JUDICIAL APPROACH TO ADOPTION:
A CRITICAL APPRAISAL

I. Prelude

The law of adoption in India has received a fair treatment from judicial hands right from the times of the Privy Council till date. The law has passed through different stages. The enactment of the Hindu Adoption and Maintenance Act, 1956 by our Parliament was a milestone in this direction. In the old law governing Hindu adoption, religious consideration predominated whereas under the present law secular considerations have gained prime importance. The law of adoption deals with its various facets which includes the capacity of the person to take in adoption as well as be given in adoption. It also deals with the requirement of valid adoption and its consequential effects. In the following pages an attempt is being made to examine critically some of the decisions of Privy Council, High Courts and the Apex Court dealing with adoption. Various situations have come up before the courts in different circumstances raising question of vital importance.
II. Judicial Approach

(A) Early Judicial Trend

Before the comings into force of the Constitution of India on January 26, 1950 the highest judicial institution in the country were High Courts and subsequently the Government of India Act, 1935 established the Federal Courts in India. From these courts appeals lay to the Privy Council in England. Thus, the rulings of the Privy Council dominated the Indian judicial scenario right upto the time of the establishment of the Supreme Court of India. The purpose of the present discussion is to make a study of the role of the judiciary in protecting, developing and safeguarding the institution of adoption in India which had continued to exist right from the shastric age. The early judicial trends in this context can be traced right form the times of the High Court and the Privy Council rulings which were also taken note of by the Supreme Court of India.

In Jammana vs. Bamasoondri,¹ the Privy Council got an opportunity to look into the question of the validity of an adoption made by a minor. The Council observed that under the Indian Majority Act, 1875 a minor who has attained the age of discretion may adopt or authorize his widow to take a child in adoption. The Council noted that under the Dayabhaga School which was applicable in Bengal the age of 15 or 16 years was considered to be an age of majority. However, according to Mitaksara School, it was the completion of 16 years. The Council held that this rule applied to the case of husband empowering the widow to make an adoption. The other notable observation which the court made was that the age of discretion can’t be fixed prior to the completion of

¹ (1876) 3 IA 72.
14 years as the law considered a girl below the age of 14 years as a child for the purpose of marriage.2

This ruling of the Privy Council shows that Hindu law ever considered a person below the age of majority as having attained the age of discretion. It would follow that the widow herself must have attained the required age before she could adopt a child. This further shows that the capacity of the widow to take the child in adoption is not to be considered with reference to the Indian Majority Act, 1875.3

The High Court of Bombay in *Punchappa vs. Sauganbaswa*,4 has held that a widow by re-marriage lost her right to give in adoption her son by the first marriage unless she was authorised by the first husband to do so. The court also made it clear that the parents could not delegate this right of heirs to another though the physical act of giving the son could be delegated. In *Fakirappa vs. Vacitrava*5 the Bombay High Court held that a widow having sons by her first husband remarried, but again become a widow. With a view to continue the line of her second husband, she took in adoption a son by her former husband, whom she herself gave in adoption as the natural mother. The adoption was held to be invalid, because the lady lost

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2 Ibid.
3 In Collector of *Madurai vs. Mootoo Ramnja*, AIR 1868 12 MIA 397, the Privy Council held earlier that in the absence of an express authority from her husband the widow could adopt a son to her deceased husband with the consent of Sapinda. C. F. *Surender Keshae vs. Doorga Soondri* (1892) 19 IA 108, 122. In *V. A. Rao Vs. Paratha Sarthi Rao*, (1914) 41 IA 51. The Privy Council while outlining the scope of the authority of the widow to adopt held that where the husband had authorised to adopt a particular boy, she could not travel beyond the scope of the authority and adopt another boy, and also see, *Rajinder Prasad vs. Gopala Prasad*, (1930) 57 IA 26.
4 (1900) 24 ILR Bom. 89.
5 (1923) Bom.LR 482 (F.B.)
her right to give away her son in adoption as soon as she remarried, as also on the ground that the same person can’t be both giver and taker.6

The Privy Council has continued to maintain the view that under the Hindu law the principle objective of adoption is two fold: First, securing the performance of the funeral rights of the person to whom the adoption is made, and secondly, preserve the continuance of his linage.7 In Amarendra Man Singh vs. Senatan Singh,8 the Privy Council recognised the religious motive as dominant and secular motive as secondary. This view has latter been confirmed by the Supreme Court.9

In the case of Bal Gagadhar Tilak vs. Shriniwas Pandit,10 the Privy Council observed that among the Hindus the ceremony of adoption is held to be necessary not only for the continuation of the childless father, but as part of the religious means whereby a son can be provided who will make those obligations and religions sacrifices which would permit of the soul of the deceased passing into paradise.

This shows that the ceremonial prospective of adoption has continued to be dominated by religious consideration and courts had continued to give their supports to it. In another notable case namely Ramchandra vs. Shankar,11 the Bombay High Court observed that Mitakshra Hindu joint family adopted a son, the later became from the moment of his adoption a coparcener, with his adopted father as well as with the other members of the

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6 See also Sharad Chandra vs. Shaniabai, (1944) ILR, Nag. 544.
7 Ramasubbayya vs. Cenchuramayya, AIR 1957 PC q124.
8 (1933) 60 IA 242.
9 See V.J.S. Chandrasekar vs. Kulandaivel, (1963) SC 185.
10 (1915) 42 FA 135
11 (1945) ILR Bom. 353.
coparcenors. The court further held that he acquires a birth right in the ancestral or joint family property and he can also demand partition and is also entitled to the benefit of survivorship. This case clearly exhibit the impact of adoption of a male child in the Hindu joint family vis-à-vis Hindu joint family property.

**In Hem Singh Vs. Harnam Singh**12 the facts were: 'A' who belonged to the Tehsil Batala of district Gurdaspur, executed a deed of adoption in 1940 and adopted one of his collateral 'B'. The adoption was challenged by two of his cousin son the grounds that under the customary law of Punjab he could adopt a near collateral and 'B' being a distant collateral could not be adopted. The trial court as well as the district court upheld the adoption. High Court also endorsed the lower court's decision. On the legality of adoption the High Court noticed that the 'Riwaj-i-am' of Gurdaspur district, of Punjab, of the year 1913 provided for the adoption of near collateral only. The court further noticed that 'A' had no male issue and 'B' was brought up by him and by his wife since his childhood and they always treated him as their adopted son. Therefore, 'A' further executed a formal document to remove any doubts.

The question before the Supreme Court for decision were (a) whether the terms of *Ruwaj-i-am* as applicable to the parties, 'B' being a collateral of 'A' in the 8th degree could be validly adopted and (b) is there any rule by which it is required that the person adopted should be related to the person adopting, if so, which relatives may be adopted. Is any preference required to be shown to a particular relatives, is it necessary that the adopted son and

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12 AIR 1954 SC 581.
his adoptive father should be the same caste or tribe and *gotra* as well?

The Hon'ble Supreme Court found that the term near collateral is not defined by the custom. The argument of the appellant that the term collateral should be confined up to three degree only was brushed aside by the court and the ground that the language used was nothing more than a wish on the part of the narrators of the custom's and not mandatory. Therefore, Court observed that the right of selection, rested with the person adopting the child.\(^{13}\) *Gulam Hasen, J.* who delivered the opinion of the Court observed, "we are unable to read . . . a restriction upon the choice of the adopter of any particular collateral, however, near is degree he may be."

The Hon'ble Court referred to *W. H. Rattingan's Digest on Customary Law of Punjab* and found that there was no restriction as regard the age of the degree of relationship of the person to be appointed/adopted.\(^{14}\) The Court thus observed that declaration in the *Rewaj-i-am* can't be treated differently so as to defeat the main object of the adoption, and was directory in nature and non-compliance with it did not invalidate the adoption.\(^{15}\)

Dismissing the appeal, the Hon'ble Supreme Court concluded, "whether a particular rule recording in the Riwaj-i-am is mandatory or directory must depend on what is the essential characteristic of the custom. Under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have therefore, been held to be

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\(^{13}\) *Id.* p. 582.

\(^{14}\) *Id.* p. 583.

\(^{15}\) The Court also drew support from other cases decided earlier, see *Sant Singh vs. Mula*, (1913) 44 Punj. 173, *Chaan Singh vs. Bhola Singh*, AIR 1935 Lah. 83.
mandatory and compliance with them regarded as a condition of the validity of adoption. On the other hand, under the customary law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preference in selection have to be held to be directory and adoptions made in this regard of them are not invalid."

The ruling of the Court in the above case clearly shows that the customs governing parties in matters of adoption cannot be interpreted as derogatory to the written provisions of the law which in all cases are mandatory. Thus, in the express recognition to the custom governing the parties the court said that its force was directory in nature. This is a welcome development in law.16

In Gurunath Vs. Kamalbai and others17 the fact were, 'A' died leaving behind surviving two widows 'W1' and 'W2' and son 'C'. 'C' died in 1913 leaving behind surviving widow 'W3' and a son 'D'. 'W3' died soon after C's death while 'D' died in the year 1914. 'E' (the plaintiff) claims that he was adopted by 'W2' (the junior widow of 'A') and he was entitled to the possession of his adoptive father's properties comprised in the suit. The nearest reversioner of 'A' disputed the adoption of 'E' on the ground that W2's power to adopt was extinguished when 'C' died in 1913, leaving behind him a widow 'W3' and a son 'D', who could continue to family line. 'W2' supported the claim of 'E' (the plaintiff) and asserted the adoption and consent of senior widow 'W1' was given to her adopting 'E'. Trial court upheld the nearest reversioners claim and dismissed the suit of plaintiff 'E'. On appeal this decision was affirmed by the

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17 AIR 1955 SC 206.
High Court and held that W2's power to adopt came to an end at the time when her son died leaving a son and a widow to continue the family line. Against the decision of the High Court an appeal in 'forma pauperis' was filed before the Supreme Court. The only question before the Supreme Court for consideration was in respect to the validity of the adoption of 'E'.

The contention of 'E' was that shastric law itself sets no limit to the exercise of the widow's power of adoption, once she has acquired that power of adoption, she is possessed of it, the power can be exercised by her during her life time when for the purpose of continuing the line of her husband.

The Hon'ble Supreme Court while dismissing the appeal held that the power of a widow to adopt comes to an end by the interposition of a grand son or the son's widow competent to adopt has become a part of Hindu law through the reasons for limiting the power may not be traceable to any shastric law. The Hon'ble Supreme Court further observed, "It is too late in the day to say that there are no limitations of any kind on the widow's power to adopt excepting those that limit the power of her husband to adopt, i.e. that she can't adopt in the presence of a son, grand son or great grand son. Hindu law generally and in particular in matters of inheritance, alienation and adoption, of a limited character." 19

The Hon'ble Supreme Court further held that the three propositions laid down by Privy Council in Amarendra's case 20 can't be ignored and questioned. 21 The Supreme Court while

18 Id. 206.
19 Id. 212.
21 The three propositions laid down by Privy Council in Amrendner's case are:
   (i) That the interposition of grand son, or the son's widow, competent to
summing up these propositions of the above cited case observed that the interposition of a grand son or the son's widow competent to continue the line by an adoption brings the mother's power of adoption to an end. It was further observed that the power to adopt does not depend upon any question of vesting or divesting of property and a mother's authority to adopt is not extinguished by the mere fact that the son had attained ceremonial competence. 22

The Hon'ble Supreme Court further held, "where the duty of providing for the continuance of the line for spiritual purposes 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 grand son or to the son's widow, the mother's power is gone." 23

The case established beyond doubt that when in a family where are two widows i.e. widow of the deceased and his son's widow, then the power to adopt a son of the former widow shall be deemed to have come to an end and it is for son's widow to continue the line by making adoption. In other words only the son's widow can adopt a child in such circumstances and no other widow.

Hon'ble Supreme Court in Lok Shman Singh vs. Rup Kanwar, 24 recognised the formalities of giving and taking as an 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; (iii) That a mother's authority to adopt is not extinguished by the men fact that her son had attained ceremonial competence.

22 See supra note 67, pp. 211-12
23 Ibid. For more details see S. Vardyanath, Adoption by a Daughter-in-law and Divesting, AIR 1967 SC(J), 35-39 and a note on Sita Bai Vs. Ram Chandra, AIR 1970 SC(J).
24 AIR 1961 SC 1378
essential ceremony on the parts of the parents and no other form is prescribed for the ceremony this was held in number of cases.²⁵

Guramma Bhraar Chanbasappa Deshmukh and others Vs. Mallapa Chanbasappa and others and Nagamma Bharatar Chanbasappa and others Vs. Guramma Bhratar Chanbasappa Deshmukh and others,²⁶ were two cross appeals. The facts were, 'A' died in possession of immovable property, on January, 1944, leaving behind his three widows, 'W1', 'W2' and 'W3' and two widowed daughters and children of his predeceased wife. At the time of his death, W3' was pregnant and gave birth to male child 'B' on October, 1944. On January 30, 1944, 'W1' the senior most widow of 'A' adopted 'C'. A few days before A's death, 'A' executed gift and maintenance deeds in favour of his wives, widowed daughters, a son of illegitimate son, and a relative.

A suit was filed by 'W1' for recovery of her share after setting aside the alienation made by her husband. The contentions of respondents were that adoption of 'C' by 'W1' was void and asserted that 'B' was the prostitumous son of 'A' by 'W3' and aliens sought to sustain the validity of the alienation in their favour. The Ld. trial court held that the adoption of 'C' was valid. An appeal was preferred by 'W1' to the High Court against the decree of the Civil Court. The Hon'ble High Court agreed with the Ld. Civil Judge that 'B' was the posthumous son of the deceased 'A'. The High Court accepted the findings of the Trial Court that the adoption was valid in law. The Court declared that the deeds executed by 'A' in favour of widows, daughters and his relatives ere invalid. It was


²⁶ AIR 1964 SC 510.
held that the two widows 'W2' and 'W3' were getting a share in the property, hence they were not entitled to separate maintenance given to them under the deeds. It was held that W1, W2 and W3 were each entitled to 4/27th share in the suit property. The adopted son 'C' was entitled to 1/9th share therein and the alleged posthumous son 'B' was entitled to 4/9th share therein.

'W1' and her adopted son 'C' filed appeal and simultaneously, W2, W3 and posthumous son 'B' and others and others also preferred appeal against the decree of High Court in so far it went against them.

The issues before the Hon'ble Supreme court for determination were that: whether the adoption of 'C' by 'W1' was void as it was made at a time when 'B' had already been conceived; whether the alienation in favour of W2, W3, B and others are binding on the members of the family; what is the share of an adopted son of a Shudra in competition with the natural born son.

Regarding first issue the Supreme Court held that the existence of a son in the embryo of a co-widow does not invalidate the adoption made by a widow. It is now well settled that the main object of adoption is to secure spiritual benefit to the adopter, though its secondary object is to secure an heir to perpetuate the adopter's name.27 It was further observed that the validity of adoption shall not be made to depend upon the contingencies that may or may not happen. The contention that an adoption can't be made unless there is certainty of not getting a son and that if the wife is pregnant, there is likelihood of the adopter of getting a son

27 Id. 514.
and, therefore, the adoption made is void can’t be accepted as correct.\textsuperscript{28}

In the present case also 'W3' was pregnant at the time of adoption of 'C' and there were no certainty of getting a son or not and hence the adoption made by W1 is valid in the eyes of law. In this regard Supreme Court observed that there are no texts of Hindu law imposing a condition on non-pregnancy of the wife or son's widow or a grand son's widow for the exercise of a person's power to adopt.\textsuperscript{29}

Regarding second issue i.e. alienation made by 'A' the Hon'ble Supreme Court held that a coparcenar, whether he is natural born or adopted into the family, acquires an interest by birth or adoption, as the case may be in the ancestral property of the family.\textsuperscript{30} It was further observed that the managing member of the family has power to alienate for value joint family property either for family necessity or for the benefit of the estate and can also be made with the consent of all the coparcenors of the family.\textsuperscript{31} The sole surviving member of a coparcenary has an absolute power to alienate the family property, at the time of alienation there is no other member who has the joint interest in the family.\textsuperscript{32}

The Court continued, "if another member was in existence or in the womb of his mother at the time of alienation, the power of manager was circumscribed as aforesaid and his alienation is void at the instance of the existing member or member who was in the womb but was subsequently, born as the case may be, unless it was made for purposes binding on the members of the family or

\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
\textsuperscript{30} Id. 511.
\textsuperscript{31} Ibid.
\textsuperscript{32} Id. 515.
existing members consented to it or the subsequently, born member ratified it after he attained majority. It was held that if another member was conceived in the family or induced therein by adoption before such consent or ratification, his right to avoid the alienation will not be affected.\footnote{Ibid.}

In the instant case the impugned alienation were made at a time when 'B' was in the womb i.e. at a time when 'A' had only a limited right of disposal over the joint family property. 'B' being in the womb could not obviously give his consent, nor ratify the alienation before the adoption of 'C' took place and he was inducted in the family. If the alienation were made by the father for the purpose not binding on the estate, they would be void at the time instance of the 'B' and 'C'.

While discussing the third issue the Hon'ble Supreme Court held that among Shudras in Madras Presidency as well as in Bengal where the rule of Dattaka Chandrika prevails, an adopted son on partition of family property would share equally with a son or son born to the adoptive father on partition.\footnote{Id.}

But in Bombay presidency the rule accepted in Dattaka Chandrika have never been followed and the share of an adopted son in competition with a natural born son among shudras has always been 1/5th in the family property i.e. 1/4th of the natural born son's share.\footnote{17 ILR Bom. 100}

The Hon'ble Supreme Court relied on Bombay High Court's decision in Giriapa Vs. Mingapa,\footnote{See supra note 74, p. 520} where it was held that in Western India, both in the districts governed by the Mitakshra and

\begin{footnotes}
\item[33] Ibid.
\item[34] Id. 521
\item[35] 17 ILR Bom. 100
\item[36] See supra note 74, p. 520
\end{footnotes}
those specially under the authority of 'Vyavhara Mayuka', the right of the adopted son, where there was a legitimate son born after the adoption, extended only to a 1/5th share of the father's estate. The question therein was whether the adopted son taken 1/4th of the estate or 1/4th of the natural born son's share in the property. After considering all the relevant texts the division bench came to the conclusion that he takes 1/4th of a natural born son's share.\(^3\) In the result the Hon'ble Supreme Court dismissed both the appeals.

The above ruling of the Apex Court resurrected the position which is thereunder the old Hindu law in different schools and sub-schools. Though the case has been decided by the Apex Court in 1964, but, it appears that the relevant provision i.e. section 12 of the Hindu Adoption and Maintenance Act, 1956 has not been brought to the notice of the Court. The provision is clear in unmistakable terms that an adopted child is just like a natural born child for all purposes. This shows that the above provisions has established a complete equality between the adopted son and the subsequently natural born son.

The position as laid down in the various sub-schools of Hindu law should have been acceptable provided the new law had not come into being. Nevertheless, the law laid down by the Apex Court is binding on all the Courts in India and unless the Apex Court express its different view point, the discrimination will go on between the two sons i.e. an adopted and the natural born.

In Dwarka Nath Vs. Lal Chand and others,\(^3\) the facts were, 'C' was the Zamidar of the said estate who died on 23.01.1901. After his death his widow 'W' succeeded to the estate. In July 1920

\(^3\) Ibid.
\(^3\) AIR 1965 SC 1549
Court of Wards assumed changes of the estate on the ground of mismanagement of the estate by 'W'. In 1923 'W' adopted 'd' and then applied to the Court of Wards under section 37 of the U. P. Court of Wards Act for permission to make the adoption; but the permission was not given on the ground that there was no authority to adopt. 'W' however, executed a deed of adoption on 06.11.1924 in favour of 'D'. Adoption was challenged by 'E' (the plaintiff and the suit was decreed and adoption was held invalid on the ground that permission of the Court of Wards is not obtained. Thereafter, 'W' adopted C's brother's son 'F' (the present appellant) and permission under section 37 of the U. P. Courts of Wards Act was accordingly given to her on 28th November, 1929. Immediately after his adoption the Court of Wards released the estate and assumed change of it again on behalf of 'F' who was minor at that time. On 05.01.1943 'W' died. A suit was filed by 'A' and 'B' the nearest reversioner of 'C' and suit was decreed by the Allahabad High Court who held inter-alia that 'A' was the nearest reversioner of 'C' and was entitled to succeed him. It was further held that adoption was invalid as there was no proof of authority given by 'C' to 'W', to make the adoption. The suit for declaration and possession was decreed against 'C', Collector and the Court of Wards, who was also made a party to the suit. The High Court affirmed the decree and an appeal was filed before the Supreme Court with special leave.

The question before the Supreme Court for consideration was that where the consent of the Court of Wards is obtained by a widow for adoption (as per the requirement of section of the U. P. Court of Wards Act) does this bar the jurisdiction of Civil Court to
inquire into the legality of the adoption on the ground of personal law, such as non-existence of deceased husband's authority.

The Hon'ble Supreme Court while dismissing the appeal held that if the adoption is void by reason of the personal law of the person adopting the consent of the Court of Wards can't bar the jurisdiction of the Civil Court to inquire into legality of adoption on the grounds of personal law such as non-existence of deceased husband's authority.39 The Supreme Court while explaining the provision of section 37 of U. P. Court of Wards Act40 held that said section does not make the sanction of the Court of Wards accorded to the ward adopted to cure illegalities or breaches of the personal law and nor does the sanction make up for incompetence arising under the personal law.41 So it is obsessions that if the adoption is void by reason of the personal law of the person adopting, the consent of the Court of Wards can't cure it. It was held that nor would the consent take place of the essential ceremonies on the religious observance where necessary. Those matters would have to be determined according to the personal law in the Civil Court of competent jurisdiction.42

It was observed by the Supreme Court that the Court of Wards gave or refused its consent to a proposed adoption, a suit would not lie either to cancel the consent or to compel it. The section, however, does not go to the length that after the consent of

39 Ibid.
40 U. P. Court of Wards Act, sec. 37 in so far as it is material reads as follows:
A ward shall not be competent
a) ... ... ... ...
(b) to adopt without the consent in writing of the Court of Wards.
c) ..., provided first, that the Court of Wards shall not withstand is consent under Clause (b) ... if the adoption ... is not contrary to the personal or special law applicable to the ward ... 

41 Ibid.
42 Ibid.
the Court of Wards the adoption itself can't be questioned at all.\textsuperscript{43} If the court of Wards gave its concurrence to a proposed adoption, the bar created by section 37 of the \textbf{U. P. Court and Wards Act} would be removed, but it would not make the adoption immune from the attacks in a Civil Court or any ground on which adoption are usually questioned there.\textsuperscript{44}

The Supreme Court while explaining the section 53(i) of the \textbf{U. P. Courts of Wards Act}\textsuperscript{45} observed that it can't be contended that the reason for the consent of the Court of Wards are a part of the consent and are within section 53(i) of the said Act.\textsuperscript{46} No doubt, the Court of Wards reaches its own conclusion for the purpose of section 37 that the deceased husband of the widow (ward) had accorded authority to the widow to adopt a son, but if the adoption was questioned in a Civil Court, the Civil Court would not be ousted of its jurisdiction to decide the question.\textsuperscript{47} It was further held that all that the Civil Court would be compelled to hold would be that the requirements of the \textbf{Court of Wards Act} as the consent of the Court of Wards were fulfilled.

Regarding the contention that appellant was adopted almost 15 years before filing the present suit and during the time he had been considered by everyone to be legally and validly adopted son, Hon'ble Supreme Court observed that adoption made by widow challenged by suit after 15 years by reversioner, who all the while has not been accepting the adopting and challenging authority of

\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
\textsuperscript{45} Id. sec. 53 read as : (i) The exercise of any discretion conferred on the said Govt. or the Court of Wards by this Act shall not be questioned in any Civil Court.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
widow, he is not concluded by any rule of law from questioning of 'C'.

The Hon'ble Supreme Court rightly observed in the present case that jurisdiction of the Civil Court to inquire into legality of adoption on the ground of personal law can't be barred by any other provision of the law (e.g. consent of the Court of Wards). So if the adoption is void by reason of the personal law of the person adopting the consent of the Court of Ward can't cure the same. These matters would have to be determined according to the personal law in a Civil Court of competent jurisdiction.

In Nathni Prasad vs. Mst. Kachnar, the facts were that an adoption had been made by a widow before the commencement of the Act without authority from the husband. All the necessary formalities and ceremonies had been performed. The adoption was challenged after the Hindu Adoption and Maintenance Act, 1956 came into force. It was contended in defence that since the adoption fulfilled all the requirements laid down in the present Act of 1956 it should be deemed to be valid now that adoptions were governed by the Act.

The court rejected the contention and holding that the Hindu Adoption and Maintenance Act, 1956 was not retrospective and could not validate an adoption which was void under the law then in force. At that time, the authority from the husband was the basis of the widow's right to adopt. Now the position has changed but the initial invalidity could not be cured.

The legal effect of an adoption made by a widow under the Act does not seem to be free from doubt. The above ruling of Patna High Court indicates that perhaps in the opinion of the learned

48 AIR 1965 Pat. 160
49 Ibid.
judge, an adoption by a widow is still made to the deceased husband.

In Bhola Claube vs. Man Matun it was held by Allahabad High Court that an admission of adoption in a registered deed was evidence of such probative force that it shifted the very grave and serious onus rests upon the person who seeks to displace the natural succession of property by the act of adoption. The admission comprises both the fact that the validity of the adoption and the burden of proving to the contrary lies upon the maker. However, as held in Gundica vs. Ishwara, an acknowledgement in a deed of adoption does not by itself confer any status. It can, at the best, operate only as an estoppels against the acknowledger, but where the parties are equally conversant with the true state of facts, the doctrine of estoppel has no operation.

The Supreme Court decision in Keshar Singh vs. Dewan Singh also reaffirms some well settled propositions of Punjab Customary law. The facts of the case were that the decedents of a person who was alleged to have been 'adopted' in the family of 'A' filed a suit for possession of certain lands against the defendants who had taken possession of land as collaterals of the deceased. The court reaffirmed the proposition that (i) there is presumption that entries in the riwaj-i-am are correct. If there is a conflict between the Rattingam’s Digest and his riwaj-i-am, normally riwaj-i-am of the locality prevails. (ii) 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

50 AIR 1965 All 258.
51 AIR 1965 Ori 86.
52 AIR 1966 SC 1555
53 See Male Singh vs. Gurdas, (1922) ILR Lah 433 (PB)
the appointed heir only. There is no tie of kinship between the appointed heir and the collateral of the father. (iii) It is the customary formal adoption that the connection of the adopted son with his natural family completely severed and the adopted son is transplanted from his natural family into the family of adoption. Such an adoption confers on the adopted son the right of collateral succession in the adoptive father’s family and take away the right of collateral succession in the natural family. The formal adoption may be made in accordance with the customs and by observing the customary forms. It is not necessary to comply with the rules of Hindu law in the matter of ceremonies, rituals etc. (v) It is question of fact in each case whether the adoption is formal or informal (particularly in Amritsar District which the case related to).

The adoption is formal if the parties manifest a clear intention that there should be a complete change of the family of the adopted son, so that he ceases to be a member of his natural family and loses his right of collateral succession in that family and a the same time become a member of the adoptive family and acquires a right of collateral succession.

In *Nand Krishna Pal vs. Bhupendra Mohan Pal*, the Calcutta High Court also reaffirms certain well established rules of Hindu law, that first a valid adoption once made can’t be cancelled or revoked. Secondly, under the *Dayabhaga* school of Hindu law

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58 AIR 1966 Cal. 181.
an adoptive father has absolute power to dispose of his property in any manner he pleases to do, no matter whether the property is ancestral or self-acquired. But this is subject to any agreement made at the time of adoption. The proposition as now been given statutory recognition in sec. 13 of the Hindu Adoption and Maintenance Act, 1956.

In Sawan Ram Vs. Kalawati,59 facts were, 'A' died leaving a widow 'W'. Land included within A's estate was mortgaged by 'W' in 1948 to 'B'. 'W' had inherited her deceased husband's property under the old law of intestate succession, and thus at the time of mortgage she had only limited estate in the property of her grand niece 'C'. The plaintiff/appellant instituted a suit for a declaration that both alienation were without legal necessity and were not binding upon him as reversioner. The reversioner's suit was decreed. 'W' appealed to the High Court and while the appeal was pending she adopted 'D'. Deed of adoption was registered in 1959. The appeal was nonetheless dismissed by the High Court. In 1959 the widow died and thereafter one reversioner 'E' brought a suit for possession of all the properties of 'A' as 'W' had divested herself of all her rights no interest remained which could become an absolute estate under the provision of section 14 of the Hindu Succession Act, 1956. The suit was dismissed by the trial court on the ground that 'D' he adopted son had a preferential right to the property of 'P' over the 'E' (Plaintiff). The decree was also confirmed by the High Court. Thereupon the appellant 'B' preferred the appeal to the Supreme Court.

In this case Bhargava, J. of Supreme Court during the course of his judgement strongly criticized an Andhra Pradesh

59 AIR 1967 SC 1761
High Court's decision.\textsuperscript{60} It was found correct on facts but wrongly interpreted in law. The High Court had refused to allow a son adopted in 1924 to divest the sole surviving coparcener on the basis of section 12 of the \textit{Hindu Adoption and Maintenance Act}, 1956. Their Lordship of Supreme Court felt that the doctrine of relation back had been abrogated. It was observed by Supreme Court, "on a fair interpretation of this provision of section 12 of the Act, we are of the opinion that the section has the effect of abrogating (the) ordinary rule of Mitakshra law that as a result of adoption made by the widow, the adoptee acquires rights to the share of his deceased adoptive father which has passed by survivorship to his father's brother.

The Supreme Court did not accept this interpretation. They said that section 5(1) of the Act, refers to an adoption 'by or to a Hindu'. They explained the word 'to' in this section by saying, "the most common instance will naturally be that of adoption by a female Hindu who is married and whose husband is dead, or has completely and finally renounced the world, or has been declared by a court of competent jurisdiction to be of unsound mind. In such a case, the actual adoption, would be by the female Hindu, while the adoption will be not only to herself but also to her husband who is dead."\textsuperscript{61}

Thus, it seems that the Supreme Court had upheld the doctrine of relation back. The Court further observed, "It is well recognized that, after a female is married, she belongs to the family

\textsuperscript{60} Hanumantha Rao Vs. Hammaya, ILR 1966 AP 140.
\textsuperscript{61} See supra note 59, p. 1765 and for further details see Paras Diwan, Adoption by a Hindu Widow : Adopted Son's Relationship with the Deceased Husband, (1969) 29 LR 1-8; and also see, J. D. M. Derrett, Adoption in the Joint Family : A Recent Supreme Court Decision and its Limits, (1968) 29 BLR(J) 1-8.
of her husband. The child adopted by her must also, therefore, belong to the same family. In adoption by a widow, therefore, the adopted son is deemed to be a member of the family of the deceased husband of the widow. Further still, he lossess all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adopted family and consequently he would certainly obtain those rights in the capacity of the member of that family as an adopted son of the deceased husband of the widow, or the married female taking him in adoption.62

Having earlier said categorically that adoption is made only to oneself the Supreme Court in this case indirectly reiterated the old doctrine of relation back, that the adoption is made to husband as is clear from the above passage. Thus, the old doctrine of relation back still holds good but is limited in cases of divesting.

It is submitted that the above construction on the provisions of the Act is rather artificial. One may wonder whether such a conclusion is also socially desirable conclusion. Such a conclusion placed on the provisions of the Act is bound to lead to some anomalies also. For instances, if a Hindu dies leaving behind more than one widow, each of the widow’s has now under the Act right to adopt a son or daughter to herself.63 Then if all of them adopt a son or a daughter to herself, then the deceased husband would be the father of more than one adopted son or daughter. Indeed, a remarkable fact, what was not within this powers when he was

62 See supra note 59, p. 1765.
63 See Hindu Adoption and Maintenance Act, 1956, sec. 8
alive is made possible for him when he died. Under the Act adoption of more than one son is not permitted.\(^{64}\)

In our submission apart from the above and other anomalies that result from the above construction placed by the Bhargava, J. and Bombay High Court, on the provision of the Act, the arguments of the learned judges do not logically flow from the provision of the Act and are not tenable.\(^{65}\)

In **Shugan Chand vs. Prakash Chand**,\(^{66}\) the judgment pertaining to adoption was delivered by the Apex Court, a feeble attempt was made in this case to get a declaration that the Hindu law of adoptions was not applicable to Jains. It was held that Hindu law is to be applied to them in the absence of proof of special customs and usages varying that law. Jains do not subscribe to the theory that a son confers spiritual benefit upon his father and therefore, Jains regard it as a wholly secular affair. But as has been the practice for more than a century the rights of adopted son are to be governed by the ordinary Hindu law.

In **Voleti Venkata Rama Rao Vs. Kesuparagada Bhaskararao and others**,\(^{67}\) the facts were that 'A' died without issue, and left behind a widow 'W'. A suit was filed by a nearest


\(^{65}\) On the relation back principle in 1970 came another case of **Sita Bai Vs. Ram Chandra**, AIR 1970 SC 343, and in this case the doctrine of relation back was fully confirmed. In this case an adopted son was allowed to become a coparcener with his uncle and soon thereafter, became sole surviving coparcener. For critique of this case see J. D. M. Derrett, Adoption of Relation Back, 71 *BLR* 33; also see **Govind Hanumantha Rao Resai Vs. Nagappa**, (1972) 1 SCC 515 and **Rejoinder Kumar Vs. Kalyan** (2000) 8 SCC 99.

\(^{66}\) AIR 1967 SC 506.

\(^{67}\) AIR 1969 SC 1359.
reversioner 'B' deceased after 50 years of the death for recovery of possession of the properties. The contention of 'W' (who was defendant in the suit) was that she was authorised by her husband to adopt a son under a will executed by him and pursuant to the authority she adopted 'C'. The trial court held that at the time of adoption 'W' was about 14 years of age. But the Hon'ble High Court held that 'W' had attained the usual age of discretion at the time of adoption and hence the adoption is valid. An appeal was preferred in the Supreme Court by the reversioner 'B' and his contention was that when 'W' adopted 'C' she had not attained the age of discretion and was not competent to make the adoption. He relied on the following passage in "Mulla's Principles of Hindu Law" (13th edn.) at pp. 405-91.

"A minor widow may adopt in the same circumstances as an adult widow, provided she had attained the age of discretion and is able to form an independent judgement in selecting the boy to be adopted. In Bengal the age of discretion is reached at the beginning of the 16th year, but in Banaras it is, at the end of the 16th year. The former view was taken in the recent Madras case." 68

Relying on the above passage of Mulla's Hon'ble Supreme Court held that since there is no clear evidence on the question of widow's age at the time of adoption made by her in 1904 and reversioner 'B' made no attempt to produce the certificate copy of the register of birth which would have shown her exact age. But on the other hand adoptee was recognised by every member of the family as an adopted son of deceased husband. 69

The Court further observed that the reversioner was challenging the validity of adoption after a lapse of 50 years on the
ground that the widow was a minor at the time of adoption. Having regard to the long lapse of time and recognition of 'C' as the adopted son of 'W' the Supreme Court held that the presumption arises in favour of the validity of adoption and the burden must rest heavily upon him who challenges its validity.

The Court while dismissing the appeal of 'B' held that the presumption in this case is very heavy considering that all the parties to the adoption and all those who could have given evidence in favour of its validity have passed away and court below rightly found in favour of the factum and validity of the adoption.

The above ruling of our Apex Court makes it clear that a widow who is a minor is competent to make an adoption provided she has attained age of discretion i.e. completed 15 years of age and is capable of understanding the nature of adoption. The line adopted by the Hon'ble Supreme Court is based on Mulla's observations who is an authority on Hindu law. The other aspect of the matter which influenced the Court was the judgement of the trial court which has looked into the all relevant facts and also to the facts that the matter was challenged after a gap of 50 years and the reversioner could not bring a substantive evidence before the court in this regard.

(B) Judicial Trends in the Seventies

The earlier judicial trends demonstrate that adoption continued to exist in Hindu social structures right from the ancient times. Quite a large number of cases came before the High Court.

70 Ibid.
71 Id. 1369. The law on this point is correctly stated in Mulla, Hindu Law Art., (13th edn), p.519.
72 Ibid.
and Privy Council during the pre-independence era. Subsequently, some of the cases traveled to our Supreme Court as well. The important aspect which continued to dominate the theme under discussion related to the objective of adoption, impact of ceremonies, personal law as well as the authority of the widows to adopt *vis-à-vis* the limitation thereon. However, no case came to the notice during this period and even during the fifties and sixties where the question of orphan to be given and taken could arise. One of the reasons which could be attributed in this regard is that for a valid adoption under the *Hindu Adoption and Maintenance Act*, 1956 the role of the father and mother as the case may be has continued to be an integral part of the ceremony of the adoption. Hence in the case of orphan child the *Hindu Adoption and Maintenance Act*, 1956 could not provide much help except where a custom was to the contrary.\(^3\)

In *Sitabai vs. Ramchandra*,\(^4\) the facts were that 'A' and 'B' were brothers and the properties in dispute were ancestral properties. Sitabai was the widow of B. B predeceased A, his elder brother sometime in 1930. After B's demise Sitabai lived with A and out of this union an illegitimate child Ramchandra was borne in 1935. 'A' died on the 13\(^{th}\) of March, 1958. A few days before his death Sitabai adopted C. After A's death Ramchandra took possession of the properties and Sitabai brought a suit for ejectment against him.

The question for decision before the Supreme Court was whether 'C' after adoption became a coparcener of 'A'. While delivering the judgment *Justice Ramaswamy* held that the legal

\(^3\) See Paras Diwan, Adoption of an Orphan under Hindu Law, (1963) XVLR 153 and 159.
\(^4\) AIR 1970 SC 343
effect of giving a child in adoption is to transfer the child from the family of its birth to the family of its adoption. As a necessary corollary to this transfer it follows that the adopted son becomes a coparcener of the surviving members of the coparcenary. In this case 'C' became a coparcener of 'A' and after the death of 'A' he as the sole surviving coparcener was entitled to succeed to the joint family property.  

In *Punithavalli Ammal vs. Ramalingam*, the Supreme Court was required to decide the question whether a female Hindu who inherited property and whose interest has been enlarged by virtue of sec. 14 of the *Hindu Succession Act*, 1956 will be divested to her estate on her adopting a son. The Supreme Court laid down that an adopted son acquires all the rights of natural born son and his rights relate back to the date of the death of the adoptive father. The court ruled that the fiction of relations back has been abrogated to the extent it conflicts with the rights conferred on a Hindu female under sec. 14 of the *Hindu Succession Act*, 1956.

75 *Ibid.* Also see *Sawan Ram vs. Kalawati*, AIR 1967 SC 1761. The observation made by Justice Bhargava in the *Sawan Ram's* case supported the comment that two decisions can't be conciled. From the two judgments (i.e. *Sawan Ram's* and *Sitabai's*) it appears that the Supreme Court has held that the son adopted by a widow is affiliated to her deceased husband but while in one case the Supreme Court held that he can't divest any person of the property already vested in him where as in the other case the Supreme Court allowed the adopted son to divest the property.

76 AIR 1970 SC 1730

77 See *Hindu Succession Act*, 1956, sec. 14 –

(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

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

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

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.
Succession Act, 1956 on all matters in respect of which provision has been made in the Act. This would mean that she can't be divested of the property already vested in her before the adoption took place. It may be pointed out that in Sitabai's case the Supreme Court has applied the doctrine of relation back and concluded that the adopted son was entitled to divest the property already vested in a stranger. The court had taken into account the sec. 12 of the Hindu Adoption and Maintenance Act, 1956, and held that the property would be liable to be divested in such situation whether it is in the hands of a male or in the hands of female. It is submitted that the provision of sec. 12 of the Hindu Adoption and Maintenance Act, 1956 as well as sec. 14 of the Hindu Succession Act, 1956 stand on independent footings. There is no question of vesting and divesting of property. Both these provisions are applicable within the legally demarcated boundaries. This would mean that suppose male dies issueless leaving behind the only widow. Naturally she would succeed to the property left behind by her deceased husband. Subsequently, if adoption is made as per the law, as per the Supreme Court's ruling it would date back to the death of the deceased. Therefore, the

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78 AIR 1970 SC 343
79 Hindu Adoption and Maintenance Act, 1956, sec. 12 read - An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be served and replaced by those created by the adoption in the adoptive family:
Provided that:
(a) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
(b) Any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
(c) The adopted child shall not divest any person of any estate, which vested in him or her before the adoption.
adopted child shall be deemed to be the child of the deceased father right from the day when he breathed his last. Obviously law shall presume that the person died leaving behind an adopted child as well as the widow and hence both will succeed to his property as per the law laid down by the Supreme Court. In another words to the extend of the rights of the adopted son, the female will have to part with the property already vested in her before making of the adoption.

In Debi Prasad vs. Tribeni Devi,\textsuperscript{80} 'A' claimed to have been the adopted by 'B' in the year 1892 when he was only an infant. The principal question that the Supreme Court had to decide was whether the adoption pleaded by 'A' was true and valid. 'A' was not able to adduce satisfactory evidence about the actual adoption because he was adopted in the very day he was born. But he had produced considerable documentary evidence to show that his adoptive father was treating him for over a quarter of a century as his son and there was reliable evidence to show that the close relations of the adoptive father treated him in like manner. The Supreme Court took a common sense view of the whole matter and laid down that although the person who plead that he had been adopted is bound to prove his title as adopted son as a fact, yet from the long period during which he had been received as an adopted on every allowance should be made for the absence of evidence to prove such fact. It must be borne in mind that the adoption in this case was alleged to have taken place in 1892, some fifty four years before the institution of the present suit. So long recognition as an adopted son raises a strong presumption in favour of the validity of adoption. As an adoption said to have

\textsuperscript{80} AIR 1970 SC 1286.
taken place years before it is put into question the most important of all evidence is the holding out by the adoptive father that the person claiming to have been adopted was his son.\textsuperscript{81}

**Deviraiji Vijayalalji vs. V. M. Chandraprapha,\textsuperscript{82}** is a case which tells us about the legal effect of the adoption among the 'Acharyas' of 'Vallabha Sampradaya'. In the present case the parties to the litigation were all decedents of Sri Vallabhacharya. They were working as Acharyas in various temples and shrine in Gujrat, Rajasthan and other places. One of the 'Gaddis', as they were called, was situated at Junagarh. After the death of the last holder, Sri Purushottamalalji, his widow adopted the appellant-defendant as a son to her deceased husband. It was assumed that in the concerned family there was a custom known as 'Goda-Datta'. But the mother said that she had cancelled the adoption and that she was entitled to do so under the customary law applicable them. While delivering the judgment the High Court made the following observations on 'Goda-Datta' adoption:

(i) no ceremony of giving and taking of the boy is required in the case of Goda-Datta adoption;

(ii) no ceremony of Datta-hamam is also required for such adoption;

(iii) this type of custom could be made use of making adoption of even an orphan;

(iv) the essential ceremonies as per the family tradition include:

(a) margan, i.e., pouring of sacred water on the person of the adoptee.

\textsuperscript{81} Ibid.

\textsuperscript{82} AIR 1971 Guj. 188.
(b) *punya-vachan*, i.e. reading of holy literature at the time of adoption;

(c) *tilak* on the forehead of the adoptee in front of the idol;

(d) smelling of the head of the adoptee and putting on an 'upara' (scarf) on the person of the adoptee.

It was also argued in the present case that in the 'Vallabhkul', the decedents of Sri Vallabacharya, here are two types of adoption, one 'samanya' and the other 'goda-datta'. The court held that only the second type of adoption, i.e., 'goda-datta' had been proved. This adoption is perhaps the only instance in Hind law where an adoption once made can be cancelled.

*Kartar Singh vs. Surjan Singh*83 is another significant case where the principle question for determination of the trial court as well as the appellant court was whether, in the light of the facts of the case, the act of formal giving and taking of minor appellant was something like the customary appointment of an heir or whether it involved the fact of the intention to transfer the appellant from the family of his birth to the adoptive family. The trial court held that the ceremony of giving and taking had taken place and dismissed the claim of the plaintiff of half of the share in the property of the deceased who had adopted the appellant/respondent. However, the first appellant court District Judge held that appellant transfers from one family to another meant only the appointment of heir, and upheld the claim of the plaintiff. On appeal the High Court disallowed the claim of the plaintiff and held that the act of giving and taking reflected transfer of the appellant from his original family to the adoptive family. The High Court thus restored the decision of the trial court. However,

83 AIR 1975 SC 2161
the Division Bench of the same High Court reversed the judgment of the single bench and upheld the view of appellant District Judge. Thus by special leave to appeal he matter reached to Supreme Court.

The Supreme Court found that the child was given in adoption in the presence of village brother-hood by the natural parents and validly taken in adoption by the adoptive father. The parties had complied with the provisions of law. The court further held that the customary mode of appointing an heir which was prevalent among the agriculture tribe of Punjab had been done away with by the Hindu Adoption and Maintenance Act, 1956. The Court was specific in pointing out that after the abolition of the customary law of adoption there was no scope that inquiring into the validity of an adoption provided the formalities laid down by the law are complied with.

In Dhan Raj Vs. Suraj Bai, facts were, 'A', husband of respondent 'B' adopted 'C' (the appellant) with the consent of 'B' on 18th November 1959 and executed a registered deed. 'C' (the appellant) was at that time 21 years of age. Both his natural father and mother were dead and he had a step mother 'D'. 'C' was given in adoption by his step mother 'D' with whom he was residing at the time of impugned adoption. Subsequently, 'A' and 'B' filed a suit in the year of 1963 against the 'C' (the appellate) impeaching his adoption on various grounds and for a declaration that adoption was illegal and invalid. 'C' (the appellate) contested the suit and pleaded a custom applicable to the parties according to which a person being of age of 15 years or more could not be taken in adoption in view of the provisions of law contained in Clause (iv)

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84  Id. 2163.
85  AIR 1975 SC 1103
of section 10 of the **Hindu Adoption and Maintenance Act, 1956** and also pleaded that under the Act step mother was competent to give him in adoption.

The issue before the trial court was, whether the adoption of 'C' is invalid on the ground that he has been given in adoption by his step mother 'D'. Trial court decided the issue in favour of 'A' and 'B' (the plaintiffs) and 'C' filed appeal in the High Court. During the pendency of appeal 'A' died and only respondent left was his widow B'. The High Court while dismissing the appeal held that the step mother is not competent to give the child in adoption. 'C' (the appellant) preferred appeal in the Supreme Court. The issue for determination before the Supreme Court was, whether the step mother was competent to give the step son in adoption. If not, whether the adoption is void.

The Hon'ble Supreme Court while dismissing the appeal of 'C' (the appellant) observed that under old Hindu law a step mother could not give her step son in adoption and the position of law is not changed even after the coming into force of the **Hindu Adoption and Maintenance Act, 1956**. In this context Supreme Court relied on Mayne's "**Hindu Law and Usages**" and observed that no person except the father and mother or the guardian of the child shall have the capacity to give the child in adoption. The

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87 Mayne, *Hindu Law and Usages*, (11th edn.) p. 226, "No other relation but the father or mother can give away a boy. For instance step mother can't give away her step son, a brother can't give away his brother. Nor can a parental grand father, or any other person. Nor is a woman competent to give in adoption her illegitimate son born of adulterous intercourse. It is well settled that parent's can't delegate their authority to another person, for instance a son, so as to enable him after their death, to give away his brother in adoption, for the act when done must have parental sanction. And, therefore, even an adult orphan can't be adopted, because he can neither give himself away, nor be given by anyone with authority to do". For further comments, see *supra* note 20, p. 104.
terms father or mother means the natural father or mother. The Supreme Court further observed that the term mother in section 9 read as whole and specially in the context of sub-sections (1) to (4), it is clear that 'mother' means the natural mother and does include 'adoptive mother' and can't by implication means that the term mother includes 'step mother'. The Supreme Court further explaining the provision of section 9 observed, "a step mother for many purposes such as inheritance etc. is distinct and different from mother, while generally speaking, an adoptive mother takes the place of mother to all intents and purposes. The necessity of explanation, therefore, arose to exclude the adoptive mother from the expressions mother, so that an adoptive mother may not be competent to give the adopted son in adoption to somebody else." 

The contention of appellant regarding the adoption of an adult orphan, the Supreme Court held that under section 10 of the Act a person is not capable of being taken in adoption if he or she has completed the age of 15 years and that is the reason that word 'child' has been used in sections 9 and 11 of the Act. The use of word 'person' in section 6(iii) and a the commencement of section 10 of the Act is not for the purpose of bringing about any difference in law in regard to the giving of the child in adoption. It was observed by the Supreme Court that if the custom permits a person of the age of 15 years or more to be taken in adoption then even such person would be the child of the father or mother and is

88 By virtue of sec. 5(i) read with sec. 6(ii) of the Hindu Adoption and Maintenance Act, 1956 an adoption of step son given by step mother in invalid. As the provision of sec. 5(i) provides that no adoption shall be made after the Act by or to a Hindu except in accordance with the provisions contained in the Act and any adoption made in contravention of the said provision shall be void. According to sec. 6(ii) that no adoption shall be valid unless the person giving in adoption has the capacity to do so. Hence a step mother has no capacity to do so.

89 See supra note 85, p. 1104.
given in adoption by father or mother. But in absence of the father or mother, no body will be competent to give him in adoption because no such provision has been made in the Act to meet such contingencies.90 But where the child is minor in absence of father or mother, a guardian appointed by the will of the child's father or mother or a guardian appointed or declared by the Court of competent jurisdiction would be competent to give the child in adoption with the prior permission of the Court.91

The Supreme Court observed that the scheme of the Act was to make a child of 15 years of age or above fit to be taken in adoption. Exception was made in favour of a custom to the contrary. It was observed by the Supreme Court that in the present case nothing was pleaded to say that there was a custom of giving an orphan in adoption or that a person above the age of 15 years could go in adoption without physical act of giving by anybody, on his own and with the consent only. For this reason the appeal was dismissed.

The above observations of the Hon'ble Supreme Court prove it beyond doubts that the only person recognized under the law to give a child in adoption are the natural parents of the child or the guardian who may have been duly auhtorised or appointed under a valid authority. Thus the Hon'ble Court very rightly held that step mother was not competent to give a child in adoption under any one of the envisaged situation.

90 Ibid.
91 By virtue of sec. 9(4) of the Hindu Adoption and Maintenance Act, 1956 "where both the father and mother are dead or have completely and family renounced the world of have abandoned the child or have been declared by a Court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself."
(C) Judicial Trends in Eighties

During the eighties the courts added many explanations and interpretations to the existing laws governing adoption. Important questions like rights of the widows to take in adoption, formalities for a valid adoption including the rights of the adopted child in the adoptive family figured prominently in the decisions of the court. The another important aspect which received judicial attention during the eighties has been inter-country adoptions. This is for the first time that the highest court of land was required to go through all aspects of the problems of inter-country adoption vis-à-vis the safeguards needed therefore. Some of the notable cases which come before the court during this period are discussed below:

In *Hindubai vs. Babu Manika Ingale*, the question involved related to the rights of the adopted son in the adoptive family. In this case one Hirabai widow of Harjai Ingale, adopted Babu Manika and executed deed of adoption in March, 1962. The suit land measuring 5 acres 23 guntas was mutated in favour of the adopted son. Subsequently she filed a suit for cancellation of the adoption and declaration with respect to ownership of the said land. After the suit was filed she tried to affect the transfer of the said land in favour of Latabai, a minor girl for an alleged consideration of Rs. 25,000/-. The trial court held that the adoption and the surrender of her interest by the widow in favour of the adopted son were valid. One of the important argument which was raised in appeal before the High Court was that the

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92 The Bombay High Court in *Re. Jaykelvin Salema* AIR 1958 Bom 139, had made some observations regarding institutional custody of abandoned children vis-à-vis the authority of the respective institution to give such children in adoption by complying with the requirements of the law.

93 AIR 1980 Bom 315.
widow was the exclusive owner of the property in view of the section 14 of the Hindu Succession Act, 1956\textsuperscript{94} and had become absolute owner thereof. Therefore unless the property was conveyed by a deed of gift, the adoptee could not acquire any interest in it. The court referred to the ruling of the Supreme Court in Sawan Ram\textsuperscript{95} and Sita Bai\textsuperscript{96} where the court had introduced the concept of prospecting furthering which implies that because of the device of adoption, though the child is taken by one of the spouses the child is equally the child of the other. It follows that on the date of adoption the child becomes the immediate heir to his deceased father or mother form that date and acquires all accessory capacity to take the property. After discussing these judgements the High Court stated that the exceptions provided in section 12 (c) of the Hindu Adoption and Maintenance Act, 1956, was meant to protect the others of he rights vested in them prior to the adoption and not to deprived the adopted child of the right with regard to the property belonging to the joint family and the court also looked at the provisions of section 14 of the Hindu Succession Act, 1956 and ruled that it does not stand in the way of the adoptive child getting an interest in the property held by the widow. Therefore the court held that the adopted child namely Babu Manika Ingale got interest in the joint family property and there was no impediment in Hirabai regarding surrender of her interest in the suit.

In Smt. Shanti Bai Vs. Smt. Maggo Devi and others,\textsuperscript{97} the brief facts were that a joint family governed by the Banaras School

\begin{itemize}
  \item \textsuperscript{94} See Hindu Succession Act, 1956, sec. 14.
  \item \textsuperscript{95} See, supra note 59
  \item \textsuperscript{96} See, supra note 74
  \item \textsuperscript{97} AIR 1980 SC 2008.
\end{itemize}
of Hindu Law, consisted of 'A' and his brother 'B' and 'C'. After A's death his widow 'W' filed a suit for partition of 1/3rd share in that joint family property against 'B' and 'C'. The contention of 'C' was that 'W' adopts C's son 'D' immediately after the death of her husband A' and therefore, 'D' is entitled to a moiety of the 1/3rd share of 'A' and 'W' is entitled to the other moiety. During the pendency of the suit 'B' died and his widow 'W' was brought on record. 'W' challenged the adoption of 'D' on the ground; one was that in fact no adoption was made nor were any ceremonies of adoption gone through by the 'W' and other ground was that at no time 'W' was authorized by 'A' to take a son in adoption as parties being governed by Banaras School of Hindu Law and no adoption could in law be made by the 'W' without authority of 'A'. A will executed by 'A' just before his death was also challenged by 'W' in the suit on the ground that 'A' was not in a sound state of mind when he made the will and the will was not proper as required by the law, and in any event, even if it was valid it could not operate to dispose of the 1/3rd share of 'A' in the joint family properties. The ld. trial judge concluded that the will was invalid as it had not been attested as required by law. So far as the adoption of 'D' is concerned the factum of adoption was established and sustained the validity of adoption and held that 'W' is entitled to 1/6th share in the joint family properties. The value of gold articles which 'W' had already received be adjusted against her 1/6th share.

Aggrieved by the preliminary decree of the trial court, an appeal was filed by 'W' in the High Court of Allahabad. The Hon'ble High Court took the view that adoption was in fact made but court was not quite satisfied with regard to the giving of authority by 'A' to 'W' to make the adoption but in view of the fact that the
adoption was established by executed deed of adoption reciting that she had been authorised by 'A' to adopt 'D'. It was further observed by High Court that the authority of 'A' to make the adoption must beheld to be established. The High Court however, took the view that value of gold articles should not be adjusted against her 1/6th share as they were the stridhana of 'W'. 'W' preferred an appeal in the Supreme Court after obtaining the necessary certificate from the High Court.

The only question which came for consideration before the Hon'ble Supreme Court was that whether 'D' was adopted by the 'W' with the authority of 'A'. While determining this question two issues were raised, one relating to the factum of adoption and other relating to its validity.

So far on the factum of adoption is concerned the Hon'ble Supreme Court held that ceremonies required for taking a son in adoption were performed and 'D' was in fact purported to be adopted by 'W'.98

But so far as the validity of adoption of 'D' is concerned the Supreme Court was of the view that since the parties were governed by the Banaras School of Hindu law, it was not competent to the widow to took a boy in adoption without the authority of her deceased husband.99

Similarly in the present case 'W' went through the ceremonies of adoption and executed a deed of adoption and also made an application for appointment of herself as the guardian of 'D'. The Hon'ble Supreme Court was of the view that these circumstances were not sufficient to establish the giving of authority by her husband 'A' to his widow 'W' to make the adoption

98 Id. 2107.
99 Id. 2008.
of 'D'. It was further observed that it was quite possible that 'W' went through the ceremonies of adoption under the impression that what she was accomplishing was valid act of adoption and in these circumstances it could not be conducted that authority must have been conferred upon her by her husband to adopt a son, unless, it can be shown that at all material times she was aware that she could not make a valid adoption without the authority of her deceased husband.  

The Hon'ble Supreme Court was, therefore, of the view that the subsequent conduct of 'W' has no bearing at all on the decision of the question whether the authority was given by 'A' to 'W' to make an adoption and the court accordingly allowed the appeal and modified the preliminary decree by declaring that 'W' is entitled to 1/3rd share in the joint family properties.

The judgement of the Supreme Court in Shyam Sunder vs. State of Bihar, is notable for its erudition an deep scholarship. It is an in depth study of the institution of Putrika Putra under the shastric Hindu law.

The facts of the case are that one Raja 'A' was the founder of 'Bettiah Raj'. The family was governed by the Banaras School of Hindu law. The principality descended in the male line of descent upto and on his great grandson 'B'. 'B' had no issue and on his death his eldest daughter's son 'C' took possession of the Raj. 'C' was dispossessed by the East India Company as he offered resistance to is authority. But later he was restored and granted the zamindari of Majhwa and Simrown purganaha. The other two purganas of the raj were granted to the younger brother of 'B'.

100 Ibid.  
101 Id. 2012  
102 AIR 1981 SC 178
Widow was found incompetent and she eventually died in 1954 and on her death the State of Bihar claimed the estate by escheat, as there was no heir to the male-holder namely 'D'. On the other hand the appellants among others, laid claim on the estate on the ground of succession.

'K' the plaintiff in title suit No 25 of 1958 (hereinafter referred to as 25 of 1958)\(^{103}\) claimed the estate on the basis that 'C' succeeded to the estate as the adopted and affiliated son of 'B' and not as his daughter's son as alleged by others; that he is nearest in degree among the reversioners to the last male-holder, 'D' being the descendent of 'L' the full brother of 'M'. Title suit No. 5 of 1961 (hereinafter referred to as 5 of 1961) was filed by 'N' and others. Their claim to the estate was based on the following averments.

That 'B' had become separated from his other agnatic kinsmen, 'C' who succeeded to the estate continued to be a member of his natural family and did not become a member of 'B's agnatic family by adoption or affiliation.

The trial court held that the custom of taking a son as a putrika putra had become absolute at the time when 'B' was alleged to have taken 'C' as a putrika putra, and therefore, 'C' was not the putrika putra; that the raj having been obtained by the force of arms was the self-acquired property of 'C'; that its succession was not governed by the rule of primogeniture and consequently the plaintiffs in 25 of 1958 could not claim to be the heirs of the last male-holder. As regards of 5 of 1961 the trial court was of the view that they had failed to establish that they were the nearest reversioners to the estate and, therefore, their claim was

\(^{103}\) The reference to title suit No. 44 of 195 is omitted hence, as the matter was not before the Supreme Court.
dismissed. Thus, it was held that the estate vested in the State of Bihar by virtue of the rule of escheat.

On appeal by the aggrieved parties, the High Court was of the view that the institution of *putrika putra* became absolute at the time when 'B' was alleged to have taken 'C's *putrika putra* and therefore, the plaintiffs in 25 of 1958 failed to establish their claim to the estate with respect to the plaintiffs in 5 of 1961, A. N. Mukherjee and G. N. Prasad J.J. were of the view that the plaintiffs established their right. Madan Mohan Prasad J, dissented from the view.

The Supreme Court in the present case confined itself to that part of the question arising under the appeals dealing with the institution of *putrika putra*. For, if the plaintiff in 25 of 1958 establish that 'C' was a *putrika putra*, then plaintiffs in 5 of 1961 will fail; but if they do not succeed in so establishing, then they fail irrespective of the result of litigation between the state and plaintiffs in 5 of 1961.

In considering this issue whether the institution of *putrika putra* was prevailing at the time when 'B' was alleged to have taken 'C' as *putrika putra*, the Supreme Court referred to the earliest sources on the subject, namely *Rig Veda* and the *Dharma Sutra* of Vasishta.

The Supreme Court pointed out that etymologically the word 'putrika' means a daughter (especially a daughter appointed to raise male issue to be adopted by a father who has no sons), and that *putrika putra* means a daughter's son who by agreement or adoption becomes the son of her father. It referred to the following
four-fold descriptions of *putrika-putra* given by Hemadi, the author of *Chaturvargachitamani*: 104

1) The first is the daughter appointed to be a son.

2) The second is her son. He is called "the son of an appointed daughter," without any special contract. He is however, to be distinguished from the third class. He is not in the place of son but in the place of son's son and is a daughter's son ....

3) The third description of a son of an appointed daughter is the child born of a daughter who was given in marriage with an express stipulation as stated by Vasistha. He appertains to his maternal grandfather as an adopted son.

4) The fourth is a child born of a daughter who was given in marriage with a stipulation in this form "the child who shall be born of her, shall perform the obsequies of both." He belongs as a son to both grandfather. But in the case where she was in thought selected for an appointed daughter she is so without a compact, and merely by an act of the mind. 105

After noting the description of twelve kinds of sons in Yagnavalkya, the Supreme Court referred to the explanation of *Mitakshara* on the word 'putrika-putra'. According to it:

\[ \text{तत सम: पुत्रिकानुत: तत सम: औरससम} \]
\[ \text{पुत्रिकाया: चुत: पुत्रिकानुत: अतएवससम:} \]

The son on an appointed daughter (*putrika-putra*) is equal to him; that is equal to a legitimate son. The term signifies 'son of a daughter'.

**Venkataramiah J.** then cited the texts of Apararka Devanna Bhatta, Maadavacharaya and Kuvera (the author of *Duttaka-Candrika*) to the effect that in the Kali age he acceptance of sons

104 Ibid.
105 Ibid.
other than Dattka or Aursa is prohibited. For example Aprarka cited the text of Sunaka says:

पुनःप्रतिनिधिभाषणं मध्ये दलक एवं कलियुगे ग्राह्यः

"of the different kinds of substitutes for a son only the Dattaka is valid during Kaliyuga". On the basis of the above texts of Hindu law, the Supreme Court came to the conclusion that "in the Kali age, in default of a legitimate son or grandson, the adopted son alone and none else is recognised as secondary son.\textsuperscript{106}

After a careful view of the decisions of Privy council and of other High Courts, Venkataramiah J. stated:

"On a consideration of the entire matter, we hold that throughout India including the area governed by the Mithila School, the practice of appointing a daughter to raise an issue (putrika-putra) had become obsolete by the time 'B' alleged to have taken 'C' as putrika-putra.\textsuperscript{107}

Re. Rasiklal Chagan Lal Meta\textsuperscript{108} is an important case where the question involved related to the inter-country adoptions. The facts were that a German couple attempt to take a girl child in adoption from an orphanage at Rajkot and take her to Germany with them. Since there was no legal provision the applicant took recourse to sec. 9(4) of the Hindu Adoption and Maintenance Act, 1956.\textsuperscript{109} The difficulty faced by the couple was that only a Hindu could take a child in adoption under the above provision of

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\textsuperscript{106} \textit{Id.} page 193.
\textsuperscript{107} \textit{Id.} at 211.
\textsuperscript{108} AIR 1982 Guj. 193.
\textsuperscript{109} \textbf{Hindu Adoption and Maintenance Act}, 1956, sec. 9(4) read as: Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.
\end{flushright}
law. The couple also filed an affidavit stating that they have embraced Hinduism without any further inquiry into this aspect of the matter the court permitted the adoption of the child. The High Court noticed that even before the court order an adoption deed had been executed stating that the authorities of the orphanage had given away the girl child in adoption in the presence of many social workers and the child would be taken to Germany by the adoptive parents. The couple applied for a passport for the child which was returned with the remarks that without an express order from the court it could not be issued. At this stage the German couple moved the High Court for seeking directions to issue the passport. The court took a serious view of the whole matter and it issued a notice *suo moto* to the applicant as to why the order of the district court be not quashed. The applicant thereafter, sought the permission of the court for withdrawing the application with a view to pursuing the matter under the *Guardians and Wards Act*, 1890. The court refused the request and referred the matter to Division Bench, which allowed withdrawal but at the same time framed some guidelines in this context.

The High Court directed that in all such cases of inter-country adoption notice has to be issued to *Indian Council for Child Welfare (ICCW)* and *Indian Council for Social Welfare (ICSW)* or other social welfare agencies in the district.\(^{110}\) The court further laid down that the court must ensure in such proceedings that the adoption is legally valid as per the laws of both the countries; that the adoptive parents fulfill the requirement of the law of adoption in their country, that they have the requisite

\(^{110}\) See *supra* note 108, p. 197
permission to adopt, if required, from the appropriate authorities in their countries, that the child will be able to immigrate to the country of the adoptive parents and that he will be able to obtain the nationality of the parents. The court also laid down that a provision for a periodical report pertaining to the maintenance and well being of the child in the hands of the adoptive parents can be envisaged as a condition of the order.\textsuperscript{111} In this regard it may be submitted that the monitoring prospective highlighted by the court entangles lots of difficulties in respect of children taken to foreign countries without a legal provision in the present state of Indian adoption law and in the law of that country. Therefore, the government should come up with a legislation covering inter-country adoption. It is further submitted that court made very useful suggestions which were later-on taken note of by our Apex Court in \textbf{L. K. Pandey vs. Union of India}.\textsuperscript{112}

In \textbf{Madhusudan Dass Vs. Smt. Narayani Bai and others},\textsuperscript{113} the facts were that 'A' and his wife 'B' had no children. 'B' died on 24.09.1951. After his death 'A' created a trust by a registered deed dated 17.03.1952 in respect of most of his estate. He reserved the right to revoke the trust, but subsequently by a further document dated 14.07.1952 he relinquished that right and ever since the trustees remained in possession of the estate. 'C' (the appellant) filed the suit on 24.09.1957 against 'A' and the other trustees claiming that he had been adopted by 'A' and his wife 'B' as their son on 24.09.1951 and the trust was void and he was entitled to half of the estates of 'A'. 'A' dies during the pendancy of the suit and in consequence 'C' (the appellant) claimed a 3/4th share of the

\begin{footnotes}
\item[111] Idem.
\item[112] \textit{AIR 1984 SC 469}
\item[113] \textit{AIR 1983 SC 114}.
\end{footnotes}
estate. Suit was decreed by the trial court. On the validity of the adoption trial court found that the legal requisites for a valid adoption in the case of the families of he appellant 'C' and 'A' who belongs to Rajasthan, did not extend to more than the ceremony of giving and taking and that the ceremony of 'Data Homa' was not necessary to effectuate the adoption of 'C' (the appellant) and the adoption was valid in law. Trustees filed appeal in the High Court and High Court disagreed with the view of the trial court and held that the adoption had not been established and by rejecting the testimony of C's witness substantially on the ground that they were related to 'C' and his mother. An appeal was filed by 'C' (the appellant) in the Supreme Court with special leave.

The Hon'ble Supreme Court while allowing the appeal held that for a valid adoption, the physical act of giving and taking is essential requisite, a ceremony imperative in all adoptions whatever the caste. And this requisite is satisfied in is essence only by the actual delivery and acceptance of the boy even though there exist an expression of consent or an executed deed of adoption. 114

The Supreme Court briefly stated the law thus, "under the Hindu law, whether among the regenerate caste or among shudras, there can't be a valid adoption unless the adoptee is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parents shall receive him. The nature of the ceremony may vary depending upon the

114 Id. 120.
circumstances of each case. But the act of giving and taking shall be part of ceremony.\textsuperscript{115}

The Supreme Court further held that High Court misdirected itself in applying a standard of proof to the evidence which the circumstances did not warrant. On the contrary the Supreme Court appreciating the finding of the trial court and refused to the general principle that in appeal against a trial court decree, when an appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witness before it and of observing the manner in which they gave their testimony.\textsuperscript{116}

It was further observed that when there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the finding of the fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of the particular witness has escaped the notice of trial Court or there is a sufficient alliance of improbability to displace its opinion as to where the credibility lies and mere relationship is no ground for rejection of evidence.\textsuperscript{117}

It was further explained by the Supreme Court that it is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the \textit{factum} of adoption and its validity. The fact of adoption must be proved in the same way as any other fact.\textsuperscript{118}

\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid.
\textsuperscript{117} Id. 115.
\textsuperscript{118} Id. 119.
In *Lakshmi Kant Pandey Vs. Union of India*\(^{119}\) the facts were that a letter addressed by the petitioner, an Advocate containing of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offer of Indian children in adoption to foreign parents. The letter referred to a press reported based on 'Empirical investigation carried out by the staff of a reputed foreign magazine' called *The Mail* and alleged that not any Indian children of tender age are under the guise of adoption, exposed to the long horrendous journey of distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and relief homes, they in course of time become beggars and prostitutes for want of proper care from their alleged foreign parents.\(^{120}\) The petitioner accordingly sought relief restraining Indian based private agencies from carrying out further activity of routing children for adoption abroad and directing the Govt. of India, the Indian Council for Child Welfare (ICCW) and the Indian Council for Social Welfare (ICSW) to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition by the Hon'ble Supreme Court and notice was issued to the Union of India, the Indian Council for Child Welfare and the Indian Council for Social Welfare to appear and assist the Court in laying down principles and norms which should be followed in cases of inter-country adoptions.

The question for consideration before the Hon'ble Supreme Court was that whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose with the object of ensuring the welfare of the child.

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\(^{119}\) AIR 1984 SC 469

\(^{120}\) Id. 471.
The Hon'ble Supreme Court while disposing of the petition in certain terms and conditions held, "since there is no statutory enactment in India providing for adoption of child by foreign parents or laying down the procedure which must be followed in such a case, resort is that to the provision of the Guardians and Wards Act, 1890 for the purpose of facilitating such adoption. The primary object of giving the child in adoption must be the welfare of the child.\textsuperscript{121}

The Supreme Court observed that when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, firstly every efforts must be made to find out adoptive parents for it within the country. The normative and procedural safeguards which should be followed so far as a foreigner wishing to take a child in adoption is concerned the Supreme Court laid down the following principles:

1. That every application from foreigner desiring to adopt a child must be sponsored by a Social Child Welfare Agency recognised or licensed by the government of the country in which the foreigner is residing. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the Juvenile Court.\textsuperscript{122}

2. That every application of a foreigner for taking a child in adoption must be accomplished by a home study report and the social or child welfare agency sponsoring such

\textsuperscript{121} Id. 69.
\textsuperscript{122} Id. 489.
application should also send along with it a recent photograph of the family and other particulars showing the social and financial status of the foreigner and his declaration and appropriate security that he will maintain the child and provide for his education and upbringing.  

(3) That the Government of India should prepare a list of social or child welfare agencies licensed or recognized for inter-country adoption by the Government in various foreign countries and supply copies of such list to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under license or recognition from the Government of India.  

(4) That if the biological parents are known they should be properly assisted in making a decision about relinquishing the child for adoption, by the institution or centre or home for child care or social or child welfare agency to which the child being surrendered. The biological parents should be told all consequences of the adoption. They should not be subjected to any duress in making a decision about relinquishment. They should be given a further period of about three months to reconsider their decision of relinquishment. Once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for adoption to a foreigner can then be initiated by filing an

123 Id. 485.
124 Ibid.
application for appointment of the foreigner as guardian of the child.\textsuperscript{125}

(5) That every recognised social or child welfare agency must maintain a register in which he names and particulars of all the children proposed to be given in inter-country adoption through it must be entered and must prepare a child study report through a professional social worker giving all relevant information with regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child.\textsuperscript{126}

(6) That the social and welfare agency which is looking after the child selected by a prospective adoptive parent may legitimately receive from such adoptive parents maintenance expenses at a rate not exceeding Rs. 60/- per day (subject to revision by the Ministry of Social Welfare, Govt. of India from time to time) from the date of selection of the child by him till the date child leaves for going to its new home.\textsuperscript{127}

(7) That the child should be given in adoption so far a possible before it has completed the age of 3 years. But where the child is above the age of 3 years his wishes may be ascertained.\textsuperscript{128}

(8) That biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in

\textsuperscript{125} Id. 487.
\textsuperscript{126} The child study report contain as identity information documents; information about original parents including their health and details of the mother's pregnancy and birth; physical, intellectual and emotional development; health report by a registered pediatrician; recent photograph etc. for further details see, Id. p. 488.
\textsuperscript{127} Id. 490.
\textsuperscript{128} Id. 491.
adoption, therefore, notice of the application for guardianship should not be given to biological parents.\textsuperscript{129}

(9) That the proceedings should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application the entire proceedings including the papers and documents should be sealed.\textsuperscript{130}

The Supreme Court observed, "these are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, there is no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical, intellectual and spiritual development."\textsuperscript{131}

Thus through this judgement the Hon'ble Supreme Court has tried to eliminate the possibility that the children made available to foreign parents by way of inter-country adoption are not suspected to abuse and with the welfare of the child being of paramount importance, the steps so enshrined in the judgement are able to afford a new home to such children where not only they find the family full of love and affection but also such opportunity which will develop in such children mental, physical and spiritual abilities otherwise denied to them. And this has been aptly

\textsuperscript{129} Id. 492.
\textsuperscript{130} Ibid.
\textsuperscript{131} Id. 493-94.
summed up by 'Gabriela Mistral' a noble laureate in the following lines:

We are guilty of many errors, many faults,
But our worst crime is abandoning the children
Neglecting the fountain of life
Many of the things we need
Can wait
The child can not
Right now is the time his bones are
Being formed, his blood is being made
And his senses are being developed
To him we can not answer
"Tomorrow"
His name is Today".

In Dharama Shamrao Agalawe Vs. Pandurang Miragu Agalawe, the facts were, 'A' governed by Mitakshra law, died leaving behind two sons 'B' (the appellant) and 'C'. 'C' died in 1928 leaving behind his widow 'W' (Respondent No. 2). Consequently, the joint family property passed on to 'B', who was the sole surviving coparcener. 'B' sold two items of the joint family properties to third party. After the Hindu Adoption and Maintenance Act, 1956 came into force. 'W' adopted 'D' (Respondent No. 1) and thereafter, she along with her adopted son 'D', filed a suit for partition of separate possession of one half share in the joint family property. The trial court dismissed the suit of 'W' and 'D'. They preferred appeal against the decree of the trial court before district court and said Ld. Court allowed the appeal and passed a preliminary decree for partition in favour of 'W' and 'D'.

and separate possession of one half share of the joint family properties except the two fields which had been sold earlier in favour of third party. Aggrieved by the decree of the Ld. District Judge, 'B' (the appellant) filed an appeal before the High Court in Bombay. The Hon'ble High Court dismissed the appeal and appeal by Special Leave was filed by 'B' (appellant) against the judgement of High Court Bombay.

It was contended before the Supreme Court on behalf of 'B', (the appellant) that the suit for partition should have been dismissed by the High Court as 'D' (Respondent No. 1) could not divest 'B' of any part of the estate which had been vested in him before the adoption in view of the Clause (c) of the provision of section 12 of the Act. 133

The question which arose before the Supreme Court for consideration was that whether a person adopted by a Hindu widow after coming into force of the Hindu Adoption and Maintenance Act, 1956, can claim a share in the property which had devolved on a sole surviving coparcener, on the death of the husband of the widow who took him in adoption.

Dismissing the appeal Supreme Court held that the joint family property does not cease to be so when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his hand and in the hands of his son. the only difference between the right of the manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect

133 Hindu Adoption and Maintenance Act, 1956, sec. 12(c) reads as: The adopted child shall not divest any person of any estate, which vested in him or her before the adoption.
of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property.\textsuperscript{134}

The Supreme Court while delivering its judgement observed, "If a son subsequently born to or adopted by sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving whether by way of sale, mortgage or gift would however, stand, for the coparcener who is born or adopted after the alienation can't object to alienation made before he was begotten or adopted."\textsuperscript{135}

In this context Supreme Court relied on the \textit{obiter dicta} of \textbf{Sawan Ram's case}\textsuperscript{136} and the decision of Andhra Pradesh High Court in \textbf{Hanumantha Rao's case}.\textsuperscript{137} The Supreme Court applying the ruling of above cited cases held that the joint family properties which belonged to the joint family consisting of 'B' (the appellant) and 'W' the widow of deceased coparcener was still alive and continued to enjoy the right of maintenance out of the said joint family properties. Supreme Court further observed that 'D' on adoption became the adopted son of 'C' and a coparcener with the 'B' in the joint family properties. When once he became the member of the coparcenary which owned the joint family properties

\begin{flushleft}
134 See, \textit{supra} note 13, p. 123.  \\
135 \textit{ibid}.  \\
137 \textbf{Hanumatha Rao Vs. Hammayya}, (1966) APLR 140
\end{flushleft}
he was entitled to institute a suit for partition and separate possession of his one half share in the joint family properties except those which had already alienated in favour of third party before the adoption. ¹³⁸

The above ruling of the Supreme Court makes it clear that the joint family property retains its character even after it is in the hands of sole surviving coparcenar. The position would not change whether he himself adopted the male child or a male child is adopted by the deceased coparcenar's widow. In both the cases the child has a right in the joint family property, like that of a natural born son. This shows that the divestiture principle has its own relevance in situation when the adopted child is still being considered to be the child of the deceased husband.

There is another important case concerning inter-country adoption decided by the Gujarat High Court. The facts of the case which is titled as Jayantilal Sah vs. Mrs. Asha T. Shah,¹³⁹ were as follows: Two Norwegian couples wanted to adopt two children namely Varun and Deepa. These children were under the care and protection of Child Welfare Agency. The couples were appointed as guardian by the court sought adoption of these Hindu children who were in the custody of Bal Ashram for quite long time. It was argued that since both the children were Hindu and they were to be given in adoption to non-Hindu parents and hence there religion was bound to suffer. The court held that under the given circumstances the primary consideration is the welfare of the child and despite the fact that both the children were in the custody of Bal-Ashram for such a long time, no Hindu couple came forward to adopt them. The court added that in such circumstance the

¹³⁸ See supra note 13, p. 126.
¹³⁹ AIR 1989 Guj. 152.
religion always rank in second place to the welfare of the children. It was further held that the consent of the biological mother who had deserted the child was not at all required for the purpose of giving the child in adoption. The court was categorical in stating that the objectives as to the change of religion or culture of child hardly stand in the way of the welfare of the child while permitting inter-country adoptions. It is submitted that the ruling of the court is coherent and consistent as welfare of the child has been considered to be utmost importance.

V. Judicial Trends in Nineties

During this period the principles of the law of adoption have been reiterated in some of the decisions given by our High Courts. Though no major ruling of Supreme Court came to light during this period, nevertheless inter-country adoption continued to dominate the same and the Apex Court issued more clarifications in this regard.

Mahalingam Vs. Kannayyam, raised the question about the age of the adopted person. It was laid down by the court that a child to be adopted should fulfill the statutory requirement regarding the age below 15 years which is mandatory and the validity of such adoption remains questionable unless custom or usage permits otherwise. But the custom must be pleaded and proved and here is no presumption in favour of such custom.

140 Ibid.
141 Ibid.
142 Ibid.
143 AIR 1990 Mad. 333.
144 See also, Kondiba Rama Papal vs. Narayan Kondiba Papal, AIR 1991 SC 1180.
In Dinaji v. Daddi, there was an adoption-deed under which the adoptive mother had relinquished all her rights in favour of the adopted son. But the deed was unregistered. Sec. 17(1)(b) of the Registration Act, 1908, lays down that where under a document any right in immovable property is either assigned or extinguished, it must be registered. The court held that in view of this provision of the Registration Act, 1908 mother's power of alienation was not extinguished and any alienation made by her was valid.

Johannes Philipus vs. State of Rajasthan is another notable case where in a destitute girl child was sought in guardianship and later for adoption by Dutch couple. The case had came before the High Court in appeal under the Guardian and Wards Act, 1890. Concerning appointment of guardian of the person of girl minor named Babita an inmate of Shanti Devi Seeshu Grah (Founding House) conducted by Rajasthan Social Welfare Department Jaipur. The family court at Jaipur had disallowed the plea of the couple. In this case the inter-country adoption agency in Neitherland approached directly to the Social Welfare Department of Jaipur and Superintendent of Shanti Devi Sheeshu Grah Jaipur to give minor Babita in guardianship to the petitioner. Though the Director of Social Welfare Department at Jaipur granted the permission but the family court disallowed the petition. The counsel for the petitioner placed all relevant record and facts before the family court regarding the status of the

145 AIR 1990 SC 1153.
146 Registration Act, 1908, sec. 17(1)(b) read as : (b) Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.
147 AIR 1990 Raj 124
petitioner as well as their willingness to adopt the said child within
two years from the date of arrival of the minor to the home of the
petitioner in accordance with the Dutch law. The court also noted
that no Indian couple has came forward to adopt the said child so
much so the biological parent of the said child were also not
traceable. The High Court found that under the given
circumstances it was in the best interest of the minor child that
she should be given in the foster care of the foreign national couple
as all formalities as laid down by the Supreme Court in L. K.
Pandey's case\textsuperscript{148} stood complied with.\textsuperscript{149} Therefore the court
approve the appointment of the petitioner as her guardian as
desired by him. The court, after essential legal formalities allowed
the petitioner to take away the child to Neitherland or wherever he
may desire and apply for passport accordingly. The above ruling of
the High Court shows that after the Supreme Court laid down
detailed guidelines for inter-country adoption it is becoming easier
for the foreign national couple to take Indian children in adoption.
It is also proving to be good to those helpless destitute to lead a
good and honourable life with proper care and protection under
the domen of the law which is protecting and safeguarding there
welfare.\textsuperscript{150}  

In Society of Sisters of Charity St. Geroseee Convent vs.
Karnataka State Council for Child Welfare,\textsuperscript{151} which involves
inter-country adoption. The facts were: the Society of Sisters of
Charity, a social and child welfare agency made a petition under

\textsuperscript{148} L. K. Pandey Vs. Union of India, AIR 1984 SC 469.
\textsuperscript{149} See supra note 147, p. 128.
\textsuperscript{150} See also Ashraya and others, AIR 1991 Kart. 10. Here the court clarify
that the application by a foreign couple for taking an Indian child in
adoption should be made in the court where the child ordinarily reside.
\textsuperscript{151} AIR 1992 Kart. 208.
the provision of the **Guardian and Wards Act**, 1890 and sought the relief of appointment of a foreign couple as guardian of a minor child named Kavita. Though the child was born out of a lawful wedlock but lost her father soon after her birth. In these circumstances the mother of the child gave the custody of the said child to the above named society as she was not in a position to support the child on account of her poor economic status. The second child of the similar status of the same society in respect of whom the guardianship sought under the above said law, the society showed its willingness to give these two children in inter-country adoption to foreign couple as no Indian citizen came forward to take these two children in adoption in India.

The Karnataka High Court directed the Karnataka Government to ascertain as to whether the said adoptions were in the best interest of the child. The State Council for Child Welfare certified that the adoptive parents were competent to be appointed a legal guardians and it was in the best interest of the children. The court pointed out that the only dominant factor to be considered in such case has been the welfare of the minor and not any procedural lapse.

It is submitted that the judicial approach to inter-country adoption is proving commendable. The court has not given much importance to the technicalities and procedural lapse of law. It has considered the welfare of the child as being the paramount consideration in all such matters governing the inter-country adoption.

**L. K. Pandey's case**\(^{152}\) again came before Supreme Court for seeking further clarification. The basic point for the consideration

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\(^{152}\) *L. K. Pandey Vs. Union of India*, AIR 1992 SC 118.
related to the role of Central Adoption Resource Agency (CARA) in matters of inter-country adoptions. The court appreciated the role of the above agency and found that it has a very useful role to play in the field. The court further noticed that though there should be no keen competition for offering adoptions, regulated competition may perhaps keep up the system in a healthy condition. The court observed that the existence of the Central Adoption Resource Authority in the field of inter-country adoption is a welcome step. This does not affect or alter the scope of the judgment in L. K. Pandey's case. The court further observed that a birth certificate in respect of an abandoned child has to be obtained on the basis of the application of the social organisation sponsoring adoption. In most of these cases the registration of birth may not be available because that would not have been done. Therefore, the court directed the agencies that on the basis of the application and such other information which may be relevant and made in an affidavit that accompany the application made by a responsible person belonging to the agency, the local magistrate should have the authority to make an order approving the particulars to be entered in the birth certificate and on the basis of the magisterial order the requisite certificate should be granted only after the adoption is finalized and the particulars of the adopting parents are available to be included.  

The judgment also laid down a scale of expense to be recovered by the agency offering placement for maintaining the child from the adoptive parents. There was some modification in

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153 Ibid.
154 Ibid.
the court keeping in view the general rise in cost of living allowed escalation by 30% once in three years.\footnote{156}

The other important issues which figured before the court related to the factum of adoption. In \textit{Ram Dass vs. Granibai},\footnote{157} the question relating to the factum of adoption. Here the petitioner filed a suit for partition against his deceased father's brother who alleged that the petitioner has no right as he was not a member of the family because he has been given in adoption to a man whom his mother later married. There is no doubt that the mother looked after the boy including all his maintenance expenses but the court found that this fact was not enough to substantiate the fact that he has been adopted by the step-father. The court held that though he was brought-up by the step-father but he continued to be the member of his deceased father's family and held that all the rights in that family as the facts were not enough to prove the factum of adoption.

Similarly in \textit{Prafulla Bala Mukherjee vs. Statish Chandra Mukherjee},\footnote{158} the mother had approached the court for her entitlement to the property of her adopted son. The court found that the mere fact that an allegedly adopted son allowed his 'adoptive' mother and her family to live in his house was no proof of adoption. The court noticed that the male child never severed his connection with the family of his birth and all documents on record showed that he treated his biological parents as his real

\begin{itemize}
\item \footnote{155} See \textit{L. K. Pandey Vs. Union of India}, AIR 1986 SC 272 and AIR 1987 SC 237.
\item \footnote{156} The Supreme Court has retreated the guidelines laid down in \textit{L. K. Pandey's case in Suman Lal Chotalal Kamdar and others vs. Miss Asha Trilokhbai, etc.}, JT 1995 (S) 165 and held that the guidelines must be strictly adhered to.
\item \footnote{157} AIR 1997 SC 1563.
\item \footnote{158} AIR 1998 Cal 86.
\end{itemize}
parents till his own death. The court further observed that the petitioner has placed no document on record recording name of the adopted son and in the absence of any proof to the contrary *factum* of adoption could not be proved. This shows that adoption can't be equaled to living together with a child of your choice unless legal formalities are complied with and *factum* of adoption proved by independent witnesses.

*Narinder Kaur vs. Union of India*\(^{159}\) raised the issue of adoption by proxy and the effect of remarriage of a divorced Hindu women on her right to adopt. The facts briefly stated were a divorced Hindu woman adopted a female child through her attorney. All the formalities of physical handing over by natural parents and taking of child by the mother's special power of attorney for being handed over to her, and ceremonies were performed. A registered deed of adoption was also executed. The Passport Officer (defendant), however, refused to issue a new passport to the child with the adoptive mother's name, on the ground that an adoption made by proxy was not valid in Indian law. Later on, however, in the written statement the defendant agreed that the Law Ministry had clarified that the child could be given/taken in adoption by parents or guardian "under their authority"\(^{160}\) but a fresh objection was raised viz. that the adoptive mother having remarried she had no authority to adopt and so passport for the child with the adoptive mother's name could not be issued. The court, after going through the facts came to the conclusion that the respondent's plea was untenable as the

\(^{159}\) AIR 1997 P&H 280.

\(^{160}\) *Hindu Adoption and Maintenance Act*, 1956, sec. 11(vi) read as: The child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of birth to the family of its adoption.
adoptive mother had remarried in 1994 whereas the adoption took place in 1990. Thus, on the date of adoption she had the capacity to take the child in adoption and her subsequent remarriage can't invalidate the adoption. The adopted daughter was held entitled to a new passport with the name of the adoptive mother inserted in it.

VI. Recent Judicial Trends

The cases have continued to flow in the High Court as well as Supreme Court raising contentious issues in adoption matters. Hence, an attempt is made to analyse some of the rulings of both the High Courts and Supreme Court.

In *Nilima Mukerjee vs. Kanta Bhushan Ghosh*[^161^] a landlord filed an eviction petition against the appellant who was relative of the tenant and used to stay in the suit premises on the ground that after the death of tenant, the tenancy had become extinct and the appellant was trespasser and hence liable to be evicted from the suit premises.[^162^] The later raised a plea that she was adopted by the deceased and the fact that she had a joint bank account with the tenant was an indication of the same. Therefore, the only point for determination before the court was whether she was the adopted daughter of the deceased. The court looked into the provisions of the section 11 of the *Hindu Adoption and Maintenance Act*, 1956 and found that provision mandated that the child to be adopted must actually be given in adoption by the parents or guardian and taken in adoption by the adoptive parents so as to transfer the child from the family of its birth to the family of its adoption. The court found that in the present case

[^161^]: AIR 2001 SC 2725
there was no document, no ceremony, nor any other evidence to suggest that she was actually given in adoption by her natural parents and taken in adoption by her adoptive parents i.e. deceased tenant. Therefore, both in trial court as well as the High Court the factum of adoption could not be established to the satisfaction of the court. The Apex Court had no difficulty in holding that mere fact of having a joint account was no proof of adoption and hence she could not be considered to be the adopted daughter of the deceased tenant.

In Ranjit Kumar Jain vs. Kamal Kumar Chawdhery, the question related to the legality of the adoption of a daughter's son. As per the record made available to the court the adoption appeared to have taken place in the year 1946, when the Hindu Adoption and Maintenance Act, 1956 was not there. The adoption was challenged on the ground that it was against the rule of prohibited degrees and plaintiff failed to prove community custom which permitted such adoption. The court held that the adoption is invalid without invoking any provision of law.

In Lalitha vs. Parmeshwari, the adoption of a female child before the enactment of Act of 1956 was challenged. Prior to the enactment of the Hindu Adoption and Maintenance Act, 1956 only a son could be adopted and the adoption of a female child was not permissible except under custom which had to be established. In the present case also a female child was adopted in 1946 i.e. before the enactment of the present Act and the name of the adoptive father is given as her father in the school certificate or other documents. It was held by the Supreme Court that even if

163 AIR 2001 AL HC 3167 (Cal).
164 Hindu Adoption and Maintenance Act, 1956.
165 AIR 2001 Mad. 363.
the name of the alleged adoptive father is given as the father of the
girl in the school certificate or other documents that would not
establish that there was a legal adoption unless a custom
permitting adoption of a female child is pleaded and proved, hence
the adoption was invalid.

**Vijayalakshmamma Vs. B. T. Shankar**,166 raises the
question of want of consent of the junior widow where the child
was adopted by the senior widow without the consent of the junior
widow. It was contended that the stipulation in the proviso to sec.
7167 of the **Hindu Adoption and Maintenance Act**, 1956 with the
explanation requiring the consent of all wives should be read into
section 8168 of the Act of 1956, which deals with the capacity of a
female Hind to take in adoption. The court, however, did not accept
this plea and held that the deliberate omission as regards
requirement of consent from a co or junior widow was an
indication of Parliament's intention to give independent authority

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166 AIR 2001 SC 1424.
167 **Hindu Adoption and Maintenance Act**, 1956, sec. 7 reads as under:
   Any male Hindu who is of sound mind and is not a minor has the capacity
to take a son or a daughter in adoption:
   Provided that, if he has a wife living, he shall not adopt except with the
   consent of his wife unless the wife has completely and finally renounced
   the world or has ceased to be a Hindu or has been declared by a court of
   competent jurisdiction to be of unsound mind.
   Explanation. -If a person has more than one wife living at the time of
   adoption the consent of all the wives is necessary unless the consent of
   any one of them is unnecessary for any of the reasons specified in the
   preceding proviso.
168 **Hindu Adoption and Maintenance Act**, 1956, sec. 8 reads as under:
   Any female Hindu-
   (a) Who is of sound mind,
   (b) Who is not a minor, and
   (c) Who is not married, or if married, whose marriage has been dissolved or
   whose husband is dead or has completely and finally renounced the world
   or has ceased to be a Hindu or has been declared by a court of competent
   jurisdiction to be of unsound mind, has the capacity to take a son or
daughter in adoption.
to a female in this matter. This was in consonance with the changed social set up which recognised equal rights and status for woman. The court observed, “to subject the exercise of power by senior widow to adopt conditioned upon the consent of the junior widow where the Hindu male died leaving behind two widows with no progeny of his own, would render the exercise of power more cumbersome and paradoxical, leaving at times, such exercise of power to adopt only next to impossibility.”

The court further held that in any case no injustice would be caused to a co-widow whose consent is not obtained as the adopted child would not divest any person of any property in him or her before the adoption. This meant that the adoption by one widow did not effect the share of the other widow. So the adoption by the senior widow without the consent of other widows was accordingly held to be valid.

**Heera Lal vs. Board of Revenue,** is another interesting case where the court got an opportunity to deliberate on the application of *Doctrine of Relation Back* knowing fully the fact that the *Doctrine of Relation Back* was already abrogated after the enactment of the **Hindu Adoption and Maintenance Act, 1956.** The present case related to the rights of a son adopted by a widow to her deceased husband who was a member of the coparcenory. When the coparcener died in 1910 without a male issue, the other surviving coparceners got the property mutated in their name. The deceased coparcener's widow adopted a son in 1959 when the

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169 Id. 1434.
170 See also Naraina Swami Maick vs. Mangammai, (1905) ILR 28 Mad. 315, where it was held that while the family peace and good relationship a senior widow should do well to consult the younger one before adopting but there is nothing in law which compels her to do so and the adoption would be valid.
Hindu Adoption and Maintenance Act, 1956 was in force. The son sought his share in the joint family property on the basis of the fiction of law which relates back the adoption to the date of father's death and the adopted son steps into the shoes of his father. Against this it was argued that the property already vested in the surviving coparceners in 1910 could not be divested by the adopted son in view of sec. 12 of the Hindu Adoption and Maintenance Act, 1956. The court did not accept the contention and held that since the adoption was valid in all respect, it would divest the other coparceners and their legal representatives of the interest of her husband in the joint family property, irrespective of the fact that the property had been partitioned after the death of her husband. Thus the adopted son was held to be entitled to the shares of the deceased father in the joint family property. Not this alone, the court went further still and held that since he was not given his due share and he was compelled to litigate in civil court for nearly 35 years and was a fit case for awarding exemplary costs.

Similarly in Krishtappa vs. Ananta Kalappa Jarata Khare, the Doctrine of Relation Back was invoked. In this case the father, died in 1930 where upon is widow and two daughters succeeded to the suit properties as heirs. The widow adopted a son in 1953, who was born in 1933. It was held that daughters could not be divested from them by virtue of the adoption in the year 1933, was not accepted. The court held that 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 law his adoption relates back by a legal fiction to the date of death of his adoptive father, he

172 AIR 2001 Kart 322.
being put in position of a posthumous son. As such the appellant must be deemed to have been in existence as the son of his adoptive father at the time of the latter's death by virtue of the said legal fiction.\textsuperscript{173}

It is submitted that the \textit{doctrine of relation back}, which in fact ought not to have been invoked at all in view of the provisions laid down in sec. 12 of the \textbf{Hindu Adoption and Maintenance Act}, 1956, had been stretched beyond logical limits in both the cases.\textsuperscript{174}

In \textbf{Chiranjilal Srilal Goenka Vs. Jasjit Singh}\textsuperscript{175} it was held by the Supreme Court that adoption does not automatically take away the adoptive parents right to will away their property. In the present case the deceased, who had adopted his elder daughter's son made a will in favour of the younger daughter. The said will was challenged by the adopted son as being illegal on the ground that there was an oral agreement by the adoptive father that after the death of adoptive father and adoptive mother, the adopted son alone will have right on the property and to that effect the adopted son produced an unsigned letter. But there was nothing in the alleged letter restraining the father to execute a will or to dispose of any property during his life time. The matter was referred to an arbitration and the award was given in favour of the adopted son and held that there was an implied prohibition against the adoptive parents and the will was, accordingly, held to be inoperative. On appeal the said award by the arbitration was set aside and court held that even assuming that the alleged letter is

\textsuperscript{173} \textit{Id.} at 327.

\textsuperscript{174} For a critical appraisal of the cases see \textit{Annual Survey of Indian Law}, (2001), pp.359 and 360.

\textsuperscript{175} \textit{AIR} 2001 SC 266.
an adoption agreement, it could at the most state that the son would be entitled to succeed as an heir whatever property is left after transfer during lifetime or bequest by the father.

**B. C. Lingaman vs. Sivakami Ammal,**\(^\text{176}\) highlights the facts that an adoption may be invalid even where the factum of adoption is more than established, if the same in violation of any legal provisions. In the present case there was evidence on record to show that an adoption had taken place and the adopted boy was treated as such for long time. The adoption was challenged 43 years after its taking place. Though there were sufficient evidence both oral as well as documentary to support the adoption but the same could not be sustained because it violated the Manjinad Vellala Act, 1926 (now repealed). Under sec. 3 of the said Act which dealt with the validity of the marriage of the said community and under section 28 of the Act of 1926 which dealt with adoption. It was laid down in the Act of 1926 that for a valid marriage a Nanjinad Vellala male should marry a Nanjinad Vellala female and a male child out of such marriage can be adopted only by an issueless Nanjinad Vellala male with the consent of his legally wedded wife. In this case, a male child born out of Nanjinad Vellala male and his Christian wife and the said child was adopted by the elder brother of the child's natural father. Since the natural mother was a Christian, the court had no difficulty in holding that the marriage was invalid and the adoption could not be termed as valid because of invalid marriage of the natural parents of the adopted son. It was, therefore, held to be void and of no legal consequences and consequently the legal heirs of the adopted son were held not

\(^{176}\) AIR 2002 NOC 60 Mad.
to be entitled to any right over the properties left by the deceased adoptive father.

In *Jai Singh vs. Sakuntala*, section 16 of the Hindu Adoption and Maintenance Act, 1956 came in for interpretation before the court. Under sec. 16 of the Act of 1956, whenever any document registered under any law is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved. Thus even though the word used is shall in case of registered adoption deeds, there is a flexibility added to it by including the words "*unless and until it is disproved*", in the section. Therefore, whenever any question about the *factum* of adoption is raised the onus of proof has to be discharged. In the present case an adopted son filed a suit claiming property of his adoptive father which was deceased within less than 10 days, on the same day on the father died. There was an adoption deed stating that he was adopted but the deed was silent regarding the ceremonies and any other evidence relating to adoption. When the legal battle arose between the adopted son and the daughter of the deceased many other facts came to the light. The alleged adopted son also produced a will by deceased in favour of him which was full of suspicious circumstances. Thus, he somehow wanted to grab the properties apart from the decree and adoption deed. The court negatived the presumption underlined in section 16 of the Act of 1956 attached to registered adoption deed and held that there was no valid adoption. The case make it clear that adoption can still be

177 AIR 2002 SC 1428
questioned despite the registered documents if contrary facts are brought on record to the satisfaction of the court.

_Ugre Gowda vs. Magi Gowda_,178 is another recent ruling wherein adoption made by a widow came for interpretation in the context of sec. 14 of the *Hindu Succession Act*, 1956. In the present case the adopted son Mr. Nag Gowda stating that he was the adopted son of the widow of deceased based on the deed of adoption-cum-settlement at the time of adoption. Since the widow had no son and adoption had taken place around 23 years back as per the custom applicable to the parties. The question raised by the adopted son related to the authority of his adoptive mother and dispose off her separate property by gift or will as the case may be. It was argued that he was the sole manager of the family property and the gift deed executed by the widow was null and void.

The lower court confirmed the factum of the adoption which took place around 1964-1965, but did not except the claim of the adopted son to the suit property. The trial court held that the suit property which vested in her i.e. widow on the death of her husband under section 14 of the *Hindu Succession Act*, 1956, could not be divested and therefore any settlement at the time of adoption to the contrary had no effect under the preset law,. Whereas the High Court set aside the findings of the trial court and allowed the appeal and hence the matter before the Apex Court. The Supreme Court held that in adoption the son can't deprive adoptive mother of the power to dispose off her share by transfer or by will. The court held that the adoption did not divest the widow of the suit property which vested in her under the succession law. The Supreme Court showed complete agreement

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178 AIR 2004 SC 3974.
with the views of the trial court and the lower appellate court that there was no valid settlement. In the result court allowed the appeal and set aside the judgment and decree of the High Court and consequently restore the judgment and decree passed by the lower appellate court.

The above case shows that the section 14 of the Hindu Succession Act, 1956 has made the female absolute owner of the property which she may inherit as a widow form her husband and she can't be divested of her share in the property of her deceased husband by any act of adoption which she may have made to her deceased husband in her own right.

Adoption such as is known to Hindu law, creating a relationship of parentage, is unknown to Mohammedan law. Further adoption does not confer any rights of inheritance or other right on adopted son. Adoption is alien to Muslim law but it is recognized if there is a valid custom of adoption prevailing in the area among Muslims. The J & K High Court in Yaqooh Laway and other Vs. Gulla and another while dealing with the right of inheritance of adopted son under Muslim law has held as under:

"Even if a person proved his status as an adopted son under custom he cannot inherit his adopted father as by mere being an adopted son and he does not become a heir to his adoptive father. The heirs are specifically mentioned in the Holly Quran and adopted son being alien to Muslim Law of inheritance does not find place anywhere. There is no custom either recorded in the code of tribal custom or any other such document as to what is the share of an adopted son under custom. Even there is no decided case on such point not is it clear as to how an adopted son will inherit in

179 AIR 2005 NOC 341 (J&K)
pursuance of other recognised heirs under Muslim law of inheritance. A *Pisar wardah* (adopted son) is entitled to inherit his adoptive father only if he has got a deed in his favour. Generally this established his status as adopted son under custom, he does not *epso-facto* get a claim over the property left by his adoptive father. If he approaches a court to get his share in such property, courts should not get impressed or swayed by his status as an adopted son, he can succeed only when he shows a deed in his favour. Such a deed should not be mere an adoption deed or a document acknowledging his status as such but it should specifically contain recitals transferring whole or any portion of the property left by the adopted father such a deed should be valid deed in terms of the Transfer of Property Act and the Registration Act."180

The above view has been supported by the J&K High Court in case *Abdul Mafid Vs. State*181 and has further held that adoption deed can also be not treated as will since under the Muslim law, bequest in excess one-third of estate cannot take effect unless such request is consented to by heirs after the death of the testator.

So in view of the legal position established above by the High Court of J&K. It is clear that Muslim couple can adopt a child if custom for adoption by Muslim is prevalent in the area. Such adoption has received recognition by the court. If such custom has not received recognition from the court then they will have to prove the validity of the custom. Thus the committee before taking decision to the child in adoption has to ask the Muslim couple to give the child in adoption has to ask the Muslim couple to give

180 Ibid.
181 AIR 2004 J&K 1
proof regarding adoption of a child which is prevalent among the Muslim in the area.\textsuperscript{182} The court has to ensure that by giving the child in adoption his/her right are fully protected because the adopted child being alien to Muslim law of inheritance and the child is not entitled to inherit the property of adoptive parents.\textsuperscript{183}

\section*{III. Some burning issues as judicial trend settlers}

As over view of the various judicial pronouncements would show that our courts including the Apex Court have shown a positive attitude towards adoption of children whether within the country or outside the country. The early judicial trends exhibit that most of the cases which came before the Privy Council as well as our High Courts related to the authority of the widow to adopt a child to her deceased husband. Of course ceremonial considerations also figured to which the courts have given due consideration. In \textit{Bal Gangadhar Tilak's case}\textsuperscript{184} and \textit{Amarendra Man Singh's case}\textsuperscript{185} the Privy Council recognized he religious motive of the adoption and later the Supreme Court of India in \textit{Hem Singh's case}\textsuperscript{186} observed that under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adoption and some of the rules have therefore, been held to be mandatory and compliance with them regarded as a condition of the validity of adoption. The validity of an adoption has to be

\begin{itemize}
  \item \textsuperscript{182} As per \textit{Mohammedan Law}, Chapter – IV, sec. 76 adoptions shall not confer upon any person the status of a child except in the following cases –
  \begin{enumerate}
    \item Where subject to the provision of the \textit{Shariat Act} (XXVI of 1937) there is a valid custom of adoption;
    \item Where it is permitted by the provision of any law for the time being in force.
  \end{enumerate}
  \item \textsuperscript{183} \textit{Ibid.}
  \item \textsuperscript{184} See \textit{Balgangadhar Tilak Vs. Shrinivas Pandit}, (1915) 42 IA 135, 144.
  \item \textsuperscript{185} See \textit{Amarendra Man Singh Vs. Senatan Singh}, (133) 60 IA 242, 248.
  \item \textsuperscript{186} See, \textit{Hem Singh Vs. Harnam Singh}, AIR 1954 SC 581.
\end{itemize}
judged by spiritual rather than temporal consideration and that
devolution of property is only of secondary importance.  

There is no doubt that the courts recognized the power of the
widow to take the child in adoption subject to certain limitations.
However, regarding the status of the child to be adopted courts did
not find any objection to it. It was also acknowledged that once a
valid adoption has been made the male child becomes a member of
the joint family and acquire the status of coparcener vis-à-vis his
rights in the joint family property. Once the adoption is validly
done, it can't be cancelled. The courts also gave in its subsequent
ruling due importance to the personal laws of the parties in
matters of adoption.

Subsequent judicial trends during the seventies and eighties
also raise important issues concerning the property rights of the
widow vis-à-vis the subsequently adopted male child. The Doctrine
of Relation Back came for reconsideration of the courts and it was
observed that the subsequently adopted male child will succeed to
the property as per the provision of law without divesting the
widow of her property which vested in her by virtue of the provision
of section 14 of the Hindu Succession Act, 1956 in her own right.
In Deviraiji Vijay Lalji's case (1971) the court got the
opportunity to examine the legal effects of adoption among the
Acharya's of the Vallabha Sampradaya where the custom of the
community provided for cancellation of the adoption once made.
During this era Rasik Lal Changan Lal Mehta's case (1982)
provided an opportunity to the Gujarat High Court to discuss and
lay down some of the guidelines to be followed in the case of inter-

188 AIR 1971 Guj. 188.
189 AIR 1982 Guj. 193
country adoption and later inter-country adoption received an excellent treatment at the hands of our Apex Court in L. K. Pandey's case (1984), wherein the Supreme Court laid down the detailed set of guidelines to be followed by all the recognized agencies involved in the process of in-country and inter-country adoptions. One important point which have continued to dominate the judicial mind in all such matters relates to the welfare of the child. Therefore, in subsequent rulings on the same theme the Supreme Court has retreated the position laid down in L. K. Pandey's case.

The later judicial trends reveal that court in its decision has laid down stress on the basic principles of law vis-à-vis the approved procedures for testing the validity of adoption. It has continued to maintain the position that the adopted child is just like the natural born child for all intents and purposes. The position will not change even if there is a subsequently born natural child. Though in some of the rulings of Rajasthan and Karnataka High Courts in 2001 the court tried to resurrect the Doctrine of Relation Back. Nevertheless, the divesture theory stands modified to the extent that the widow cannot be divested of the share of the property to which she is entitled under the law. Similarly, the courts have maintained that the essential requirements for the validity of adoption have to be observed in letter and spirit, failing which the adoption may be held invalid despite the fact of adoption. Even in cases where an adoption deed was registered, it was open to challenge when other legal requirements have not been met.

190 ARI 1984 SC 469
191 See for example Heera Lal Vs. Board of Revenue, AIR 2001 Raj.318 and Krishtappa Vs. Ananta Kalappa Jarala Khare, AIR 2001 Kart. 322
Therefore, the conclusion emerges that the judiciary has settled all burning issues concerning adoption both in-country and inter-country adoption in an amicable environment as well as keeping in view the welfare and well being of the child who gets transplanted in the adopted family.

IV. Lack of Comprehensive Legislation Governing Adoption

A review of the judicial decisions in the foregoing discussion shows that the principal legislation which have come up before the courts for interpretation included the Hindu Adoption and Maintenance Act, 1956 and the Guardian and Wards Act, 1890, which are regulating adoptions in India. In some of the decisions customary law applicable to the parties concerned also came in for judicial reflection and defections. The adoption made under the Act of 1956, have legal consequences which protect all the rights of the adopted child. On the other hand the Act of 1890, results in the termination of the guardians duty in providing basic needs for his or her ward on attainment of the age of majority by the child which means that the child can still be taken away from the custody of the guardians so appointed. The main reason for such a state of affair which renders the courts helpless in many situations is the inherent contradiction between the laws and the lack of a comprehensive uniform legislation/law governing adoption of children belonging to all religions. The two legislations have different prospectives and the need for a uniform law of adoption cannot be over emphasized. Some legislative attempts in this direction, were made in 1960 when a private member introduced the first Adoption of Children Bill in the Lok Sabha in 1961, 1970 and later in 1972. Another Attempts in the direction were
made. The 1972 effort was at the behest of the Union Government, but the Bill was later on withdrawn on the strict opposition from the Muslim minority. Thus, the basic issue regarding the welfare of the destitute children was once again consigned to the dustbin. In 1980 Adoption of Children Bill excluding Muslim community, entered the corridors of Parliament but nothing did come out of this effort also. The question of adoption in today’s context has acquired global prospective. Therefore any legislation that is enacted in this regard should provide for in-country and inter-country adoptions. This appears to be the only way to implement the mandate of Article 44 of the Indian Constitution, which provides for uniform civil code. Though the Supreme Court laid down some guidelines in L. K. Pandey's case but unless these guidelines acquires a statutory status the need for a comprehensive legislation/law concerning adoption shall always remain there. Therefore we need a law whereunder a Hindu, Christian, Parsi and Muslim can adopt a child of his or her choice. We should not expect too much from the courts. It is basically the functioning of the legislature to enact a uniform law. The earlier we do it, the better it would be in the interest of childless couples as well as the neglected, abandoned and orphaned children and would go a long way in protecting the rights as well as the welfare of the helpless and poverty stricken children. In other words the law would save the interest of both the child as well as the adoptive parents.

III. Sum-up

The conclusion that emerges from the above discussion is that our courts including the Hon’ble Supreme Court have very
successfully handled all cases and controversies coming before them on the matters concerning adoption as well as the property interest of the adopted child. The courts have maintained that the substitute of a son of the deceased for the failure of a male issue, or spiritual reasons is the essence of adopted and the devolution of property is a mere accessory to it. The Courts have further adhered to the well settled principles of adoption where its main object is to secure the performance of the funeral rights of the person to whom the adoption is made and also to preserve the continuance of his lineage.

Regarding the consent aspect of adoption by the widows the basic thrust of the consent of kinsman aims at an assurance that the adoption has been bonafide in all respects.

**Theory of Relation Back** is still with us though slightly in a different context. The divestiture principle is legally recognised to the extent of the rights of the adopted child. The child can't deprive a widow from the property to which she became entitled in her own right under the law. Regarding the adoption by a minor widow the courts have maintained that the adoption will be valid provided the widow has attained the age of discretion. On the point where there are two widows one of the deceased and other his predeceased son the law is well settled and the father's widow right to adopt come to an end in his presence of her widowed daughter-in-law.

Though in one of the case the Court has taken the view that an adoptive son takes a lesser share in comparison to the subsequently born natural son, but in our submission, if section 12 of the **Hindu Adoption and Maintenance Act, 1956** is pressed into service, the Courts may be constrained to revise its view as the provision established complete equality between the adopted and
the natural born son. As regards the rights of the adopted child in the coparcenary property the Courts have said that such a child can be admitted into the coparcenary in real sense when the father dies.

As regards the customary mode of adoption the Courts have taken the view that such adoption are valid provided they do not contravene the provision of the Act. The ruling of the Court in this regard shows that the customs governing the parties in matters of adoptions cannot be interpreted as derogatory to the written provision of the law, which in all cases are mandatory.

Regarding the step mother's capacity to give child in adoption the courts have observed that the only person recognised under the law to give a child in adoption are the natural parents of the child of the guardian who may have been duly authorised and hence step-mother was not competent to give a child in adoption.

As regard the essential requirement of adoption, the Hon'ble Supreme Court said that, the physical act of giving and taking is essential requirement i.e. the natural parents shall hand over the child and the adoptive parents shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case.

Regarding the jurisdiction of Civil Court to inquire into the validity of adoption on the ground of personal law the courts have taken the view that if the adoption is void by reason of personal law of the parties the Civil Courts have power to inquire into the legality of such adoption. Another important ruling of the Court governs matters relating to the inter-country adoption. The Court has permitted such adoption subject to the fulfilment of
conditions laid down by it in **L. K. Pandey's case**[^1] Accordingly, to facilitate the implementation of norms, principles and procedure relating to adoption of children laid down by the Hon'ble Apex Court in the above cited judgement, the Govt. of India had issued certain guidelines vide Ministry of Welfare dated 4th July, 1989. To revise these guidelines on the basis of above judgement the Government has formulated a Committee headed by Justice, P. N. Bhagwati, a Retd. Chief Justice of India which has revised and framed the guidelines laid down by the Apex Court. Thus, we may say that our judiciary has made a significant contribution in the development of the law of adoption.

[^1]: *L. K. Pandey Vs. Union of India, AIR 1984 SC 469*