



न्यायालय

## सहायक कलक्टर / उपखण्ड अधिकारी

गुडामालानी

(पीठासीन अधिकारी -केशव कुमार मीना आर.ए.एस.)

वाद संख्या:-2021 / 57

दर्ज तिथि:-24.02.2021

1. भानाराम गोदपुत्र हमीरा जाति कलबी निवासी लुणवा जागीर तहसील गुडामालानी जिला बाड़मेर।

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7. रमेश कुमार पुत्र हाजा
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उपस्थित अधिवक्ता  
वादी:-श्री रामजीवन विश्नोई  
प्रतिवादी संख्या:-एकतरफा

राजस्व वाद अन्तर्गत धारा-88, 188  
राजस्थान काश्तकारी अधि0-1955

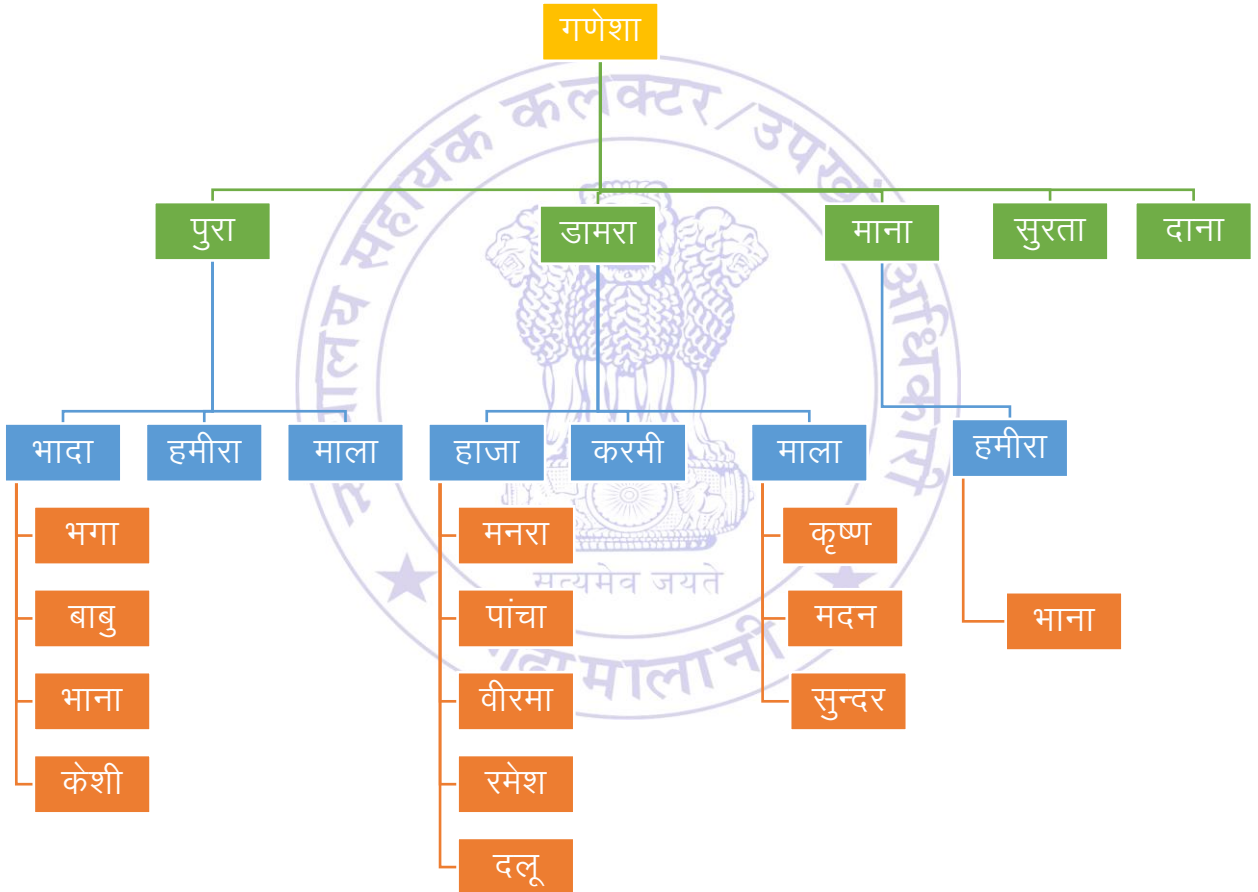


—:निर्णय:—

दिनांक:-30.03.2026

1. आज यह पत्रावली दावा बाबत् इस्तकराहक्क अन्तर्गत धारा-88, 188 राजस्थान काश्तकारी अधिनियम-1955 का वास्ते निर्णय हेतु पेश हुई। हस्तगत वाद पत्र निर्णयन हेतु प्रकरण का सारतः सूक्ष्म विवरण इस प्रकार से है:-

- कि आराजी खसरा संख्या 509 रकबा 01-08 बीघा, खसरा संख्या 558 रकबा 22-05 बीघा, खसरा संख्या 608 रकबा 18-07 बीघा मौजा लुणवा जागीर तथा खसरा संख्या 92 रकबा 42 बीघा मौजा उकजी की ढाणी कुल रकबा 84 बीघा तहसील गुड़ामालानी में खातेदारी आराजी दर्ज रिकार्ड है।
- कि वादीगण एवं प्रतिवादीगण संख्या 01-13 का पारिवारिक सजरा निम्न प्रकार है-



- कि वादीगण एवं प्रतिवादीगण संख्या 01-13 हिन्दू होने के कारण हिन्दू उत्तराधिकार अधिनियम-1956 से शासित होते हैं। वादीगण एवं प्रतिवादीगण संख्या 01-13 के पूर्वज गणेशाराम के पांच पुत्र क्रमशः पुरा, डामरा, माना,

सुरता, दाना वारिस थे। उक्त आराजी में पांचों पुत्रों का प्रत्येक का 1/5-1/5 हिस्सा निहित होने के कारण गणेशाराम की विरासत के अनुसार पांचों पुत्र उक्त आराजी में 1/5-1/5 हिस्से के सहखातेदार दर्ज हैं।

- कि उक्त आराजी में 1/5 हिस्से के सहखातेदार दानाराम पुत्र गणेशाराम ने अपना 1/5 हिस्सा जरिये पंजीकृत बयनामा प्रतिवादी संख्या 04 ता 08 के पूर्वज हाजा पुत्र डामरा को बैचान कर दिया। उक्त मुतनाजा आराजी के 1/5 हिस्से के सहखातेदार सुरता वल्द गणेशा के निःसंतान फौत होने के कारण उसकी विरासत शेष तीनों भाईयों पुरा, डामरा एवं माना वल्द गणेशा के नाम दर्ज की गई। इस प्रकार मुतनाजा आराजी में पुराराम, डामराराम एवं मानाराम का हिस्सा संयुक्त रूप से 4/5 हो गया व हाजा पुत्र डामरा का हिस्सा 1/5 पृथक से दर्ज रिकॉर्ड रहा।
- कि मुतनाजा आराजी में पुराराम, डामराराम एवं मानाराम का हिस्सा संयुक्त रूप से 4/5 में पुराराम के वारिस, डामराराम व मानाराम के वारिस दर्ज हुए तथा प्रत्येक का 4/15-4/15 हिस्सा दर्ज हुआ। पुराराम के तीन वारिसान भादाराम, हमीराराम व मालाराम प्रत्येक का 4/45-4/45 हिस्सा दर्ज रिकॉर्ड हुआ। इसी प्रकार भादाराम पुत्र पुराराम की विरासत चार वारिसों क्रमशः भगाराम, भानाराम, बाबूराम पिसरान भादाराम व केशी बेवा भादाराम प्रत्येक के 1/45-1/45 हिस्से अनुसार दर्ज हुई।
- कि उक्त मुतनाजा आराजी में मानाराम पुत्र गणेशाराम 4/15 हिस्से का सहखातेदार था। मानाराम पुत्र गणेशाराम के निःसंतान होने के कारण मानाराम ने दिनांक 09.09.2004 को हमीरा पुत्र पुराराम को जरिये पंजीकृत गोदनामा गोदपुत्र ग्रहण किया। इसप्रकार हमीरा पुत्र पुराराम को अपने पिता पुराराम की विरासत से प्राप्त हिस्सा 4/45 उक्त गोदग्रहण से पूर्व प्राप्त होने के कारण गोदग्रहण के साथ ही सम्पत्ति में समाहित रहा। इसी प्रकार मानाराम वल्द गणेशाराम के फौत होने पर विरासत में 4/15 हिस्सा भी हमीरा गोदपुत्र मानाराम को प्राप्त होकर सम्पत्ति में समाहित हो गया। इस प्रकार हमीरा गोदपुत्र मानाराम को मानाराम की विरासत से प्राप्त 4/15 हिस्सा तथा अपने पैतृक पिता पुराराम की विरासत से प्राप्त हिस्सा 4/45 कुल हिस्सा 16/45 संयुक्त खातेदारी में प्राप्त हुआ।
- कि हमीरा गोदपुत्र मानाराम के निःसंतान होने के कारण भानाराम पुत्र भादाराम को गोदग्रहण किया। उक्त गोदनामा का उल्लेख रावजी भाट की बही में दर्ज है। इस प्रकार वादी भानाराम पुत्र भादाराम को हमीरा की विरासत से 16/45 हिस्सा प्राप्त हुआ। साथ ही वादी भानाराम पुत्र भादाराम को अपने पैतृक पिता की विरासत से 4/180 हिस्सा भी प्राप्त हुआ। इस प्रकार मुतनाजा आराजी में वादी भानाराम पुत्र भादाराम का 17/45 हिस्सा निहित है। उक्त हिस्सा अनुसार वादीगण एवं प्रतिवादीगण संख्या 01 का मौके पर कब्जा काश्त जारी है।
- कि उक्त आराजी में वादी को गोदपिता हमीरा के फौत होने पर विरासत का नामांतरकरण संख्या 1298 मौजा लुणवा जागीर को बिना वादी के संज्ञान में लाये गलत रूप से दर्ज कर दिया। इस कारण वादी नामांतरकरण

संख्या 1298 मौजा लुणवा जागीर को आरंभ से शून्य, अवैध व निष्प्रभावी घोषित करवाने के अधिकारी है। इस आधार पर वादीगण अपने हिस्से की पैतृक भूमि में घोषणा करवाने के अधिकारी है।

- कि वादीगण के उक्त आधारों पर निम्न अनुतोष निवेदित है:-
  1. उक्त आराजी में वादी को 17/45 हिस्से का सहखातेदार घोषित किया जावे।
  2. खातेदारी आराजी के राजस्व रिकॉर्ड में भानाराम पुत्र हमीराराम का हिस्सा 17/45 अंकित किया जावें।
  3. अन्य अनुतोष।

2. वाद पत्र दर्ज रजिस्टर किया जाकर प्रतिवादीगण को जरिये सम्मन तलब किया गया। प्रकरण में प्रतिवादीगण के हाजिर न्यायालय नहीं होने के कारण उनके विरुद्ध एकतरफा कार्यवाही अमल में लाई गई। प्रकरण में उक्त प्रकार से कार्यवाही किये जाने पर विचारण आरम्भ किया गया। प्रकरण में वादीगण द्वारा साक्ष्य स्वरूप निम्न दस्तावेज प्रस्तुत कर प्रदर्श अंकित किए-

दस्तावेज	संवत् / विवरण	प्रदर्श
जमाबंदी	खाता संख्या 51 सम्वत् 2074-2077 मौजा उकजी की ढाणी	प्रदर्श-01
जमाबंदी	खाता संख्या 79 सम्वत् 2074-77 मौजा लुणवा जागीर	प्रदर्श-02
नामांतरकरण	नामांतरकरण संख्या 1298 मौजा लुणवा जागीर	प्रदर्श-03
नामांतरकरण	नामांतरकरण संख्या 101 मौजा लुणवा जागीर	प्रदर्श-04
गोदनामा	पंजीबद्ध गोदनामा दिनांक 09.09.2004	प्रदर्श-05
गोदनामा	रावजी का गोदनामा	प्रदर्श-06
प्रमाण पत्र	मृत्यु प्रमाण पत्र हमीराराम	प्रदर्श-07
प्रमाण पत्र	मृत्यु प्रमाण पत्र मानाराम	प्रदर्श-08

3. प्रकरण में वादीगण द्वारा साक्ष्य स्वरूप निम्न गवाह प्रस्तुत किए-

नाम	जाति	निवासी	गवाह
भानाराम गोद पुत्र हमीरा	कलबी	लुणवा जागीर	पी0डब्ल्यू-1

4. प्रकरण में भानाराम गोदपुत्र हमीरा पी.डब्ल्यू-01 द्वारा हलफनामा प्रस्तुत कर निम्न प्रकार कथन किये-

- कि उक्त आराजी में 1/5 हिस्से के सहखातेदार दानाराम पुत्र गणेशाराम ने अपना 1/5 हिस्सा जरिये पंजीकृत बयनामा प्रतिवादी संख्या 04 ता 08 के पूर्वज हाजा पुत्र डामरा को बैचान कर दिया। उक्त मुतनाजा आराजी के 1/5 हिस्से के सहखातेदार सुरता वल्द गणेशा के निःसंतान फौत होने के कारण उसकी विरासत शेष तीनों भाईयों पुरा, डामरा एवं माना वल्द गणेशा के नाम दर्ज की गई। इस प्रकार मुतनाजा आराजी में पुराराम, डामराराम एवं मानाराम का हिस्सा संयुक्त रूप से 4/5 हो गया व हाजा पुत्र डामरा का हिस्सा 1/5 पृथक से दर्ज रिकॉर्ड रहा।

- कि मुतनाजा आराजी में पुराराम, डामराराम एवं मानाराम का हिस्सा संयुक्त रूप से 4/5 में पुराराम के वारिस, डामराराम व मानाराम के वारिस दर्ज हुए तथा प्रत्येक का 4/15-4/15 हिस्सा दर्ज हुआ। पुराराम के तीन वारिसान भादाराम, हमीराराम व मालाराम प्रत्येक का 4/45-4/45 हिस्सा दर्ज रिकॉर्ड हुआ। इसी प्रकार भादाराम पुत्र पुराराम की विरासत चार वारिसों क्रमशः भगाराम, भानाराम, बाबूराम पिसरान भादाराम व केशी बेवा भादाराम प्रत्येक के 1/45-1/45 हिस्से अनुसार दर्ज हुई।
  - कि उक्त मुतनाजा आराजी में मानाराम पुत्र गणेशाराम 4/15 हिस्से का सहखातेदार था। मानाराम पुत्र गणेशाराम के निःसंतान होने के कारण मानाराम ने दिनांक 09.09.2004 को हमीरा पुत्र पुराराम को जरिये पंजीकृत गोदनामा गोदपुत्र ग्रहण किया। इसप्रकार हमीरा पुत्र पुराराम को अपने पिता पुराराम की विरासत से प्राप्त हिस्सा 4/45 उक्त गोदग्रहण से पूर्व प्राप्त होने के कारण गोदग्रहण के साथ ही सम्पत्ति में समाहित रहा। इसी प्रकार मानाराम वल्द गणेशाराम के फौत होने पर विरासत में 4/15 हिस्सा भी हमीरा गोदपुत्र मानाराम को प्राप्त होकर सम्पत्ति में समाहित हो गया। इस प्रकार हमीरा गोदपुत्र मानाराम को मानाराम की विरासत से प्राप्त 4/15 हिस्सा तथा अपने पैतृक पिता पुराराम की विरासत से प्राप्त हिस्सा 4/45 कुल हिस्सा 16/45 संयुक्त खातेदारी में प्राप्त हुआ।
  - कि हमीरा गोदपुत्र मानाराम के निःसंतान होने के कारण भानाराम पुत्र भादाराम को गोदग्रहण किया। उक्त गोदनामा का उल्लेख रावजी भाट की बही में दर्ज है। इस प्रकार वादी भानाराम पुत्र भादाराम को हमीरा की विरासत से 16/45 हिस्सा प्राप्त हुआ। साथ ही वादी भानाराम पुत्र भादाराम को अपने पैतृक पिता की विरासत से 4/180 हिस्सा भी प्राप्त हुआ। इस प्रकार मुतनाजा आराजी में वादी भानाराम पुत्र भादाराम का 17/45 हिस्सा निहित है। उक्त हिस्सा अनुसार वादीगण एवं प्रतिवादीगण संख्या 01 का मौके पर कब्जा काश्त जारी है।
5. पत्रावली पर विद्वान अधिवक्ता उभयपक्षकारान की बहस सुनी गई। दौराने बहस विद्वान अधिवक्ता वादी द्वारा दावा के अभिकथनों को दौहराते हुए मुतनाजा आराजी में वादी को 17/45 हिस्से का सहखातेदार घोषित किया जाकर राजस्व इन्द्राज में दुरूस्ती किये जाने का निवेदन किया।
  6. मैंने विद्वान अधिवक्ता उभयपक्षकारान की बहस पर मनन किया गया एवं पत्रावली पर संलग्न दस्तावेजात् का ध्यानपूर्वक अवलोकन किया गया।
  7. अब प्रकरण का अनुतोषवार विश्लेषण किया जाना अपेक्षित है। इस संबंध में सर्वप्रथम प्रथम अनुतोष के संबंध में विश्लेषण किया जाना अपेक्षित है। प्रकरण में प्रथम अनुतोष निम्न प्रकार है:-
    1. उक्त मुतनाजा आराजी में वादी को 17/45 हिस्से का सहखातेदार घोषित किया जावे।

## Object of Adoption

8. प्रकरण में विश्लेषण से पूर्व सर्वप्रथम हिन्दू परंपरा में गोद की व्यवस्था के उद्देश्य को समझना प्रासांगिक प्रतीत होता है। इस श्रृंखला में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा गोद के उद्देश्य की व्याख्या के न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 7764 / 2001 बउनवान **Brijendra Singh vs State Of M.P** में दिनांक 11.01.2008 को दिये गये निर्णय में हिन्दू परंपरा में गोद की व्यवस्था के उद्देश्य को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*The origin of custom of adoption is lost in antiquity. The ancient Hindu law recognized twelve kinds of sons of whom five were adopted. The five kinds of adopted sons in early times must have been of very secondary importance, for, on the whole, they were relegated to an inferior rank in the order of sons. Out of the five kinds of adopted sons, only two survive today, namely, the dattaka form prevalent throughout India and the kritrima form confined to Mithila and the adjoining districts. The primary object of adoption was to gratify the means of the ancestors by annual offerings and, therefore, it was considered necessary that the offerer should be as much as possible a reflection of a real descendant and had to look as much like a real son as possible and certainly not be one who would never have been a son. Therefore, the body of rules was evolved out of a phrase of Saunaka that he must be the reflection of a son. The restrictions flowing from this maxim had the effect of eliminating most of the forms of adoption. (See Hindu Law by S.V. Gupte, 3rd Edn., at pp. 899-900.) The whole law of dattaka adoption is evolved from two important texts and a metaphor. The texts are of Manu and Vasistha, and the metaphor that of Saunaka. Manu provided for the identity of an adopted son with the family into which he was adopted. (See Manu, Chapter IX, pp. 141-42, as translated by Sir W. Jones.) The object of an adoption is mixed, being religious and secular. According to Mayne, the recognition of the institution of adoption in the early times had been more due to secular reasons than to any religious necessity, and the religious motive was only secondary; but although the secular motive was dominant, the religious motive was undeniable. The religious motive for adoption never altogether excluded the secular motive. (See Mayne vs Hindu Law and Usage, 12th Edn., p. 329.)*

*As held by this Court in V.T.S. Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar (AIR 1963 SC 185) substitution of a son for spiritual reasons is the essence of adoption, and consequent devolution of property is mere accessory to it; the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.*

*In Hem Singh v. Harnam Singh (AIR 1954 SC 581) it was observed by this Court that under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rituals have, therefore, been held to be mandatory, and compliance with them regarded as a condition of the validity of the adoption. The first*

important case on the question of adoption was decided by the Privy Council in the case of *Amarendra Man Singh Bhramarbar v. Sanatan Singh* (AIR 1933 PC 155). The Privy Council said:

*Among the Hindus, a peculiar religious significance has attached to the son, through Brahminical influence, although in its origin the custom of adoption was perhaps purely secular. The texts of the Hindus are themselves instinct with this doctrine of religious significance. The foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.*

*With these observations it decided the question before it viz. that of setting the limits to the exercise of the power of a widow to adopt, having regard to the well-established doctrine as to the religious efficacy of sonship. In fact, the Privy Council in that case regarded the religious motive as dominant and the secular motive as only secondary.*

*The object is further amplified by certain observations of this Court. It has been held that an adoption results in changing the course of succession, depriving wife and daughters of their rights, and transferring the properties to comparative strangers or more remote relations. [See: *Kishori Lal v. Chaltibai* (AIR 1959 SC 504). Though undeniably in most of the cases, motive is religious, the secular motive is also dominantly present. We are not concerned much with this controversy, and as observed by Mayne, it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular adoption were religious or secular and an intermediate view is possible that while an adoption may be a proper act, inspired in many cases by religious motives, courts are concerned with an adoption, only as the exercise of a legal right by certain persons. The Privy Council's decision in *Amarendra Man Singh's* case (supra) has reiterated the well-established doctrine as to the religious efficacy of sonship as the foundation of adoption. The emphasis has been on the absence of a male issue. An adoption may either be made by a man himself or by his widow on his behalf with his authority conveyed therefor. The adoption is to the male and it is obvious that an unmarried woman cannot adopt, for the purpose of adoption is to ensure spiritual benefit for a man after his death and to his ancestors by offering of oblations of rice and libations of water to them periodically. A woman having no spiritual needs to be satisfied, was not allowed to adopt for herself. But in either case it is a condition precedent for a valid adoption that there should be without any male issue living at the time of adoption.*

9. इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1954 AIR 581 बउनवान **Hem Singh And Another vs Harnam Singh** में दिनांक 01.04.1954 को दिये गये निर्णय में हिन्दू परंपरा में गोद की व्यवस्था के उद्देश्य को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*It appears to us that the basic idea underlying a customary adoption prevalent in the Punjab is the appointment of an heir to the adopter with a view to associate him in his agricultural pursuits and family*

*affairs. The object is to confer a personal benefit upon a kinsman from the secular point of view 'unlike the adoption under the Hindu Law where the primary consideration in the mind of the adopter if a male is to -derive spiritual benefit and if a female, to confer such benefit upon her husband. That is why no emphasis is laid on any ceremonies and great latitude is allowed to the adopter in the matter of selection. Mulla in his well-known work on Hindu Law says:*

*"It has similarly been held that the texts which prohibit the adoption of an only son, and those which enjoin the adoption of a relation in preference to a stranger, are only directory; therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as the above, where the texts are merely directory, the principle of factum valet applies, and the act done is valid and binding." (Page 541).*

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*Whether a particular rule recorded 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 mandatory and compliance with them regarded as a condition of the validity of the 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 preferences in selection have to be held to be directory and adoptions made in disregard of them are not invalid.*

10. इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1963 AIR 185 बउनवान **V. T. S. Chandarasekhara Mudaliar vs Kulandaivelu Mudaliar** में दिनांक 26.04.1962 को दिये गये निर्णय में हिन्दू परंपरा में गोद की व्यवस्था के उद्देश्य को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*It may be said with some justification that till this stage the Judicial Committee had not clearly disclosed its mind, but was wavering between two positions, namely, whether religious duty was the sole object of adoption or whether proprietary interests had an equal or a subordinate place with or to that of a religious object. But in Amarendra Mansingh v. Sanatan Singh (2) the Judicial Committee reconsidered its earlier decisions, resurveyed the entire law on the subject and veered round to the view that the validity of an adoption was to be determined by spiritual rather than temporal considerations. Sir George Lowndes observed :*

*"..... it is clear that the foundation of Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites....."*

*"It can, they think, hardly be doubted that in this doctrine the devolution of property, though recognized as the inherent right of son, is altogether a secondary consideration....."*

*"Having regard to this well-established doctrine as to the religious efficacy of sonship, their Lordships feel that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man..... Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property."*

*This decision is, therefore, a clear pronouncement by the highest judicial authority of the time that the substitution of a son of the deceased for spiritual reasons is the essence of adoption and the consequent devolution of property is mere accessory to it. Whatever ambiguity there may have still remained it was dispelled by a later decision of the Privy Council in Ghanta China Ramasuabbayya v, Moparthi Chenchuramayya (1), wherein Sir Madhavan Nair, delivering the judgment on behalf of the Board, after a resurvey of the textual authorities and the earlier decisions, observed at p. 170:*

*"Under the Hindu law it is the "taking of a son" as a Substitute for the failure of male issue. Its object is two-fold: (1) to secure the performance of the funeral rites of the person to whom the adoption is made; and (2) to preserve the continuance of his lineage."*

*Adverting to observation of Mr. Ameer Ali in Veera Benavaraju v. Balasurya Prasada Rao (2), he proceeded to state at p. 175:*

*"The utmost that could be said in favour of the appellants is the statement in the judgment that right to property cannot be left out of consideration in the determination of the question",*

*while the spiritual welfare of the deceased also is referred to in the course of the judgment. That the above regular view of adoption cannot any longer be maintained appears to be clear from the judgment of the Board' in Amarendra Mansingh v, Sanatan Singh (1) Reverting to the object of adoption, he remarked at P. 179:*

*Their lordships do not desire to labour this point, as in their view the following opinion of the Board, delivered by Sir George Lowndes in Amarendra's case (1) should be considered to have settled the question finally so far as the Board is concerned. "It may, therefore, safely be held that the validity of an adoption has to be judged by spiritual rather than temporal considerations and that devolution of property is only of secondary importance.*

11. इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 2058/2003 बउनवान **Laxmibai vs Bhagwanthbuva** में दिनांक 29.01.2013 को दिये गये निर्णय में हिन्दू परंपरा में गोद की व्यवस्था के उद्देश्य को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*13. Adoption is made to ensure spiritual benefit for a man after his death. The primary object of adoption was to gratify ancestors' by means of annual offerings, and therefore it was considered necessary that the*

*offerer, must as far as possible be a reflection of the real descendant, and must look as much like a real son as possible, and must certainly not be one, who could never have been a son. Therefore, the present body of rules has evolved out of a phrase of Saunaka, which emphasizes that an adopted male, must be 'the reflection of a son'. (Vide: Gherulal Parakh v. Mahadeodas Maiya, AIR 1959 SC 781; and V.T.S. Chandrashekhara Mudaliar (Dead thr. Lrs.) & Ors. v. Kulandaivelu Mudaliar, AIR 1963 SC 185).*

12. उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि हिन्दू परंपरा के तहत किसी व्यक्ति को गोद लेने के निम्न उद्देश्य होते हैं—
- धार्मिक प्रयोजन—पुत्र के द्वारा अपने पूर्वजों को श्राद्ध अर्पण करना। (मुख्य उद्देश्य)
  - पारिवारिक प्रयोजन—पुरुष के वंश को आगे बढ़ाना।
  - लौकिक प्रयोजन—पूर्वजों की संपत्ति को परिवार से बाहर जाने से रोकना।
13. प्रकरण में विश्लेषण से पूर्व गोद के संबंध में विधिक प्रावधान को समझना प्रासांगिक प्रतीत होता है। इस श्रृंखला में पत्रावली के अवलोकन से ज्ञात होता है कि प्रकरण हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 से संबंधित है। प्रकरण का अग्रिम विश्लेषण करने से पूर्व हिन्दू विधि के तहत दत्तक/गोद के संबंध में कानूनी स्थिति को समझना उचित प्रतीत होता है। इस संबंध में दत्तक/गोद पर हिन्दू विधि को एक समेकित रूप देते हुए भारतीय संसद ने हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 अधिनियमित किया है। उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के अधिनियमित होने के पश्चात दत्तक/गोद के संबंध में नई विधि के अनुसार ही कार्यकरण विधिसंगत माना गया है। इस कारण हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के संबंध में दत्तक/गोद की संकल्पना एवं कानूनी स्थिति को समझना आवश्यक है।

#### Section-4

14. इस श्रृंखला में सर्वप्रथम हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के दत्तक/गोद के संबंध में पुरानी हिन्दू विधि पर प्रभाव को समझना आवश्यक है। इस संबंध में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-04 का उद्धरण निम्न प्रकार है—

**4. Overriding effect of Act.**—Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

15. प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के उक्त प्रावधान के तहत माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 6642/2010 बउनवान **Kalindi Damodar Garde(D) By Lrs. vs Manohar Laxman Kulkarni** में दिनांक 07. 02.2020 को दिये गये निर्णय में धारा-04 के अधिभावी प्रभाव को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*13. Since the succession has opened after the death of Laxman on 10 th January, 1987, therefore, succession has to be in accordance with the Act and not as per Hindu law as all text, rule or interpretation of Hindu law prior to commencement of the Act have ceased to have any effect unless expressly provided for in the said Act. This Court in a Judgment reported as Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo<sup>4</sup> held that a bare perusal of Section 4 would indicate that any custom or usage as part of Hindu law in force will cease to have effect after the enforcement of Hindu Succession Act with respect to any matter for which provision is made in the Act.*

*14. The principle that the Act will be applicable on the date succession opens is well settled. Reference may be made to a judgment re- ported as Bhanwar Singh v. Puran & Ors.<sup>5</sup>, wherein this Court held that the Act brought about a sea of change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non- obstante provision in terms whereof any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided.*

16. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-04 तथा न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि
- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 में किये गए प्रावधानों की सीमा तक पुरानी हिन्दू विधि के प्रावधान प्रभाव में नहीं रहने का अधिभावी प्रावधान बनाए गए है।
  - अर्थात् हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 में बनाए गए प्रावधानों से असंगत पुरानी हिन्दू विधि के प्रावधान अब प्रभाव में नहीं है।

### Section-5

17. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-04 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-05 हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-05 में गोद ग्रहण करने वाले पुरुष व्यक्ति के बारे में प्रावधान किये गए है। इस कड़ी में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-05 का उद्धरण निम्न प्रकार है—

**5. Adoptions to be regulated by this Chapter.**—(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance

with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

### Upbringing:Adoption

18. प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के उक्त प्रावधान के तहत माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा बउनवान **Ram Das Alias Ram Suraj vs Smt. Gadiabai** में दिनांक 20.11.1996 को दिये गये निर्णय में किसी व्यक्ति के पालन पोषण एवं गोद ग्रहण के अन्तर को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*It is well established on record and there was no dispute about the same that plaintiff's mother re-married Ram Charan and at the time of her re-marriage plaintiff and his sister Tulsabai were the children from her first husband; plaintiff's father. On re-marriage plaintiff's mother along with these two children went and stayed with Ram Charan. Thereafter if Ram Charan spent money on their upkeep and upbringing as step-children and even if he might have spent on the occasion of marriage of his step-daughter Tulsabai it would not mean that the plaintiff would, therefore, be treated to have been adopted by his step-father. Therefore, the aforesaid circumstance of marriage expenses being incurred by Ram Charan so far as his step-daughter Tulsabai was concerned, was totally an irrelevant circumstance which had no impact on the finding of plaintiff's adoption by Ram Charan.*

19. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-05 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि
- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के प्रभाव में आने के पश्चात कोई भी गोद केवल हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 से असुसंगत होने पर अवैध होगा।
  - इस प्रकार किसी व्यक्ति का परिवार द्वारा पालन-पोषण करना मात्र ही गोद ग्रहण नहीं है। किसी व्यक्ति के गोद ग्रहण के संबंध में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के प्रावधानों की पालना आवश्यक है।

### Section-7

20. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-05 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-07 में गोद ग्रहण करने वाले पुरुष व्यक्ति हेतु आवश्यक योग्यताओं के बारे में प्रावधान किये गए हैं। इस कड़ी में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-07 का उद्धरण निम्न प्रकार है—

**7.Capacity of a male Hindu to take in adoption.**—Any male Hindu who is of sound mind and is not a minor has the capacity to take on 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 word 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.*

### Consent of Wife

21. इस कड़ी में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के उक्त प्रावधान के तहत गोद लेते समय पत्नी की सहमति की विधिक स्थिति के बारे में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1995 SCC (6) 213 बउनवान **Kashibai W/O Lachiram vs Parwatibai W/O Lachiram** में दिनांक 25.09.1995 को दिये गये निर्णय में गोद लेते समय पत्नी की सहमति की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*9. It is no doubt true that after analysing the parties evidence minutely the trial Court took a definite view that the defendants had failed to establish that the plaintiff No. 1, defendant No. 1 and deceased Lachiram had taken the defendant No. 3, Purshottam in adoption. The trial Court also recorded the finding that the plaintiff No. 1 was not a party to the Deed of Adoption as the plaintiff No. 1 in her evidence has specifically stated that she did not sign the Deed of Adoption nor she consented for such adoption of Purshottam and for that reason she did not participate in any adoption proceedings. On these findings the trial Court took the view that the alleged adoption being against the consent of Kashi Bai the plaintiff No. 1, it was not valid by virtue of the provisions of Section 7 of the Hindu Adoptions and Maintenance Act, 1956. Section 7 of the Act provides that 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. It provides that if he has a wife living, he shall not adopt except with the consent of his wife. In the present case as seen from the evidence discussed by the trial Court it is abundantly clear that plaintiff No. 1 Kashi Bai the first wife of deceased Lachiram had not only declined to participate in the alleged adoption proceedings but also declined to give consent for the said adoption and, therefore, the plea of alleged adoption advanced by the defendants was clearly hit by the provisions of Section 7 and the adoption can not be said to be a valid adoption.*

22. इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 7764 / 2001 बउनवान **Brijendra Singh vs State Of M.P** में दिनांक 11.01.2008 को दिये गये निर्णय में गोद लेते समय पत्नी की सहमति लेने के बारे में विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*We are concerned in the present case with clause (c) of Section 8. The Section brings about a very important and far reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her*

own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from Clause (c) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the Section expressly provides for cases in which she can adopt a son or daughter to herself during the life time of the husband. She can only make an adoption in the cases indicated in clause (c). It is important to note that Section 6(1) of the Act requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption. Section 8 speaks of what is described as capacity. Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or sons son or grand son by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with Clauses (i) & (ii) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance of the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorced woman. There is conceptual and contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration sought for. Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of law.

Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

Section 5 provides that adoptions are to be regulated in terms of the provisions contained in Chapter II. Section 6 deals with the requisites of a valid adoption. Section 11 prohibits adoption; in case it is of a son, where the adoptive father or mother by whom the adoption is made has a Hindu son, son's son, or son's son's son, whether by legitimate blood relationship or by adoption, living at the time of adoption. Prior to the Act under the old Hindu law, Article 3 provided as follows:

3. (1) *A male Hindu, who has attained the age of discretion and is of sound mind, may adopt a son to himself provided he has no male issue in existence at the date of the adoption.*

(2) *A Hindu who is competent to adopt may authorize either his ( i ) wife, or ( ii ) widow (except in Mithila) to adopt a son to himself.*

*Therefore, prior to the enactment of the Act also adoption of a son during the lifetime of a male issue was prohibited and the position continues to be so after the enactment of the Act. Where a son became an outcast or renounced the Hindu religion, his father became entitled to adopt another. The position has not changed after the enactment of the Caste Disabilities Removal Act (21 of 1850), as the outcast son does not retain the religious capacity to perform the obsequial rites. In case parties are governed by Mitakshara law, additionally adoption can be made if the natural son is a congenital lunatic or an idiot.*

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*A married woman cannot adopt at all during the subsistence of the marriage except when the husband 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. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the 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. It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically depicts from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossess the requisite capacity. As per the proviso to Section 7 the wifes consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and adoption without wifes consent would be void. Both proviso to Sections 7 and 8(c) refer to certain circumstances which have effect on the capacity to make an adoption.*

23. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 6373/2002 बउनवान **Ghisalal vs Dhapubai** में दिनांक 12.11.2011 को दिये गये निर्णय में गोद लेते समय पत्नि की सहमति लेने के बारे में विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*18. In Indian society, a male spouse enjoyed the position of dominance for centuries together. This was particularly so in Hindu families. Under the old Hindu Law, a Hindu male had an absolute right to adopt a male child and his wife did not have the locus to question his right or to object to the adoption. A wife could adopt a son to her husband but she could not do so during her husband's lifetime without his express consent. After his death, she could adopt a son to him, in certain parts of India, only if he had expressly authorized her to do so. In other parts of India, she could adopt without such authority. However, in no case a wife or a*

widow could adopt a son to herself. An adoption by a woman married or unmarried of a son to herself was invalid and conferred no legal rights upon the adopted person. A daughter could not be adopted by a male or a female Hindu. The physical act of giving was a prime necessity of the ceremonial requirements relating to adoption. As to datta homam, that is, oblations of clarified butter to fire, the law was not finally settled and there was divergence of judicial opinion.

19. After India became a sovereign, democratic republic, this position has undergone a sea change. The old Hindu Law has been codified to a large extent on the basis of constitutional principles of equality. The Hindu Marriage Act, 1955 codifies the law on the subject of marriage and divorce. The Hindu Succession Act, 1956 codifies the law relating to intestate succession. The Hindu Minority and Guardianship Act, 1956 codifies the law relating to minority and guardianship among Hindus. The 1956 Act is also a part of the scheme of codification of laws. Once the Hindu Succession Act was passed giving equal treatment to the sons and daughters in the matter of succession, it was only logical that the fundamental guarantee of equality of a status and equality before law is recognized in the matter of adoption. The 1956 Act now provides for adoption of boys as well as girls. By virtue of the proviso to Section 7, the consent of wife has been made a condition precedent for adoption by a male Hindu. The mandatory requirement of the wife's consent enables her to participate in the decision making process which vitally affects the family. If the wife finds that the choice of the person to be adopted by the husband is not appropriate or is not in the interest of the family then she can veto his discretion. A female Hindu who is of a sound mind and has completed the age of eighteen years can also take a son or daughter in adoption to herself and in her own right. A female Hindu who is unmarried or a widow or a divorcee can also adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption [Sections 8, 11(1) and 11(2)]. However, if she is married, a female Hindu cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. By incorporating the requirement of wife's consent in the proviso to Section 7 and by conferring independent right upon a female Hindu to adopt a child, Parliament has tried to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

20. The term 'consent' used in the proviso to Section 7 and the explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the Court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife.

*This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.*

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*34. In view of the above discussion, we hold that the concurrent finding recorded by the trial Court and the lower appellate Court, which was approved by the learned Single Judge of the High Court that Gopalji had adopted Ghisalal with the consent of Dhapubai is perverse inasmuch as the same is based on unfounded assumptions and pure conjectures. We further hold that Dhapubai had succeeded in proving that the adoption of Ghisalal by Gopalji was not valid because her consent had not been obtained as per the mandate of the proviso to Section 7 of the 1956 Act.....*

### **Power of Widow**

24. प्रकरण में अग्रिम विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत विधवा के गोद लेने की शक्ति के बारे में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1963 AIR 185 बउनवान *V. T. S. Chandarasekhara Mudaliar vs Kulandaivelu Mudaliar* में दिनांक 26.04.1962 को दिये गये निर्णय में विधवा के गोद लेने की शक्ति के बारे में विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*It is common place that a widow adopts a boy to her husband and that nobody except a widow can make an adoption to her husband. The reason is that Hindu law recognizes her not merely as an agent of her husband but, to use the felicitous Hindu metaphor, as his surviving half : see Brihaspati XXV, II and Yagnavalkya I, 156. In Sarkar Sastri's Hindu Law. 8th edn., pp. 161-162, it is, stated that though according to the commentaries, the widow adopts in her own right, the modern view is that she acts merely as a delegate or representative of her husband, that is to say, she is only an instrument through whom the husband is supposed to act. Mulla in his book "Principles of Hindu Law" stated that she acts as a delegate of her husband.*

*The Judicial Committee in Balusu Guralingaswami v. Balusu Ramlakshamma (1) pointed out that if the consent of the husband's kinsmen has been obtained, the widow's power to adopt is co-extensive with that of her husband. It is, therefore, clear that a Hindu widow in making an adoption exercises a power which she alone can exercise, though her competency is conditioned by other limitations which we shall consider at a later stage. Whether she was authorised by her husband to take a boy in adoption or whether she obtained the assent of the*

*sapindas, her discretion to make an adoption, or not to make it, is absolute and uncontrolled. She is not bound to make an adoption and she cannot be compelled to do so. But if she chooses to take a boy in adoption there is an essential distinction between the scope of the authority given by her husband and that of the assent given by the sapindas. As the widow acts only as a delegate or representative of her husband, her discretion in making an adoption is strictly conditioned by the terms of the authority conferred on her. But in the absence of any specific authorisation by her husband, her power to take a boy in adoption is coterminus with that of her husband, subject only to the assent of the sapindas. To put it differently, the power to adopt is that of the widow as the representative of her husband and the requirement of assent of the sapindas is only a protection against the misuse of it. It is not, therefore, right to equate the authority of a husband with the assent of the sapindas. If this distinction is borne in mind, it will be clear that in essence the adoption is an act of the widow and the role of the sapindas is only that of advisers.*

### Remarriage of Widow & Authority Delegation

25. प्रकरण में अग्रिम विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत विधवा के गोद लेने के बाद पुनर्विवाह होने पर उत्पन्न परिस्थिति तथा गोद देने व लेने के अधिकारिता के प्रत्यायोजन पर माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय पंजाब एवं हरियाणा उच्च न्यायालय द्वारा AIR 1997 P&H 280 बउनवान *Narinderjit Kaur vs Union Of India* में दिनांक 24.01.1996 को दिये गये निर्णय में विधवा के गोद लेने के बाद पुनर्विवाह होने पर उत्पन्न परिस्थिति तथा गोद देने व लेने के अधिकारिता के प्रत्यायोजन पर विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*7. It clearly envisages that the child can be adopted "under the authority" of the parents. In this case, the adoptive mother had executed a valid Power of Attorney authorising Surjit Singh Jaswal to take the petitioner in adoption on her behalf. Actual adoption took place according to the Sikh rites in the presence of Sri Guru Granth Sahib. Child was given in adoption willingly by the natural parents and was taken in adoption by the adoptive mother through her Attorney with the intention of transferring the child from the family of its birth. Adoption made was a valid adoption and the finding recorded to the contrary in order, Annexure P-1, cannot be sustained. Respondents have themselves admitted that on a subsequent advice given by the Law Ministry, it has been clarified that adoption could be made "under the authority" given by the adoptive parents. The ground taken by the respondents now that the passport cannot be issued to the petitioner because of their marriage of the adoptive mother on 16-11-1994 is also not sustainable. Adoption took place on 2-3-1990 and for all intents and purposes, adoption would be deemed to have been completed on that date. On that date, adoptive mother had the capacity to take the child in adoption. Adoption cannot be invalidate because of the subsequent marriage of the adoptive mother,*

*Petitioner became the daughter of the adoptive mother on the date she was taken in adoption and is, thus, entitled to a new passport with the name of her adoptive mother inserted in it.*

### **Remarriage of Widow & Capacity to give in Adoption**

26. प्रकरण में अग्रिम विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत विधवा के पुनर्विवाह होने पर उत्पन्न परिस्थिति में गोद देने की अधिकारिता पर माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय पंजाब एवं हरियाणा उच्च न्यायालय द्वारा AIR 1981 PAT 204 बउनवान *Ram Sakhi Kuer And Anr. vs Daroga Prasad Singh* में दिनांक 28.01.1981 को दिये गये निर्णय में विधवा बाद पुनर्विवाह होने पर उत्पन्न परिस्थिति में गोद देने की अधिकारिता पर विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*This implies that on remarriage, in the circumstances stated in Section 3 the widow ceases to be the guardian of the person of her minor son born of her previous husband. If the matter is considered in these perspectives, the irresistible conclusion would be that it would be against the principles of Hindu law to permit a widow remarrying to give her son from the previous husband in adoption to her second husband, without the permission of her previous husband. Mr. Thakur Prasad relied on certain decisions of the other High Courts which support this view. One of the decisions is in Panchappa v. Sanganbasawa, (1900) 24 Bom 89, wherein it was held that a Hindu widow had no power, after her remarriage to give in adoption her son by her first husband, unless he had expressly authorised her to do so, which is not the case of the defendants in the instant case. A somewhat contrary view was taken by the Bombay High Court in the case of Putlabai v. Mahadu (1909) ILR 33 Bom 197. This led to a consideration of the matter by a Full Bench of the Bombay High Court in Fakirappa Veerbhadrapa v. Savitrewa Sangappa (AIR 1921 Bom 1) where it was laid down that a Hindu widow after her remarriage could not claim to have any right to give a son by her first husband in adoption.*

27. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-07 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-07 के तहत बालिग एवं स्वस्थ मस्तिष्क वाला हिन्दू पुरुष गोद ग्रहण कर सकता है।
- साथ ही अगर उस हिन्दू पुरुष के जीवित पत्नि है तो गोद ग्रहण हेतु उस पत्नि या समस्त पत्नियों की स्पष्ट सहमति आवश्यक है।
- कोई हिन्दू विधवा अपने पुनर्विवाह से पूर्व गोद ग्रहण कर सकती है तथा उस हिन्दू विधवा के अपने पुनर्विवाह से पूर्व गोद ग्रहण किए गए व्यक्ति के हिन्दू विधवा के पुनर्विवाह के कारण उस हिन्दू विधवा से संबंध में कोई अंतर नहीं आता है।

- कोई हिन्दू विधवा अपने पुनर्विवाह के पश्चात अपने पुनर्विवाह से पूर्व उत्पन्न संतान को गोद में देने की अधिकारिता नहीं रखती है।
- गोद ग्रहण हेतु अपनी अधिकारिता प्रत्यायोजित की जा सकती है। इस प्रकार गोद ग्रहण हेतु प्रत्यायोजित अधिकारिता से किया गया गोद कार्यक्रम वैध होता है।

### Section-8

28. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-07 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-08 का उद्धरण निम्न प्रकार है—

**8.Capacity of a female Hindu to take in adoption.**—Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption:

*Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband 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.*

### Capacity of Husband vis-a-vis Wife

29. प्रकरण में विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत पति एवं पत्नी के गोद लेने की अलग-अलग क्षमता के बारे में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय कलकत्ता उच्च न्यायालय द्वारा AIR 2007 CAL 4 बउनवान **Malati Roy Chowdhury vs Sudhindranath Majumdar** में दिनांक 04.09.2006 को दिये गये निर्णय में पति एवं पत्नी के गोद लेने की अलग-अलग क्षमता के बारे में विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*21. The language of Section 7 is clear. A male is entitled to adopt, but if he is married the consent of the wife is a must. This Section clearly shows that unless the wife gives consent the husband cannot take adoption but that does not mean that the wife is authorized to take adoption by the husband. According to us, adoption has to be taken factually or legally by the male in case of marriage, and not by the wife. In other words, the wife has no capacity to adopt even with the consent of the husband under Section 7. We find a decision of the Bombay High Court in support of this proposition reported in 1977 (79) Bombay L.R. 426. The judgment rendered by a learned single Judge on interpretation of the provisions of Sections 4, 5 and 8 of the Act has held that a Hindu wife cannot validly adopt even with consent of her husband. Before enactment of the Act under Hindu custom and religion a Hindu female had no right to adopt any son or daughter. By this act, under the provisions of Section 7, a Hindu male has been given exclusive right to adopt under the circumstances and conditions mentioned therein. While under Section 8 a Hindu female has been given right under the conditions mentioned therein. The gender discrimination in the matter of adoption which prevailed prior to this Act has been eliminated by enactment giving both male and female right to adopt under Sections 7 and 8, respectively,*

*under the Act. Thus it is clear that during subsistence of a marriage a wife has no right to adopt, only to give consent in adoption if taken by her husband, meaning thereby it is the husband who is to take decision and initiative and such right of adoption of husband is inchoate until consent is given by his wife. Therefore the right of Hindu male to adopt consent is not absolute under Section 7, while under Section 8 the female's right is absolute under the conditions mentioned therein.*

30. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-08 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि
- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-08 के तहत बालिग एवं स्वस्थ मस्तिष्क वाली हिन्दू महिला गोद ग्रहण कर सकती है।
  - साथ ही अगर उस हिन्दू महिला के जीवित पति है तो गोद ग्रहण हेतु उस पति की स्पष्ट सहमति आवश्यक है।

### Section-09

31. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-08 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-09 में गोद प्रदान करने वाले व्यक्ति के बारे में प्रावधान किये गए हैं। इस कड़ी में अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-09 का उद्धरण निम्न प्रकार है-

#### **9. Persons capable of giving in adoption.—**

(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption:

*Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them 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.*

3\* \*

(4) 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.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

32. प्रकरण में अग्रिम विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत स्वयं गोद गए पिता के स्वयं के गोद जाने से पूर्व उत्पन्न पुत्र तथा स्वयं

के गोद जाने के पश्चात उत्पन्न पुत्र के पिता होने की विधिक स्थिति के बारे में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 6642/2010 बउनवान **Kalindi Damodar Garde vs Manohar Laxman Kulkarni** में दिनांक 07.02.2020 को दिये गये निर्णय में स्वयं गोद गए पिता के स्वयं के गोद जाने से पूर्व उत्पन्न पुत्र तथा स्वयं के गोद जाने के पश्चात उत्पन्न पुत्र के पिता होने की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

9. *The Full Bench of Bombay High Court in Martand Jiwajee Patil & Anr. v. Narayan Krishna Gumast-Patil & Anr.* 3 referred to the aforesaid judgment when considering a case as to whether the adoptee has a right to give his son, born prior to his adoption, in adoption. The Court held as under:

*“In Raghuraj Chandra v. Subhadra Kunwar [(1928) L.R. 55 I.A. 139 at p. 148, S.C. 30 Bom. L.R. 829.] their Lordships of the Privy Council after stating at p. 148 that though adoption is spoken of as “new birth” in many cases, a term sanctioned by the theory of Hindu law, yet “As has been more than once observed, the expressions ‘civilly dead or as if he had never been born in the family’ are not for all purposes correct or logically applicable, but they are complementary to the term ‘new birth’.”*

*The inapplicability of the theory can be illustrated by concrete instances:—*

(a) *The tie of blood between the adopted son and the members of his natural family is not severed. He cannot marry in his natural family within the prohibited degrees, nor can he adopt from his natural family a boy whom he could not have adopted if he had remained in that family [Moottia Moodelly v. Uppon Vencata Charry]. [(1858) Mad. S.D. 117.]*

xx xx xx

(c) *The adoptive father cannot give his adopted son in adoption (Sarkar's Hindu Law of Adoption, pages 281-282).*

xx xx xx

*These instances show that an adopted son is not civilly dead in his natural family nor reborn in his adoptive family.*

*It is no doubt true that by giving away his son in adoption the adopted father indirectly meddles with the riktha or property of his natural family, since the effect of that adoption will be to extinguish the son's interest in that property. But thereby the father himself gains no interest in the property. All that Manu's text says is that he should not take for himself the gotra and riktha of his natural family, and does not prohibit him from doing any act which may affect the property of his natural family. Thus, for instance, if he has a brother in his natural family, he is not prohibited from giving his son born after his own adoption, in adoption to that brother, although thereby the different interests in the property of his natural family are affected.*

xx xx xx

*In the absence of any express text or judicial decision depriving an adopted son of his right to give away in adoption his son born before his adoption, we do not think that any useful purpose will be served by imposing such a restriction upon him. The modern trend of decisions is to take a more liberal view and to interpret the texts from a practical point of view as far as possible. This is particularly noticeable in the decisions of this Court on several questions of adoption, such as the adoption of an only son, the adoption of a married boy, the adoption of a boy whose mother the adopting father could not have legally married, and the adoption by a widow without the express consent of her husband. We do not see why a similar liberal view should not be taken in this case, having regard to the interests of the boy to be given in adoption. With his father actually living, it would be a hardship on the boy to treat him as an orphan, merely because the father has gone in adoption. Usually when the father is adopted, his preborn sons are still minors, and in practice they go with their father to live with him, though legally they are held to have remained in the natural family of their father. Though the father has gone in adoption, the ties of affinity and love for his preborn sons cannot be severed, and he is the proper man to look after their education and welfare. If a guardian is to be appointed for them, he will naturally be consulted. Having their interest at heart, he is the best person to decide whether one of them should be given in adoption and what is conducive to their benefit. By giving one of his sons in adoption he himself gains no benefit, and he may be safely trusted to exercise his discretion rightly for the good of his son, though born before his own adoption.”*

xxx

10. The Court held that the paternity of the father cannot be shaken off even though he may leave the family, as, according to Hindu Shastras, “By no means can you make your father cease to be,”. The Court held as under:

*“It may be that in ancient and primitive society the son was regarded as hardly better than his father's slave, and the prominent idea involved in an adoption was the transfer of dominion or patria potestas to the person adopting. But when the times changed and the status of the son was raised, the father's power to give in adoption came to be founded on a different conception. The text of Vasishtha quoted in Dattaka Mimansa (sec. V, pl. 31), which is said to afford the foundation of the Hindu law of adoption, and which I have already referred to, recognizes the power of the father and the mother to “give or sell or abandon” their son as he is “produced from their virile seed and uterine blood.” This paternity of the father cannot be shaken off even though he may leave the family, as, according to the Hindu Shastras “By no means can you make your father cease to be,” (Jaimini, Bibliotheca Indica Series, Volume I, p. 742).*

The same thing is expressed by Chandavarkar, J. in *Kalgavda Tavanappa v. Somappa Tamangavda* as follows (p. 690):—

*“The mere fact that the father has gone into another family by adoption and eased to be of his son's gotra or family cannot unmake what he naturally is—the son's father.”*

xxx

21. In view of the provisions of the Act which do not make any distinction between the son born to a father prior or after adoption of his father and that there is no provision which bars the natural born son to inherit the property of his natural father, therefore, the High Court has rightly upheld the rights of the sons of Laxman. In fact, in the Full Bench judgment of Bombay High Court in Martand Jiwajee Patil, it has been held that the natural father retains the right to give in adoption his son born before his own adoption. Therefore, if he has a right to give his son in adoption, such son has a right to inherit property by virtue of being an agnate. There was a full blood relationship between the three sons and the daughter who was born after adoption. All the children of Laxman are entitled to inherit the property of their natural father and mother in accordance with the provisions of the Act as succession has opened after the death of Laxman in 1987 and subsequently the mother in the year 1992.

33. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-09 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि
- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-09 के तहत केवल जैविक माता व पिता या संरक्षक ही गोद प्रदान कर सकता है।
  - कोई हिन्दू विधवा अपने पुनर्विवाह के पश्चात अपने पुनर्विवाह से पूर्व उत्पन्न संतान को गोद में देने की अधिकारिता नहीं रखती है।
  - कोई हिन्दू पुरुष अपने पुनर्विवाह के पश्चात अपने पुनर्विवाह से पूर्व उत्पन्न संतान को गोद में देने की अधिकारिता रखता है। क्योंकि हिन्दू पुरुष अपने पुनर्विवाह के पश्चात अपने पुनर्विवाह से पूर्व उत्पन्न संतान का आजीवन पिता की भूमिका में रहता है।
  - गोद ग्रहण हेतु अपनी अधिकारिता प्रत्यायोजित की जा सकती है। इस प्रकार गोद ग्रहण हेतु प्रत्यायोजित अधिकारिता से किया गया गोद कार्यक्रम वैध होता है।

### Section-10

34. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-09 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-10 में गोद लिए जाने वाले व्यक्ति के बारे में प्रावधान किये गए हैं। इस कड़ी में अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-10 का उद्धरण निम्न प्रकार है—

**10. Persons who may be adopted.**—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) *he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.*

35. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-10 के अवलोकन से ज्ञात होता है कि

- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-10 के तहत गोद लिया जाने वाला व्यक्ति हिन्दू ही होना अपेक्षित है।
- गोद लिए जाने वाला व्यक्ति पूर्व में गोद नहीं लिया गया होना अपेक्षित है।
- गोद लिए जाने वाला व्यक्ति, जब तक कि संबंधित पक्षकारों के रीति रिवाजों के द्वारा शादीशुदा व्यक्ति को गोद लिए जाने के संबंध में अनुमति हो, अविवाहित व्यक्ति होना अपेक्षित है।
- गोद लिए जाने वाला व्यक्ति, जब तक कि संबंधित पक्षकारों के रीति रिवाजों के द्वारा 15 वर्ष से अधिक आयु के व्यक्ति को गोद लिए जाने के संबंध में अनुमति हो, 15 वर्ष से कम आयु का व्यक्ति होना अपेक्षित है।

### Exception: Customs & Usages

36. प्रकरण में उक्त धारा-10 के उपबंध-03 व 04 के अंतर्गत रीति रिवाज व अपवाद के अन्तर्गत गोद लेने वाले परिवार के रीति रिवाजों की प्रासंगिकता के संबंध में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय दिल्ली उच्च न्यायालय द्वारा AIR 1985 DELHI 95 बउनवान **Suraj Mal And Ors. vs Babu Lal** में दिनांक 28.11.1984 को दिये गये निर्णय में उक्त धारा-10 के उपबंध-03 व 04 के अंतर्गत रीति रिवाज व अपवाद के अन्तर्गत गोद लेने वाले परिवार के रीति रिवाजों की प्रासंगिकता के संबंध में विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

(13) *In Mulla's Hindu Law 15th edition para 480 tho LAW on the requirement of age of the adopted person is stated in these words :*

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

(I) *in Bengal, Benares, Bihar ana Orissa, the adoption must be before upanayana that is before the boy is invested with the sacred thread; it t& immaterial that the adopted boy is older than the adopter (II)the above rule applies also in the Madras State;but if the person to be adopted is of the same gotra as the adopter, the adoption may be made even after, upanayana, provided it is made before marriage -*

(NI) *in the Bombay State, a person may be adopted at any age, though he may be older than the adopter and though he may be married and havechildren. The adoption is not- invalid although it took place after the thread ceremony of the boy was performed.*

(14) Thus in Bengal, Benaras, Bihar and Orissa a person can be adopted before he is invested with a sacred thread. According to all the schools (except Bombay school) he must not be married at the time of adoption. The object of adoption among Jains, however, is purely secular, i.e. to secure a heir and perpetuate the adoption's name. It has no religious significance whatsoever. There is, therefore no restriction of age or marriage and a married man could be adopted among Jains.

(15) In *Lala Rup Chand v. Jambu Prasad* (supra) the finding of the High Court that "among the Jains adoption is no religious ceremony, and that under the law or custom there is no restriction of age or marriage among them" was confirmed. In *Sheofcuarbai v. Jeoraj*, the Privy Council held that in Sitambari sector Jains the adopted son may, at the time of his adoption, be grown up and a married man. In *Manohar Lal v. Banarsi Doss* the High Court of Allahabad held that according to the law and custom prevailing amongst the Jain community a married man may lawfully be adopted by a widow.

37. इसी प्रकार माननीय बोम्बे उच्च न्यायालय द्वारा AIR 1994 BOMBAY 235 उनवान *Nemichand Shantilal Patni vs Basantabai* में दिये गये दिनांक 21.01.1994 में उक्त धारा-10 के उपबंध-03 व 04 के अंतर्गत रीति रिवाज व अपवाद के अन्तर्गत गोद लेने वाले परिवार के रीति रिवाजों की प्रासंगिकता के संबंध में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है—

9. It is, however, to be noted that in the case of *Suraj Mal v. Babu Lal* referred to above, the parties were Jains of Oswal sect and were residents of Delhi and on evidence it was found that the boy was adopted according to the custom prevailing in Delhi in Jain community permitting the adoption without any restriction to the marriage or age. In the case of *Anirudh Jagdeorao* the parties were Hindu belonging to Maratha community and a custom was pleaded and proved in that community to take in adoption any person even above the age of 15 years and even though such adopted person was a married one. So also in the case of *Kondiba Rama* it was found on evidence that the custom prevailed amongst them that the person may adopt at any age though he may be older than the adopter and was married and have children. It was also found that the evidence was led of 2 instances of such adoptions of persons belonging to the same caste and as such when the factum of adoption was established by sufficient evidence, its validity was upheld on the ground of custom as judicially recognised. It is to be noted further that the parties to the present proceedings are Digamber Jain Khandelwal, and, as observed above, not a single person was examined to prove the alleged custom in this community permitting the adoption of a married person and also above the age of 15 years. It need not be stated that the parties setting up a particular custom is required not only to allege but to prove it so as to make such a custom to be a rule of law as applicable to the concerned parties. Shri Nawandar, the learned counsel for the respondent, in this connection relied on a ruling in *T. Saraswathi Animal v. Jagadambal*, wherein it is ruled that custom cannot be extended by analogy and it cannot be established by a "piori" methods. In the same ruling it is further laid down that it is not that any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. If the facts, as brought on record in the case at

*hand, are re-averted, it is clear that neither the plaintiff sets such a custom in his plaint nor proves it on which he relies so as to succeed to the properties of his mother Kundanbai.*

38. इसी प्रकार माननीय पंजाब एवं हरियाणा उच्च न्यायालय द्वारा AIR 1982 P&H 282 उनवान **Amar Singh vs Tej Ram** में दिये गये दिनांक 18.11.1981 में उक्त धारा-10 के उपबंध-03 व 04 के अंतर्गत रीति रिवाज व अपवाद के अन्तर्गत गोद लेने वाले परिवार के रीति रिवाजों की प्रासंगिकता के संबंध में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है-

*I find force in the contention of the learned counsel. It is well-settled that if the Courts have recognised the custom in a particular matter for a long time, that is considered to be the law and it is not necessary to prove it. The Courts can take judicial notice of such a custom. In the aforesaid view, I am fortified by the Supreme Court in Ujagar Singh v. Mst. Jeo, AIR 1959 SC 1041. The following observations may be read with advantage (at p. 1045) :-*

*"It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under S. 57 of the Evidence Act, however, nothing need be proved of which courts can take judicial notice. Therefore it is said that if there is custom of which the Courts can take judicial notice, it need not be proved. Now, the circumstances in which the courts can take judicial notice of a custom were stated by Lord Dunedin in Raja Rama Rao v. Raja of Pittapur, 45 In App 148 at pp. 154, 155 ; (AIR 1918 PC 81 at p. 83), in the following words, "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case". When a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary u/s. 57(1) of the Evidence Act. It appears to us that in the courts in the Punjab the expression "general custom" has really been used in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice as was said in Bawa Singh v. Mt. Taro, AIR 1951 Punj 239, and Sukhwant Kaur v. Bahwant Singh AIR 1951 Punj 242."*

*Admittedly, the parties are Jats. It is well-recognised that the Jats in the State of Haryana, which was earlier a part of the erstwhile State of Punjab, are governed by customary law. In para 36 of Rattigan's Digest of Customary Law in the Punjab, it is clearly stated that there are no restrictions as regards the age or the degree of relationship of the person to be adopted. It is also well-settled that a married man having children can be adopted under custom. Reference in this regard may be made to Ramkishore v. Jainarayan, (1922) ILR 49 Cal 120 : (AIR 1922 PC 2), wherein it has been observed that under the Customary Law, a brother can be adopted, a daughter's son can be adopted; there is no limit as to the age of the person who may be adopted; a married man who has had children may be adopted; and a guardian may give a boy in adoption. No contrary view has been brought to my notice to the effect that amongst Jats such a person cannot be adopted. Therefore, I am of the opinion that the adoption of Harkesh respondent cannot be challenged on this ground.*

39. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील 2008 / 2003 उनवान **Laxmibai (Dead) Thru Lr'S. & Anr vs Bhagwanthbuva** में दिये गये दिनांक 29.01.2013 में रीति रिवाजों की स्थिति एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है—

7. *Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.*

*Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it.*

**Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.** *He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.*

8. *In Dr. Surajmani Stella Kujur v. Durga Charan Hansdah AIR 2001 SC 938, this Court held **that custom, being in derogation of a general rule, is required to be construed strictly. A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence.** (Vide: Salekh Chand (Dead) thr. Lrs. v. Satya Gupta & Ors. (2008) 13 SCC 119).*

9. *A custom must be proved to be ancient, certain and reasonable. **The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method.** Nothing that the Courts can take judicial notice of needs to be proved. When a custom has been judicially recognised by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious, that the Courts take judicial notice of it.*

10. *In Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya, 14 Moo. Ind. App. 570, it was held: **"It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further essential that such special usage is established to be so, by way of clear and unambiguous evidence. It is only by means of such evidence, that courts can be assured of their existence, and it is also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends."***

11. *In Salekh Chand (supra), this Court held as under:*

**"Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established**

governing rule of a particular locality. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy.”

12. In *Bhimashya & Ors. v. Smt. Janabi @ Janawwa*, (2006) 13 SCC 627, this Court held:

“A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm.....it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

xx xx xx xx

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are rational, they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom.”

40. इसी प्रकार माननीय बंबई उच्च न्यायालय द्वारा AIR1983BOM391 उनवान **Anirudh Jageorao vs Babarao Irbaji** में दिये गये दिनांक 20.01.1983 में रीति रिवाजो की स्थिति एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है—

*In Butterworths's Words and Phrases Legally Defined, Second Edition, Volume I, at page 392 under the heading "Custom" it is' inter alia, stated:*

*"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. As regards the matter to which it relate, a custom takes the place of the general common law, and is in respect of that matter the local common law within particular locality where it obtains."*

*A little later, a distinction between the terms "custom" and "usage" has been brought out. It is stated (Para 393):*

*"The terms "custom" and "usage" are often used interchangeably. Strictly speaking, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom beings where usage ends. Usage is an international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self-consistent. Viner's Abridgment, referring to custom in English law, has the matter in a nutshell: 'A custom, in the intendment of law, is such a usage as the hath obtained the force of a law" (Starke's International Law (6th Edn. 34)." Clause (a) of Section 3, however, does not preserve this distinction between custom and usage but places both on the same footing by defining each of these expressions in the same terms. What is required to make an act or conduct amount to custom or usage within the meaning of Clause (a) of Section 3 is that*

*it must be a rule which, having been continuously and uniformly observed for of law among Hindus in any local area, tribe, community, group or family, provided that this rule is certain and not unreasonable or opposed to public policy and provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family. The question of family does not arise in the present case. The evidence led by the appellant to prove custom has been held to be insufficient and the finding of fact on this point is against the appellant. The appellant's case is really based either upon a custom which has become a part of the Bombay School of Hindu Law or on the relevant text of the Bombay School of Hindu law declaring or setting out a custom which prevailed in the region to which it applies.*

xxx

*On this aspect of the case, Vimadlal, J., referred to the Supreme Court decision in R. B. S. S. Muninalal v. S. S. Rajkumar, AIR 1962 Second 1493. In that case it was held (page 1498) :---*

**"..... It is well settled that where a custom is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom introduced into the law without the necessity of proof in each individual case."**

*After citing this case Vimadlal, J., proceeded to hold as follows (page 271) :---*

*"..... The position, therefore, is that where the custom in question has been repeatedly recognised by Courts of law, the Court may, in another case, hold that custom as proved without the necessity of independent proof in that case, but even where the case law relied upon falls short of that, a judicial decision in which such a custom has been recognised can certainly be regarded as affording corroboration of the evidence of the witnesses who have deposed to the same in another case".*

41. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील 6378 / 2013 उनवान **Ratanlal v. Sundarabai** में दिये गये दिनांक 22.11.2017 में उक्त धारा-10 के उपबंध-03 व 04 के अंतर्गत रीति रिवाज व अपवाद के अन्तर्गत गोद लेने वाले परिवार के रीति रिवाजों की प्रासंगिकता के संबंध में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है-

*12. India has a strong tradition of respect for difference and diversity which is reflected under the Hindu family laws as it is applicable to diverse communities living from the southern tip to northern mountains, from western plains to eastern hills. Diversity in our country brings along various customs which defines what India is. Law is not oblivious of this fact and sometimes allows society to be governed by customs within the foundation of law. It is well known that a custom commands legitimacy not by an authority of law formed by the State rather from the public acceptance and acknowledgment. This Court in Thakur Gokal Chand v. Pravin Kumari, has explained the ingredients of a valid custom in the following manner-*

*"A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian condition. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality".*

*Black's Law Dictionary defines customary law as "customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws."* I Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathi*, MIA 397 (1868), has observed that "under the Hindu System of law, clear proof of usage will outweigh the written text of law".

**13. As per the settled law under Section 3(a) the Act, the following ingredients are necessary for establishing a valid custom**

- a. Continuity.**
- b. Certainty.**
- c. Long usage.**
- d. And reasonability.**

*As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. **Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner.** It should be noted that, there are many types of customs to name a few-general customs, local customs and tribal customs etc. and the burden of proof for establishing a type of custom depend I Bryan A. Garner, *Black's Law Dictionary (10th Eds.)*, p. 468. on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz., that it is accepted willfully as having force of law, and is not a mere practice more or less common. The acts required for the establishment of customary law ought to be plural, uniform and constant.*

14. Custom evolves by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law. The characteristic of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted, but from practices prompted by the convenience of society. A judicial decision recognizing a custom may be relevant, but these are not indispensable for its establishment. When a custom is to be proved by judicial notice, the relevant test would be to see if the custom has been acted upon by a court of superior or coordinate jurisdiction in the same jurisdiction to the extent that justifies the court, which is asked to apply it, in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration. In this case at hand there was no pleading or proof which could justify that the above standards were met.

15. It would not be out of context to observe certain judicial decisions which throw some light on the issue raised in this case instant. In *Rup Chand v. Jambu Prasad*, (1910) ILR 32 247, Privy Council held that- "The custom alleged in the pleading was this: "

*Among the Jains Adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them."*

*And that appears to be the custom found by the High Court to exist. But upon the argument before their Lordships it was strenuously contended that the evidence in the present case, limited as it is to a comparatively small number of centers of Jain population, was insufficient to establish a custom so wide as this, and that no narrower custom was either alleged or proved. In their Lordships' opinion there is great weight in these*

*criticisms, enough to make the present case an unsatisfactory precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming”.*

16. In *Sheokuarbai v. Jeoraj*, AIR 1921 PC 77, Privy Council observed that, among the Sitambari Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption, and the adopted son may at the time of his adoption be a grown-up and married man. The only ceremony to the validity of such an adoption is the giving and taking of the adopted son.

17. It is very much evident that the appellant in this case has failed to produce any evidence to prove that such practice has attained the status of general custom prevalent among the concerned community. **Custom, on which the appellant is relying, is a matter of proof and cannot be based on a priori reasoning or logical and analogical deductions, as sought to be canvassed by the appellant herein.** Hence the issue is answered against the appellant.

18. In response to issue number two, we are concerned here with the custom of adopting married sons in the community of the appellant. The only evidence, the appellant has adduced, is his own testimony and a word of a priest who had performed the ceremony. **A general custom which the appellant intends to prove requires greater proof than the one appellant adduced before the court.** Moreover, there is no dispute with regard to the fact that the appellant did not plead in his written statement about existence of any custom as such. Parties to a suit are always governed by their pleadings. **Any amount of evidence or proof adduced without there being proper pleading is of no consequence and will not come to the rescue of the parties.**

19. At this juncture it would be necessary to observe the law laid down by this Court in numerous **cases that the burden of proving adoption is a heavy one and if there is no documentary evidence in support of adoption, the Court should be very cautious in relying upon oral evidence.** This Court held so in *Kishori Lal v. Mst. Chaltibai*, AIR 1959 SC 504, We can do no better than to quote the relevant passage from the above judgment which reads as under:-

*“As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. **Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance.***

*(emphasis supplied)*

20. In *Rahasa Pandiani (dead) by LRs. and Ors. v. Gokulananda Panda and others*, AIR 1987 SC 962, aforesaid aspect was observed as under:

*“When the Plaintiff relies on oral evidence in support of the claim that he was adopted by the adoptive father in accordance with the Hindu rites, and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the Court has to act with a great deal of caution and circumspection. Be it realized that setting up a spurious adoption is not less frequent than concocting a spurious will, and equally, if not more difficult to unmask. And the Court has to be extremely alert and vigilant to*

*guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. **If there are any suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt.** In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the Court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. **Experience of life shows that just as there have been spurious claims about execution of a will, there have been spurious claims about adoption having taken place. And the Court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the, suspicion of the Court and the conscience of the Court is not satisfied that the evidence preferred to support such an adoption is beyond reproach.***

(emphasis supplied)

42. इसी प्रकार इस संबंध में माननीय बोम्बे उच्च न्यायालय द्वारा AIR 2006 BOM 123 बउनवान *Hanmant Laxman Salunke Since vs Shri Shrirang Narayn Kanse* में दिनांक 21.12.2005 को दिये गये निर्णय में उक्त धारा-10 के उपबंध-03 व 04 के अंतर्गत रीति रिवाज व अपवाद के अन्तर्गत गोद लेने वाले परिवार के रीति रिवाजों की प्रासंगिकता के संबंध में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है—

7. The Full Bench of this Court in *Anirudh's case (Supra)* observed, *inter alia*, as under:

(a) By following a decision of Seven Judge Bench of the Hyderabad High Court in the case of *Sheshadri v. Venubai*, 37 Deccan Law Report 244, in the Marathwada area of the old State of Hyderabad, adoption of a married person was valid and that Hindus in that area were governed by the Mayukha or the Bombay School of Hindu Law and not by the Mitakshara;

(b) a widow can take a boy over 15 years of age in adoption as also a married person;

(c) the practice of taking married persons and boys over 15 years of age in adoption in the regions which are governed by the Bombay School of Hindu Law has been consistently recognised by the Bombay High Court; and

(d) the expressions "custom" and "usage" as defined in clause (a) of Section 3 of the Act include not only customs and usages in the ordinary sense which have obtained the force of law among Hindus in any local area, tribe, community, group or family, but also texts, rules and interpretations of Hindu Law which have been continuously and uniformly observed and have obtained the force of law among Hindus in any local area, tribe, community, group or family.

43. उक्त संदर्भ में उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि कानूनी रूप से अनुमत रीति रिवाज एवं उपयोग के बारे में विधिक स्थिति स्पष्ट होती है जिसके महत्वपूर्ण अवयव एवं बिन्दु निम्न प्रकार है—

1. किसी समुदाय के रीति रिवाज का पहला महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज लंबे समय से समुदाय के द्वारा उपयोग में लिये जा रहे हो तथा ऐसा उपयोग बिना अपवाद के किया जा रहा हो।

2. किसी समुदाय के रीति रिवाज का दुसरा महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज अनवरत रूप से समुदाय के द्वारा उपयोग में लिये जा रहे हो।
  3. किसी समुदाय के रीति रिवाज का तीसरा महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज निश्चित रूप से समुदाय के द्वारा उपयोग में लिये जा रहे हो।
  4. किसी समुदाय के रीति रिवाज का अगला महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज तार्किक एवं सार्वजनिक नीति से सुसंगत हो।
  5. किसी समुदाय के द्वारा लंबे समय से, अनवरत रूप से तथा निश्चित रूप से उपयोग में लाए जा रहे रीति रिवाज को उस समुदाय द्वारा एक तरह से कानूनी एवं नियमों रूप प्रदान कर दिया गया हो।
  6. किसी समुदाय के द्वारा लंबे समय से, अनवरत रूप से तथा निश्चित रूप से उपयोग में लाए जा रहे रीति रिवाज के विरुद्ध जाकर किसी व्यक्ति द्वारा किया गया कोई कार्य एक तरह से उस समुदाय के द्वारा तीव्र विरोध को जन्म देने वाला या वह संबंधित कार्य को समुदाय द्वारा अमान्यता प्रदान की गई हो।
  7. अगर किसी समुदाय के द्वारा लंबे समय से, अनवरत रूप से तथा निश्चित रूप से उपयोग में लाए जा रहे रीति रिवाज को उस क्षेत्र के न्यायालयों द्वारा पहचान प्रदान करने की स्थिति में वह रीति रिवाज एक तरह से कानून या विधि की प्रास्थिति प्राप्त कर लेते हैं। ऐसे रीति रिवाजों को पृथक से साबित करने की आवश्यकता नहीं होती है।
44. साथ ही उक्त संदर्भ में उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि कानूनी रूप से अनुमत रीति रिवाज एवं उपयोग तथा न्यायिक प्रकरणों में उक्त रीति रिवाज के संबंध में साक्ष्य प्रस्तुत करने के बारे में विधिक स्थिति स्पष्ट होती है—
- *It need not be stated that the parties setting up a particular custom is required not only to allege but to prove it so as to make such a custom to be a rule of law as applicable to the concerned parties.*
  - *that custom cannot be extended by analogy and it cannot be established by a "piori" methods. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method.*
  - *that it is not that any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case.*
  - *It is well-settled that if the Courts have recognised the custom in a particular matter for a long time, that is considered to be the law and it is not necessary to prove it. The Courts can take judicial notice of such a custom.*
  - *It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under S. 57 of the Evidence Act, however, nothing need be proved of which courts can take judicial notice. Therefore it is said that if there is custom of which the Courts can take judicial notice, it need not be proved.*
  - *When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the*

*Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case*

- *that custom, being in derogation of a general rule, is required to be construed strictly. A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence.*
- *The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting.*
- *It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further essential that such special usage is established to be so, by way of clear and unambiguous evidence. It is only by means of such evidence, that courts can be assured of their existence, and it is also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends.*
- *Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy*
- *Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner.*
- *A general custom which the appellant intends to prove requires greater proof than the one appellant adduced before the court.*
- *Any amount of evidence or proof adduced without there being proper pleading is of no consequence and will not come to the rescue of the parties.*
- *that the burden of proving adoption is a heavy one and if there is no documentary evidence in support of adoption, the Court should be very cautious in relying upon oral evidence.*

## Section-11

45. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-10 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-11 में गोद ग्रहण के संबंध में अन्य अतिरिक्त प्रावधान किये गए हैं। इस कड़ी में अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-11 का उद्धरण निम्न प्रकार है—

**11. Other conditions for a valid adoption.**—*In every adoption, the following conditions must be complied with:—*

*(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu sonson's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;*

*(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;*

*(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;*

*(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;*

*(v) the same child may not be adopted simultaneously by two or more persons;*

*(vi) 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 its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption:*

*Provided that the performance of dattahomam shall not be essential to the validity of an adoption.*

### **Interpretation**

46. प्रकरण में उक्त प्रावधान की व्याख्या के संबंध में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय बोम्बे उच्च न्यायालय द्वारा AIR 2006 BOM 123 बउनवान **Hanmant Laxman Salunke Since vs Shri Shrirang Narayn Kanse** में दिनांक 21.12.2005 को दिये गये निर्णय में उक्त प्रावधान की व्याख्या के संबंध में विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*12. Now coming to the requirements of Section 11(iv), the findings of both the courts below are concurrent i.e. the age difference between the adoptive mother and the adoptive son was less than years. Whereas Section 11(iv) mandates that the adoptive mother is at least 21 years older than the person to be adopted. The opening sentence of Section 11 states that the conditions set out in Clauses (i) to (vi) must be complied with in every adoption. In the case of Ramchandra (Supra) this court held, "at the very inception the section speaks of the conditions set out being mandatorily required to be complied with. No other meaning can be assigned to the words 'must be complied with'. Therefore, one of the conditions for a valid adoption is the difference in ages prescribed by clause (iv). Therefore, this is not a merely directory provision but something which is mandatory and the violation whereof results in the invalidity of the adoption".*

xxx

*Section 11 finds its place in Chapter II of the Act. Thus, a combined reading of Sections 5,6 and 11 clearly goes to prove that the other conditions for valid adoption set out under Section 11 are mandatory and the word "must" cannot be read as "may" as contended by the learned counsel for the respondent. The arguments advanced by the learned counsel for the respondent though appear sound, may be impressive and deserving consideration on the floor of the House (Parliament) and while deciding the Second Appeal the scheme of Sections 5,6, 10 and 11 of the Act will have to be considered on the basis of the interpretations set out by various enunciations and referred to hereinabove. It is not for the Courts to give a different meaning to the word "must" and a combined reading of the scheme of Sections 5, 6, 10 and 11 goes to show that the*

*other conditions set out under Section 11 of the Act are mandatory for a valid adoption. Whatever may be the intention of the Legislature originally, it cannot be diluted so as to read the word "must" as "may" as contended by the learned counsel for the respondent.*

47. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-11 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-11 के तहत पुत्र को गोद लेने की स्थिति में गोद लेने वाले माता या पिता के पूर्व से ही कोई पुत्र, पौत्र, प्रपौत्र नहीं होना अपेक्षित है।
- किसी पुत्री को गोद लेने की स्थिति में गोद लेने वाले माता या पिता के पूर्व से ही कोई पुत्री, पौत्री, प्रपौत्री नहीं होना अपेक्षित है। साथ ही किसी महिला हिन्दू द्वारा पुत्र को गोद लेने की स्थिति में गोद लेने वाले माता तथा गोद लिए जा रहे पुत्र की आयु में कम से कम 21 वर्ष का अन्तर होना अपेक्षित है।
- किसी पुरुष हिन्दू द्वारा पुत्री को गोद लेने की स्थिति में गोद लेने वाले पिता तथा गोद लिए जा रहे पुत्री की आयु में कम से कम 21 वर्ष का अन्तर होना अपेक्षित है। साथ ही एक ही व्यक्ति को एक साथ दो या अधिक व्यक्तियों द्वारा गोद नहीं लिया जाना अपेक्षित है।
- गोद लिए जा रहे व्यक्ति का अपने जन्म स्थान से वास्तविक रूप से गोद में गोद देने तथा गोद लिए जा रहे व्यक्ति का अपने गोद जाने के स्थान हेतु वास्तविक रूप से गोद में प्रदान करने की मंशा से होना अपेक्षित है।

## Section-12

48. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-11 के विश्लेषण के पश्चात अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 में गोद के प्रभाव के संबंध में प्रावधान किये गए हैं। इस कड़ी में अब हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 का उद्धरण निम्न प्रकार है—

**12.Effects of adoption.**—*An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:*

*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.*

### **Status of Adopted child in Adopting family**

49. प्रकरण में उक्त प्रावधान के तहत गोद लिए गए व्यक्ति की गोद ग्रहण करने वाले परिवार में स्थिति के बारे में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा AIR 1970 SC 343 बउनवान **Smt. Sitabai And Anr. vs Ramchandra** में दिनांक 20.08.1969 को दिये गये निर्णय में गोद लिए गए व्यक्ति की गोद ग्रहण करने वाले परिवार में स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*5. It is clear on a reading of the main part of Section 12 and Sub-section (vi) of Section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in Section 14(1) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of Sections 11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations, of the husband would be connected with the child through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that Section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of Sections 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in Sub-section (4) of Section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the "step-father" of the adopted child. The true effect and interpretation of Sections 11 and 12 of Act No. 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created*

*by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses.*

50. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा 1967 AIR 1761 बउनवान **Sawan Ram & Others vs Kala Wanti** में दिनांक 19.04.1967 को दिये गये निर्णय में गोद लिए गए व्यक्ति की गोद ग्रहण करने वाले परिवार में स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*We are unable to accept this interpretation of the provisions of the Act by the Andhra Pradesh High Court as it appears to us that the High Court ignored two important provisions of the Act and did not consider their effect when arriving at its decision. The first provision, which is of great significance, is contained in s. 5 (1) of the Act which lays down : "No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void." It is significant that, in this section, the adoption to be made is mentioned as "by or to a Hindu". Thus, adoption is envisaged as being of two kinds. One is adoption by a Hindu, and the other is adoption to a Hindu. If the view canvassed on behalf of the appellant be accepted, the consequence will be that there will be only adoptions by Hindus and not to Hindus. On the face of it, adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. It is only in such a case that it can be said that the adoption has been made to that other person. The most common instance will naturally be that of adoption by a female Hindu who is married and whose husband is dead, or has completely and finally renounced the world, or has been declared by a court of competent jurisdiction to be of unsound mind. In such a case, the actual adoption would be by the female Hindu, while the adoption will be not only to herself, but also to her husband who is dead, or has completely and finally renounced the world or has been declared to be of unsound mind.*

*The second provision, which was ignored by the Andhra Pradesh High Court, is one contained in s. 12 itself. The section, in its principal clause, not only lays down that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, but, in addition, goes on to define the rights of such an adopted child. It lays down that from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. A question naturally arises what is the adoptive family of a child who is adopted by a widow, or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive. It is well-recognized that, after a female is married, she belongs to the family of her husband. The child adopted by her must also, therefore, belong to the same family. On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow. Further still, he loses all his rights in the family of his birth and those rights are replaced by the*

*rights created by the adoption in the adoptive family. The right, which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth, is, thus, clearly to be replaced by similar rights in the adoptive family and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow, or the married female, taking him in adoption. This provision in s. 12 of the Act, thus, itself makes it clear that, on adoption by a Hindu female who has 'been married, the adopted son will, in effect, be the adopted son of her husband also. This aspect was ignored by the Andhra Pradesh High Court when dealing with the effect, of the language used in other parts of this section.*

51. उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 के तहत गोद लिया गया व्यक्ति, गोद लेने वाले परिवार में जैविक संतान के समान स्थिति को प्राप्त करता है।
- किसी हिन्दू विधवा द्वारा गोद लिया गया कोई व्यक्ति, गोद लेने वाले परिवार में अपने पूर्व मृत पिता का भी पुत्र/पुत्री के समान स्थिति को प्राप्त करता है।

### **Rights After Adoption**

52. प्रकरण में उक्त धारा-12 के परंतुक के बिन्दु-बी के तहत परिवार में किसी व्यक्ति के गोद लिए जाने पर परिवार के सदस्यों के उक्त गोद से पूर्व के अधिकार एवं उक्त गोद के पश्चात के अधिकार के अन्तर्संबंधों पर माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 901 / 2014 बउनवान **Saheb Reddy vs Sharanappa** में दिनांक 16.11.2016 को दिये गये निर्णय में धारा-12 के परंतुक के बिन्दु-बी के तहत परिवार में किसी व्यक्ति के गोद लिए जाने पर परिवार के सदस्यों के उक्त गोद से पूर्व के अधिकार एवं उक्त गोद के पश्चात के अधिकार के अन्तर्संबंधों पर विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*14. At the time when Shri Sharnappa died in 1957, defendant no.1 was not in the picture as he was adopted by Smt. Sharnappa on 9th February, 1971. By virtue of proviso to Section 12 of the Adoption Act, an adopted child cannot divest any person of any estate which vested in him or her before the adoption. Thus, the property of late Shri Sharnappa which, upon his death in 1957, had vested in his widow and three daughters, would not be disturbed by virtue of subsequent adoption of defendant no.1.*

*15. So far as inheritance of the suit property in favour of the plaintiff is concerned, in our opinion, the first appellate Court was correct to the effect that the plaintiff would inherit not only property of his mother, Smt. Nagamma along with his three sisters, but he would also have share in the properties of his grandmother, late Smt. Sharnappa. Smt. Sharnappa had also not prepared any Will and as she had died intestate, her*

*property would be divided among her adopted son i.e. defendant no.1 and heirs of her three daughters, who had predeceased Smt. Sharnappa. Smt. Sharnappa was having 1/4th share in the entire property, which she had inherited from her husband late Shri Sharnappa. One of the daughters being Nagamma, heirs of Nagamma would inherit 1/4th share of property of Smt. Sharnappa and the plaintiff being one of the four heirs of late Smt. Nagamma, would get 1/64th share from the property of his grandmother Smt. Sharnappa.*

*16. As originally Smt. Sharnappa was to get 1/4th share from the property of Shri Sharnappa, from her 1/4th share, the properties would be inherited by her adopted son and heirs of her predeceased daughters. As stated hereinabove, the plaintiff would be getting 1/16th share in the property of Smt. Nagamma and 1/64th share upon death of Smt. Sharnappa and thus, the plaintiff would be getting 5/64th share in the suit property, whereas defendant no.1 would get 1/16th share of the suit property.*

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*18. Looking at the aforesaid provisions of Section 12 of the Adoption Act, it is crystal clear that the property which had been vested in the widow and three daughters of late Shri Sharnappa Gaded in 1957 would not be disturbed because of adoption of defendant no.1, which had taken place on 9th February, 1971. Thus, Smt. Sharnappa had become absolute owner of 1/4th share and Smt. Nagamma, the mother of the plaintiff had also become an owner of 1/4th share of the property belonging to late Shri Sharnappa Gaded.*

53. उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 के परन्तुक के बिन्दू-बी के तहत गोद लिया गया व्यक्ति में गोद ग्रहण से पूर्व समाहित व निहित संपत्ति उस व्यक्ति के गोद ग्रहण के पश्चात भी गोद लिए गए व्यक्ति में समाहित व निहित बने रहते हैं।

### **Coparcenary:Adoption**

54. इसके साथ ही सहदायिकी संपत्ति में गोद पुत्र के अधिकार को समझना आवश्यक है। सहदायक संपत्ति में सहदायक (पुत्र/पौत्र/प्रपौत्र) कभी भी अपना हक निर्धारित करवाकर सहदायिकी से पृथक हो सकता है। इस संबंध में माननीय न्यायालयों द्वारा प्रतिपादित असंख्य न्यायिक दृष्टांतों के द्वारा सहदायिकी संपत्ति में गोद पुत्र के अधिकार की व्याख्या की गई है। इस श्रृंखला में कुछ महत्वपूर्ण न्यायिक दृष्टांतों द्वारा की गई विवेचना का उद्धरण प्रकरण में प्रासंगिक है। इस संबंध में माननीय उच्चतम न्यायालय द्वारा सिविल अपील संख्या 5475/2013 बउनवान **Rohit Chauhan vs Surinder Singh** में दिनांक 15.07.2013 को दिये गये निर्णय में सहदायिकी संपत्ति पर गोद पुत्र के अधिकार के संबंध में विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in*

inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

55. उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- कोई हिन्दू संयुक्त परिवार में एकल पुरुष या सहदायक सदस्य होने की स्थिति में भी हिन्दू संयुक्त परिवार का अस्तित्व समाप्त नहीं होता है।
- किसी हिन्दू संयुक्त परिवार में एकल पुरुष या सहदायक सदस्य होने की स्थिति में किसी पुरुष के गोद लेने की स्थिति में सहदायिकी बनी रहती है।
- किसी सहदायिकी का किसी सहदायक के द्वारा विभाजन के पश्चात प्राप्त हिस्सा उस सहदायक का पृथक व स्वतंत्र हिस्सा होता है। जैसे ही उस सहदायक के कोई पुत्र उत्पन्न होता है या कोई पुत्र गोद ग्रहण किया जाता है तो सहदायिकी पुनर्जीवित हो जाती है।
- किसी हिन्दू विधवा महिला के द्वारा गोद लिया गया पुरुष उस हिन्दू संयुक्त परिवार व सहदायिकी में अपने गोद पिता की मृत्यु के दिन से ही गोद लिया गया एवं सहदायक माना जाता है।

### **Doctrine of Relation Back**

56. उपरोक्त विश्लेषण में सहदायिकी संपत्ति में गोद पुत्र के अधिकारों की संकल्पना को समझने के पश्चात अब उक्त धारा-12 के परंतुक के बिन्दु-सी के तहत विधवा महिला के द्वारा किसी पुत्र को गोद लेने के पश्चात सहदायिकी सम्पत्ति में दत्तक पुत्र के अधिकार एवं विधवा तथा अन्य सहदायकों के अधिकार एवं सहदायिकी सम्पत्ति के निस्तारण के मध्य अन्तर्संबंध पर माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1972 AIR 1401 बउनवान **Govind Hanumantha Rao Desai vs Nagappa Alias Narahari Laxman Rao** में दिनांक 25.01.1972 को दिये गये निर्णय में विधवा महिला के द्वारा किसी पुत्र को गोद लेने के पश्चात सहदायिकी सम्पत्ति में दत्तक पुत्र के अधिकार एवं विधवा तथा अन्य सहदायकों के अधिकार एवं सहदायिकी सम्पत्ति के निस्तारण के मध्य अन्तर्संबंध की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*The doctrine of relation back is only a legal fiction. There is no justification to logically extend that fiction-. In fact the plaintiff had nothing to do with his*

*adoptive father's family when Krishna Rao died. On that day his adoptive father was not alive. The devolution of Krishna Rao's property must be held to have taken place at the very moment Krishna Rao died. We know of no legal fiction under which it can be said to have been in a suspended animation till the plaintiff was adopted. This takes us to the decided cases. A long line of decisions has firmly laid down that an adoption dates back to the date of the death of the adoptive father. It is not necessary to refer to the catena of decisions on this point. Suffice it to refer to the decision of this Court in Shrinivas Krishnarao Kango v. Narayan Devji Kango and Ors.(1). But that fiction by itself does not help the plaintiff. That fiction merely enables him to establish that he must be deemed to have been in existence on the date of the death of his adoptive father. Division of status need not be effected by bilateral agreement. It can be effected by an unilateral declaration by a coparcener if the same is properly communicated. Therefore it was within the power of Krishna Rao and Lakshmana Rao to separate themselves from the family and in fact they did so in 1933. We see no basis for the contention of the appellant that he can ignore the events that took place in 1933. He can no doubt ignore the actual partition by metes and bounds effected by Krishna Rao and Lakshmana Rao and ask for a repartition of the properties but his adoption by itself does not and cannot re-unite the divided family. It is one thing to say that an adopted son can ignore a partition effected prior to his adoption, which affects his rights and it is a different thing to say that his adoption wipes out the division of status that had taken place in his family. Reliance was placed on the decision of the Bombay High Court in Ramchandra Shrinivas and Ors. v. Ramkrishna Krishnarao (2) in support of the proposition that the plaintiff can enter into the adoptive family on the basis that the family is a joint and undivided Hindu family and his rights in the property of the family must be decided on that basis. It is true that this decision lends some support to the argument that despite the partition effected in 1933, the plaintiff can work out his rights on the basis that the family remains joint. The conclusion of the High Court that the adopted son is entitled to enter his adoptive family on the basis that the family continues as a joint and undivided Hindu family and that his rights in the family property must be decided on that basis does not appear to be supported by any Hindu law text or by any decision of this Court or the Judicial Committee. The decision of the Judicial Committee in Anant Bhikappa Patil, Minor v. Shankar Ramchandra Patil(3), relied on by the High Court did not consider that question. It is true that some of the observations of Chief Justice Stone in Bajirao and Ors. v. Rantkrishna(1), does support the view taken by the Bombay High Court. But the question that arose for decision in that case was whether a person adopted, after a partition in his adoptive father's family cannot divest the properties that had vested in the other coparceners. It may be noted that in the course of his judgment, the learned Chief Justice observed :*

*"There can, in our opinion, be no question of a partition whereby the partitioning male members take away all the family property from a joint Hindu family unless the family can be wholly disrupted and finally brought to an end. We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential, mother if that mother in the way of nature or in the way of law brings in a new male member. The existing male members can separate off; they can take away their share. They cannot prejudice by partitioning the rights of the after-bom male member whether the birth is natural or legal. If in point of fact, before his arrival, the existing coparceners have partitioned the new arrival can obtain a re-opening of the partition and thereby get his share. How that share is to be calculated in various circumstances need not be decided here."*

*These observations in our opinion lay down the ratio of the decision and that ratio does not support the conclusion reached by the Bombay High Court. The decision of the Full Bench of the Madras High Court, in K. R. Sankaralingam Pillai and anr. v. Veluchami Pillai, Minor (2) , relied on by Bombay High Court merely laid down that an adopted son is entitled to reopen partition entered into in the family of his adoptive father, before his adoption. That position is no more open to question and was not questioned in this appeal. We are only concerned with the quantum of share to which the plaintiff is entitled. Our attention has not been invited to any decision which supports the view taken by the Bombay High Court. We see no justification to accept that view.*

*Further the interest of the society is not advanced by engrafting one more fiction to the already existing fiction that an adopted son is deemed to have been born on the date of death of his adoptive father. Acceptance of the new fiction canvassed on behalf of the plaintiff is bound to create various complications. Hindu widows in the past were proverbially long lived because of 'the child marriage system. Adoptions might take place and have taken place more than half a century after the death of the adoptive father. Meanwhile the other coparceners might have dealt with the family property on the basis of the then existing rights. They might have alienated the property. We see no justification to create chaos by inventing a new fiction unknown to Hindu law texts nor authorised by stare decisis. This Court in Shrinivas Krishnarao Kango's case(1) has laid down that the fiction that an adoption relates back to the date of the death of the adoptive father applies only when the claim of the adoptive son relates to the estate of the adoptive father. But where the succession to the property of a person other than the adoptive father is involved, the principle applicable is not the rule of relation back but the rule, that inheritance once vested cannot be divested. It is true that the question that arose for decision in that case was whether an adoptive son can claim to succeed to a collateral's estate, divesting the property that had already vested in someone else. But the rule laid down by this Court in that case is much wider than the limited question that arose for decision and the reasons given in support of that rule support our conclusion. The rights of an adopted son cannot be more than that of his adoptive father. If the plaintiff's adoptive father was alive in 1933 when the partition took place, he could not have obtained anything more than 1/3rd share in the family properties. It passes our comprehension how the plaintiff could acquire a greater right than his adoptive father could have had if he had been alive on the date of partition and that he could have got if he had been adopted prior to that date. In our judgment the plaintiff's claim for a half share in the family properties is unsustainable.*

57. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा 1974 AIR 878 बउनवान **Shripad Gajanan Suthankar vs Dattaram Kashinath Suthankar** में दिनांक 01.03.1974 को दिये गये निर्णय में धारा-12 के परंतुक के बिन्दु-सी के तहत विधवा महिला के द्वारा किसी पुत्र को गोद लेने के पश्चात सहदायिकी सम्पत्ति में दत्तक पुत्र के अधिकार एवं विधवा तथा अन्य सहदायिकों के अधिकार एवं सहदायिकी सम्पत्ति के निस्तारण के मध्य अन्तर्संबंध की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*It is established law that the adoption by a widow relates back to the date of the death of the adoptive father, which, in this case, took place in 1921. Indeed, the complexity of the present case arises from the application of this legal fiction of "relation-back" and the limitations on the amplitude of that fiction vis a vis the partition of 1944. in the light of the rulings of the various High Courts and of*

*the Judicial Committee of the Privy Council, and of this Court, the last of which is Govind v. Nagappa.(1) According to the appellant, the rights of the adopted son, armed as he is with the theory of "relation-back", have to be effectuated retroactively, the guidelines wherefor are available from the decided cases. It is no doubt true that "when a member of a joint family governed by Mitakshara law dies and the widow validly adopts a son to him, a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which the deceased coparcener had, and it vests at once in the adopted son". (see Mulla on Hindu Law, 13th edn. page 516). The same author, however, points out that "the rights of an adopted son arise for the first time on his adoption-. He may, by virtue of his rights as adopted son, divest other persons in whom the property vested after the death of the adoptive father, but all lawful alienations made by previous holder would be binding on him. His right to impeach previous alienations would depend upon the capacity of the holder who made the alienation as well as on the nature of the action of alienation. When the holder was a male, who had unfettered right of transfer, e.g., the last surviving member of a joint family, the adopted son could not impeach the transfer. In case of females who had restricted right of transfer even apart from any adoption, the transfers would be valid only when they are supported by legal necessity." (ibid; pp; 516-517; para 507). "An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural born son would be." (Ibid, p.517; para 508).*

*It is settled law that rights of an adopted son spring into existence only from the moment of the adoption and all alienations made 'by the widow before the adoption, if they are made for legal necessity or otherwise lawfully, such as with the consent of the next reversioners, are binding on the adopted son. The narrow but important question that arises here is as to whether the adoption made in 1956 can upset the partition of 1944, validly made under the then conditions, and whether the gift by Mahadev of properties exclusively set apart to him, and, therefore, alienable by him, could be retroactively invalidated by the plaintiff on the application of the legal fiction of "relation-back". it is unlikely that a similar question will arise hereafter since s. 4 of the Hindu Succession Act, 1956 has practically swept off texts, rules and the like in Hindu Law, which were part of that law in force immediately before the commencement of the Act, if provisions have been made for such matters in the Act. Since on the husband's death the widow takes an absolute estate, questions of the type which engage us in this appeal will be stilled for ever. Of course, we need not investigate this aspect of the matter as the present case relates to a pre-statutory adoption. Even s. 12 of the Hindu Adoptions and Maintenance Act, 1956, makes it plain that 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. We may now proceed to consider the contention of Mr. Gupte that the adopted son cannot challenge the partition And the gift.*

*The plaintiff. as the adopted son, for secular and spiritual purposes continues the line of the adoptive father and when the widow adopts, the doctrine of 'relation-back' makes sonship retroactive from the moment of death of the late husband. 'the new entrant is deemed to have been born on the date of death of the adoptive father. Supposing there was an undivided family in existence when the adoptive father died, how far can the legal fiction of anterior sonship disrupt the doings between notional birth and actual adoption? Mulla sums up the result of the rulings thus : (p. 496).*

*"If, therefore, there was a coparcenary in existence when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an*

*adoption validly made by the widow of the deceased coparcener would have the effect of divesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second and enabling the adopted son to claim a share in the family properties as if they were still joint."*

*This means that at the partition of 1944 although as a physical fact only Mahadev and defendant No. 1 were alive, the plaintiff must be deemed to have been alive. The division had denied a share to him while he was eligible, in the eye of law, to a share. There were thus three co- parceners and the plaintiff was entitled to a third out of the estate of the joint family as it then existed. Illustration (a) at page 497 of Mulla, based on Surendra Nandan(1) is apt and reads:*

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

*The plaintiff's claim for a share is thus well-founded-not half, which is tall but one-third which fits the fiction as in 1944.*

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*If the widow of a deceased coparcener had alienated for binding necessity, such property has to be excluded although a strict projection of the fiction would mean that the adopted son was alive at the time succession opened and the widow could not have the right to even a limited estate and a fortiori could not competently alienate for necessity or otherwise. Liberties with the legal fiction have been taken in this and other aspects of the "relation back" theory. If a property has validly gone out of the hotch-potch the adopted son cannot recall it. The fact of partition cannot be drowned by the subsequent adoption because when it was entered into there was no legal impediment in doing it. Likewise, if a manager or widow alienate& for binding necessity the constructive ante-dated nativity of the adopted son cannot nullify what has taken place before he in actuality entered the coparcenary. By the same token, a sole surviving coparcener (except perhaps in the Banaras School where unlike in other schools he has no independent power of transferring his share) may dispose of the estate before adoption by a deceased coparcener's widow and that act defeats the claim of a later adoptee. Such is the inexorable operation of time and circumstance on long later adoptions and their proprietary fall-out. You cannot put the clock back beyond a certain stage. We may express the 'view that some observations, clearly obiter, in P. Ammal v. Ramalingam,(1) relied on by Shri Javali for the 1st respondent are wider than justified. Legal fictions have legal frontiers. In Srinivas(2), Venkatarama Iyer, J., after referring to the relevant books and cases, cautioned against the application of the defeasance right of the adopted son to cases of collateral succession opening before adoption. "The law was thus well settled that when succession to the properties of a person other than an adoptive father was involved, the principle applicable was not the rule of relation back but the rule that inheritance once vested could not be divested." The learned Judge, expressing some dissent from Anant Bhikappa(3), stated the proposition thus:*

*"When an adoption is made by widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the, death of the adoptive father by reason of the theory of relation back is*

*subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate.*

*Thus, transferees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened-in this case it was 41 years thereafter-and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations. We must hesitate to subscribe to a view of the law which leads to consequences so inconvenient. The claim of the appellant to divest a vested estate rests on a legal fiction, and legal fictions should not be extended so as to lead to unjust results."*

xxx

*The propositions that emerge are that : (i) A widow's adoption cannot be stultified by an anterior partition of the joint family and the adopted son can claim a share as if he were begotten and alive when the adoptive father breathed his last ; (ii) Never-the-less, the factum of partition is not wiped out by the later adoption ; (iii) Any disposition testamentary or inter vivos, lawfully made antecedent to the adoption is immune to challenge by the adopted son; (iv) Lawful alienation, in this context, means not necessarily for a family necessity but alienation made competently in accordance with law (v) A widow's power of alienation is limited and if-and only if-the conditions set by the Hindu Law are fulfilled will the alienation bind a subsequently adopted son. So also alienation by the Karta of an undivided Hindu family or transfer by a coparcener governed by the Banaras school ; (vi) Once partitioned validly, the share of a member of a Mitakshara Hindu family in which his own issue have no right by birth can be transferred by him at his will and such transfers, be they by will, gift or sale, bind the adopted son who comes later on the scene. Of course, the position of a void or voidable transfer by such a sharer may stand on a separate footing but we need not investigate it here.*

58. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 6076 / 2010 बउनवान **Kasabai Tukaram Karvar vs Nivruti** में दिनांक 20.07.2022 को दिये गये निर्णय में विधवा महिला के द्वारा किसी पुत्र को गोद लेने के पश्चात सहदायिकी सम्पत्ति में दत्तक पुत्र के अधिकार एवं विधवा तथा अन्य सहदायकों के अधिकार एवं सहदायिकी सम्पत्ति के निस्तारण के मध्य अन्तर्संबंध की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*11. In this case, there is no dispute about the adoption or about the validity of the adoption. It is, in fact, the case of the plaintiff that the first defendant was the adopted son. On the said basis, the further conclusion is inevitable that on applying the doctrine of relation back, it would be deemed that as on the date of the death of their father, the first defendant was very much notionally alive and he would become the sole coparcener. It is indisputable that there can be no vacuum or break in vesting of title on the death of a person. We must further*

*bear in mind that this is a case where succession opened up admittedly prior to the Hindu Succession Act, 1956 coming into force.*

59. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा स्पेशल लीव पिटीशन 10558-59 / 2024 बउनवान **Mahesh vs Sangram** में दिनांक 02.01.2025 को दिये गये निर्णय में विधवा महिला के द्वारा किसी पुत्र को गोद लेने के पश्चात सहदायिकी सम्पत्ति में दत्तक पुत्र के अधिकार एवं विधवा तथा अन्य सहदायकों के अधिकार एवं सहदायिकी सम्पत्ति के निस्तारण के मध्य अन्तर्संबंध की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

22. *Obviously, in the case on hand, the factum of adoption of the appellant/the plaintiff by defendant No.1 after the death of adoptive father, on 16.07.1994 is established by the appellant/the plaintiff and it is pertinent to note that the same was admitted by defendant No.1 as well, in her written statement. **In such circumstances, in view of the 'Doctrine of Relation Back' and by applying the law laid down in Sripad Gajanan Suthankar's case (supra) relied on with agreement in Kasabai Tukaram Karvar's case (supra) the adoption by defendant No.1, the widow of Bhavakanna Shahpurkar, would relate back to the date of death of the adoptive father which is 04.03.1982 but then all lawful alienations made by defendant No.1 would be binding on the appellant/plaintiff. As held in Sripad Gajanan Suthankar's case (supra) in paragraph 11 his right to impeach previous alienations would depend upon the capacity of defendant No.1 who made the alienation as well as on the nature of the action of alienation.***

23. *The first among the alienations under challenge in the case on hand is the one where defendant No.1 effected sale of the properties covered by registered sale deed dated 13.12.2007 in respect of 'A' schedule property in favour of defendant Nos.2 and 3. There is concurrency with respect to the said issue between the trial Court and the High Court. The Courts have held that defendant No.1 got absolute right to effect the sale of the property covered thereunder and that the sale was done in favour of defendant Nos.2 and 3 in accordance with the law. Admittedly, in regard to the sale, defendant No.1 executed the sale deed dated 13.12.2007 and she was not having a case that she had not received sale consideration. By applying the 'Doctrine of Relation Back' and the ratio of decisions in Kasabai Tukaram Karvar's case (supra) and Sripad Gajanan Suthankar's case (supra) it can only be held that the appellant/plaintiff is bound by the said alienation. This is because of the cumulative effect of the compromise decree in OS No.122 of 2009 followed by Ext.D14 and the allotment of share based on the same. In this context it is also relevant to note that the factum of execution of the sale deed is not disputed by the appellant but his contention is only that defendant No.1 could not have sold the property without his consent and knowledge. **Though the alienation was subsequent to his adoption by virtue of the fact that defendant No.1 got absolute right and title in regard to the property covered by the said sale deed dated 13.12.2007 and that a valid sale was effected following the procedures, the challenge of the appellant against the said alienation of property by defendant No.1 in favour of defendant Nos.2 and 3 is not liable to be interfered with. We have no hesitation to hold that the concurrent findings of***

the trial Court and the High Court in regard to the said sale deed warrant no interference. In such circumstances, dismissal of RFA No.100247 of 2018 filed by the appellant/plaintiff challenging the alienation under the registered sale deed dated 13.12.2007 is only to be confirmed.

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**25. In the light of the 'Doctrine of Relation Back' and the ratio in the decisions in Kasabhai Tukaram Karwar's case (supra) and Sripad Gajanan Suthankar's case (supra) we have already found that all lawful alienations made by defendant No.1 will bind the appellant/plaintiff and his right to impeach previous alienation would depend upon the capacity of the holder who make the alienation as well as on the nature of the action of alienation.**

The nature of action of alienation is gift and it is allegedly made in favour of defendant Nos.4 and 5. It is to be noted that defendant Nos.4 and 5 though got a case that earlier defendant No.1 executed a Will in regard to the said properties in their favour they themselves would admit and plead that subsequently the properties were given in gift as per registered gift deed dated 27.08.2008. The very fact that the defendant Nos.4 and 5 themselves relied on the gift deed would go to show that if at all there was a Will that was revoked. At any rate, it is a fact that even defendant Nos.4 and 5 did not rely on the same.

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29..... The declaration that gift deed dated 27.08.2008 is null and void is made by the trial Court in the aforesaid circumstances and it is only as a necessary sequel that the trial Court held that the appellant/plaintiff is entitled to entire 'B' and 'C' schedule properties as the sole legal heir of deceased defendant No.1. As noted hereinbefore, DW-1 herself in her written statement admitted the adoption of the appellant/plaintiff as her son and the registered adoption deed could fortify the same. When that be so the finding that the appellant is entitled to the said properties being the sole legal heir of deceased defendant No.1 cannot be said to be faulty as it is the inevitable consequence of application for the 'Doctrine of Relation Back' and the ratio of the decisions in Kasabhai Tukaram Karwar's case (supra) and Sripad Gajanan Suthankar's case (supra).

60. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 के परन्तुक के बिन्दू-सी तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- किसी हिन्दू विधवा महिला के द्वारा गोद लिया गया पुरुष उस हिन्दू संयुक्त परिवार व सहदायिकी में अपने गोद पिता की मृत्यु के दिन से ही गोद लिया गया एवं सहदायक माना जाता है।
- किसी हिन्दू विधवा महिला के द्वारा गोद लिया गया पुरुष अपने गोद ग्रहण से पूर्व सहदायिकी संपत्ति का विभाजन व निस्तारण को अमान्य ठहराते हुए गोद पुत्र अपने मृत पिता के दिन की स्थिति के आधार पर अपने हिस्से का दावा कर सकता है। हालांकि इस प्रकार गोद पुत्र द्वारा किए गए दावे से गोद से पूर्व निष्पादित विभाजन के प्रभाव पूरी तरह समाप्त नहीं होते हैं।
- किसी हिन्दू विधवा महिला के द्वारा गोद लिया गया पुरुष अपने गोद ग्रहण से पूर्व सहदायिकी संपत्ति के वैद्य निस्तारण व अंतरण से बाध्य रहता है। यहां वैद्य अंतरण से तात्पर्य विधिक आवश्यकता से नहीं होकर विधि द्वारा स्थापित प्रक्रिया के अनुसरण में किए गए अंतरण से है।

- किसी हिन्दू विधवा महिला के द्वारा गोद लिया गया पुरुष अपने गोद ग्रहण से पूर्व सहदायिकी संपत्ति के उस विधवा के द्वारा अपने सीमित अधिकार के तहत किए गए वैद्य अंतरण से बाध्य रहता है।
- किसी हिन्दू विधवा महिला के द्वारा गोद लिया गया पुरुष अपने गोद ग्रहण से पूर्व सहदायिकी संपत्ति के उस परिवार के कर्ता के द्वारा अपनी अधिकारिता के तहत किए गए वैद्य अंतरण से बाध्य रहता है।
- किसी सहदायक को वैद्य विभाजन से प्राप्त संपत्ति, जिसमें उसकी संतान को जन्म से कोई अधिकार नहीं है, का अंतरण करने पर पश्चातवर्ती गोद पुत्र उक्त अंतरणों से बाध्य रहता है।

### Section-13

61. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 के विश्लेषण के पश्चात अब प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-13 के प्रावधान का अवलोकन किया जाना उचित प्रतीत होता है। प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-13 का उद्धरण निम्न प्रकार है-

**13. Right of adoptive parents to dispose of their properties.**—Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

### Right of Parents & Right of Adopted Child

62. प्रकरण में उक्त प्रावधान के तहत विधवा महिला के किसी पुत्र को गोद लेने के पश्चात दत्तक पुत्र के अधिकार एवं दत्तक माता-पिता के अधिकार के अन्तर्संबंध पर माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1990 AIR 1153 बउनवान *Dinaji And Ors vs Daddi* में दिनांक 10.11.1989 को दिये गये निर्णय में विधवा महिला के किसी पुत्र को गोद लेने के पश्चात दत्तक पुत्र के अधिकार एवं दत्तक माता-पिता के अधिकार के अन्तर्संबंध की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*Proviso (C) of this Section departs from the Hindu General Law and makes it clear that the adopted child shall not divest any person of any estate which has vested in him on her before the adoption. It is clear that in the present case, Smt. Yashoda Bai who was the limited owner of the property after the death of her husband and after Hindu Succession Act came into force, has become an absolute owner and therefore the property of her husband vested in her and therefore merely by adopting a child she could not be de- prived of any of her rights in the property. The adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the Scheme of S. 12 proviso (C).*

*S. 13 of the Hindu Adoption and Maintenance Act reads:*

*13. Right of adoptive parents to dispose of their properties:*

*Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.*

*This Section enacts that when the parties intend to limit the operation of proviso (C) to S. 12, it is open to them by an agreement and it appears that what she included in the present deed of adoption was an agreement to the contrary as contemplated in S. 13 of the Hindu Adoptions and Maintenance Act.*

*Section 17(1)(b) of the Registration Act clearly provides that such a document where any right in movable property is either assigned or extinguished will require registration. It could not be disputed that this part of the deed which refers to creation of an immediate right in the adopted son and the divesting of the right of the adoptive mother in the property will squarely fall within the ambit of S. 17(1)(b) and therefore under S. 49 of the Registration Act, this could not be admitted if it is not a registered document. Unfortunately, the Hon'ble Judge of the High Court did not notice this aspect of the matter and felt that what could not be done because of the proviso (c) to S. 12 has been specifically provided in the document itself but this part of the document could not be read in evidence as it could not be admitted.*

63. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-13 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि
- कोई गोद संतान अपने गोद ग्रहण के पश्चात अपने गोद माता-पिता में समाहित व निहित अधिकारों पर कोई व्यवधान उत्पन्न नहीं कर सकता है। हालांकि इस प्रकार गोद पुत्र द्वारा किए गए दावे से गोद से पूर्व निष्पादित विभाजन के प्रभाव पूरी तरह समाप्त नहीं होते हैं।

### **Adoption Deed Vs Validity of Adoption**

64. उपरोक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-13 के विश्लेषण के पश्चात अब प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-16 के प्रावधान का अवलोकन किया जाना उचित प्रतीत होता है। प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-16 का उद्धरण निम्न प्रकार है—

**16. Presumption as to registered documents relating to adoption.**—Whenever any document registered under any law for the time being in force 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.

65. प्रकरण में उक्त प्रावधान के तहत पंजीबद्ध गोदनामा एवं गोद ग्रहण की वैधता के अन्तर्संबंधों पर माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस

संबंध में माननीय मद्रास उच्च न्यायालय द्वारा (1989) 2 MLJ 341 बउनवान *Mahalingam vs Kannayyan* में दिनांक 19.04.1989 को दिये गये निर्णय में पंजीबद्ध गोदनामा एवं गोद ग्रहण की वैधता के अन्तर्संबंधों की विधिक स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*The implication of Section 16 of the Act is: If there is any document purporting to record an adoption made and it is signed by the person giving and the person taking the child in adoption, and that document is registered under any law for the time being in force and it is produced before any Court, the Court shall presume that the adoption has been made in compliance with the provisions of the Act, unless and until it is disproved. When Section 16 speaks about compliance with the provisions of the Act, it has reference to the general requirements under the Act with regard to a valid adoption. The general requirements take in what has been laid down in Section 10, Clause (iv) thereof sets down the requirement regarding the age of the person to be adopted as fifteen years. If the conditions as per Section 16 are satisfied, there could be a presumption also as to the satisfaction of the requirement of the age being fifteen years. But when the admitted position is that the age of the person adopted was over fifteen years, then it could only come under the exception, and the validity of such adoption could be upheld only when the custom or usage applicable to parties permitting the adoption of a person over the age of fifteen years is proved and established. **The simple reason is, with regard to an exception, there could not be a presumption, legal or otherwise. Exception is a departure from the normal and general requirements. An exception takes the case from the purview of general requirements. An exception must be proved and it cannot be presumed. When an exception is engrafted in the main part of the provision to the effect that on satisfaction of certain conditions, the general requirements need not be invoked, the onus in regard to such exceptional conditions is on the person who pleads them. An exception must be strictly construed. The presumption under Section 16 does not cover the case of an exception to the general requirements of the provisions of the Act. That is how, Section 16 must be construed. Otherwise, it will lead to anomalous results. Even if there is no satisfaction of the general requirement regarding age, Court will be called upon to presume the exception. This could not be the intendment of the legal presumption under Section 16. There must be plea and proof of the exception under custom or usage spoken to in Clause (iv) of Section 10. Unless that is made out, the exception cannot rule. There could not be a presumption of such custom or usage. Even by a bare reading of Section 16, it is not possible to spell out a theory that it dispenses with pleading and proof in the case of an exception under Section 10(iv) of the Act. As already noted, one of the four qualifications set out in Section 10 of the Act is that the person, who is to be adopted should not have completed the age of fifteen years. If there should be an exception as contemplated in that clause certainly, there has got to be a pleading and proof of the same. By having resort to Section 16 of the Act, it is not possible to dispense with the said pleading and proof Section 16 has no relevance at all with regard to the exception set forth in Section 10(iv) of the Act.***

### Adoption deed vis-a-vis Adoption

66. प्रकरण में विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत गोदनामा एवं गोद लिये जाने की तिथि में अंतर होने पर कानूनी स्थिति को समझना उचित प्रतीत होता है। इस संबंध में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 4101 / 2006 बउनवान **M. Gurudas & Ors vs Rasaranjan & Ors** में दिनांक 13.09.2006 को दिये गये निर्णय में गोद लेने तथा गोदनामा पंजीबद्ध करवाने के अंतर्संबंधों को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*To prove valid adoption, it would be necessary to bring on records that there had been an actual giving and taking ceremony. Performance of 'datta homam' was imperative, subject to just exceptions. Above all, as noticed hereinbefore, the question would arise as to whether adoption of a daughter was permissible in law.*

*In Mulla's Principles of Hindu Law, 17th edition, page 710, it is stated:*

*"488. Ceremonies relating to adoption-*

*(1) The ceremonies relating to an adoption are*

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

*(2) They physical act of giving and receiving is essential to the validity of an adoption;*

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

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

*(3) No religious ceremonies, not even datta homam, are necessary in the case of Shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."*

67. इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 2435 / 2010 बउनवान **Moturu Nalini Kanth vs Gainedi Kaliprasad** में दिनांक 20.11.2023 को दिये गये निर्णय में गोद लेने तथा गोदनामा पंजीबद्ध करवाने तथा वैद्य गोद के आवश्यक कारकों के अंतर्संबंधों को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*The presumption, as is clear from the provision itself, is rebuttable. In G. Vasu vs. Syed Yaseen Sifuddin Quadri, a Full Bench of the Andhra*

*Pradesh High Court pointed out that presumptions are of two kinds - presumptions of fact and of law. It was noted that a presumption of fact is an inference logically drawn from one fact as to the existence of other facts and such presumptions of fact are rebuttable by evidence to the contrary. It was also held that presumptions of law may be either irrebuttable, so that no evidence to a contrary may be given, or rebuttable, and a rebuttable presumption of law is a legal rule to be applied by the Courts in the absence of conflicting evidence. This view was affirmed by this Court in Bharat Barrel & Drum Manufacturing Company vs. Amin Chand Payrelal and it was held that in order to disprove a presumption, such facts and circumstances have to be brought on record, upon consideration of which, the Court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist.*

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*37. We may now take note of relevant case law. In Laxmibai (Dead) through LRs. and another vs. Bhagwantbuva (Dead) through LRs. and others<sup>15</sup>, this Court held that the mere signature or thumb impression on a document is not adequate to prove the contents thereof but, in a case where a person who has given his son in adoption appears in the witness box and proves the validity of the said document, the Court ought to accept the same taking into consideration the presumption under Section 16 of the Act of 1956. Ergo, the proving of the validity of the document is a must.*

*38. Much earlier, in Kishori Lal vs. Mst. Chaltibai, a 3-Judge Bench of this Court held that, as an adoption results in changing the course of succession, it is necessary that the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth. On facts, the Bench found that no invitations were sent to the brotherhood, friends or relations and no publicity was given to the adoption, rendering it difficult to believe.*

*39. In Govinda vs. Chimabai and others, a Division Bench of the Mysore High Court observed that the mere fact that a deed of adoption has been registered cannot be taken as evidence of proof of adoption, as an adoption deed never proves an adoption. It was rightly held that the factum of adoption has to be proved by oral evidence of giving or taking of the child and that the necessary ceremonies, where they are necessary to be performed, were carried out in accordance with shastras.*

*40. In Padmalav Achariya and another vs. Srimatyia Fakira Debya and others, the Privy Council found that a cloud of suspicion rested upon an alleged second adoption and the factum of the second adoption was sought to be proved on the basis of evidence of near relatives who were also partisan, which made it unsafe to act upon their testimonies. The Privy Council held that both the adoptions were most improbable in themselves and were not supported by contemporaneous evidence.*

41. In *Jai Singh vs. Shakuntala*, this Court noted the statutory presumption envisaged by Section 16 of the Act of 1956 and observed that though the legislature had used 'shall' instead of any other word of lesser significance, the inclusion of the words 'unless and until it is disproved' appearing at the end of the statutory provision makes the situation not that rigid but flexible enough to depend upon the evidence available on record in support of the adoption. This Court further noted that it is a matter of AIR 1931 Privy Council grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession - thus onus of proof is rather heavy. This Court held that the statute allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words 'unless and until it is disproved', per this Court, have to be ascertained in proper perspective and as such, the presumption cannot but be said to be a rebuttable presumption. This Court further held that the registered instrument of adoption presumably stands out to be taken to be correct but the Court is not precluded from looking into it upon production of some evidence contra the adoption and the Court can always look into such evidence. This Court further noted the mandate of Section 11 (vi) of the Act of 1956 and held that the 'give and take in adoption' is a requirement which stands as a sine qua non for a valid adoption.

42. In *Mst. Deu and others vs. Laxmi Narayan and others* 20, this Court observed that in view of Section 16 of the Act of 1956, whenever any document registered under law is produced before the Court purporting to record an adoption made and is signed by the persons mentioned therein, the Court should presume that the adoption has been made in compliance with the provisions of the said statute, unless and until it is disproved. It was further held that in view of Section 16 of the Act of 1956, it is open to the persons who challenge the registered deed of adoption to disprove the same by taking independent proceedings.

43. In *Lakshman Singh Kothari vs. Rup Kanwar (Smt) alias Rup Kanwar Bai* 21, having referred to texts on Hindu Law, this Court observed:

'10. The law may be briefly stated thus: Under the Hindu law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object, it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their

*volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party.'*

44. In *M. Vanaja vs. M. Sarla Devi (Dead)*<sup>22</sup>, this Court took note of the relevant provisions of the Act of 1956 and held that a plain reading of the said provisions made it clear that compliance with the conditions in Chapter 1 of the Act of 1956 is mandatory for an adoption to be treated as valid and that the two important conditions mentioned in Sections 7 and 11 of the Act of 1956 are the consent of the wife before a male Hindu adopts a child and the proof of the ceremony of actual giving and taking in adoption.

45. In *Dhanno wd/o Balbir Singh vs. Tuhi Ram (Died)* represented by his LRs.<sup>23</sup>, a learned Judge of the Punjab & Haryana High Court, faced with the argument that Section 16 of the Act of 1956 required a registered adoption deed to be believed, held that the presumption thereunder, if any, is rebuttable and by merely placing the document on record without proving the ceremony of due adoption, it could not be said that there was a valid adoption. The learned Judge rightly noted that the factum of adoption must be proved in the same way as any other fact and such evidence in support of the adoption must be sufficient to satisfy the heavy burden that rests upon any person who seeks to displace the natural succession by alleging an adoption.

68. इसी प्रकार माननीय पंजाब एवं हरियाणा उच्च न्यायालय द्वारा सिविल रिट पीटीशन संख्या 28074 / 2023 बउनवान **Union Of India And Another vs Sukhpreet Kaur** में दिनांक 13.02.2025 को दिये गये निर्णय में गोद लेने तथा गोदनामा पंजीबद्ध करवाने तथा वैद्य गोद के आवश्यक कारकों के अंतर्संबंधों को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

6. *The Hindu Adoptions and Maintenance Act, 1956 (hereinafter to be referred as 'the Act') provides the manners and methods in which an adoption is to be made of a Hindu child in a Hindu Family. Adoption can be by way of a registered-deed register deed or even without it. However, an act of giving and taking in adoption has to be performed by both the parties, namely, the biological parents and the adoptive adopt parents. An adoption, which has already been done by way of a customary method or by any ssuch uch give and take, may be reduced in writing subsequently and the adoption adoption-deed may, thereafter, be registered.*

7. *Once an adoption-deed is registered, it would be presumed that a valid adoption has taken place with, with of course course, the right of rebuttal. The provisions regarding such presumption are provided under Section 16 of the Act. The contention of the petitioners petitioner that the adoption of respondent no.1 not being in accordance with law on the ground that she has attained the age of majority on the day of the registration of the adoption adoption-deed, is also erroneous. The date of birth of the applicant applicant-respondent no.1 (Sukhpreet Kaur) is 23.03.1997.*

23.03.1997. *The registered adoption deed reflects that the adoption had taken place on 12.01.2010 but the registration could not take place. It is a matter of common knowledge that so far as the School Education Board Boardss are concerned, they would only recognize actual parents of a child for being 2 of 4 mentioned in the certificate and the names of father and mother would change only on the presentation of a registered adoption deed. In June, 2013, there here was no registered adoption deed and, therefore, it is natural that in the Punjab School Education Board Certificate, certificate, the names of original parents,, instead of adoptive parents, of the applicant-respondent no.1 were ere mentioned. The same would, therefore, not be a reason to deprive her claim for compassionate appointment on account of demise of her adopt adoptive father Vijay Kumar, who was, was admittedly, an employee of the Railways and had died while in service.*

### **Ceremony for Adoption**

69. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 8814/2010 बउनवान *M.Vanaja vs M.Sarla Devi* में दिनांक 06.03.2020 को दिये गये निर्णय में गोद लेने हेतु आवश्यक कार्यक्रम की महत्ता को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

12. *A plain reading of the above provisions would make it clear that compliance of the conditions in Chapter I of the Act of 1956 is mandatory for an adoption to be treated as valid. The two important conditions as mentioned in Sections 7 and 11 of the Act of 1956 are the consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption. The Appellant admitted in her evidence that she does not have the proof of the ceremony of giving and taking of her in adoption. Admittedly, there is no pleading in the plaint regarding the adoption being in accordance with the provisions of the Act. That apart, the Respondent who is the adoptive mother has categorically stated in her evidence that the Appellant was never adopted though she was merely brought up by her and her husband. Even the grand- mother of the Appellant who appeared before the Court as PW-3 deposed that the Appellant who lost her parents in her childhood was given to the Respondent and her husband to be brought up. PW 3 also stated in her evidence that the Appellant was not adopted by the Respondent and her husband. Therefore, the Appellant had failed to prove that she has been adopted by the Respondent and her husband Narasimhulu Naidu.*

13. *The Appellant relied upon a judgment of this Court in L. Debi Prasad (Dead) by Lrs. (supra) to submit that abundant evidence submitted by her before Court would point to the fact that she was brought up as the daughter of the Respondent and her husband (Late) Narasimhulu Naidu. Such evidence can be taken into account to draw inference that she was adopted by them. The facts in L. Debi Prasad (Dead) by Lrs. (supra) case are similar to those in the instant case. In that case, Shyam Behari Lal was adopted by Gopal Das in the year 1892 when he was an infant. Shyam Behari Lal was unable to establish the actual adoption but has*

*produced considerable documentary evidence to show that he was treated as the son of Gopal Das for a quarter of century. This Court accepted the submission of Shyam Behari Lal and held that there was sufficient evidence on record to infer a valid adoption. Though the facts are similar, we are unable to apply the law laid down in L. Debi Prasad (Dead) by Lrs. (supra) to the instant case. L. Debi Prasad (Dead) by Lrs. (supra) case pertains to adoption that took place in the year 1892 and we are concerned with an adoption that has taken place after the Act of 1956 has come into force. Though the Appellant has produced evidence to show that she was treated as a daughter by (Late) Narasimhulu Naidu and the Defendant, she has not been able to establish her adoption. The mandate of the Act of 1956 is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the Act of 1956. The two essential conditions i.e. the consent of the wife and the actual ceremony of adoption have not been established. This Court by its judgment in Ghisalal v. Dhapubai (Dead) by Lrs. & Ors.2 held that the consent of the wife is mandatory for proving adoption..*

70. इसी प्रकार माननीय पंजाब एवं हरियाणा उच्च न्यायालय द्वारा AIR 1982 P&H 282 उनवान **Amar Singh vs Tej Ram** में दिये गये दिनांक 18.11.1981 को दिये गये निर्णय में गोद लेने हेतु आवश्यक कार्यक्रम की महत्ता को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

*From a reading of the section it is evident that if there is a registered document of adoption signed by the person giving and the person taking the child in adoption, the Court is required to presume that the adoption had been made in compliance with the provisions of the Act. In that eventuality it is on the other side to disprove the adoption. In the aforesaid view I get support from Basdeo Bhardwaj v. Ram Sarup, (1968) 70 Pun LR 535, wherein it is observed that where there is a registered document relating to adoption, the presumption shall be drawn in favour of adoption and it is then for the other side to disprove that adoption. The presumption has to be disproved by the other party by leading cogent evidence in rebuttal. It is further observed that where no such evidence is led, the legal presumption remains unaffected not having been disproved. In view of the document and the position of law, it is to be presumed that Harkesh was validly adopted and it is for the other side to rebut that presumption.*

71. इसी प्रकार माननीय कर्नाटक उच्च न्यायालय द्वारा द्वितीय अपील संख्या 403 / 2009 बउनवान **N L Manjunatha vs B L Ananda** में दिनांक 10.07.2023 को दिये गये निर्णय में गोद लेने के कार्यक्रम की महत्ता को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:—

13.....

*Section 16 of the Hindu Adoption and Maintenance Act, 1956 (for short the Act') reads as under:*

*“16. Presumption as to registered documents relating to adoption. — Whenever any document registered under any law for the time being in force 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.”*

*Section 16 of the Act provides presumption as to registered documents relating to adoption. Provisions of the Act does not provide that the adoption is not valid in the absence of adoption deed. Section 16 of the Act only provides that if any document registered is produced before the 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 adoption has been made in compliance with the provisions of the Act unless and until it is disproved. The presumption has to be raised under Section 16 of the Act if the following ingredients are established:*

- i. there must be a document;*
- ii. it must be registered under the law in force;*
- iii. it must purport to record an adoption;*
- iv. the document must be signed by both the giver and taker of the child in adoption;*
- v. it must be produced before the Court.*

*Therefore, what is provided under Section 16 of the Act is presumption regarding the registered adoption deed that the adoption has been made in compliance with the provisions of the Act unless and until it is disproved.*

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*17. It is the act of adoption and not the adoption deed which confers the status of the adopted son. A perfectly valid adoption deed can be made without an adoption deed and any status which the adopted son gets by virtue of adoption is due to the proper ceremonies being performed and not any deed passed as evidence of that adoption.*

*18. Even Section 17 of the Registration Act, 1908 does not provide for compulsory registration of an adoption deed. Therefore adoption deed or registered document is not must to prove the adoption. If conditions of valid adoptions as required under the Act are established it is sufficient to prove the adoption. In the case on hand there is no adoption deed. Even the evidence led has not established that ceremonies of giving of the adopted child by the natural father and taking of child by the adoptive father. Even there is no whisper regarding the consent of the natural mother and adoptive mothers either in the pleadings or in the evidence. Therefore, the trial Court has rightly held that defendant No.1 has failed to prove the adoption of plaintiff by the said Sri. Nanjegowda. The first appellate Court is even though right in dismissing the appeal has erred in holding that the registered adoption deed is a must for a valid adoption.*

72. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा 1961 AIR 1378 बउनवान **Lakshman Singh Kothari vs Smt. Rup Kanwar** में दिनांक 22.03.1961 को दिये गये निर्णय में

गोद लेने हेतु आवश्यक कार्यक्रम की महत्ता को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*The law may be briefly stated thus: Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party.*

73. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-16 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत किसी व्यक्ति को गोद लेने के लिए पंजीबद्ध गोदनामा होना अपरिहार्य शर्त नहीं है।
- किसी व्यक्ति को दत्तक पुत्र होने के लिए आवश्यक है कि वह दत्तक पुत्र हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के द्वारा प्रावधित की गई शर्तों को पूरा करता हो और गोद लिये व दिये जाने की रस्म पूरी की गई हो। उक्त प्रकार से दत्तक व्यवस्था को हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत वैध माना गया है।
- किसी व्यक्ति को गोद लेने की रस्म किसी अलग दिन पूरी की गई हो और पंजीबद्ध गोदनामा किसी अन्य पश्चातवर्ती दिन निष्पादित के होने की स्थिति में गोद लिये जाने का प्रभाव गोद लिये जाने की रस्म के दिन से आरंभ हो जाता है। अर्थात् गोद पंजीबद्ध गोदनामा से प्रभावित नहीं होकर गोद की रस्म से प्रभावित होता है।
- इस प्रकार पंजीबद्ध गोदनामा पूर्व में अदा की गई गोद की रस्म को एक दस्तावेजीय स्वरूप देना मात्र है।
- अगर किसी प्रकरण में पंजीबद्ध गोदनामा के आधार पर गोद का अभिवचन किया जाता है तो धारा-16 के तहत न्यायालय द्वारा यह अवधारणा लिए जाने के प्रावधान है कि जब तक कि उक्त गोद को अवैध घोषित नहीं किया जाता है तब तक उक्त गोद वैध गोद है। अर्थात् पंजीबद्ध गोदनामा धारक अधिक प्रभावी स्थिति में रहता है।
- अगर किसी प्रकरण में पंजीबद्ध गोदनामा के आधार पर गोद का अभिवचन किया जाता है तो धारा-16 के तहत न्यायालय द्वारा यह अवधारणा लिए

जाने के प्रावधान है। अगर कोई पक्ष इस स्थिति में उक्त गोद को चुनौती देता है तो उक्त गोद को अवैध साबित करने का भार चुनौती करने वाले पक्ष पर होता है।

- अगर किसी प्रकरण में बिना पंजीबद्ध गोदनामा के आधार पर गोद का अभिवचन किया जाता है तो उक्त गोद को वैध साबित करने का भार दावा करने वाले पक्ष पर होता है।

### Exception

74. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा 1975 AIR 1103 बउनवान **Dhanraj vs Smt. Suraj Bai** में दिनांक 03.04.1975 को दिये गये निर्णय में गोद लेने हेतु आवश्यक कार्यक्रम में अनुमत अपवाद की स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*The physical act of giving and receiving was absolutely necessary to the validity of an adoption tinder the Hindu Law as it existed before coming into force of the Act : vide para 489 at page 554 of Mulia's Hindu Law, Fourteenth Edition. Identical is the position under the Act. Nor is it different as to the incapacity of the stepmother to give her step-son in adoption. Section 9 of the Act enumerates the persons capable of giving in adoption. Sub-section (1) says*

*"No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption."*

*The departure in the law is that under the Act even the guardian of a child has the capacity to give him or her in adoption. But the step-mother as such has not. The father or mother mentioned in sub-section (1) must necessarily mean the natural father and the natural mother. Explanation (i) appended to section 9 was pressed into service to say that the step-mother is included in the term "mothers because the said explanation says "the expressions "father" and "mother" do not include an adoptive father and an adoptive mother." Learned counsel for the appellant submitted that step-mother has not been excluded from the expression "mother" and only an adoptive mother has been so excluded. By necessary implications, therefore, it was submitted that it ought to be held that the word "mother" in sub-section (i) includes a step-mother. We have no difficulty in rejecting this argument. Reading section 9 as a whole and specially in the context of sub-sections (2), (3) and (4) it is clear that the term "mother" means the natural mother and not the step-mother. 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 the explanation, therefore, arose to exclude the adoptive mother from the expression mother so that an adoptive mother may not be competent to give the adopted son in adoption to somebody else.*

*Learned counsel for the appellant then submitted that in case of an adult orphan, as the appellant was at the time of adoption, no consent was necessary of any person except the adopter himself. No body could be available to give him in adoption. The use of the word "child" in clause*

(vi) of section 11 and in section 9(1) read in contra-distinction of the use of word "person" in clause (iii) of section 6 would make it clear, counsel submitted, that the condition of giving in adoption is applicable only to a minor child and not to an adult. We see no substance in this argument. Under the law as engrafted in 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 the word "child" has been used in sections 9 and 11. The use of the word "person" in section 6(iii) and at the commencement of section 10 is not for the purpose of bringing about any difference in law in regard to the giving of the child. 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 the mother. 'Child' would not necessarily mean in that context a minor child. If the child is a minor, in absence of the father or the mother, a guardian appointed by the will of the child's father or mother and a guardian appointed or declared by a court, would be competent to give the child in adoption. But in case of a major in absence of the father or the mother, no body will be competent to give him in adoption because no such provision has been made in the Act to meet such a contingency. The scheme of the Act was not 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.

### Challenge to Adotion

75. प्रकरण में अग्रिम विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत गोद को चुनौती देने के संबंध में कानूनी स्थिति को समझना उचित प्रतीत होता है। इस संबंध में माननीय उच्च न्यायालयों व माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायिक दृष्टांतों का अवलोकन किया जाना उचित प्रतीत होता है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 1970 AIR 1286 बउनवान **Debi Prasad (Dead) By L.Rs vs Tribeni Devi** में दिनांक 18.03.1970 को दिये गये निर्णय में गोद को चुनौती देने के संबंध में कानूनी स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

*While considering the question of proof of the adoption pleaded, we must bear in mind the fact that the same is alleged to have taken place in 1892 nearly 54 years before the present suit was instituted. Therefore, naturally, it was extremely difficult for Shyam Behari Lai to adduce any oral evidence in proof of that adoption. All the persons who could have known about the adoption are likely to have died. Shyam Behari Lai himself could not speak to that adoption. His evidence is at best hearsay. It is true, as observed by this Court in Addagada Raghayamma and anr. v. Addagada Chenchamma and anr. (1) that it is **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 factum of adoption and its validity)**. Again as held by this Court in Lakshman Singh Kothari v. Smt. Rup Kanwar(2) that in order that an adoption may be valid under the Hindu law, there must be a formal ceremony of giving and taking. This is true of the regenerate castes as well as of the Sudras. Although no particular form is prescribed for the ceremony, the law requires that the natural parent should hand over the adoptive boy and the adoptive parent must receive him, the nature of the ceremony varying according to the circumstances. In the course of the judgment Subba Rao J. (as he then was) who spoke for the, Court quoted with approval the following observations of Gopalchandra Sarkar in his book on Hindu Law, 8th Edn.;*

*"The ceremonies of giving and taking are absolutely necessary 'in all cases. These ceremonies must be accompanied by the actual delivery of the child; symbolical or constructive delivery by the mere parol expression of intention on the part of the giver and the taker without the presence of the boy is not sufficient. Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption nor acknowledgment, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery; a formal ceremony being essential for that purpose."*

*That is also the view expressed in Mayne's Hindu Law wherein it is observed that-the giving and receiving are absolutely necessary to the validity of an adoption; they are the operative part of the ceremony, being that part of it which transfers the boy from one family to another; but the Hindu law does not require that there shall be any particular form so far as giving and acceptance are concerned; for a valid, adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, and that the boy shall be handed over and taken for this purpose.*

*There is no doubt that the burden of proving satisfactorily that he was given by his natural father and received by Gopal Das as his adoptive son is on Shyam Behari Lal. But as observed by the Judicial Committee of the Privy Council in Rajendrao Nath Holder v. Jogendro Nath Benerjee and ors.(1); that although the person who pleads 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 son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant, in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family; that in the case of a Hindoo, long recognition as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. In Rup Narain and anr. v. Mst. Gopal Devi and ors. (1), the Judicial Committee observed, that in the absence of direct evidence much value has to be attached to the fact that the alleged adopted son had without controversy succeeded to his adoptive father's estate and enjoyed till his death and that documents during his life and after his death were framed upon the basis of the adoption. A Division Bench of the Orissa High Court in Balinki Padhano and anr. v. Gopalkrishntt Padhano and ors(3); held that in the case of an ancient adoption evidence showing that the boy was treated for a long time as the adopted son at a time when there was no controversy is sufficient to prove the adoption although evidence of actual giving and taking is not forthcoming. We are in agreement with the views expressed in the decisions referred to above.*

**In the case of all ancient transactions, it is but natural that positive oral evidence will be lacking. Passage of time gradually wipes out such evidence. Human affairs often have to be judged on the basis of probabilities. Rendering of justice will become impossible if a particular mode of proof is insisted upon under all circumstances.** In judging whether an adoption pleaded has been satisfactorily proved or not, we have to bear in mind the lapse of time between the date of the alleged adoption and the date on which the concerned

party is required to adduce proof. In the case of an adoption said to have taken place years before the same is questioned, the most important evidence is likely to be that the alleged adoptive, father held out the person claiming to have been adopted as his son; the latter treated the former as his father and their relations and friends treated them as father and son. There is no predetermined way of proving any fact. **A fact is said to have been proved where after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.** Hence if after taking an overall view of the evidence adduced in the case, we are satisfied that the adoption pleaded is true, we must necessarily proceed on the basis, in the absence of any evidence to the contrary, that it is a valid adoption as well.

76. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 2058 / 2003 बउनवान ***Laxmibai vs Bhagwanthbuva*** में दिनांक 29.01.2013 को दिये गये निर्णय में गोद को चुनौती देने के संबंध में कानूनी स्थिति को स्पष्ट किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक पैरा का उद्धरण निम्न प्रकार है:-

21. In *S.T. Krishnappa v. Shivakumar & Ors.*, (2007) 10 SCC 761, this Court observed that the "adoption deed" must be read as a whole and that on reading the same in such a way, the intention of the parties with respect to whether the adoptive father/mother wanted to make an adoption according to law and not merely, to appoint an heir, must be clearly established.

22. In *Debi Prasad (dead) by L.Rs. v. Smt. Tribeni Devi*, AIR 1970 SC 1286, this Court held that the giving and receiving are absolutely necessary to the validity of an adoption. All that is required is that the natural father be asked by the adoptive parent to give his son in adoption, and that the boy be handed over and taken for this purpose.

Furthermore, in *Mst. Deu & Ors. v. Laxmi Narayan & Ors.*, (1998) 8 SCC 701, the presumption of registered documents under Section 16 of the Act was discussed. It was held that in view of Section 16, wherever any document registered under any law is produced before any court purporting to record an adoption made, and the same is signed by the persons mentioned therein, the court shall presume that the said adoption has been made in compliance with the provisions of the Act, until and unless such presumption is disproved. It was further held, that in view of Section 16 it is open for a party to attempt to disprove the deed of adoption by initiating independent proceedings.

23. **Mere technicalities therefore, cannot defeat the purpose of adoption, particularly when the defendants/respondents have not made any attempt to disprove the said document.** No reference was ever made either by them, or by their witnesses, to this document i.e. registered adoption deed. Undoubtedly, the natural parents had signed alongwith 7 witnesses and not at the place where the executants could sign. But it is not a case where there were no witnesses except the executants. Instead of two witnesses, seven attesting witnesses put their signatures.

24. In *Atluri Brahmanandam (D), Thr. LRs. v. Anne Sai Bapuji*, AIR 2011 SC 545, the Court held:

“The aforesaid deed of adoption was produced in evidence and the same was duly proved in the trial by the evidence led by PW-1, the respondent. We have carefully scrutinized the cross-examination of the said witness.

*In the entire cross-examination, no challenge was made by the appellant herein either to the legality of the said document or to the validity of the same. Therefore, the said registered adoption deed went unrebutted and unchallenged. We have already referred to the recitals in the said documents which is a registered document and according to the recitals therein, the respondent was legally and validly adopted by the adoptive father. Since the aforesaid custom and aforesaid adoption was also recorded in a registered deed of adoption, the Court has to presume that the adoption has been made in compliance with the provisions of the Act, since the respondent has utterly failed to challenge the said evidence and also to disprove the aforesaid adoption.” (emphasis added)*

25. The appellate courts could therefore, not have drawn any adverse inference against the appellants/plaintiffs on the basis of a mere technicality, to the effect that the natural parents of the adoptive child had acted as witnesses, and not as executors of the document. **Undoubtedly, adoption disturbs the natural line of succession, owing to which, a very heavy burden is placed upon the propounder to prove the adoption. However, this onus shifts to the person who challenges the adoption, once a registered document recording the adoption, is brought before the court. This aspect must be considered taking note of various other attending circumstances i.e., evidence regarding the religious ceremony (giving and taking of the child), as the same is a sine qua non for valid adoption.**

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40. The appellate court has erred by considering the irrelevant material, while the most relevant evidence, i.e., the adoption ceremony and the adoption deed, have been disregarded on the basis of mere surmises and conjectures. The correctness or authenticity of adoption deed is not disputed. What is disputed is that the natural parents of adoptive child who were definitely executing parties of the deed have signed as witnesses alongwith 7 other witnesses. In such a fact-situation, by gathering the intention of the parties and by reading the document as a whole and considering its purport, it can be concluded that the adoption stood the test of law. We think that cause of justice would be served, instead of being thwarted, where there has been substantial compliance of the legal requirements, specified in Section 16 of the Act 1956. **When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best.**

77. उक्त हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-16 तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि

- अगर किसी प्रकरण में पंजीबद्ध गोदनामा के आधार पर गोद का अभिवचन किया जाता है तो धारा-16 के तहत न्यायालय द्वारा यह अवधारणा लिए जाने के प्रावधान है। अगर कोई पक्ष इस स्थिति में उक्त गोद को चुनौती देता है तो उक्त गोद को अवैद्य साबित करने का भार चुनौती करने वाले पक्ष पर होता है।
- अगर किसी प्रकरण में बिना पंजीबद्ध गोदनामा के आधार पर गोद का अभिवचन किया जाता है तो उक्त गोद को वैद्य साबित करने का भार दावा करने वाले पक्ष पर होता है।

- किसी प्रकरण में किसी संपत्ति के प्राकृतिक न्यागमन से हटकर गोद के आधार पर न्यागमन का दावा करने की स्थिति में गोद को संदेहरहित व मजबूत साक्ष्य के परीक्षण पर गोद की वैधता की बारीकी से जांच व परीक्षण किया जाना अपेक्षित होता है। इस तथ्य को दावा करने वाले पक्ष द्वारा आवश्यक रूप से साबित करने का भार का निर्वहन किया जाना अपेक्षित होता है।
- किसी गोद की वैधता का केवल तकनीकी खामियों के आधार पर परीक्षण नहीं किया जाना चाहिए। जब तकनीकी खामी एवं सारभूत प्रश्न आमने-सामने हो तो न्याय निर्णयन करने हुए तकनीकी खामी को नजरअंदाज किया जाना अपेक्षित होता है।
- किसी प्रकरण में गोद को वैध साबित करने का कोई निश्चित पैमाना नहीं है। यह प्रकरण दर प्रकरण अलग-अलग हो सकता है तथा प्रकरण के तथ्यों पर आधारित होता है।

78. उपरोक्त प्रकार से हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 के तहत गोद के संबंध में प्रभावी प्रावधानों व माननीय न्यायालयों द्वारा उक्त प्रावधानों की व्याख्या को समझने के पश्चात कानूनी संकल्पना के साथ अब प्रकरण का प्रस्तुत तथ्यों के संदर्भ में अनुतोषवार विश्लेषण अपेक्षित है। इस श्रृंखला में सर्वप्रथम प्रथम अनुतोष पर विवेचन किया जाना अपेक्षित है।

79. इस प्रकार पत्रावली पर प्रथम अनुतोष को साबित करने का भार वादी के उपर है। प्रकरण में प्रदर्श-04 नामान्तरकरण संख्या 101 फैसल दिनांक 20.05.1973 के अवलोकन से ज्ञात होता है कि पुरा वल्द गुणेशा की मृत्यु लगभग जनवरी 1973 में हो गई थी। मृतक खातेदार पुरा वल्द गुणेशा की विरासत का नामान्तरकरण संख्या 101 फैसल दिनांक 20.05.1973 दर्ज किया गया। प्रकरण में प्रदर्श-05 पंजीबद्ध गोदनामा 09.09.2004 के अवलोकन से ज्ञात होता है कि हमीरा वल्द पुरा को करीब 15.07.1984 को माना वल्द गुणेशा द्वारा गोद ले लिया गया था। परंतु गोदनामा 09.09.2004 को पंजीबद्ध कर निष्पादित करवाया गया।

80. प्रकरण में हमीरा वल्द पुरा को दिनांक 15.07.1984 को माना वल्द गुणेशा द्वारा गोद लिया गया था। इस गोद की रस्म भी उसी समय पूरी कर ली गई थी। तत्पश्चात् दिनांक 09.09.2004 को गोदनामा पंजीबद्ध करवाया गया। यहां उल्लेखनीय है कि हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-16 के तहत पंजीबद्ध गोदनामा की वैधता माने जाने के प्रावधान है। उक्त गोदनामा को किसी प्रकार से प्रकरण में चुनौती नहीं दी गई है। इस प्रकार हमीरा वल्द पुरा को माना वल्द गुणेशा के द्वारा गोद लिया जाना वैध प्रतीत होता है।

81. अब प्रकरण में प्रकरण का अवलोकन करने पर प्रतीत होता है कि प्रथम अनुतोष सारतः हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 से संबंधित है। प्रकरण में विश्लेषण से पूर्व हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की

धारा-12 का अवलोकन किया जाना उचित प्रतीत होता है। प्रकरण में हिन्दू दत्तक एवं भरण पोषण अधिनियम-1956 की धारा-12 का उद्धरण निम्न प्रकार है:-

**12.Effects of adoption.**—*An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:*

*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.*

82. उक्त प्रावधान के अवलोकन से ज्ञात होता है कि अगर किसी दत्तक पुत्र अपने दत्तक ग्रहण से पूर्व कोई संपत्ति का धारण करता है तो उस दत्तक पुत्र की वह पूर्व से धारित संपत्ति दत्तक ग्रहण किये जाने के बाद भी उस दत्तक पुत्र की संपत्ति माने जाने के प्रावधान है। प्रकरण में प्रदर्श-04 नामान्तरकरण संख्या 101 फैसल दिनांक 20.05.1973 के अवलोकन से ज्ञात होता है कि पुरा वल्द गुणेशा की मृत्यु लगभग जनवरी 1973 में हो गई थी। मृतक खातेदार पुरा वल्द गुणेशा की विरासत का नामान्तरकरण संख्या 101 फैसल दिनांक 20.05.1973 दर्ज किया गया। इस प्रकार पुरा वल्द गुणेशा की विरासत का नामान्तरकरण संख्या 101 फैसल दिनांक 20.05.1973 दर्ज कर विरासत में भादा, हमीरा व मला के नाम संपत्ति दर्ज की गई। इस प्रकार स्पष्ट है कि पुरा वल्द गुणेशा की विरासत में हमीरा वल्द पुरा को संपत्ति 20.05.1973 को प्राप्त हो गई थी। तत्पश्चात् प्रदर्श-05 पंजीबद्ध गोदनामा 09.09.2004 के अवलोकन से ज्ञात होता है कि हमीरा वल्द पुरा को करीब 15.07.1984 को माना वल्द गुणेशा द्वारा गोद ले लिया गया था। परंतु गोदनामा 09.09.2004 को पंजीबद्ध कर निष्पादित करवाया गया। इस प्रकार प्रकरण में पुरा वल्द गुणेशा की संपत्ति की विरासत हमीरा वल्द पुरा के दत्तक ग्रहण से पूर्व ही दर्ज हो चुकी थी। इस प्रकार हमीरा को पुरा की विरासत में 4/45 हिस्से की संपत्ति दत्तक ग्रहण दिवस से पूर्व ही प्राप्त हो चुकी थी। इस प्रकार हमीरा के दत्तक ग्रहण दिवस पर हमीरा को पुरा वल्द गुणेशा की संपत्ति में से 4/45 हिस्सा तथा दत्तक पिता माना वल्द गुणेशा की संपत्ति में माना वल्द गुणेशा की मृत्यु दिनांक 07.11.2016 के विरासत के नामान्तरकरण के द्वारा 4/15 हिस्सा कुल 16/45 हिस्सा प्राप्त हुआ। इस प्रकार हमीरा दत्तक पुत्र माना का कुल संपत्ति में 16/45 हिस्सा होना विधिसंगत व उचित प्रतीत होता है।

83. प्रकरण में हमीरा दत्तक पुत्र माना भी लाओलाद दिनांक 03.12.2016 को फौत हो गया। इस प्रकार हमीरा दत्तक पुत्र माना की विरासत नामान्तरकरण संख्या 1296 दिनांक 19.12.2016 मौजा लूणवा जागीर द्वारा दर्ज की गई है। प्रकरण में वादी का अभिकथन है कि हमीरा दत्तक पुत्र माना द्वारा भाना पुत्र भादा को गोद लिया गया

था। उक्त गोद के संबंध में वादी द्वारा प्रदर्श-06 रावजी की बही प्रस्तुत की है। उक्त प्रदर्श के अवलोकन से ज्ञात होता है कि भाना वल्द भादा को हमीरा दत्तक पुत्र माना द्वारा संवत् 2067 में गोद ले लिया था। प्रथम दृष्टया उक्त प्रमाण के आधार पर भाना वल्द भादा को हमीरा दत्तक पुत्र माना द्वारा गोद लेना मानना उचित प्रतीत होता है।

84. अब प्रकरण में वादी द्वारा अभिकथन किया गया है कि कुल संपत्ति में भादा वल्द पुरा का 4/45 हिस्सा निहित था। तत्पश्चात कुल संपत्ति में भादा वल्द पुरा का 4/45 हिस्सा में से भादा की फौत के पश्चात विरासत में भाना पुत्र भादा को अन्य वारिसों के साथ 1/45 हिस्सा प्राप्त हुआ। उक्त 1/45 हिस्से को प्राप्त करने के पश्चात भाना पुत्र भादा को हमीरा दत्तक पुत्र माना द्वारा गोद ग्रहण किया गया। इस प्रकार भाना दत्तक पुत्र हमीरा को अपने जैविक पिता से 1/45 हिस्सा तथा दत्तक पिता से 16/45 हिस्सा कुल संपत्ति में प्राप्त हुआ। इस प्रकार भाना दत्तक पुत्र हमीरा को कुल संपत्ति में 17/45 हिस्से का खातेदार घोषित किया जाए।

85. प्रकरण में वादी द्वारा भाना दत्तक पुत्र हमीरा को अपने जैविक पिता से 1/45 हिस्सा तथा दत्तक पिता से 16/45 हिस्सा सहित कुल संपत्ति में 17/45 हिस्से का खातेदार घोषित किये जाने का अभिवचन किया गया है। यह साबित करने का भार वादी पर है। प्रकरण में सर्वप्रथम यह देखा जाना है कि भादा पुत्र पुरा की विरासत भाना पुत्र भादा को कब दर्ज हुई? साथ ही यह भी देखा जाना है कि भाना पुत्र भादा को हमीरा दत्तक पुत्र माना द्वारा कब गोद लिया गया। अगर भाना पुत्र भादा को हमीरा दत्तक पुत्र माना द्वारा पुरा की मृत्यु के पश्चात गोद लिया गया हो तो उस स्थिति में भाना दत्तक पुत्र हमीरा को भादा पुत्र पुरा की संपत्ति में हिस्सा प्राप्त होगा। परंतु अगर भाना पुत्र भादा को हमीरा दत्तक पुत्र माना द्वारा पुरा की मृत्यु से पूर्व गोद लिया गया हो तो उस स्थिति में भाना दत्तक पुत्र हमीरा को भादा पुत्र पुरा की संपत्ति में हिस्सा प्राप्त नहीं होगा। यहां यह भी देखा जाना है कि भादा पुत्र पुरा की संपत्ति उसके पुत्रों क्रमशः भगा, बाबू, भाना व पत्नी केसी की सहदायिकी संपत्ति रही या सभी वारिसों की पृथक्-पृथक् संपत्ति रही। अगर भादा पुत्र पुरा की संपत्ति उसके पुत्रों क्रमशः भगा, बाबू, भाना व पत्नी केसी की सहदायिकी संपत्ति रही हो तो भाना दत्तक पुत्र हमीरा को अपने जैविक पिता की संपत्ति में कोई अधिकार प्राप्त नहीं होगा। परंतु अगर भादा पुत्र पुरा की संपत्ति उसके पुत्रों क्रमशः भगा, बाबू, भाना व पत्नी केसी की पृथक्-पृथक् संपत्ति रही हो तो भाना दत्तक पुत्र हमीरा को अपने जैविक पिता की संपत्ति में नियमानुसार अधिकार प्राप्त होगा।

86. प्रकरण में अग्रिम विश्लेषण से पूर्व सिविल मामलों में संबंधित पक्षों के दावे व खण्डन के संबंध में साबित करने के भार के संबंध में कानूनी स्थिति का अवलोकन किया जाना अपेक्षित है। इस संबंध में भारतीय साक्ष्य अधिनियम-2023 के प्रासंगिक प्रावधानों का विश्लेषण किया जाना अपेक्षित है। इस प्रकार भारतीय साक्ष्य अधिनियम-2023 के प्रासंगिक प्रावधानों का उद्धरण निम्न प्रकार है-

### OF THE BURDEN OF PROOF

**104. Burden of proof.**—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

**105. On whom burden of proof lies.**—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore, the burden of proof is on A.

(b) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore, the burden of proof is on B.

**106. Burden of proof as to particular fact.**—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission. B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

**107. Burden of proving fact to be proved to make evidence admissible.**—The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

87. इस संबंध में माननीय उच्चतम न्यायालय द्वारा सिविल अपील संख्या 2413/2006 उनवान में निर्णय दिनांक 02.05.2006 में साक्ष्य अधिनियम-1887 के प्रासंगिक

प्रावधानों की विवेचना करते हुए किसी दावे में साबित करने के भार के बारे में विस्तृत विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किया है। उक्त न्यायिक दृष्टांत के प्रासंगिक विवेचन का उद्धरण निम्न प्रकार है—

The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:-

"Sec. 101. Burden of proof.- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto.....

Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

xxx

There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr., the law is stated in the following terms :

"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma there is an essential distinction between burden of proof and onus of proof:

burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

88. प्रकरण में भारतीय साक्ष्य अधिनियम-2023 के प्रासंगिक प्रावधानों तथा उक्त न्यायिक दृष्टांत का अवलोकन करने पर कानूनी स्थिति स्पष्ट होती है कि जहां आपराधिक प्रकरणों में निर्णयन संदेहरहित प्रमाणन के आधार पर किया जाता है। वही सिविल प्रकृति के मामलों में संभावनाओं की प्रबलता/प्रधानता के आधार पर निर्णयन किया जाता है। साथ ही यह भी कानूनी स्थिति है कि दावे के अभिवचन साक्ष्य नहीं होते हैं। दावाकर्त्ता व्यक्ति को अपने दावे के समर्थन में पृथक से साक्ष्य प्रस्तुत करते हुए अपने दावे के तथ्य को साबित करने का दायित्व होता है।
89. इसके साथ ही यह भी कानूनी स्थिति स्पष्ट होती है कि सबूत का भार तथा प्रमाण का भार में अंतर है। किसी सिविल दावे में सबूत का भार प्रमुखतः वादी पर होता है। सबूत का भार स्थानांतरित नहीं होता है। जबकि प्रमाण का भार स्थानांतरित होता है। किसी सिविल दावे में किसी तथ्य को साबित करने का भार उस तथ्य के आधार पर दावा करने वाले व्यक्ति पर होता है। जब किसी तथ्य को किसी व्यक्ति द्वारा प्रमाण का भार पूर्ण करते हुए साबित करने का दायित्व पूर्ण किया जाता है तो प्रमाण का भार प्रतिद्वंदी पर आ जाता है। अब प्रतिद्वंदी को उक्त तथ्य विशेष के खण्डन हेतु साबित करने का भार होने के कारण अगर प्रमाण प्रस्तुत करते हुए प्रमाणन का भार पूर्ण किया जाता है तो प्रमाण का भार वापस स्थानांतरित हो जाता है। इस प्रकार प्रमाण का भार स्थानांतरित होता रहता है। यह एक अनवरत प्रक्रिया है। जो व्यक्ति प्रमाणन का भार का दायित्व पूर्ण करने में असफल रहता है उसके विरुद्ध उक्त तथ्य को साबित माना जाता है।
90. प्रकरण में वादी द्वारा यह स्पष्ट नहीं किया है कि भादा पुत्र पुरा की विरासत भाना वल्द भादा को हमीरा दत्तक पुत्र माना के द्वारा दत्तक ग्रहण किये जाने से पूर्व दर्ज हो गई थी। वादी ने इस संबंध में केवल वाद पत्र में अभिवचन किए हैं परन्तु उक्त अभिवचनों को साबित करने हेतु कोई दस्तावेजी साक्ष्य यथा भादा पुत्र पुरा का मृत्यु प्रमाण पत्र या नामांतरण आदि के साथ ही कोई मौखिक साक्ष्य प्रस्तुत नहीं किया है। इस संबंध में वादी के उपर आरोपित प्रमाणन का भार को निर्वहन करने में वादी असफल रहे हैं। इससे प्रमाणन का भार वापस प्रतिवादी के उपर स्थानांतरित नहीं होता है। इस कारण वादी अपने इस तथ्य को साबित करने में असफल रहे हैं। इस आधार पर भाना दत्तक पुत्र हमीरा को केवल हमीरा दत्तक पुत्र माना की संपत्ति पर ही अधिकार निहित होता है तथा भादा पुत्र पुरा की संपत्ति में कोई अधिकार निहित नहीं होना न्यायसंगत प्रतीत होता है। साथ ही यहां यह भी उल्लेखनीय है कि अभी तक भादा पुत्र पुरा की विरासत के पश्चात ही वारिसों के मध्य संपत्ति का विभाजन नहीं हुआ है। यह अभिवचन मुतनाजा आराजी के हाल राजस्व रिकॉर्ड में सभी वारिसों के एक ही खाते में सहखातेदार होने से भी प्रमाणित होता है। इस प्रकार स्पष्ट होता है कि भादा पुत्र पुरा की संपत्ति उसके पुत्रों क्रमशः भगा, बाबू, भाना व पत्नी केसी की सहदायिकी संपत्ति रही है। इस प्रकार भाना दत्तक पुत्र हमीरा को अपने जैविक पिता की संपत्ति में कोई अधिकार निहित नहीं होना न्यायसंगत प्रतीत होता है। इस आधार पर भाना दत्तक पुत्र हमीरा का अपने दत्तक पिता की संपत्ति के साथ-साथ जैविक पिता की संपत्ति में भी विरासत के द्वारा हिस्सा प्राप्त किया जाना विधिसंगत प्रतीत नहीं होता है। इस

प्रकार वादी केवल अपने दत्तक पिता हमीरा दत्तक पुत्र माना का कुल संपत्ति में 16/45 हिस्से का अधिकारी प्रतीत होता है। इस प्रकार इस अनुतोष का निर्णयन किया जाता है।

91. प्रकरण में अब वादी के द्वितीय अनुतोष का विवेचन अपेक्षित है। उक्त के द्वितीय अनुतोष स्थाई निषेधाज्ञा से संबंधित है। उक्त स्थाई निषेधाज्ञा से संबंधित द्वितीय अनुतोष विवेचन हेतु तथ्यों का गहन विश्लेषण से पूर्व राजस्थान काश्तकारी अधिनियम-1955 की धारा-188 का उद्धरण यहाँ प्रतीत होता है। जो कि निम्न प्रकार है:-

**188. Injunction against wrongful ejection—**

(1) Any tenant whose right to or enjoyment of the whole or a part of his holding is invaded or threatened to be invaded by his landholder or any other person may bring a suit for the grant of a perpetual injunction.

(2) The court may after making the necessary enquiry grant a perpetual injunction in the following cases, namely-

(a) if there exist no standard for ascertaining the actual damage caused or likely to be caused by the invasion;

(b) if the invasion is such that pecuniary compensation does not afford adequate relief;

(c) where it is probable that pecuniary compensation cannot be got for the invasion.

(d) where the injunction is necessary to prevent a multiplicity of proceedings.

92. उक्त राजस्थान काश्तकारी अधिनियम-1955 की धारा-188 के अवलोकन से स्पष्ट है कि धारा-188 के अन्तर्गत किसी खातेदारी आराजी पर खातेदारी अधिकारी की आमदरफत में किसी प्रकार का व्यवधान/अतिक्रमण किया जा रहा हो/किया जाने वाला हो उस स्थिति में व्यवधान उत्पन्न/अतिक्रमण करने वाले व्यक्ति को स्थाई निषेधाज्ञा से पाबंद किए जाने के प्रावधान बनाए गए हैं। राजस्थान काश्तकारी अधिनियम-1955 की धारा-188 की उपधारा-2 में स्थाई निषेधाज्ञा जारी किए जाने हेतु निम्न चार परिस्थितियां बताई गई हैं:-

परिस्थिति	विवरण
1.	जब हो रहे/होने वाले संभावित अतिक्रमण/व्यवधान/घुसपैठ से होने वाले नुकसान के आंकलन हेतु कोई मानक/मापदण्ड अस्तित्व में नहीं हो।
2.	जब अतिक्रमण/व्यवधान/घुसपैठ इस प्रकार का हो कि नुकसान की आर्थिक भरपाई/क्षतिपूर्ति पर्याप्त राहत/संतुष्टि प्रदान नहीं करता हो।
3.	जब इस तथ्य की संभावना हो कि अतिक्रमण/व्यवधान/घुसपैठ से होने वाले नुकसान की आर्थिक भरपाई/क्षतिपूर्ति की प्रदानगी संभव नहीं होगी।
4.	जब निषेधाज्ञा राजस्व विवादों की बहुलता को रोकने हेतु आवश्यक हो।

93. उक्त विधिक प्रावधानों के परिप्रेक्ष्य में प्रकरण का विश्लेषण किया जाना आवश्यक है। प्रकरण में वादी का अनुतोष संख्या 01 स्वीकार होने के पश्चात् मुतनाजा

आराजी पर वादी का संयुक्त काश्तकार घोषित होने के आधार पर वादी की संयुक्त खातेदारी होना पूर्ण रूप से साबित होती है। अतः मुतनाजा आराजी पर मुताबिक हिस्सा वादी का संयुक्त स्वामित्व अविवादित है। परंतु राजस्व रिकॉर्ड में संयुक्त खातेदारी होने से वादी के किसी निश्चित भू-भाग पर बिना विधिक विभाजन करवाये कब्जे के बारे में कथन किया जाना कानूनन अनुचित है। इस कारण मुतनाजा आराजी पर वादी की संयुक्त खातेदारी आराजी होने के कारण वादी के किसी निश्चित भू-भाग पर बिना विधिक विभाजन करवाये कब्जे के बारे में संशय होने के कारण सुविधा व न्याय का संतुलन वादी के पक्ष में होना स्पष्ट नहीं है। अंत में प्रार्थी को अपूरणीय क्षति साबित करने से पूर्व संयुक्त आराजी का विधिक विभाजन करवाया जाना अपरिहार्य शर्त है। इस प्रकार अन्त में उपरोक्त विवेचन से स्पष्ट है कि वादीगण द्वितीय अनुतोष प्रतिवादीगण के विरुद्ध संयुक्त आराजी का विधिक विभाजन करवाये बिना स्थाई निषेधाज्ञा प्राप्त करने के अधिकारी नहीं है।

94. अंत में उपरोक्त विश्लेषण अनुसार न्यायालय अपने विनम्र मत में हमीरा दत्तक पुत्र माना को मुतनाजा आराजी में 16/45 हिस्से का खातेदार मानते हुए तथा भान पुत्र भादा का अपने जैविक पिता भादा की सहदायिकी व अविभाजित संपत्ति में कोई हिस्सा नहीं पाते हुए केवल अपने दत्तक पिता हमीरा के 16/45 हिस्से का खातेदारी अधिकार निहित होना पाता है। इसी आधार पर न्यायालय भाना दत्तक पुत्र हमीरा के मुतनाजा आराजी में पूर्व से निहित अधिकारों की घोषणा करना उचित पाता है। साथ ही न्यायालय वादी के मुतनाजा आराजी में संयुक्त खातेदार होने तथा बिना विभाजन करवाए स्थाई निषेधाज्ञा का अधिकारी नहीं पाता है। अतः

आदेश है कि

वादी का दावा बाबत इस्तक्करारहक स्वीकार किया जाकर आंशिक डिक्री किया जाता है। वादी को मुतनाजा आराजी में 16/45 हिस्से का खातेदार घोषित करते हुए मुताबिक घोषणा राजस्व इन्द्राज दुरुस्त करवाने का अधिकारी घोषित किया जाता है।

निर्णय की पृथक से पर्चा डिक्री तैयार की जाये।

आज 30.03.2026 को यह निर्णय मेरे द्वारा खुले न्यायालय में सुनाया जाकर हस्ताक्षर एवं मोहर युक्त जारी किया गया।

(केशव कुमार मीना आर.ए.एस)

सहायक कलक्टर

गुढामालानी



न्यायालय

## सहायक कलक्टर / उपखण्ड अधिकारी

गुडामालानी-बाड़मेर

(पीठासीन अधिकारी -केशव कुमार मीना आर.ए.एस.)

वाद संख्या:-2021 / 57

दर्ज तिथि:-24.02.2021

1. भानाराम गोदपुत्र हमीरा जाति कलबी निवासी लुणवा जागीर तहसील गुडामालानी जिला बाड़मेर।

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6. वीरमाराम पुत्र हाजा
7. रमेश कुमार पुत्र हाजा
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प्रतिवादी संख्या:-एकतरफा

राजस्व वाद अन्तर्गत धारा-88, 188  
राजस्थान काश्तकारी अधि0-1955

—:पर्चा डिक्री:—

वादी का दावा बाबत इस्तक्करारहक स्वीकार किया जाकर आंशिक डिक्री किया जाता है। वादी को मुतनाजा आराजी में 16/45 हिस्से का खातेदार घोषित करते हुए मुताबिक घोषणा राजस्व इन्द्राज दुरुस्त करवाने का अधिकारी घोषित किया जाता है।

यह पर्चा—डिक्री पालनार्थ हेतु तहसीलदार गुड़ामालानी को भिजवाई जावें। आदेश जारी हो। पक्षकारान अपना—अपना खर्चा स्वयं वहन करेंगे।

यह पर्चा—डिक्री आज दिनांक 30.03.2026 को मेरे द्वारा लिखवाई जाकर हस्ताक्षर एवं मुहर युक्त जारी की जाकर खुले न्यायालय में सुनाई गई।



(केशव कुमार मीना आर.ए.एस)  
सहायक कलक्टर  
गुढ़ामालानी