THE

MADRAS LAW JOURNAL.

II] NOVEMBER. [1950

DOCTRINE OF KINSMEN'S CONSENT AND ADOPTION IN UNDIVIDED FAMILIES.

The law of adoption has little textual authority behind it. In the beginning it was a sort of *terra incognita* through which the Privy Council had to feel its way. The law has, however, been steadily built up by Judicial decisions. Hindus regard adoption as spiritually necessary. A sonless man should adopt a boy for the sake of the funeral cake and the perpetuation of his line. A text of Manu states :

अपुत्रेणैव सुतः कार्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डादक क्रियाहेतोः नामसङ्कीर्त्तनाय च ॥

Adoption is always to the male. If the husband is dead, the wife can adopt to him as thereby she could confer spiritual benefit upon him. But her competency to adopt is limited. The limitation rests on a text of Vasishtha :

न तु स्त्री पुत्रं दद्यात् प्रतिग्रह्णीयाद्वान्यत्रानुज्ञानाद्भर्तुः ॥

—Nor let a woman give or accept a son unless with the assent of her lord. This rule has been accepted as binding by all schools of Hindu law though in regard to its precise import there has been considerable difference of opinion. The outside assent, in the felicitous language of Holloway, J., may well be not to supply " a capacity for rights but a capacity for action ". The need for the assent arose, presumably, from the state of tutelage postulated in regard to women. A text of Yajnavalkya states :

रक्षेत् कन्यां पिता, विन्नां पतिः पुत्रास्तु वार्धके ।
अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं क्वचित् स्त्रियाः ॥

It is true that there are texts which make no discrimination between the husband and wife in regard to the giving of a son in adoption.

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।
सदृशं प्रीतिसंयुक्तं सज्ञेयो दत्रिमः सुतः ॥

Sastraic texts are to be read harmoniously. The independence of the mother to give the son recognised in the last text has to be taken along with the text declaring

the general incapacity of women to do things and therefore as requiring authorisation by an independent male relation of the husband. The author of the Smriti Chandrika has so dealt with the matter. By parity of reasoning it would follow that even in the matter of receiving a son, independent male advice is necessary. It is to be noted that the text of Vasishtha treats giving and receiving on the same footing. In fact, in regard to the taking of a son in adoption, a statement in the Dattaka Mimamsa of Vidyaranyaswami, the author of the Madhaviyam, cited in the *Ramnad case*[1] declares : " In the same way the adoption of a son by a widow with the permission of the father, etc., cannot be censured in the Kali age". The reference is to the father of the husband obviously. It was not a far cry from that to argue that the reference to the father is only illustrative and in the absence of the father, the other kinsmen's permission should be taken. The sanction of the 'lord' prescribed by Vasishtha does not militate but fits in with the theory so evolved. It has thus become well-settled law, in Madras, that a Hindu widow not having her husband's permission, may, if duly authorised by his kindred, adopt a son to him, *Collector of Madura* v. *Mootoo Ramalinga Sethupathi*[2], *Sri Virada Pratapa Raghunada Deo* v. *Sri Brojo Kishore Patta Deo*[3], *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[4], *Krishnayya* v. *Laksmipathi*[5]. That the principle is also rooted in custom is suggested by an observation of Sir James Colvile made during the arguments of Mr. Leith, Q. C., in the *Guntur case*[4], that the husband's permission is supplied by the consent of the sapindas under " the custom of the Dravida country ".

It is equally well-settled law, that there is no residuary or inherent power in the widow to adopt if she does not have either her husband's authorisation or assent of his kinsmen. Apropos of this, in *Balasubrahmanya* v. *Subbayya Tevar*[6], Sir George Lowndes observed : " No assent of kinsmen is alleged, but in the plaint a somewhat novel point was taken that there being no agnates of Irudalaya in existence at the time of the adoption, whose assent could be sought, the lady had an inherent authority to adopt of her own volition. . . . Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates. . . . Their Lordships think moreover that it would be equally difficult for them to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas ". In *Vojjula* v. *Gopalkrishnamma*[7], it was held that the decisions of the Privy Council when fully examined entirely negative the proposition that there is residuary power in a widow to adopt when her husband's sapindas are all dead. In *Ramasubbayya* v. *Chenchuramayya*[8], Sir Madhavan Nair observed : " Being a woman, a widow is not independent and needs advice ".

As to who are the husband's kinsmen whose consent is needed for an adoption by his widow, Holloway, J., had in the *Ramnad case*[9] developed the thesis that the law of adoption as prevalent in Madras was a substitute for the old and obsolete practice of procreating a son on the wife of a sonless man by appointment, that the limitations therefore on the power to adopt are to be traced by analogy from that practice and that the argument from analogy was in favour of the assent of one sapinda being sufficient rather than more. Holloway, J., had repeated these views in the *Berhampore case*[10] as well. These views did not, however, commend themselves to the Judicial Committee. In the *Ramnad case*[9], Sir James Colvile observed :

---

1. (1868) 12 M.I.A. 397 (P.C.).
2. *Ibid.*
3. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69 (P.C.).
4. (1876) L.R. 4 I.A. 1 : I.L.R. 1 Mad. 174 (P.C.).
5. (1920) 39 M.L.J. 70 : L.R. 47 I.A. 99 : I.L.R. 43 Mad. 650 (P.C.).
6. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).
7. (1940) 1 M.L.J. 779.
8. (1947) 2 M.L.J. 39 : L.R. 74 I.A. 162 : I.L.R. (1948) Mad. 362 (P.C.).
9. (1864) 2 M.H.C.R. 231.
10. (1873) 7 M.H.C.R. 301.

" They think that positive authority affords a foundation for the doctrine (of consent of kinsmen as substitute for husband's authorisation) safer than any built upon speculation touching the natural development of the Hindu law, or upon analogies real or supposed between adoptions according to the dattaka form and the obsolete practice with which that form of adoption co-existed of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular, by the Dattaka Mimamsa of Vidyaranyaswami, the author of the Madhaviyam ; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention "[1]. In the *Berhampore case*, in reiterating these views Sir James Colvile added : " To these remarks of their predecessors their Lordships adhere ".[2]

The principle being premised that assent of kinsmen is needed to an adoption by a widow on account of the tutelage of women, it follows that it is only those on whom the law has cast the duty of protection that should be looked to for the necessary permission. Protection involves the right and duty to advise in spiritual as well as temporal matters. It may also carry with it in law an obligation to provide maintenance. The duty is founded mainly on relationship to the husband as a *gnati*. It might also arise as a consequence of accrual of property rights. If the husband's family was joint both factors, namely, relationship as well as the taking of the husband's interest by survivorship were present. If the husband had died as a separated member, the widow took the property as heir and there was no obligation cast on any of the husband's kinsmen to provide for her maintenance. In such a case, the role of advisership resulted from relationship merely. An adoption in the former case by the widow of a coparcener would defeat the present rights to property of the other coparceners and also relieve them of the liability to provide maintenance to the widow. In the latter case, no present rights would be affected but only future and shadowy rights. Having regard to these results it was considered but just that in the former case the permission of the person who took the benefit of survivorship to her husband's interest in the joint family property should be sought by the widow for an adoption by her. Emphasis was laid on the unity and team-spirit underlying the coparcenary and on the consequent necessity to consult the members of the team. It is true that no member can object to the adoption by the widow merely on the ground that to allow her to do so will extinguish his rights in the interest of her husband in joint family property which had survived to him. The reason for consulting him is, not because he must lose his rights but, that the spirit of the institution of coparcenary required that in a matter concerning that body its head or representative should assent. The validity of an adoption is to be determined by spiritual rather than temporal considerations and the substitution of a son to the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it, *Amarendra* v. *Sanatan Simgh*[3], *Ramasubbayya* v. *Chenchuramayya*[4]. This last case held that in determining whose assent should be taken by a Hindu widow for an adoption by her, the possession by one of interest in the property of her husband which is liable to be defeated by the adoption will not clothe him with a right to be consulted as against an agnate. For one thing, the proprietary interest with reference to which the observation was made was a reversionary interest only and not a present or concrete right in possession and enjoyment. Secondly, the observation does not mean that property interest is to be ignored altogether. It only states that agnatic relationship is the paramount or dominating factor and a cognate will

---

1. (1868) 12 M.I.A. 397, 441 (P.C.).
2. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69, 80 (P.C.).
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
4. (1947) 2 M.L.J. 39 : L.R. 74 I.A. 162 : I.L.R. (1948) Mad. 362 (P.C.).

not acquire a right to be consulted merely because he is the nearest reversioner. The decision of the Madras Full Bench in *Seshamma* v. *Narasimha Rao*[1] was approved without reservation by the Privy Council and the Full Bench had held that in the absence of agnates the consent of cognates may be taken. Anyway, in a joint family, the person in whom the husband's interest vests by survivorship is always an agnate. And his interest is not a *spes successionis* either. As pointed out by the Judicial Committee itself: "It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect of adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property. . . . subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property[2]". See also *Veerabasavaraju* v. *Balasurya Prasada Rao*[3].

Although the reason for adoption whether in an undivided or divided family is the same, namely, the spiritual benefit of the deceased husband, yet, from early times, in regard to the kinsmen whose consent would be necessary, the Privy Council has maintained a distinction between a case of joint family and a case of divided family. That this is so becomes clear from the statement of Sir James Colvile in the *Berhampore Case*[4]: "There exists a broad distinction between cases in which the deceased husband was a member of a joint and undivided Hindu family and those, in which, he being separated, the widow has taken his estate by right of inheritance." In *Ramasubbayya* v. *Chenchuramayya*[5], Sir Madhavan Nair observed: "According to the Madras School of Hindu law, a widow may adopt, in the absence of authority from her husband, (i) if she obtains the consent of his sapindas where the husband was separate at the time of his death, and (ii) where he was joint, if she obtains the consent of his undivided coparceners."

The persons to be consulted are different therefore as stated above. In the *Ramnad case*[6], in developing the point, it was observed: "Where the husband's family is in the normal condition of a Hindu family—*i.e.*, undivided—that question is of comparatively easy solution. In such a case, the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers who in default of adoption, would take the husband's share would probably be required since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt, when not actually given by the husband, can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty as understood by Hindus. Their Lordships do not think there is any ground for saying, that the consent of every kinsmen, however remote is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would

---

1. (1940) 1 M.L.J. 400 : I.L.R. (1940) Mad. 454 (F.B.).
2. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69, 83 (P.C.).
3. (1918) 36 M.L.J. 40 : L.R. 43 I.A. 265 : I.L.R. 41 Mad. 998 (P.C.).
4. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69, 78-79 (P.C.).
5. (1947) 2 M.L.J. 39 : L.R. 74 I.A. 162 : I.L.R. (1948) Mad. 362 (P.C.).
6. (1868) 12 M.I.A. 397 (P.C.).

be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and venerable protector of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case, must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of the kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." The statement shows : (i) consent is needed by reason of women's incapacity for independence, (ii) the persons whose consent is needed would depend upon whether the family is joint or not, (iii) in both cases the father's sole assent would suffice, and (iv) in other cases, if the family is joint the consent of coparceners should be sought ; if the family is divided there should be a sufficiency of assent and no hard and fast rule could be laid down.

The principles governing consent in joint families have been particularly dealt with in subsequent decisions. In what has come to be known as the *Travancore case*[1], the Sadr Court of Travancore adopting the principles formulated in the *Ramnad case*[2], by the Privy Council, held that in a joint family, the assent of divided agnates of the husband cannot validate an adoption by a widow to which her husband's undivided brother and head of the family had withheld his assent. In the *Berhampore case*[3], a widow had a power of adoption conferred on her by her husband. She had also secured the assent of a divided kinsman of the husband. She had not, however, obtained the consent of a nearer and undivided kinsman of the husband. The husband's authorisation being found to be genuine, the adoption was held to be valid. Though it was not necessary for the disposal of the appeal, the Judicial Committee proceeded to examine the principles applicable to adoptions with consent of kinsmen in joint families. Sir James Colvile laid down : " If it were necessary, which in this case it is not, their Lordships would be unwilling to dissent from the principles recognised in the *Travancore case*[1], *viz.*, that *the requisite authority is, in the case of an undivided family, to be sought within that family*. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint, not only in estate, but in food and worship ; therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by their members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family, that, as widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she *must* presumably find such councillors and protectors *as the law makes requisite for her*. There seem to be strong reasons against the conclusions that for such a purpose as that now under consideration she cannot at her will travel out of that undivided family and obtain the authorisation required from a separated and remote kinsman of the husband " (italics ours). The decision brings out : (i) In a joint family the consent should be procured from within the family, (ii) this is a rule of law and not a matter of volition with the widow, (iii) the reason for the rule is the corporate character of the joint family and commensality of interest of the members, requiring that whatever affects such commensality should be regulated by the members of that body ; (iv) if there is a manager, his consent would suffice, and (v) lack of consent of coparceners cannot be made up by consent of kinsmen outside the coparcenary. Reviewing the law laid down in the *Ramnad case*[2], in regard to consent to adoption in joint families, Mr. Ameer Ali referred to it in *Veerabasavaraju* v. *Balasurya Prasada Rao*[4], as stating :

---

1. (1873) 8 Mad. Jur. 58.
2. (1868) 12 M.I.A. 397 (P.C.).
3. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69, 81 (P.C.).
4. (1918) 36 M.L.J. 40 : L.R. 45 I.A. 265 : I.L.R. 41 Mad. 998, 1009 (P.C.).

" That the requisite authority in the case of an undivided family is to be sought by the widow within that family ; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her ; and that she cannot at her will travel out of that undivided family and obtain the authorisation required from separate and remote kinsmen of the husband." Referring to the rules established by these cases, in *Bhimabai* v. *Gurunathgowda*[1], Sir Dinshaw Mulla stated : " The Board held that the consent to be obtained when the family was undivided must be the consent, not of a separated kinsman who has no interest in the property but of his (the husband's) coparceners to whom his interest had passed on his death by survivorship." The application of the rule has given rise to complex problems. In *Chellathammal* v. *Kalitheertha Pillai*[2] the only coparcener was a lunatic and the widow adopted with the consent of divided kinsmen. Disagreeing with the opinion of Somayya, J., it was held by Sir Lionel Leach, C.J., and Krishnaswami Aiyangar, J., that the adoption was valid. The learned Chief Justice referring to the observation of Sir James Colvile in the *Berhampore case*[3]—" there seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family, and obtain the authorisation required from a separated and remote kinsman of her husband "—treated it as a direct authority only for the proposition that a widow cannot ignore an undivided sapinda and held : " it does not decide whether she can seek the consent of the divided kinsmen when there is an undivided sapinda alive but so mentally afflicted as to be incapable of adivising her." In *Sundararama Rao* v. *Satyanarayanamurti*[4], it has been held by Satyanarayana Rao and Viswanatha Sastri, JJ., that where the only undivided coparcener of the husband, whose consent was sought in the first instance, withholds his consent wrongfully, a widow can make a valid adoption with the consent of a divided sapinda. The following seem to be the reasons that underlie the conclusion : (i) the observations in the *Berhampore case*[3] are only *obiter* and do not preclude further examination, (ii) the *Berhampore case*[3] at best only prohibits the widow from travelling outside the family at her will and does not cover a case where she is compelled to so travel by reason of the only coparcener improperly declining to give assent, (iii) it is no longer right that effect of adoption on property rights should be regarded as in any measure a guide or pointer to the person whose consent should be sought, (iv) if the undivided coparceners from purely secular motives refuse to assent there would be no means of saving the soul of the deceased, (v) the rigour of the law relating to consent to adoption where the husband had died separated has been considerably modified by the Privy Council itself and there is no valid reason why it should not be similarly modified regarding undivided families and the rules laid down in the *Adusumilli case*[5], applied equally to consent to adoption in joint families, and (vi) the literal application of the rule suggested in the *Ramnad case*[6] with reference to undivided families would lead to many difficulties in practice and to anomalous results. The reasons are weighty but do not seem to be free from objection. The first of the points loses force in view of the specific statement of Sir James Colvile in the *Berhampore case*[3] : " Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decision in the *Ramnad case*[6] had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras." Similarly, at another place[7], Sir James Colvile observed : " The great importance, however, of the subject induces them to make

---

1. (1932) 64 M.L.J. 34 : L.R. 60 I.A. 25 : I.L.R. 57 Bom. 157 (P.C.).
2. (1942) 2 M.L.J. 206 : I.L.R. (1943) Mad. 107.
3. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69, 83 (P.C.).
4. (1949) 2 M.L.J. 199.
5. (1920) 39 M.L.J. 70 : L.R. 47 I.A. 99 : I.L.R. 43 Mad. 650 (P.C.).
6. (1868) 12 M.I.A. 397 (P.C.).
7. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69, (78).

some observations upon it." These remarks preclude the treatment of the dicta in the *Berhampore case*[1], as mere *obiter*. The second of the reasons suggested, that what the *Berhampore case*[1] has stated is only that the widow cannot ignore the undivided kinsmen but does not prohibit her from adopting with the consent of a divided sapinda where the coparcener unreasonably refuses assent, does not allow sufficiently for the fact that the rule as to consent is spoken of as "what *the law* makes requisite" as distinguished from what *her volition* may suggest. The observation of Sir Dinshaw Mulla in *Bhimabai's case*[2], fully recognises that the rule that the consent in the case of a joint family should be sought within the limits of the joint family itself really defining of the boundary, a demarcation of the frontier which cannot be crossed. The third of the reasons gatherable in *Sundararama Rao* v. *Satyanarayanamurthi*[3] has nowhere been so stated in any of the Privy Council decisions and at any rate that the repercussion of adoption on vested coparcenary rights is not to be ignored altogether is apparent from the antithesis drawn by Sir Dinshaw Mulla in *Bhimabai's case*[2] between "a separated kinsman who has no interest in the property" and "the coparcener to whom his (the husband's interest has passed by survivorship". The fourth reason, if valid, would produce unreasonable results. It is asked: If the undivided coparcencer unreasonably withholds consent how is the soul of the deceased to be saved? On the same reasoning, in a divided family if the only agnate refuses consent can the widow adopt? The latter course has been held impossible because the consent of some sapinda is needed for the act. In the case of divided families the rule as to consent was that it was to be obtained from within the ranks of sapindas; in the case of a joint family from within the circle of copaceners. If in the former case, refusal by the only sapinda cannot be cured, in the latter case refusal by the only coparcener cannot be made good. The fifth reason, that as the rule relating to consent in divided families has been modified in course of time should be equally permissible for modifications being made in the rule as to consent to adoption in joint families, is inadmissible in view of the express statement in the *Ramnad case*[4] that to formulate a rule as to consent to adoption in divided families is fraught with difficulties; that where there was no father of the husband alive, it is not easy to lay down an inflexible rule; that every case must depend on the circumstances of the family; and all that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the adoption is made by the widow in the proper and *bona fide* performance, of a religious duty. The position was deliberately left in a fluid condition so that the law could be moulded from time to time to meet fresh facts. No similar elasticity is to be found in regard to the rule relating to adoption in joint families. The *Berhampore case*[1] recognised the decision in the *Travancore case*[5] as a correct elucidation and application of the principles set out in the *Ramnad case*[4]. The facts in the *Travancore case*[5] were more or less the same as the facts in *Sundararama Rao* v. *Satyanarayanamurti*[3]. And it was held that the want of assent of the undivided coparcener cannot be replaced. The last of the reasons found in *Sundararama Rao's case*[3] would really afford good ground for seeking modification of the law through legislation, particularly in view of Sir James Colvile's observation in the *Berhampore case*[1] that the rules as to consent are founded on custom. In fact, Viswanatha Sastri, J., has observed: "It is remarkable that even after nearly a century of exposition of the principles of Hindu law relating to adoption by the High Courts and the Judicial Committee, questions of such frequent recurrence as those involved in this appeal, still remain the subject of debate. This case demonstrates the need for an immediate codification of this branch of the Hindu law and the avoidance of protracted and expensive litigation which has often followed adoptions."

---

1. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69, 83 (P.C.).
2. (1932) 64 M.L.J. 34: L.R. 60 I.A. 25: I.L.R. 57 Bom. 157 (P.C.).
3. (1949) 2 M.L.J. 199.
4. (1868) 12 M.I.A. 397 (P.C.).
5. (1874) 8 Mad. Jur. 58.