937 Ori 16.

69 *Bansidhar v Champoo* (1946) 21 Luck 152.

70 *Bagaru v Vijayamachi* (1899) 22 ILR Mad 175.

71 *Veerayya v Chellamma* (1939) ILR Mad 234.

72 *Trimbak v Bhagu Bai* (1941) ILR Nag 437, 185 IC 580, AIR 1939 Nag 249.

73 *Gojikabai v Dattatraya* (1900) 24 Bom 386; *Vijaya v Sripathi* (1885) 8 Mad 94; *Ruka Bai v Ganda Bai* (1878) 1 All 594.

74 *Lala Maheshwari Prasad v Mst Sahdei Kanwar* (1938) 13 Luck 13, 165 IC 227, AIR 1937 Ori 16.

75 *Mobeisbwara v Durgamba* (1924) 47 Mad 308, 78 IC 831, AIR 1924 Mad 687; *Purushottamadas Harijivandas v Bai Ruxmani* (1938) ILR Bom 1, 39 Bom LR 458, 170 IC 897, AIR 1937 Bom 358.

76 *Maharana Shri Ranmalsangji v Kundankunwar* (1902) 26 Bom 707, (1878) 1 All 594; *Savitribai v Radhkishan* (1947) ILR Nag 381.

it is fixed and charged upon the estate. This may be done by a decree of a court, or by an agreement between the widow and the holder of the estate, or by the will by which the property was bequeathed. Therefore, the widow's right is liable to be defeated by a transfer of the husband's property to a bona fide purchaser for value, without notice of the widow's claim for maintenance. It is also liable to be defeated by transfer to purchaser for value, even with notice of the claim, unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention.

In fact, a widow's right to receive maintenance is one of an indefinite character, which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge exists.[77] However, where maintenance has been made a charge upon the property, and the property is subsequently sold, the purchaser must hold it subject to the charge.[78] No question, however, of bona fides, can arise where a transfer is made for payment of debts as stated in § 570.

Section 27, Hindu Adoptions and Maintenance Act 1956, lays down inter alia. That widow's claim for maintenance under the Act shall not be a charge on the estate of the deceased husband or any portion thereof, unless one has been created by the will of the deceased, by decree of court, by an agreement between the widow and the holder of the estate, or otherwise.

Section 39, Transfer of Property Act 1882

A widow's right of maintenance not being a charge, it is but equitable that it should not be enforced against transferee for value, unless the transfer was made in fraud of the right of maintenance. A transferee for value may be a purchaser, or he may be a mortgagee. The provisions of s 39, Transfer of Property Act 1882, are to the same effect.[79] That section is as follows:

77 *Lakshman v Satyabhamabai* (1878) 2 Bom 494; *Bhartpur State v Gopal* (1902) 24 All 160, 163; *Ram Kanwar v Ram Dai* (1900) 22 All 326; *Ramanandan v Rangammal* (1889) 12 Mad 260, 272; *Jayanti v Alamelu* (1904) 27 Mad 45, 49; *Soorja Koer v Nath Buksh* (1885) 11 Cal 102 (mere notice immaterial); *Prononno v Barbosa* (1866) 6 WR 253 (change created by will); *Sorolah v Bhoobun* (1888) 15 Cal 292, 307; *Shri Bebarilalji v Bai Rajbai* (1899) 23 Bom 342; *Bhagat Ram v Mst Sahib Devi* (1922) 3 Lah 55, 67 IC 848, AIR 1922 Lah 273 (transfer not bona fide). Reference may also be made to the full bench decision in *Mst Satwati v Kali Shanker* (1954) ALJ 645, AIR 1955 All 4 (case of a wife).

78 *Kuloda Prosad v Jogesbwar* (1900) 27 Cal 194; *Prosonno v Barbosa* (1866) 6 WR 253.

79 See *Shri Bebarilalji v Bai Rajbai* (1899) 23 Bom 342; *Ram Kanwar v Ram Dai* (1900) 22 All 326; *Somasundaram v Unnamalai* (1920) 43 Mad 800, 802, 59 IC 398, AIR 1920 Mad 722.

Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Decree; death of Judgment-debtor

A decree for maintenance obtained against a member of an undivided family can be executed, after his death, against joint property in the hands of the other members, if the decree created a charge against the joint family property;[80] even when there is no charge, it may be executed against the son of the judgment-debtor,[81] to the extent of the ancestral property in his hands, whether such maintenance was due at the time of the death of the deceased judgment-debtor or became due since.

Where in execution of a decree creating a charge, the decree-holder herself purchases the charged property subject to her claim to future maintenance, it has been held that the judgment-debtor's personal liability for future claims is not extinguished.[82]

Possession of Property by Widow for Her Maintenance

It has been held that where a widow is in possession of a specific property for the purpose of her maintenance, a purchaser buying with notice of her claim, is not entitled to possession of the property without first securing proper maintenance for her.[83] It is the settled practice of the High Court of Bombay, not to allow even an heir to recover family property from a widow in possession, without first securing a proper maintenance for her.[84] In such a case, the property may be sold subject to her right.[85]

Charge May be Created by A Will

A may bequeath his property to *B*, subject to a charge for the maintenance of his widow out of the property.[86]

80 *Subbanna v Subbanna* (1907) 30 Mad 324; *Minakshi v Chinnappa* (1901) 24 Mad 689.

81 *Mt Munnibibi v Radhay Shiam* (1945) Luck 641; *Muttia v Virammal* (1887) 10 Mad 283; *Bhagirathi v Anantha* (1887) 17 Mad 268.

82 *Sanyasi Rao v Suryanarayanamma* (1937) Mad 324, 165 IC 647, AIR 1936 Mad 964.

83 *Rachawa v Shivayagapa* (1894) 18 Bom 679; *Iman v Balamma* (1889) 12 Mad 334.

84 *Yellawa v Bhimangavda* (1894) 18 Bom 452.

85 *Ram Kanwar v Amar Nath* (1932) 54 All 472, 138 IC 863, AIR 1932 All 361.

86 *Prosonno v Barbosa* (1866) 6 WR 253, (1899) 23 Bom 342.

Alienation Made in Husband's Lifetime

A Hindu widow is debarred from impeaching alienations of joint family property made in her husband's lifetime. The reason is that when her right of maintenance comes into existence (ie, on her husband's death) she takes that right in the property, as it stands at the time of her husband's death.[87]

§ 570. TRANSFER FOR PAYMENT OF DEBTS

Debts contracted by a Hindu takes precedence over the right of maintenance of his wife, or infant child,[88] or his widow after his death.[89] The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided, the debts were incurred for the benefit of the family.[90] Similarly, debts incurred by a joint family trading business take precedence over the widow's right to maintenance and residence.[91]

If property belonging to the husband or to the joint family is sold in liquidating such debts, the sale is binding on the widow, and she has no right of maintenance against the purchaser or against property sold to him, even if the purchaser had notice of her claim for maintenance.[92] However, where maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money-decree, though the decree was in respect of debts binding on the family.[93] As the Privy Council has laid down in a case,[94] of the two obligations which confront a joint family; namely: (1) the obligation to pay family debts; and (2) the duty to provide maintenance to the widows of the family. The first would have preference over the second, so long as neither of these obligations has

87 *Ramzan v Ram Daiya* (1918) 40 All 96, 42 IC 944, AIR 1918 All 408.

88 *Sunder Singh v Ram Nath* (1926) 7 Lah 12, 93 IC 1013, AIR 1926 Lah 167; *Jawahar Singh v Paraduman Singh* (1933) 14 Lah 399, 141 IC 424, AIR 1933 Lah 110.

89 *Adhiranee v Shona Malee* (1876) 1 Cal 365; *Jayanti v Alamelu* (1904) 27 Mad 45; *Dur Dayal v Kaunsila* (1883) 5 All 637; *Natchiarammal v Gopalkrishna* (1878) 2 All 126; *Jamiat Rai v Mt Malan* (1932) 13 Lah 41, 133 IC 62, AIR 1931 Lah 718.

90 *Lakshman v Satyabhamabai* (1878) 2 Bom 494; *Ramanandan v Rangammal* (1889) 12 Mad 260; *Joburra v Sreegopal* (1876) 1 Cal 470.

91 *Mt Champa v Official Receiver, Karachi* (1934) 15 Lah 9, 144 IC 636, AIR 1933 Lah 901.

92 (1878) 2 Bom 494, (1889) 12 Mad 260; *Mst Tara v Sarup* (1929) Lah 706, 149 IC 707, AIR 1930 Lah 117.

93 *Somasundaram v Unnamalai* (1920) 43 Mad 800, 59 IC 398. The *dicta* to the contrary in *Sham Lal v Banna* (1882) 4 All 296, 300 and *Gur Dayal v Kaunsila* (1883) 5 All 367 are not supported by any text of Hindu law or by a decided case.

94 *Mt Dan Kuer v Mt Sarla Devi* (1946) 73 IA 208, (1946) All 756, 51 CWN 81; *Kaveri v Parameswari* AIR 1971 Ker 216 (enhanced maintenance).

taken the form of a charge on the family property; but if either of them assumes the shape of a charge, it would take precedence over the other. If the decree of a creditor against the members of a joint family based on a family debt is to be binding on a widow in the family entitled to maintenance, it is not necessary that she should be made a party to the suit, so long as the family is joint. However, if a partition is effected before the suit or during the pendency of the suit, in which a separate share is allotted to her in lieu of her maintenance, she ought to be made a party to such a suit.[95]

Section 27, Hindu Adoptions and Maintenance Act 1956, as stated in the preceding paragraph, lays down the manner in which a charge may be created for securing maintenance payable to a dependant. Section 26 of that Act lays down, that subject to the provisions of s 27, debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under the Act.

§ 571. RIGHT OF MAINTENANCE AGAINST DONEES AND DEVISEES

A Hindu cannot dispose of his entire property by gift or by will, to defeat the right of his widow to maintenance. If he does so, the donee or devisee must hold the property subject to the widow's right of maintenance, and the widow may enforce her right against it.[96]

Section 22(2), Hindu Adoptions and Maintenance Act 1956, lays down that where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of the Act, the dependant shall be entitled subject to the provisions of the Act, to maintenance from those who take the estate (reference may be made to the notes under that section).

Transfer of Property Pending Suit for Maintenance

If during the pendency of a suit instituted by a widow to establish a charge on specific immovable property for her maintenance, the property is transferred by any other party to the suit, and a decree is subsequently passed creating a charge on the property for the widow's maintenance, the transferee must hold the property subject to such charge, unless the transfer be effected for the purpose of paying off a debt, which has priority over the widow's claim for maintenance.[97] The same rule applies

95 *Mt Prabbawati Kuer Ram Saran Lal* (1934) 13 Pat 785, 152 IC 691, AIR 1934 Pat 538.

96 *Becha v Mothina* (1901) 23 All 86; *Joytara v Rambari* (1884) 10 Cal 638; *Narbadabai v Mahadeo* (1881) 5 Bom 99; *Jamna v Machul* (1879) 2 All 315.

97 *Dose Thimmanna v Krishna* (1906) 29 Mad 508.

where the widow is a party to the suit and she has, by her written statement, claimed a charge on the property.[98]

The above rule is an application of the doctrine of *lis pendens* as enunciated in s 12, Transfer of Property Act 1882. The rule does not apply where a widow claims maintenance without asking at the same time that it should be made a charge on the property.[99]

V. Transfer of Family Dwelling-house and Its Effect on the Right of Residence

Note.—The position and rights of a widow, daughter, predeceased son's wife and certain other female heirs of a Hindu have been materially changed by the Hindu Succession Act 1956, and the question of the right of residence of such persons must now be considered in the context of the provisions of that Act. Section 23 of that Act lays down a special provision respecting the family dwelling house. In §§ 573 and 574, the law has been stated as is stood prior to the coming into operation of that Act under the decided cases.

§ 572 & 573. WIDOW OF UNDIVIDED COPARCENER

Where an undivided family consists of two or more males related as father and son or otherwise, and one of them dies leaving a widow, she is entitled to reside in the family dwelling-house in which she lived with her husband.[1]

If the house is sold by the surviving coparcener or coparceners without necessity, the sale does not affect her right, and the purchaser cannot evict her,[2] at all events, until another suitable residence is found for her.[3] If the purchaser buys the house with full knowledge that the widow is residing and is being maintained in it, the purchaser is not entitled to oust her, even though there may be other property belonging to the family, out of which her maintenance can be derived.[4] However, if the sale is for a family necessity, she is liable to be evicted, even though the purchaser had noticed at the time of purchase that she was in occupation

98 *Jagendra v Fulkumari* (1900) 27 Cal 77.

99 *Manika v Ellappa* (1896) 19 Mad 271.

1 *Bai Devkore v Sanmukbram* (1889) 13 Bom 101.

2 *Venkatammal v Andyappa* (1883) 6 Mad 130; *Gauri v Chandramani* (1876) 1 All 262; *Telemand v Ruknina* (1881) 3 All 353.

3 *Mangala v Dinanath* (1869) 4 Beng LROC 72; *Ganga Dei v Jagannath* (1947) 22 Luck 518.

4 *Dalsukbram v Lalubai* (1883) 7 Bom 282.

of the house.[5] Similarly, the right of residence cannot prevail against the husband's debts.[6]

Illustrations

(a) *A* dies leaving a widow and son. The son sells the family dwelling-house without family necessity. The purchaser is not entitled to evict the widow.[7]

(b) *A* and *B*, two Hindu brothers, are members of joint family residing together in the family dwelling-house. *A* dies leaving a widow *W*. After *A*'s death, dispute arises between *B*'s wife and *W*. *B* offer *W* a residence in another house on condition of *W* vacating the part of the family house in her occupation. *W* refuses and *B* sues *W* to recover from her possession of the portion of the family house in her occupation. *B* is not entitled to possession. *W* is entitled to reside in the house.[8]

(c) *A* and his nephew *B* are members of a joint family residing together in the family dwelling-house. *A* dies leaving a widow. After *A*'s death, *B* sells the family dwelling-house without family necessity. The purchaser in not entitled to evict *A*'s widow.[9]

The widow of a deceased coparcener cannot impeach an alienation of the family dwelling-house made in her husband's lifetime. Thus, a daughter-in-law cannot impeach an alienation of the dwelling-house made by her father-in-law in her husband's lifetime.[10]

§ 574. UNMARRIED DAUGHTERS OF DECEASED COPARCENER

Where an undivided family consists of two of more males related as father and son or otherwise, and one of them dies leaving unmarried daughters, they are entitled to reside, until their marriage, in the family dwelling-house in which they lived with their father. A purchaser of the family house is not entitled to evict them unless the sale was for a family necessity.[11]

5 *Ramanadan v Rangammal* (1889) 12 Mad 260; *Joburra v Sreegopal* (1876) 1 Cal 470, 475 (insolvency of manager); *Mt Champa v Official Receiver, Karachi* (1934) 15 Lah 9, 144 IC 636, AIR 1933 Lah 901.

6 *Jamiat Rai v Mt Malan* (1932) 13 Lah 41, 133 IC 62, AIR 1931 Lah 718.

7 4 Beng LROC 72, ILR 6 Mad 130, ILR 7 Bom 282.

8 *Bai Devkore v Sanmukharam* (1889) 13 Bom 101.

9 1 All 262.

10 *Ramzanv Ram Daiya* (1918) 40 All 96, 42 IC 944, AIR 1918 All 408.

11 *Suriyanarayanna v Balasubramania* (1920) 43 Mad 635, 56 IC 524, AIR 1920 Mad 106.

Illustrations

(a) *A* dies leaving a son, a widow *W*, and two unmarried daughters *D*1 and *D*2. On *A*'s death, the son enters into possession of the whole property including the family dwelling-house. The son then sells the house without family necessity. The purchaser is not entitled to oust the daughters. The daughters are entitled to reside in the house until their marriage.

(b) In the case put in ill (a), the son dies leaving his mother *W* and his two unmarried sisters *D*1 and *D*2. After his death, the dwelling house is sold in execution of a money-decree passed against *W* on a personal debt of *W*, and is purchased by *P*. *P* is not entitled to oust *D*1 and *D*2.[12]

§ 575. WIFE AND UNMARRIED DAUGHTERS OF SOLE OWNER

(1) Where a family consists only of a husband and wife, the wife cannot assert her right of residence in the family dwelling-house, either against the purchaser in execution of a decree passed against her husband in his lifetime or against his estate after his death,[13] or even against a purchaser under a private sale from her husband without necessity,[14] though the purchaser had notice at the time of sale that she was residing in the house.[15]

(2) The same rule applies to unmarried daughters. They too cannot resist the claim for possession of the purchaser at a court-auction or under a private sale.[16]

Illustrations

(a) *N* executes a mortgage of the family dwelling house to *M*. *M* obtains a decree on the mortgage against *N*. *N* then dies leaving a widow. After *M*'s death, the house is sold in execution of the decree and purchased by *P*. *P* is entitled to the possession of the house free from the widow's right of residence.[17] In *Manilal v Bai Tara*, the learned judge observed that if the mortgage was not beneficial to and binding upon the wife or was in any way

12 *Suriyanarayana v Balasubramania* (1920) 43 Mad 635, 56 IC 524, AIR 1920 Mad 106.
13 *Manilal v Bai Tara* (1893) 17 Bom 398; *Jayanti v Alamelu* (1904) ILR Mad 45.
14 *Gangabai v Jankibai* (1921) 45 Bom 337, 59 IC 583, AIR 1921 Bom 380.
15 ILR 17 Bom 398, ILR 45 Bom 337, 59 IC 583, AIR 1921 Bom 380.
16 See *Suriyanarayana v Balasubramania* (1920) Mad 635, 56 IC 524, AIR 1920 Mad 106 and 27 Mad 45.
17 *Manilal v Bai Tara* (1893) 17 Bom 398; *Jayanti v Alamelu* (1904) 27 Mad 45.

in fraud of her rights, her right of residence would not be affected by the sale. However, these observations have been dissented from by Bhashyam Ayyangar J in *Jayanti v Alamelu* and also by Shah J, in *Gangabai v Jankibai*,[18] who agreed with the view taken by Bhashyam Ayyangar J.

(b) *A* sells the family dwelling-house without any family necessity to *P*. *P* sues *A* and his wife for possession. *A* then dies leaving his widow. *P* is entitled to possession free from the widow's right of residence.

VI. Right of Maintenance Not Affected by Will

§ 576. RIGHT OF MAINTENANCE NOT AFFECTED BY WILL

A Hindu cannot so dispose of his property by will as to affect the right of maintenance to which a person is entitled under the Hindu law.[19]

See restriction no. 1 of Sch III, Indian Succession Act 1925.

VII. Transfer and Attachment of Right of Maintenance

§ 577. TRANSFER OF RIGHT OF MAINTENANCE

A Hindu female cannot transfer her right to future maintenance in whatever manner arising secured or determined.[20]

This is s 6, cl (dd), Transfer of Property Act 1882, as amended by the Transfer of Property (Amendment) Act 1929.

The maintenance may be fixed by agreement or it may be fixed by a decree of court. Before the amendment, there was conflict of opinion, whether if the maintenance was fixed by a decree, it could be transferred by the widow, the High Court of a Calcutta holding that it could,[21] and the High Court of Madras that it could not.[22] The Calcutta view is no longer law.

§ 578. ATTACHMENT OF RIGHT OF MAINTENANCE

A right to future maintenance cannot be attached in execution of a decree, though arrears of maintenance may be so attached.[23]

18 (1921) 45 Bom 337, 59 IC 583, AIR 1921 Bom 380.
19 *Sriramulu v Anasuyamma* AIR 1957 AP 21.
20 *Narabadabai v Machadeo* (1881) 5 Bom 99, 103, 104.
21 *Asad Ali v Haidar Ali* (1911) 38 Cal 13, 6 IC 826.
22 *Ranee Annapurni v Swaminatha* (1911) 34 Mad 7, 6 IC 43.
23 Section 60, cl (n), Code of Civil Procedure 1908 s 60. *Haridas v Baroda* (1900) 27 Cal 38; *Hoymobutty v Koroona* (1876) 8 WR 41.

VIII. Suit for Maintenance

§ 579. SUIT FOR MAINTENANCE

(1) A widow, who is entitled to maintenance, may sue for all or any of the following reliefs for:

(1) a declaration of her right to maintenance;
(2) arrears of maintenance;[24]
(3) charge on a specific portion of her husband's estate for her maintenance and residence.[25]

Where a member of an undivided family comprising of several branches, dies, and a suit is brought by his widow for maintenance, she is entitled to a decree against all the members of the joint family, and not only against the branch to which her husband belonged and to which his share lapsed by survivorship.[26]

Death Pending Suit for Maintenance

The right of a widow to claim maintenance, when it has not crystallised into a definite sum, is an inchoate right. In such a case, if she dies pending her suit for maintenance, it does not survive to her legal representatives.[27] However, if the right has been declared, for instance, by a preliminary decree, the position will be different.[28]

§ 580. LIMITATION

(1) A suit for a declaration of the right to maintenance must be brought within 12 years from the time when the right is denied.[29]

The refusal by a husband to maintain his wife on the ground of unchastity, does not prevent a fresh cause of action arising to her on his death, if it is found that there is no unchastity. A suit within 12 years from the husband's death would be in time.[30]

(2) A suit for arrears of maintenance must be brought within 12 years from the time when the arrears are payable.[31] Therefore, past maintenance cannot be claimed for period of more than 12 years [now see art 105, Limitation Act (three years)].

24 *Raja Pirthee Singh v Rani Rajkooer* (1874) 12 Beng LR 238, IA Supp Vol 203.
25 *Moobalakshmamma v Venkataratnamma* (1883) 6 Mad 83.
26 *Subbarayalu v Kamala Vallithayaramma* (1912) 35 Mad 147, 10 IC 347.
27 *Muthalammal v Veeraraghavathi* AIR 1953 Mad 202.
28 *Dhanapala v Krishna Chiettiyar* AIR 1955 Mad 165.
29 Schedule I, art 129, Limitation Act 1908.
30 *Mt Shibbi v Jodh Singh* (1933) 14 Lah 759, 148 IC 479, AIR 1933 Lah 747.
31 Schedule I, art 128, Limitation Act 1908.

Arrears

In order to recover arrears of maintenance, it is necessary to prove that there was a wrongful withholding of maintenance for the period for which arrears are claimed.[32] It is not necessary to prove a demand for each year's maintenance, as it became payable. At the same time, it must be observed that mere non-payment of maintenance does not constitute conclusive proof of wrongful withholding. However, it constitutes prima facie proof of wrongful withholding, and if it is coupled with a denial of the plaintiff's right to maintenance, it may constitute sufficient proof of wrongful withholding to entitle the plaintiff to arrears to maintenance.[33]

Declaration of right to maintenance

A suit by a Hindu widow for a declaration of her right to maintenance is not barred, merely because it is brought twelve years after the date of her husband's death. The period of limitation runs from the time when her right to maintenance is denied. The reason is that the right to maintenance is one accruing from time to time according to the wants and exigencies of the person entitled to maintenance.[34]

§ 581. EXECUTION OF DECREE

(1) A decree which directs the payment of future maintenance from time to time, can be enforced by execution,[35] but a decree which merely declares a right of maintenance, cannot be so enforced.[36]

(2) A decree which runs 'the plaintiff's maintenance is fixed at the rate of Rs 30 per month, which the defendant will be liable to pay her every month' is executable. An application by the defendant to reduce the rate of maintenance, on the ground of diminution of income, cannot be entertained by the executing court.[37]

(3) If a husband and wife resume cohabitation after a decree for maintenance, the decree cannot be executed. If a fresh cause of action arises, a fresh decree must be obtained.[38]

32 *Seshamma v Subbarayadu* (1895) 18 Mad 403. However, see *Sidramappa v Mahadevi* AIR 1971 Mys 145.

33 *Raja Yarlagadda v Raja Yaralagadda* (1901) 24 Mad 147, 27 IA 151; *Parwatibai v Chatru* (1912) 36 Bom 131, 12 IC 708; *Chandrakunverba v Randhirsinghji* AIR 1965 Guj 270.

34 *Narayanrao v Ramabai* (1879) 3 Bom 415, 6 IA 114; *Parwatibai v Chatru* (1912) 36 Bom 131.

35 *Ashutosh v Lukhimoni* (1892) 19 Cal 139. The death of the husband does not alter the foundation of the decree—*Ramesh Chander v Sh Bibi Ved Kaur* AIR 1951 Punj 129.

36 *Venkanna v Aitamma* (1889) 12 Mad 183.

37 *Kallu Mal v Barfo* (1938) All 535, 176 IC 139, AIR 1938 All 362.

38 *Vasantam Venkayya v Vasantam Raghavamma* (1942) Mad 24, 200 IC 794, AIR 1942 Mad 1; *Ansuya v Rajaiah* AIR 1971 AP 296. Cf *Meenakshi Ammal v PS Muthukrishna* AIR 1961 Mad 380.