
(2014) 08 AP CK 0141

In the Andhra Pradesh High Court

Case No : Appeal Suit No. 946 of 1995

Maremmahalli Nariyappa and Others

APPELLANT

Vs

Kadirempalli Thippaiah and Others

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Evidence Act, 1872 — Section 68, 68, 69, 70

Hindu Adoptions and Maintenance Act, 1956 — Section 10, 10(iv), 11, 12, 16

Succession Act, 1925 — Section 63

Citation : (2015) 2 ALT 157

Hon'ble Judges : M. Satyanarayana Murthy, J

Bench : Single Bench

Advocate : Badana Bhaskara Rao, Counsel, Advocates for the Appellant; A. Prabhakar Sarma, Counsel, Advocates for the Respondent

Judgement

M. Satyanarayana Murthy, J.—The unsuccessful plaintiffs in O.S. No. 10 of 1982 preferred this appeal against the impugned decree and judgment passed by the Additional Subordinate Judge's Court, Anantapur, dated 31.01.1995. The appellants were the plaintiffs and the respondents were the defendants and they will hereinafter be referred to as plaintiffs and defendants for convenience.

2. The plaintiffs filed suit for partition of schedule property into two shares and allot one such share to them and for rendering true and correct account of income from the plaint "A" and "B" schedule property alleging that Rudrappa and Somalingappa are the sons of Thippaiah who died more than 60 years ago. The property described in the schedule annexed to the plaint is the ancestral undivided Hindu joint family property. Plaintiff No. 1 is the wife of Somalingappa, plaintiff No. 2 is the son-in-law of 1st plaintiff and Somalingappa, and plaintiff Nos. 3 to 5 are the children of the 2nd plaintiff and his wife Rudramma, daughter of the 1st plaintiff and Somalingappa. Consequent on death of Rudramma, plaintiff Nos. 2 to 5 succeeded her estate.

3. After death of Thippaiah, Rudrappa being the elder member used to manage

the affairs of the joint family, whereas Somalingappa, who was a man of weak intellect and not worldly wise, was always a tool in the hands of Rudrappa. After death of Rudrappa, his son the 1st defendant took over the joint family affairs and managing the property of Rudrappa and Somalingappa. Somalingappa died while continuing as a member of joint family, and upon his death, his share devolved upon the plaintiffs, thereby they are entitled to claim share in the property. After his death, the plaintiffs demanded the defendants for payment of their due share of profits from the property, but they refused to pay any amount towards share of profits from the joint family property to the plaintiffs. The 1st defendant, who is a man of scheming brain and highly intelligent, appears to have brought into existence certain deeds and documents, which are not legally valid and never acted upon. Despite the evil designs of the 1st defendant, the property continued to remain joint.

4. The income from the property is more than Rs. 25,000/- per annum and the Kanuga trees yield more than 2000 head-loads of green manure which is valuable, and the total income per annum would be around Rs. 50,000/- from the entire property. But the defendants bent upon to cause loss to the plaintiffs and tried to secret the income. Therefore, the plaintiffs thought that it is no more safe to continue as members of the joint family and filed the present suit for the reliefs mentioned above.

5. The 1st defendant filed written statement denying the material allegations, while admitting the relationship between the plaintiffs and the defendants, but resisted the claim of the plaintiffs on the following three grounds:

(a) The 2nd defendant was adopted by Somalingappa with the consent of the 1st defendant and his wife after observing all the customary rituals and Somalingappa also obtained a registered adoption deed dated 13.07.1962 and since the date of adoption, the 2nd defendant became a member of the joint family of Somalingappa and ceased to be a member of natural parents. Therefore, from the date of adoption, the 2nd defendant being the coparcener became entitled to a share in the property, and after death of Somalingappa, the 2nd defendant being the sole class-I legal heir succeeded the entire estate and he is in exclusive possession and enjoyment of the schedule property in his own right. Even otherwise, he continued to be in possession and enjoyment of the property without any interruption by anybody for over a statutory period of 12 years, thereby perfected his title by adverse possession. Thereby, the plaintiffs are not entitled to claim partition of the schedule property.

(b) The 2nd contention of the defendants is that after adopting the 2nd defendant, there was partition of the property reduced into writing between Somalingappa and Rudrappa and it was registered on 30.11.1966. Thus, in the said partition, Acs. 19.00 of land was allotted to the share of Somalingappa and about Acs. 30.00 of land was allotted to the share of Rudrappa as Rudrappa spent most of his life in management of the property. Therefore, the suit for partition without setting aside the earlier partition is not maintainable and, consequently,

the plaintiffs are not entitled to claim any share in the property.

(c) The 3rd contention of the defendants is that Somalingappa in sound disposing state of mind executed a Will dated 23.04.1975 bequeathing his property in favour of the 3rd defendant, and since the date of his death, the 3rd defendant being a legatee under the Will is in continuous possession and enjoyment of the property, thereby the plaintiffs are not entitled to claim any share in the property.

The defendants specifically denied the income from the property, while contending that the property would not fetch any income much less Rs. 50,000/- per annum. Finally, it is contended that the plaintiffs and the defendants were not in joint possession and enjoyment of the property, thereby Court fee paid on the plaint, basing on the averments in the plaint, is not proper fee and advalorem Court fee under Section 34(1) is required to be paid, and prayed to dismiss the suit.

6. Defendant Nos. 2 and 3 filed a memo adopting the written statement filed by the 1st defendant.

7. Basing on the above pleadings, the trial Court framed the following issues and additional issues:

ISSUES:

(1) Whether Somalingappa is the manager of joint family after the death of Rudrappa?

(2) Whether the suit properties are joint family properties as alleged by plaintiffs?

(3) Whether the 1st plaintiff deserted her husband Somalingappa?

(4) Whether the 2nd defendant is the adopted son of Somalingappa and whether the registered adoption deed dated 13.07.1962 is true, valid and binding on the plaintiffs?

(5) Whether the partition alleged by the defendants dated 30.11.1966 is true, valid and binding on the plaintiffs?

(6) Whether the Will dated 23.04.1975 executed by late Somalingappa in favour of D. 3 is true, valid and binding on the plaintiffs?

(7) Whether the plaintiffs are entitled to partition and separate possession, if so, to what extent?

(8) To what relief, are the plaintiffs entitled?

ADDITIONAL ISSUE:

Whether Hanumakka is a necessary and proper party to the suit?

8. After impleading the 4th defendant, the 1st defendant filed additional written statement denying the share of the plaintiffs.

9. During course of trial, on behalf of the plaintiffs, P.Ws. 1 to 3 were examined and no documents were marked. On behalf of the defendants, D.Ws. 1 to 6 were examined and Exs. B. 1 to B. 7 were marked.

10. Upon hearing the arguments of both the counsel, the trial Court dismissed the suit holding that Somalingappa executed a Will dated 28.04.1975 in sound disposing state of mind, and in view of the bequeath under the Will, the 3rd defendant became entitled to claim entire property of Somalingappa, and answered issue No. 6 in favour of the defendants and against the plaintiffs. The trial Court also believed the partition deed dated 30.11.1966 and held issue No. 3 (sic. 5) in favour of the defendants and against the plaintiffs. Similarly, the adoption of 2nd defendant pleaded by the defendants is answered in favour of the defendants believing the adoption and held issue No. 4 in favour of the defendants and against the plaintiffs. Finally, the trial Court dismissed the suit in toto.

11. Aggrieved by the impugned decree and judgment, the plaintiffs being unsuccessful before the trial Court preferred this appeal raising several contentions. The main contentions in the grounds of appeal and during arguments are as follows:

(a) The trial Court believed the adoption deed, which was not executed by both the natural parents and the adoptive parents, and it does not bear the signatures of Somalingappa and natural parents. Therefore, it is invalid under the Hindu Adoptions and Maintenance Act (for short "the Act"). If the adoption is disbelieved, the plaintiffs being the legal heirs of Somalingappa, are entitled to claim share in the property. But, the trial Court on wrong appreciation of facts and law, disbelieved the case of the plaintiffs.

(b) The trial Court did not consider the essentials of valid adoption and the consent of wife of D. 1 i.e., natural mother is essential for valid adoption. In the absence of proof of consent of D. 1's wife, the adoption of D. 2 is not valid. Therefore, on this ground also, the adoption of D. 2 cannot be accepted.

(c) The trial Court erroneously believed the earlier partition dated 30.11.1966, without considering the effect of such partition and conduct of the parties to the partition subsequent to the alleged partition like mutation of their names in the revenue records, etc. But, the finding is based totally on the partition deed and evidence of D.W. 2. If the trial Court considered the conduct of the parties to the partition subsequent to the alleged partition, the partition is only a nominal one and never acted upon. Therefore, the partition deed dated 30.11.1966 is not legal and valid.

(d) The trial Court also believed the Will Ex. B. 4 dated 28.04.1975 basing on the evidence of D.W. 4 alone without taking into consideration all the suspicious circumstances surrounding the execution of Ex. B. 4 Will and gave much credence to the evidence of witnesses on behalf of the defendants and without considering the evidence of witnesses examined on behalf of the plaintiffs. Thus,

committed an error in dismissing the suit and prayed to set aside the impugned decree and judgment and pass a decree in favour of the plaintiffs for partition of plaint "A" and "B" schedule property into two equal shares and for allotment of one such share to the plaintiffs and direct the defendants to render true and correct account of income realized from the property, from the date of suit till delivery of possession of the property.

12. The learned counsel for the appellants/plaintiffs almost reiterated the grounds urged in the appeal, and mainly pointing out the validity of the adoption of D. 2, placed reliance on a judgment reported in Dkapubai (dead) widow of Ghisalal Vs. Dhapubai (Dead) by L.Rs. and Others, .

13. Per contra, the learned counsel for the defendants/respondents contended that the execution of adoption deed is only a formality and it is not a mandatory requirement. When the defendants proved giving and taking of a child, it completes the requirements of adoption and the consent of D. 1's wife was not questioned at any time during trial, but for the first time, it is questioned during arguments and in the grounds of appeal. Therefore, the plea of absence of consent of D. 1's wife is not based on a factual foundation laid in the pleadings. Hence, the adoption cannot be questioned at this stage. It is further contended that the adoption of D. 2 is an ancient adoption and the burden is upon the plaintiffs, who are denying the adoption, to prove that there was no adoption, and placed reliance on several decisions reported in Devgonda Raygonda Patil Vs. Shamgonda Raygonda Patil and another, , Pabbathi Reddy Sudarshan Reddy Vs. Pabbathi Reddy Sashirekhamma, , Voleti Venkatarama Rao Vs. Kesapragada Bhaskara Rao and Others, , Atluri Brahmanandam (d), Thr. LRs. Vs. Anne Sai Bapuji, , Lakshman Singh Kothari Vs. Smt. Rup Kanwar, , and L. Debi Prasad (Dead) by Lrs. Vs. Tribeni Devi and Others, .

(a) Assuming for a moment that the adoption of D. 2 is not legal and valid, still Somalingappa executed a Will bequeathing his property in favour of the 3rd defendant in sound disposing state of mind and the execution of the Will is proved by the defendants, thereby the 3rd defendant being a legatee under the Will alone is entitled to claim entire property under testamentary disposition. On this ground also, the plaintiffs are disentitled to claim the relief of partition.

(b) Finally, it is contended that the joint family property was already partitioned by executing Ex. B. 1 dated 30.11.1966. Thus, there is a disruption in the joint family, and since then, Rudrappa and Somalingappa enjoyed the share of property allotted to them in the partition in their own right. Therefore, without setting aside the earlier partition under Ex. B. 1, the plaintiffs are not entitled to claim any share in the schedule property. On this ground also, the suit is liable for dismissal and the learned counsel argued totally in support of the findings of the trial Court, while praying to dismiss the appeal confirming the impugned decree and judgment passed by the trial Court.

14. Considering rival contentions, perusing the impugned decree and judgment,

and the oral and documentary evidence, the points that arise for consideration are as follows:

- (1) Whether the adoption of D. 2 is valid, legal and binding on the plaintiffs?
- (2) Whether the joint family property was partitioned under Ex. B. 1, if so, whether the suit is maintainable without setting aside the partition marked as Ex. B. 1?
- (3) Whether Somalingappa executed Ex. B. 4 Will dated 28.04.1975 in sound disposing state of mind, bequeathing the schedule property in favour of D. 3?
- (4) Whether the plaint schedule property is continuing to be the ancestral undivided Hindu joint family property, if so, are the plaintiffs entitled to claim partition of the property into two equal shares and for allotment of one such share to them and for income from the schedule property?

POINT NO. 1:

15. According to the plaintiffs, the 1st plaintiff is the wife of Somalingappa and the 2nd plaintiff is their son-in-law and husband of Rudramma, the only daughter of the 1st plaintiff and Somalingappa, and the defendants 3 to 4 are the children of Rudramma and the 2nd plaintiff. They are claiming right in the schedule property being the legal heirs of deceased Somalingappa, on the ground that they are the sole legal heirs. Curiously, the defendants set up adoption of D. 2 by Somalingappa under Ex. B. 2 dated 13.07.1962 contending that D. 2 is the son of D. 1 and was taken into adoption by Somalingappa in the year 1962 from the natural parents i.e., D. 1 and his wife, and later, executed an adoption deed marked as Ex. B. 2. Therefore, D. 2 became the member of family of Somalingappa and entitled to claim entire share of Somalingappa and ceased to be a member of natural parents' family.

16. The trial Court believed the adoption of D. 2 by Somalingappa, while disbelieving Ex. B. 2. The said finding is challenged now on various grounds mainly contending that the consent of mother of natural parents of D. 2 was not obtained at the time of adoption and, therefore, it is invalid under law.

17. The learned counsel for the appellants/plaintiffs mainly contended that when the adoption deed marked as Ex. B. 2 itself is invalid, the question of accepting the adoption by oral evidence is improbable and that the finding of the trial Court is not based on any sound legal reasoning, and prayed to set aside this finding.

18. Since the trial Court did not accept Ex. B. 2 adoption deed and when no appeal or cross-objections are filed questioning the adverse findings recorded by the trial Court, this Court need not decide the validity of Ex. B. 2 adoption deed executed by Somalingappa, as it remained unchallenged. Therefore, I would like to refrain myself to decide the validity of adoption, according to the provisions of the Act.

19. The plaintiffs filed the suit for different reliefs, but they did not deny the

adoption of D. 2 in the plaint. More over, the plea of adoption was set up for the first time in the written statement contending that D. 2 was taken in adoption by Somalingappa, after following necessary customary formalities prevailing in Lingayat community and adduced evidence in support of their case, more particularly, with regard to giving and taking.

20. One of the contentions of the defendants is that when they set up a specific plea of adoption of D. 2 by Somalingappa, it is for the plaintiffs to file rejoinder after obtaining necessary permission under Order VIII Rule 9 of CPC denying the adoption. The plaintiffs did not file any rejoinder denying the adoption set up by the defendants. But, mere failure of the plaintiffs to deny the adoption pleaded by the defendants in the written statement by filing rejoinder would not amount to admission, but this may be one of the circumstances to be considered at the time of deciding the validity of adoption. Therefore, it is not a ground to accept the defendants' case accepting the contention totally.

21. According to the defendants, the adoption of D. 2 took place in the year 1962, but whereas the challenge took place in the year 1982 i.e., almost after 20 years, and that apart, the alleged adoptive father Somalingappa is no more, whereas the alleged adoptive mother is acting adverse to the interest of the 3rd defendant. Naturally, she will not support the case of the defendants. Therefore, it is difficult for the defendants to prove the adoption by examining the adoptive parents. However, when the adoption is ancient, the presumption is that the adoption is valid and the burden is upon the plaintiffs in this suit to prove that there was no adoption.

22. The learned counsel for the defendants has placed reliance on the judgment of the Apex Court reported in L. Debi Prasad (supra). In para 8 of the judgment, the Supreme Court held as follows:

"Under Hindu Law, 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."

(i) In para 9 of the judgment, it is held as under:

"The burden of proving satisfactorily that he was given by his natural father and received the adoptive father as his adoptive son is on the alleged adopted son. 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."

(ii) In para 10 of the judgment, it is held as follows:

"In the case of all ancient transactions, it is but natural that positive oral evidence will be lacking. 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. 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."

23. From the principles laid down in the above judgment, when the adoption is ancient, the best evidence is treatment of the adopted boy and adoptive father, as father and son by the friends and relatives, etc., and the burden is upon the person, who is disputing the adoption, since the positive oral evidence is lacking in most of the ancient adoptions.

24. In Lakshman Singh Kothari case (supra), the Supreme Court held in para 10 of the judgment as follows:

"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 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."

25. In Atluri Brahmanandam case (supra), the Supreme Court discussed about a caste custom prevailing in "Kamma" community in Andhra Pradesh permitting adoption of boy even above age of 15 years and when the boy was transferred from natural parents to the family of adoptive parents, it is sufficient to prove the adoption. In para 13 of the judgment, the Supreme Court held as follows:

"There is no denial of the fact in the present case that the respondent was more than 15 years of age at the time of his adoption. But the respondent has relied upon the exception provided in Section 10(iv) and has proved by leading cogent and reliable evidence like Ex. A. 8 that there is a custom in the "Kamma" community of Andhra Pradesh for adoption of a boy ever above the age of 15

years. Therefore, the aforesaid exception which is engrafted in the same part of the provision of Section 10 of the Act was satisfied. 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."

26. The learned counsel for the defendants also contended that there is a presumption under Section 16 of the Act that the adoption is valid, when the evidence established giving and taking of a boy transferring a boy from natural family to adoptive family, and placed reliance on the judgment of this Court reported in Pathivada Ramaswami and another Vs. Korda Surya Prakasa Rao and another, , where this Court, while referring to its judgment reported in G. Ramarao alias V.D. Ramarao v. V. Atchutamma ((1971) II An WR 60), which contains the following passage:

"Even under the Hindu Adoptions and Maintenance Act, the legal requirement for the validity of an adoption is the ceremony of adoption at which there is a giving and taking of the boy as adoption does not by itself confer the status of an adopted son on the boy. It is, therefore, incumbent upon the defendant to prove that there was a giving and taking as required by the Hindu Law."

held as follows:

"With utmost respect to the learned Judge, I have to point out that the above quoted passage overlooks the statutory provision of Section 16 of the Hindu Adoptions and Maintenance Act. S. 16 of the Act contemplates a statutory presumption. The working of S. 16 is very significant. 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."

Similar view is expressed by the Apex Court in the earlier judgment reported in Voleti Venkata Ramarao Case (supra).

27. The learned counsel for the defendants has also drawn the attention of this Court to a judgment reported in Pabbathi Reddy Sudarshan Reddy case (supra). In para 6 of the judgment, the Division Bench of this Court held that the burden of proof is on the person, who challenged the adoption after long lapse of years, and the burden heavily rests on one who challenges the validity of adoption. It is further held that a precondition for adoption by giving and receiving has to take place, if it is much before formal ceremony of Datta Homam which was performed some years afterwards on day previous to day of marriage of adoptee and adoption is not vitiated nor it become effective from date of performance of ceremony.

28. In the above judgment, the Division Bench of this Court totally placed burden on the person, who challenged the adoption, when the adoption took place long prior to the challenge, and apart from that, mere proof of giving and taking is sufficient to prove valid adoption unless and until it is rebutted.

29. In view of the principles laid down in the line of judgments of the Apex Court and this Court, it is clear that the burden is upon the plaintiffs who set up the adoption initially. But, when the adoption is ancient one, the burden heavily rests on the person who challenged the adoption.

30. In the present case, the adoption took place in the year 1962 and whereas the adoption was indirectly challenged by the adoptive mother and her daughter by filing the present suit in the year 1982 i.e., almost after 20 years. This cannot be so ancient. However, it is difficult for the parties who pleaded adoption by producing all oral evidence. On the other hand, the defendants made a sincere and honest attempt to prove the adoption by examining the natural father of D. 11 (sic. D-2) as D.W. 1, who testified about the necessary requirement of giving and taking and establishment of panchakalasas, as per the custom prevailing in Lingayat community, and after chanting mantras, the boy was given in adoption by the natural parents to the adoptive parents. The evidence of D.W. 1 though challenged putting several suggestions, nothing has been elicited to discredit or impeach his trustworthiness with regard to adoption.

31. The learned counsel for the plaintiffs contended that Datta Homam is a necessary ceremony, and unless it is proved, the adoption cannot be said to be valid. Undoubtedly, Datta Homam is a formality in adoption of a child. But, when the caste custom permits a particular mode of adoption that is establishing panchakalasas and chanting mantras and delivering child by the natural parents to the adoptive parents is sufficient and mere non-compliance of formality of Datta Homam will not vitiate the adoption under the Hindu Adoptions and Maintenance Act. Therefore, the contention of the learned counsel for the plaintiffs is without any substance.

32. In cross-examination, D.W. 1 asserted that Somalingappa was having love and affection towards his only daughter Rudramma and she was blessed with two children. Taking advantage of this admission, he contended that when Somalingappa is not blessed with male children, nothing prevented him to adopt the children of Rudramma, his only daughter. But no specific reason was assigned by D.W. 1 in his evidence, but that by itself is not a ground to disbelieve the adoption. In the cross-examination of D.W. 1 at page No. 9, he specifically asserted that prior to adoption of D. 2 in the year 1962, there was no occasion for all the elders meeting in his house and prior to the year 1962, no adoption ceremony had taken place in his house in respect of adoption of D. 2 and it is followed by a suggestion that D. 2 was not adopted by Somalingappa and got denial of it. Even this admission would not affect the validity of adoption and not sufficient to disbelieve the adoption of D. 2 by Somalingappa. Thus, no material was elicited in the cross-examination of D.W. 1 to impeach his trustworthiness.

Of course, D.W. 1 is the natural father, who is sailing with D. 2, and he is supposed to speak in favour of D. 2, who is claiming as son of Somalingappa. In such case, the Court must insist corroboration to the evidence of D.W. 1 by examining any independent witnesses.

33. To prove the adoption, the defendants examined B. Hanumantharayappa as D.W. 2, who attended the adoption ceremony being a relative of both parties to the adoption along with other relatives. He specifically testified about the customary formalities followed at the time of adopting D. 2 by Somalingappa and his wife, like, establishment of panchakalasas, chanting mantras and giving and taking, as per the custom prevailing in Lingayat community for adoption of a child. But the Purohit, who performed necessary formalities, is no more. He further testified about the presence of V. Hanumanthappa, Mule Hanumanthappa, Veera Bhadrappa, Mariappa - 2nd plaintiff and his wife, parents-in-law of D. 1 and others. He also testified about the execution of Ex. B. 2 adoption deed. But, it is not necessary for deciding the adoption in the present case. The consistent evidence in the examination in chief of D.W. 2 clearly proved observance of necessary formalities prevailing in Lingayat community for adoption of a child. In the cross-examination of D.W. 2 at page 3, he admitted that no actual giving and taking ceremony took place at the time of Ex. B. 2 at Kalyandurg. Taking advantage of this admission, the counsel for the plaintiffs contended that the necessary requirement of giving and taking has not taken place. Therefore, the adoption is invalid. In fact, it is the consistent case of the defendants from the beginning that the adoption took place at the house of D.W. 1 in the presence of village elders and relatives of both the families, and after observing necessary formalities required for adoption in Lingayat community, Ex. B. 2 adoption deed was executed by Somalingappa. So, these two instances of actual adoption by giving and taking of a child and execution of Ex. B. 2 are not simultaneous, and apart from that, Ex. B. 2 is allegedly executed at the Registrar's Office. Therefore, question of taking place the requirement of giving and taking of the child at the Registrar's Office at the time of execution of Ex. B. 2 does not arise and it is improbable to the ordinary circumstances. Hence, the admission of D.W. 2 that no ceremony of giving and taking took place at the time of Ex. B. 2 would not vitiate the actual adoption of D. 2 by Somalingappa.

34. D.W. 3 is the nearest relative of both Somalingappa and Rudrappa, father of D. 1. He testified about the adoption of D. 2 by Somalingappa and execution of Ex. B. 4 Will in favour of D. 3. At this stage, it is not appropriate to advert to the evidence with regard to execution of Ex. B. 4 Will.

35. The defendants also examined P. Ramanjaneyulu as D.W. 4. Whose testimony is consistent with the adoption of D. 2 by Somalingappa and with the execution of Ex. B. 4 Will. Therefore, the oral evidence on record established that D. 2 was given in adoption to Somalingappa by D. 1 and the necessary requirement of giving and taking took place at the house of D. 1 in the presence of village elders and relatives, who attended the adoption ceremony officiated by the purohit of

Lingayat community who is no more. In the entire cross-examination of the witnesses examined on behalf of the defendants, the counsel for the plaintiffs could elicit nothing to rebut the evidence with regard to the adoption, except putting suggestions and getting denial of those suggestions. When the adoption took place about 20 years prior to its challenge, normally it is difficult for the parties, who are residing at a remote village, to produce evidence by examining each and every one, who attended the adoption ceremony. Proving of adoption by examining any person, who attended the adoption ceremony, is sufficient. Therefore, the defendants examined D.Ws. 2, 3 and 4, who are independent witnesses, and established that D. 2 was taken in adoption by (D. 1 to) (sic.) Somalingappa and Somalingappa and D. 2 were treated as father and son by the relatives in the village.

36. When the defendants established the ancient partition (sic. adoption), which took place about 20 years prior to the challenge, the burden will automatically shifts to the plaintiffs, who are challenging the adoption, in view of the principles laid down in the above judgments. Therefore, it is for the plaintiffs to rebut the evidence of D.Ws. 1 to 4 with regard to the adoption pleaded by them.

37. P.W. 1 is the son-in-law of the 1st plaintiff and Somalingappa and husband of Rudramma. In his examination in chief, he testified about the details of his marriage and relationship with the plaintiffs and death of his wife Rudramma in the year 1963. In cross-examination, he admitted that he is the native of Marampalli in Karnataka State and owned and possessed agricultural land at his village. At page No. 5 of the cross-examination, he stated that in the year 1965, D. 2 beat Somalingappa and tried to drive him from the house, and since then, Somalingappa and D. 2 were not in cordial terms. But, he did not testify anything denying the adoption. Therefore, his evidence is not useful to disprove the adoption.

38. The plaintiffs also examined one Bheemappa as P.W. 2. But, he was not tendered any cross-examination and thereby his evidence was eschewed. Hence, the evidence of P.W. 2 needs no consideration. Therefore, there is nothing on record to rebut the evidence of D.Ws. 1 to 5 regarding adoption of D. 2 by Somalingappa. Thus, the plaintiffs, who are challenging the adoption of D. 2, miserably failed to establish that D. 2 is not the adopted son of Somalingappa. On the other hand, the defendants established that D. 2 was taken in adoption by Somalingappa.

39. The learned counsel for the plaintiffs contended that the adoption is not valid, since the consent of wife of D. 1 was not obtained to give D. 2 in adoption.

(i) The valid requisites of adoption, as per Section 6 of the Act, are as follows:

"No adoption shall be valid unless--

- i. the person adopting has the capacity, and also the right, to take in adoption;
- ii. the person giving in adoption has the capacity to do so;

iii. the person adopted is capable of being taken in adoption; and
iv. the adoption is made in compliance with the other conditions mentioned in this Chapter."

(ii) Section 11 of the Act contemplates the other conditions for valid adoption and according to it, 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 son, son's son or 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 data homam shall not be essential to the validity of an adoption.

According to the proviso to Section 11 of the Act, Datta Homam shall not be essential to the validity of adoption. Therefore, if the valid requisites under Section 6 and valid conditions under Section 11 of the Act are complied with, the adoption is deemed to be valid adoption. In the instant case, the defendants established the conditions contemplated under Section 11 of the Act and the requisites contemplated under Section 6 of the Act and thereby the adoption is valid.

40. The learned counsel for the plaintiffs mainly contended that the adoption is not valid for the reason that the consent of wife of D. 1 (sic.) was not obtained, as required under Section 7 of the Act. According to it, any male Hindu, who is of sound mind and is not a minor, has the capacity to take a son or a daughter in adoption, provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. In the present case, the wife of

Somalingappa is the 1st plaintiff and it is difficult for the defendants, who affirmed the adoption of D. 2, to prove the consent of the 1st plaintiff. If for any reason the 1st plaintiff is disputing the adoption and did not give consent for the adoption to her husband Somalingappa, it is for the 1st plaintiff to enter into witness box and depose that she did not give consent for adopting D. 2 by Somalingappa. But, no evidence is brought on record to prove that the 1st plaintiff did not give consent. In fact, she is the competent witness to speak about the adoption and lack of her consent for adopting D. 2. When she stayed back without entering into the witness box, depriving the adversary to elicit anything with regard to consent for adoption of D. 2, the Court can presume that what she pleaded is not true. Further, the examination of P.W. 1, who does not know anything about the family affairs prior to his marriage, is of no avail to disprove the adoption.

41. The learned counsel for the plaintiffs, in support of his above contention, placed reliance on the judgment reported in Dhapubai case (supra), where the Supreme Court, while deciding the capacity of a male Hindu to take a person in adoption in compliance of Section 7 of the Act, held that 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 and the Court cannot presume the consent of wife simply because she was present at the time of adoption and the wife's silence or lack or (sic. of) protest on her part also cannot give rise to inference that she had consented to the adoption.

42. In the entire cross-examination of D.W. 1, no suggestion was put to him that the 1st plaintiff did not give consent for adopting D. 2 by Somalingappa. Even the 1st plaintiff did not enter into the witness box denying her consent for adopting D. 2 by Somalingappa. In the absence of eliciting anything in the cross-examination of D.W. 1, so also specific denial by filing rejoinder and by examining the 1st plaintiff, who is competent to speak about lack of consent, the Court can conclude that the adoption took place with the consent, since it is ancient adoption and it was not rebutted by the plaintiffs, who are challenging the same. Hence, the trial Court upon appreciation of each and every piece of evidence, minutely, concluded that the adoption of D. 2 by Somalingappa is valid, as the defendants established the necessary requirement of giving and taking and following the necessary customary formalities prevailing in Lingayat community for adoption of a child. Hence, I find no error in the finding of the trial Court on this point, warranting interference by this Court. Therefore, I am totally in agreement with the finding recorded by the trial Court holding this point against the plaintiffs and in favour of the defendants.

POINT No. 2;

43. The plaintiffs filed the suit contending that the suit property is still continuing as undivided Hindu joint family property and no partition took place between Rudrappa father of D. 1 and Somalingappa husband of the 1st plaintiff and father-in-law of the 2nd plaintiff. The defendants set up a registered partition between

Somalingappa and Rudrappa marked as Ex. B. 1. After filing of written statement by the 1st defendant, the plaintiffs did not file any rejoinder denying the partition, pleaded by the 1st defendant.

44. To prove the said partition, the defendants examined D.W. 1, who is a party to the suit, and attested the partition deed as an attesor. When the plaintiffs contended that the family is continuing to be undivided Hindu joint family, it is for them to establish that there was no partition, more particularly, when the defendants set up the partition by a registered document marked as Ex. B. 1. Here, the 2nd plaintiff though examined himself as P.W. 1, but said something about continuing the property as undivided Hindu joint family property. His marriage took place with Rudramma about 10 to 15 years prior to his examination as P.W. 1, but whereas the partition took place on 30.11.1966. Thus, after death of Rudramma in the year 1963, the partition took place between Somalingappa and Rudrappa during the lifetime of Somalingappa. P.W. 1 as usual supported his case and admitted that Somalingappa was not a literate, but he knows only signing and asserted that no partition took place between Somalingappa and Rudrappa and the property is continuing as undivided Hindu joint family property. Thus, he denied the partition pleaded by the defendants, but in the cross-examination he asserted once again that Somalingappa used to sign on documents and denied the suggestion that Rudrappa and Somalingappa are literates and used to affix their thumb impression. P.W. 1 also admitted at the end of second phase of cross-examination that Somalingappa was not a man of weak intellect and he was not in the habit of fabricating the documents and he was also not in the habit of writing or executing nominal documents. In view of this admission, the partition deed marked as Ex. B. 1 cannot be said to be nominal as Somalingappa was not in the habit of writing or executing nominal documents.

45. D.W. 1, who affirmed about execution of Ex. B. 1 by Somalingappa and Rudrappa testified that during his lifetime and his uncle Somalingappa, they divided their property under a registered partition deed and he was present at the time of partition by executing Ex. B. 1 dated 30.11.1966. Ex. B. 1 was executed in the presence of Hanumappa, Basappa and Thippeswarny and the executants also testified about putting signatures and affixing thumb impressions on Ex. B. 1. As seen from Ex. B. 1, the thumb impressions of the executants, by name, Rudrappa and Somalingappa, were obtained on each page of the document. But, the contention of the plaintiffs is that Somalingappa used to sign on documents, but no such document was brought on record to establish that Somalingappa used to sign on any of the documents. Mere assertion in the evidence of P.W. 1 is of no use to establish that Somalingappa was in the habit of signing on documents executed by him instead of affixing his thumb impression. Thus, the plaintiffs failed to prove that Somalingappa was in the habit of signing on the documents executed by him.

46. On the other hand, the evidence of D.W. 1 coupled with Ex. B. 1 shows that

Somalingappa was in the habit of affixing thumb impression on the documents executed by him. That apart, at the time of registration, the Sub-Registrar got identified the executants Rudrappa and Somalingappa by the identifying witnesses and obtained their thumb impressions on the reverse of first page of Ex. B. 1. If really Somalingappa was in the habit of signing on the documents, the question of obtaining thumb impression on his identification by the identifying witnesses before the Sub-Registrar does not arise. In the absence of proof that Somalingappa was in the habit of signing on the documents, the evidence of D.W. 1 that Ex. B. 1 was executed by Somalingappa by affixing thumb impression is to be accepted.

47. The defendants also examined one of the attestors of Ex. B. 1 as D.W. 5 to establish the execution of Ex. B. 1, but he was not present at the time of execution, as per the unequivocal admission made in the first sentence of the cross-examination. Therefore, his evidence is of no use to establish the execution of Ex. B. 1.

48. At the same time, the defendants did not examine any other witness, who attested Ex. B. 1, so also the scribe of the document, to prove the execution of Ex. B. 1. On the other hand, there are clear admissions that no steps were taken for mutation of the names of Rudrappa and Somalingappa in the revenue records after partition of the property. Taking advantage of the failure to mutate the names of Rudrappa and Somalingappa, it is contended that it is a strong piece of evidence to conclude that there was no partition. In the cross-examination of D.W. 1, the counsel for the plaintiffs could elicit that the names of the respective owners were not mutated in the revenue records. This is a strong circumstance to disbelieve Ex. B. 1. Apart from that, non-examination of any witnesses, to wit, any of the attestors or the scribe of Ex. B. 1, is another strong reason to disbelieve the execution of Ex. B. 1. The trial Court ignoring the evidence of D.W. 1, who has no personal knowledge about execution of Ex. B. 1, based its finding and held that Ex. B. 1 was executed and it is acted upon. If really the partition covered by Ex. B. 1 is acted upon, there must be some evidence, like, payment of land revenue to the Government and enjoyment of the property separately by the respective parties to Ex. B. 1. But, taking into consideration of obtaining loan depositing Ex. B. 1, the trial Court believed execution of Ex. B. 1. But, that by itself is not sufficient to believe the actual partition between Somalingappa and Rudrappa as contended by the plaintiffs (sic. defendants), more particularly, in the absence of payment of land revenue for the agricultural lands separately from the date of execution of Ex. B. 1 and also in the absence of mutation of the names of respective owners in the revenue records. Thus, the finding of the trial Court is not based on any legal reasoning and not supported by any evidence to prove the ancient partition set up by the defendants. Therefore, the finding of the trial Court is erroneous on the face of record and, consequently, it is liable to be set aside. Hence, I hold that execution of Ex. B. 1 partition deed is not established by the defendants and the property remained as undivided Hindu joint family property. Accordingly, the point is answered in favour of the plaintiffs

and against the defendants.

POINT NO. 3:

49. The defendants set up Ex. B. 4 Will dated 28.04.1975 allegedly executed by Somalingappa in favour of D. 3 bequeathing his entire estate and consequent upon death of Somalingappa, the 3rd defendant succeeded his entire estate as a legatee under the Will under testamentary disposition and that the Will was executed by Somalingappa in sound disposing state of mind. As per the settled principles of law under Section 68 of the Indian Evidence Act, it is the duty of the propounder of the Will to prove execution of Ex. B. 4 by examining at least one of the attestors or the scribe, since it is a compulsorily attestable document. Thus, the Will is required to be proved as per the sub-rules contained in Sections 68 to 70 of the Indian Evidence Act, and even according to Section 63 of the Indian Succession Act, the Will is required to be proved by examining at least anyone of the attesting witnesses or, in case they are not available, by examining the scribe or any person, who is able to identify the writing of the testator. In view of the settled principles of law, the initial burden is upon the propounder of the Will to prove that Ex. B. 4 Will was executed by Somalingappa in sound disposing state of mind dispelling all the suspicious circumstances, as held by the Apex Court in the judgments reported in Gangala Raju and Others Vs. Rayavarapu Apparao and Others, and S.R. Srinivasa and Others Vs. S. Padmavathamma, .

50. In order to substantiate their contentions, the 1st defendant was examined as D.W. 1 and he testified about execution of Ex. B. 4 Will by Somalingappa bequeathing his estate in favour of D. 3 in sound disposing state of mind on 28.04.1975, and after death of Somalingappa, D. 3 is enjoying the property of Somalingappa. In the cross-examination of D.W. 1, except eliciting that Somalingappa was affectionate towards the children of Rudramma, nothing was elicited and no suggestion was put to D.W. 1 that Ex. B. 4 Will was not executed in sound disposing state of mind and no suspicious circumstances in execution of Ex. B. 4 Will were pointed out. On the other hand, a suggestion was put to him that Ex. B. 4 is a fabricated document and not executed by Somalingappa and the same was denied by D.W. 1.

51. The defendants also examined D.Ws. 3 and 4 to establish the execution of Ex. B. 4. D.W. 3 is G. Somalingappa. His consistent evidence is that Somalingappa executed Ex. B. 4 Will in favour of D. 3 in sound disposing state of mind, and in his presence, Somalingappa affixed his thumb impression, himself and one Ramanjaneyulu attested Ex. B. 4 and one Tirumala Rao scribed Ex. B. 3. In the cross-examination of D.W. 3, the witness asserted that to the dictation of Somalingappa, Tirumala Rao scribed Ex. B. 4 and mistakes in Ex. B. 4 were corrected on the instructions of Somalingappa and that there was no reference about Gangamma, the 1st plaintiff Rudramma and her children in Ex. B. 4. Somalingappa himself purchased the required stamp for execution of Ex. B. 4. In the lengthy cross-examination of D.W. 4, nothing was elicited to disprove the

execution of Ex. B. 4 by Somalingappa. On the other hand, the facts elicited in the cross-examination would strengthen the contentions of the defendants about the execution of Ex. B. 4. Therefore, the unrebutted testimony of D.W. 3 supports the defendants' case about the execution of Ex. B. 4 by Somalingappa bequeathing his estate to D. 3.

52. D.W. 4 is another attestor of Ex. B. 4. He also testified in the same lines of D.W. 3 about the execution of Ex. B. 4 and attestation of the same by D.W. 3 and himself. In the cross-examination, D.W. 4 admitted that by the date of death of Somalingappa, his property was being enjoyed separately each Acs. 23.00 as the property possessed by the family was Acs. 46.00. Thus, Somalingappa and Rudrappa were enjoying Acs. 23.00 each. Except that, nothing was elicited in the entire cross-examination of D.W. 4 to disprove the execution of Ex. B. 4 Will by Somalingappa. During the course of arguments, the learned counsel for the plaintiffs did not bring to my notice any of the suspicious circumstances surrounded in execution of Ex. B. 4 and not even a single suggestion was put to D.Ws. 1, 3 and 4 that Somalingappa was not in sound disposing state of mind as on the date of alleged execution of Ex. B. 4 Will. On the other hand, the consistent evidence of D.Ws. 1, 3 and 4 would clinch the issue that Somalingappa was in sound disposing state of mind at the time of execution of Ex. B. 4 affixing his thumb impression and thereafter D.Ws. 3 and 4 signed on Ex. B. 4 as attestors. The unrebutted testimony of D.Ws. 3 and 4, who are independent witnesses, established that Ex. B. 4 was executed by Somalingappa in sound disposing state of mind. The trial Court, after appreciation of entire evidence on record with reference to law laid down by various Courts, concluded that Ex. B. 4 was executed by Somalingappa in sound disposing state of mind. Therefore, I find no legal infirmity warranting interference of this Court in this appeal, after discerning the entire material available on record. Hence, D. 3 became entitled to claim the share of Somalingappa, consequent upon death of Somalingappa, as a legatee under the Will Ex. B. 4. Accordingly, the point is held in favour of the defendants and against the plaintiffs.

POINT NO. 4:

53. The plaintiffs claimed right in the property of deceased Somalingappa being his legal heirs. But, as per my finding on point No. 1, the 2nd defendant is the adopted son of Somalingappa and in the absence of any testamentary disposition, D. 2 is entitled to claim the entire property of Somalingappa under Section 12 of the Act. But, due to execution of Ex. B. 4 Will, D. 3, a legatee under the said Will, succeeded the entire estate of Somalingappa under testamentary disposition, consequent upon the death of Somalingappa. Hence, the plaintiffs were totally disinherited. The reason for disinheriting the 1st plaintiff is that she abandoned the marital ties with Somalingappa and he got issued a legal notice marked as Ex. B. 3 through his Advocate, but she did not join Somalingappa during his lifetime. Therefore, totally disinheriting the 1st plaintiff is justifiable for the reason that she deserted Somalingappa and the

same is evidenced by the office copy of the legal notice marked as Ex. B. 3. The 1st plaintiff did not enter into the witness box to deny issue of original of Ex. B. 3 legal notice. Therefore, basing on Ex. B. 3, the Court has to believe that a notice was got issued by Somalingappa, since it was not disputed by the 1st plaintiff by examining herself as a witness. Hence, disinheriting the 1st plaintiff is not a ground to disbelieve the execution of Ex. B. 4. On the other hand, Rudramma, daughter of Somalingappa, pre-deceased to him and thereby her legal heirs are made to disinherit by executing Ex. B. 4. Therefore, the plaintiffs are not entitled to claim any share in the property by way of partition in view of Ex. B. 4 Will.

54. In view of my foregoing discussion, D. 2 being the adopted son of Somalingappa is entitled to claim the entire property of Somalingappa in the absence of any testamentary disposition. As Somalingappa executed Ex. B. 4 Will in favour of D. 3, D. 3 became entitled to claim entire estate of Somalingappa. Thereby, the plaintiffs are not entitled to claim any share in the property. Hence, I hold that the plaintiffs are not entitled to any share in the property by way of partition and the trial Court rightly denied the partition and other reliefs. Accordingly, the point is held in favour of the defendants and against the plaintiffs. In view of my foregoing discussion, I find that the appeal is devoid of merits and it deserves to be dismissed and, accordingly, it is dismissed.

In consequence, miscellaneous petitions, if any, pending in the appeal shall stand dismissed. No order as to costs.