
(2016) 02 MAD CK 0036
In the Madras High Court
Case No : S.A. (MD) No. 410 of 2002

Sri Brahadambal Agency, a partnership firm, Rep. by its Managing Partner, Kumarasamy and others

APPELLANT

Vs

S. Ramasamy Chettiar (Died) and others

RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Hindu Adoptions and Maintenance Act, 1956 — Section 12, 16

Citation : (2016) 3 Civil LJ 857 : (2016) 2 CTC 739 : (2016) 2 HLR 136 : (2016) 2 MadWN(Civil) 299 : (2016) 3 MLJ 11

Hon'ble Judges : Mr. C.S. Karnan, J.

Bench : Single Bench

Advocate : M/s. A.L. Gandhimathi, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. C.S. Karnan, J. - The appellants herein have preferred this second appeal against the judgment and decree dated 15.12.1999 made in A.S. No.77 of 1995 by the Principal District Judge, Pudukkottai confirming the judgment and decree of Subordinate Judge, Pudukkottai dated 13.09.1994 made in O.S. No. 163 of 1987.

2. The appellants herein are the plaintiffs in the suit in O.S. No. 163 of 1987 and the respondents herein are the defendants therein. For the sake of convenience, the ranks of the parties in the suit has been referred to hereunder:

The Second Appeal was originally filed before the Principal Seat, viz., the Madras High Court. Notices were sent to the respondents by the Principal Seat. But except the seventh respondent, none of the respondents have entered appearance. After the formation of the Madurai Bench, due notices were sent to the appellants and respondents. But, excepting the appellants and seventh respondent, no appearance was made by the respondents 1 to 6. During the pendency of the Second Appeal, the first respondent died. Since the respondents

2 to 6, who are the sons and mother of the deceased first respondent were already on record, an application to implead the widow and daughter of the first respondent as respondent Nos. 8 and 9 was filed and allowed. Later, the sixth respondent also died and the respondents 2 to 5, 7 to 9 were recognised as her legal heirs. Later, the eighth respondent died and her sons and daughter, the respondents 2 to 5 and 9 were recognised as her legal heirs. The learned counsel appearing for the appellants has filed memo stating that the sixth and eighth respondents had died. In the above said impleading applications, due notices were sent to the respondents and the proposed parties and only after following the due process, the said applications were allowed. After such impleadment, due notice was sent to the respondents 2 to 5 and 9 in the Second Appeal through Court and Post and Private notice was also ordered and the ninth respondent had received the notice, but the respondents 2 to 5 have refused to receive the notice. Hence, substituted service by way of paper publication was made to the respondents 2 to 5. In spite of service of notice upon the ninth respondent and in spite of sending notice to respondents 2 to 5 as stated above, no appearance has been made for them. Accordingly, the Second Appeal has been taken up for final disposal.

3. The appellants filed a suit for partition of the suit properties in Item Nos. 1 to 11 in "A" and "B" Schedule properties by means and bound and to allot ?th share.

4. The short facts of the case are as follows:-

The first plaintiff is a partnership firm which is registered under the Indian Partnership Act. The plaintiffs 2 to 5 are the partners in the said firm. The suit schedule properties comprises of agricultural lands measuring an extent of about 65 acres in Nathampannai Village in Pudukkottai Taluk shown as items 1 to 11 in the suit "A" schedule properties. A farm house and building is shown as suit schedule "B" property. It is the case of the plaintiffs that the suit "A" schedule properties in items 1 to 6 were purchased by one Raman Chettiar under a registered sale deed dated 19.05.1923. The suit "A" schedule properties in items 7 to 11 are the ancestral properties of the said Raman Chettiar. The said Raman Chettiar died leaving behind his two sons namely Chellappa Chettiar and Swaminathan Chettiar to succeed his estate. The said Chellappa Chettiar and Swaminathan Chettiar remained undivided during their life time and enjoyed all the properties in common. The joint family of the above two brothers owned and enjoyed the suit properties along with lands in Rajavayal and Sevalapattivayal etc; as well as a house in Arimalam. The said Chellappa Chettiar died issueless. Swaminathan Chettiar had two sons namely Ramasamy Chettiar, the first defendant and Sambantham Chettiar, the seventh defendant.

5. It is the further case of the plaintiffs that during the lifetime of Swaminathan Chettiar, the property situated in Rajavayal and Sevalapattivayal were divided and allotted to his two sons. At the time of the said partition, Sambantham Chettiar, the seventh defendant was allotted 10 acres in excess. In order to

compensate the same Ramsamy Chettiar, the first defendant was allotted 10 acres of land in Pallathuvayal out of the total extent of land measuring 74.07 acres, leaving behind the 65.87 acres of land in Pallathuvayal, hereinafter referred to as the suit "A" Schedule property, to be enjoyed in common by the two brothers namely the defendants 1 and 7.

6. The defendants 1 and 7 were each entitled to half share in the said 65.87 acres of land and it is the case of the plaintiffs that some dispute arose between the brothers with regard to the maintenance of the said land and this resulted in a panchayat and the brothers have agreed to partition the said land into two equal halves within three months under an agreement dated 20.02.1978 entered into between them. However, the said agreement had not materialised due to the non cooperation by the first defendant.

7. Under such circumstances the said Sambantham Chettiar, the seventh defendant sold his half share in the suit properties to the plaintiffs firm. The Plaintiff firm at the time of purchase of the suit properties comprised of plaintiffs 2 to 4 and one K. Kalyanasundaram as partners of the firm. The said K. Kalyanasundaram had retired from the firm and had executed a release deed dated 15.04.1984. Subsequent to his resignation, the plaintiffs firm was reconstituted with plaintiffs 2 to 4 and the fifth plaintiff as partners. The plaintiff firm purchased half share in the suit properties from the seventh defendant under a registered sale deed dated 16.02.1983. The first defendant and his sons, the defendants 2 to 5 are jointly entitled to the other half of the suit properties. It is the further case of the plaintiffs that the fifth defendant sold his 1/10th share in the suit properties to the plaintiffs herein for a valuable sale consideration under the registered sale deed dated 19.10.1983. Thus, plaintiffs are entitled to $(1/2)5/10 + 1/10 = 6/10$ th share in the suit properties by virtue of the registered sale deeds dated 16.02.1982 and 19.10.1983.

8. Further, the sixth defendant who is the mother of defendants 1 and 7, along with her husband had given up their rights in the suit properties by way of family arrangement in favour of defendants 1 and 7 and the same is evidenced by a letter dated 30.01.1979. Therefore the sixth defendant is not entitled to any share but impleaded only as a proper party.

9. According to the plaintiffs they have requested the defendants on various occasions to effect partition amicably but they were evading. Hence the plaintiffs have filed the suit for partition in items 1 to 11 of the suit "A" and "B" Schedule properties by metes and bounds and allot ?th share to them.

10. The defendants 2 and 4 have filed a written statement and the first defendant has filed an Additional written statement which are as follows:-

"The crux of the defendants case is that the plaintiffs firm is not a registered firm. The defendants 1 and 7 are divided brothers and since Chellappa Chettiar did not have any issues, the seventh defendant was given in adoption to the widow of Chellappa Chettiar. The suit properties are not joint family properties.

The lands in Rajavayal and Pallathuvayal were divided among the Chellappa Chettiar and Swaminathan Chettiar. The seventh defendant was allotted 80 acres of land in Rajavayal out of which 50 acres were taken by the Government under the Land Ceiling Act and the balance 30 acres, the seventh defendant had sold it to various persons. Further, the land in Pallathuvayal is allotted only to the share of Swaminathan Chettiar and the first defendant alone is entitled to it and the seventh defendant has no share in the said lands. After being given in adoption to wife of Chellappa Chettiar as per custom of Nattukotai Nagarathar, the seventh defendant cannot make any claim in share allotted to Swaminathan Chettiar.

It is also the case of the first defendant that in O.P. No. 5 of 1984 filed before the Subordinate Court, Pudukkottai, the seventh defendant filed an application to implead himself as a legal heir of Swaminathan Chettiar in the said proceedings. However, he was not impleaded as he is the adopted son of Chellappa Chettiar. Further, it is also stated that the sale deed executed by the fifth defendant has been executed under influence of seventh defendant and on the promise to get him a job in Indian Bank and therefore the said sale deed is void.

It is the further case of the first defendant that he had entered into an agreement of sale with the plaintiffs in respect of 10 acres in S.No. 97/1, Patta No. 460 Pallathuvayal for a sum of Rs. 3.5 lakhs on 12.12.1982. Since the plaintiffs have not paid the amounts within the time stipulated under the contract, the first defendant has sold the said land in favour of 6 persons belonging to the Nizam's family on 25.05.1984 and 26.05.1984.

The plaintiffs then filed a suit for specific performance in O.S. No. 86 of 1985 and also sought for Rs. 3,00,000/- as compensation. The Court had held that the sale made by the defendants 5 and 7 is invalid and not supported by valid consideration. Pursuant to the said order, the Nizam family members had sold the properties to various third parties and they have not been made as a party to this present suit and thus the suit is bad for non joinder of necessary parties.

Further, it is the case of the first defendant that the sale deed executed by the fifth defendant is not supported by valid consideration and therefore it is sham and nominal. The defendants 2 to 5 had given power to first defendant. The fifth defendant had cancelled the power at the instructions of seventh defendant and the same is invalid. The agreement dated 20.02.1978 is false and the letter dated 30.01.1979 is not true and concocted. The suit is barred by Order 2, Rule 2 of C.P.C. as the plaintiffs ought to have claimed the present relief of partition in the earlier suit in O.S. No. 86 of 1985 and O.P. No. 5 of 1984 and thus the present suit is bad.

The Court fee paid by the plaintiffs is not correct and they are not in joint possession with the first defendant.

Therefore, the suit filed by the plaintiffs for partition on the basis of sale deeds executed by seventh defendant and fifth defendant is not valid. Though the fourth defendant had filed written statement has remained ex parte after filing

written statement."

11. On the side of the plaintiffs the Managing partner of the firm was examined as PW1 and Exhibits A1 to A31 were marked. On the side of the defendants, the first defendant examined himself as DW1 and Exhibits B1 to B22 were marked. An Advocate Commissioner was appointed to value the suit "B" schedule properties and his report was marked as C1 and C2.

12. The trial Court has framed various issues. With regard to the issue of court fee the trial court directed the plaintiffs to pay additional court fee by fixing the market value of the suit "B" schedule property. The trial court on consideration of oral and documentary evidence negated the prayer for partition. The trial court had observed that the adoption of seventh defendant by the widow of Chellappa Chettiar is true and had relied on the earlier proceedings in I.A. No. 80 of 1984 in O.P. No. 5 of 1984 wherein the application filed by the seventh defendant to revoke the Succession Certificate issued in respect of the heirs of the Swaminathan Chettiar was dismissed and no steps had been taken by seventh defendant to challenge the same.

13. Further, the trial court drew adverse inference for non examining the seventh defendant and came to the conclusion that the adoption of seventh defendant is valid. The trial court further concluded that the seventh defendant is not entitled to any right as a son of his natural father as per Section 12 of Hindu Adoption and Maintenance Act. The trial court further held that the sale deed executed by the fifth defendant in favour of the plaintiffs is genuine. However, held that the suit is bad for non joinder of necessary parties as the plaintiffs have not impleaded the purchasers who have purchased an extent of about 8 acres from the first defendant. Thus passed a judgment and decree dated 13.09.1994 dismissing the above suit.

14. Aggrieved by the same, the plaintiffs have preferred an appeal and the lower appellate court has dismissed the appeal on 15.12.1999 and confirmed the findings of the trial Court. The lower appellate court confirmed the findings of the trial court that the seventh defendant was validly given in adoption and that the seventh defendant has no share in the suit properties and thus the plaintiffs are not entitled to the relief of partition. The lower appellate court also held that the sale deed executed by the fifth defendant in favour of the plaintiffs is not true and valid.

15. Aggrieved by the judgment and decree of the lower appellate court, the plaintiffs have preferred the present second appeal.

16. The following substantial questions of law have been framed at the time of admission of the Second Appeal :

(1) Whether there is sufficient plea and proof regarding the case of adoption set up in defence and the finding uphold adoption is legal and justified?

(a) Whether in the absence of necessary plea regarding the date and details of

adoption, the status of a person as adopted can be upheld on foot of the oral evidence of the person setting up the case of adoption as his sole witness, overlooking the discrepancies and contrary to documentary evidence on record?

(b) Whether the status of a person adopted can be upheld without considering relevant documents and rejecting certain others received in evidence without objections or on admission in cross examination, placing the burden on the party disputing the adoption to prove the negative?

(c) Whether the lapse of time is a ground for presumption in favour of adoption or for diluting the requirements of proper plea and satisfactory proof of adoption?

(2) Whether registered sale deeds can be rejected as sham and nominal on the ground that payment of sale consideration charged on the property is recited to be postponed till the possession is delivered?

17. The learned counsel appearing for the appellants has submitted that both the courts below did not consider the case in the proper perspective. Adoption of the seventh defendant has not been proved by the first defendant. Adoption is not supported by any documentary evidence except a vague plea that the seventh defendant was given in adoption to family of Chellappa Chettiar as per custom. The date, month and year of adoption is neither pleaded nor spoken about by DW1, the sole witness. There is no evidence about the ceremony of adoption or about the actual "giving" or "taking" is proved in the required manner contemplated under law. He has further submitted that from the evidence of DW1, it is evident that the said Chellappa Chettiar died prior to 1928 and the date of death of his widow is not known. The case of the defendants regarding adoption is not supported by any documentary evidence. The evidence of DW1 about the date of adoption suggests an adoption between 1940 to 1963. The case of allotment of half of the properties of the family to the seventh defendant towards the share of Chellappa Chettiar falsified by the strong evidence which was not considered by courts below.

18. The learned counsel for the appellants has further submitted that when letters under Exhibits A24, A25, A27 and A28 are perused, the case of the adoption is proved to be false. The courts below ignoring the vital documents and relying upon some few inadmissible documents, held that the adoption is proved. The legal requirements for a valid adoption were not considered by the courts below and hence the findings of both the lower courts deserves to be set aside.

19. The learned Counsel appearing for the appellants relied upon the following judgments in support of his contention:

1) Subramanian Chettiar v. Kumarappa Chettiar reported in 1955 (1) MLJ 355.

2) Dal Bhadur Singh and others v. Bijai Bahadur Sigh and others reported in AIR 1930 PC 79.

3) Kishori Lal v. Mt. Chaltibai reported in AIR 1959 SC 504.

4) Rahasa Pandiani (dead) by LRs and others v. Gokulanada Panda and others reported in AIR 1987 SC 962.

5) A. Raghavamma and another v. A. Chenchamma and another reported in AIR 1964 SC 136.

6) Madhusudan Das v. Narayanibai and others reported in AIR 1983 (1) SCC 35.

7) Smt. Shanti Bai v. Miggo Devi reported in AIR 1980 SC 2008.

8) K. Gopalaswami Reddiar v. Peria Siddammal reported in 1958 (II) MLJ 107.

9) M. Gurudas and others v. Rasaranjan and others reported in 2007 (1) MLJ 41.

10) N. Lakshmanan Servai and others v. Duraipandi reported in 2000 (1) MLJ 54.

11) R. Meenakshi Ammal v. Velusamy and others reported in 2002 (3) MLJ 305.

12) V. Ravichandran v. R.Ramesh Jayaram and others reported in 1999 (I) MLJ 223

13) Balasubrahmanya Pandya Thalaivar v. M. Subbayya Tevar and another reported in AIR 1938 PC 34.

14) Aravamudha Iyengar v. Ramaswami Bhattar reported in 1952 (1) MLJ 251.

15) N. Jayavel v. M. Nallammal reported in 2007 (3) LW 634.

20. The learned counsel appearing for the appellants has further submitted that with regard to the validity of Ex.A9 and Ex.A11 executed by the seventh defendant and fifth defendant that it is settled that when a sale deed of immovable property is executed and registered, there is a transfer of title. Mere postponement of payment of part consideration will not arrest the passing of title as a sale of immovable property. Property may be sold in exchange for a price paid or promised to be paid. He has further submitted that from the documents Ex.A9 to A16, the plaintiffs have proved the passing of consideration and the fact that the sale deeds were intended to be acted upon and the validity of the document is to be gathered from the intention of the document maker. From the subsequent receipts Exs.A9 and A12 to A16, the executant's have accepted the payments in terms of the sale deeds under the Exs.A9 and A11. Without considering the legal requirement of a valid sale and the documentary evidence, the Lower Appellate court has given perverse findings that the documents of sale deeds Exs.A9 and A11 are sham and nominal.

21. Upon considering the pleadings, evidences and documents available on record and the arguments put forth by the learned counsel for appellants and though notices were served upon the respondents, none appeared today excepting the seventh respondent and therefore the Second appeal is taken up for final disposal on merits.

22. The Substantial questions of law are taken for consideration as hereunder:-

As per the substantial questions of law framed, the core issue that has to be decided in the Second Appeal is as to whether the seventh defendant has been taken in adoption by the widow of Chellappa Chettiar for her husband or not?

In the trial court, on the side of the defendants, the defendants 1 and 2 alone have contested the suit and the defendants 3 to 7 remained ex parte. In the first appellate court also, the respondents 1 and 2 alone contested the appeal and the notice to other respondents was dispensed with.

It is the basic principle of law that the person who sets up a case must specifically plead and prove his case in accordance with the law. In the case on hand, it is the case of the first defendant that the seventh defendant is the natural son of his father Swaminathan Chettiar and that he was adopted by the widow of Chellappa Chettiar for her husband. Therefore, the onus to prove this fact lies upon the defendants 1 and 2.

23. The learned counsel appearing for the appellants has further submitted that as far as adoption is concerned, it plants a person from the family of his birth to the family which adopted him and displaces natural course of succession. In such a case, the learned counsel submitted that the degree of proof is very high and placed reliance upon the following rulings, viz.,

(1) The decision of the Privy Council reported in Dal Bhadur Singh and others v. Bijai Bahadur Sigh and others - AIR 1930 PC 79, wherein the larger Bench of five judges reiterated the legal position thus:

"the onus is heavy on the person who seeks to displace the natural succession of property by the act of an adoption and that in such a case, the proof requires strict and almost severe scrutiny".

(2) The decision of the Hon"ble Apex Court reported in A. Raghavamma and another v. A. Chenchamma and another - AIR 1964 SC 136, wherein it has been held in para 14 that

"It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity".

It has to be seen as to whether the defendants 1 and 2 have properly pleaded and proved the factum of adoption propounded by them and whether the courts below have properly applied the above principles of law.

While looking at the pleadings of the defendants 1 and 2, specific details are lacking about the date, month and year when the seventh defendant was taken in adoption by the widow of Chellappa Chettiar, the age of seventh defendant at the time of adoption, the age of widow of Chellappa Chettiar at the time of adoption, the performance of ceremonies of adoption and the actual "giving of adoption" and "taking in adoption".

24. The details of adoption have also not been adduced in the oral evidence of

DW1. Instead, a perusal of the deposition of DW1 would go to show that several years have been suggested as to the time when the seventh defendant was taken in adoption by the widow of Chellappa Chettiar. They are:-

(i) DW1 deposed that the seventh defendant had contracted second marriage in or about the year 1953 or 1954. DW1 further deposed that 15 years subsequent to adoption only, seventh defendant contracted the second marriage. So, the earliest year of adoption suggested by DW1 is 1948 or 1949.

(ii) DW1 deposed that the properties were partitioned when the seventh defendant was taken in adoption and that Ex.A22 was executed at that time. Ex.A22 is dated 20.10.1963.

(iii) DW1 deposed that at the time of second marriage of the seventh defendant, Ex.A8 came into being. Ex.A8 is dated 20.02.1978.

In the eye of law, these contradictions regarding the date when the seventh defendant was taken in adoption by the widow of Chellappa Chettiar, ranging a period of 30 years from 1948 to 1978 falsifies the case of adoption propounded by the defendants 1 and 2. The courts below have failed to take note of these contradictions. In view of the above said contradictions, the findings of the courts below accepting the factum of adoption propounded by the defendants 1 and 2 are perverse.

25. The first appellate court having found that the date on which adoption was given is not stated in the written statement and that the adoption is said to have been done near 1954, 1955 and 1956, it ought to have rejected the plea of adoption. As far as the proof of adoption is concerned, except the interested testimony of DW1, no other person who was a witness to the adoption was examined on the side of the defendants 1 and 2 to prove the factum of adoption of the seventh defendant. Equally, no other independent witness was examined as to the treatment of the seventh defendant by the general public as the adopted son of Chellappa Chettiar and his widow.

26. The first appellate court had misdirected itself in holding that the first defendant is a competent witness to speak about the adoption. The first appellate court has failed to see that the first defendant is an interested witness and no other independent witness was examined to prove the factum of adoption. Thus, the finding of the courts below in this regard is perverse. It may be noted that DW1 in his chief examination states that the adoption of the seventh defendant was made by Chellappa Chettiar. This is in contradiction to his pleadings where it has been stated that the seventh defendant was taken in adoption by the widow of Chellappa Chettiar, for her husband.

27. In fact, when a specific plea was made in the plaint that Sambantham Chettiar, the seventh defendant is the son of Swaminathan Chettiar and that he is entitled to ? share in the suit properties and that the plaintiffs have bought the said ? share and impleaded the mother of the seventh defendant as sixth

defendant in the suit, if really the seventh defendant was taken in adoption by the widow of Chellappa Chettiar and he was not entitled to any share in the suit properties, the 6th defendant, who is the mother of the seventh defendant and who is the fit person to speak about the adoption, would have contested the suit. But, she remained ex parte in the suit, not even entering appearance. Thus, since the sixth defendant has not denied the above facts pleaded in the plaint, this court holds that the sixth defendant has admitted the above case of the plaintiffs. To give a son in adoption, the natural parents have to give him in adoption. Here, one of the natural parents of the seventh defendant, viz., the sixth defendant was alive, during the pendency of the suit, during the pendency of the appeal and she died only during the pendency of the Second Appeal. Thus, the sixth defendant is a valuable witness to speak about the factum of adoption. But the defendants 1 and 2 have not examined her as a witness on their side. Thus, a valuable witness who has a better knowledge and who is the right person to speak about the adoption has not come to court to depose evidence. Hence, under Section 114 of Evidence Act, an adverse inference is drawn and it is held that the defendants 1 and 2 have not proved the factum of adoption. In Ex.A23, DW1 has admitted that his mother, sixth defendant in the suit, was not aware of taking of the seventh defendant in adoption by the widow of Chellappa Chettiar. It is a rudimentary principle of law that natural parents have to be present to give their son in adoption. The admission by DW1 in Ex.A23 that his mother was not present at the time of taking of seventh defendant in adoption by the widow of Chellappa Chettiar falsifies the case of adoption as propounded by the defendants 1 and 2. In the light of the above, Ex.A8 assumes much significance. DW1 had admitted the execution of the said document. In the said document in para 2, it has been recited that the father shall remain as Kartha of the joint family and that after his life time, the joint family properties shall be partitioned between the defendants 1 and 7 in equal moieties. The above said explicit content of the document proves that the seventh defendant was the son of Swaminathan Chettiar as on the date of Ex.A8, viz., 20.02.1978. If really the seventh defendant was given in adoption to the widow of Chellappa Chettiar in the year 1948 or 1949 or 1963, as propounded by the defendants 1 and 2, sufficient recital would have been made in Ex.A8 to that effect. Contra, the recital in Ex.A8 would only go to establish that the seventh defendant remained as the son of Swaminathan Chettiar and the plea of he having been given in adoption is disproved. The findings of the courts below to discard this valuable piece of documentary evidence is perverse. Exhibit A22 dated 20.10.1963 is a statement given by first defendant to the Secretary of Pudukkottai Co-operative Bank to enable the seventh defendant to avail a mortgage loan. In the said statement, first defendant had admitted that he and his brother seventh defendant are the sons of his father Swaminathan Chettiar. Ex.A22 statement has been admitted by first defendant during his cross examination. Exs.A24, A25, A27 and A28 are the letters written by Swaminathan Chettiar to his son the seventh defendant during the period 1977-79. Swaminathan Chettiar wrote the said letters in his own handwriting. These documents were also admitted by DW1

and in fact they were marked in his cross examination. A reading of the said letters would show that the sons and father remained as members of joint family and that is the reason why the father was asking to plug-in the sale considerations received by his 2 sons, the defendants 1 and 7 into the common pool and to divide them in equal moieties. A consideration of the above documents, viz., Exs.A22, 24, 25, 27 and 28 disproves the factum of adoption propounded by the defendants 1 and 2.

In *R. Meenakshi Ammal v. Velusamy and others* reported in 2002 (3) MLJ 305, the case of adoption was not accepted as the proponent of adoption had failed to plead and prove the actual date and manner of adoption.

In *N. Jayavel v. M. Nallammal* - 2007 (3) LW 634, this Hon'ble Court has held that with regard to adoption, the factum of adoption has to be pleaded and proved.

28. In the courts below, the defendants 1 and 2 have also attempted to portray a case of customary adoption. But, they have not proved this customary adoption also in accordance with the law. They have not examined any independent witness to buttress this case. With regard to the proof of custom the following extract from the judgment reported in *Subramanian Chettiar v. Kumarappa Chettiar* - 1955 (1) MLJ 355 is relevant:

"Now, the essentials of a valid family custom are: A custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of "the general rules of law, must be construed strictly:--"*Hurpurshad v. Sheb Dyal*, 3 Ind App 259 (PC) (D). It is further essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends. It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature: -- *Ramalakshmi Ammal v. Sivanantha, Perumal*, 14 Moo Ind App 570 (PC) ; "*Gopalayyan v. Raghupathi Ayyan*", 7 Mad HCR 250; "*Mira Bivi v. Vellayanna*". 8 Mad 464; *Harnabh Pershad v. Mandil Das*". 27 Cal 379; "*Rupchand v. Jambu Parshad*", 32 All 247 (PC); "*Abdul Hussein Khan v. Mt. Bibi Sona Dero*", AIR 1917 PC 181 ; "*Ram Narain v. Bar Narinjan Kaur*", AIR 1924 Lah 116; "*Mookkakone v. Ammakutti Ammal*", AIR 1928 Mad 299 (FB) ; "*Bhikubhai v. Manilal*", AIR 1930 Bom 517; "*Gulabchand v. Mannilal*", AIR 1941 Oudh 230. The burden of proving such a custom is upon the person asserting it. In this case applying these tests it is clear that the plaintiff has not proved the custom and discharged the burden lying upon him."

In the present case what is the custom prevailing in Nattukottai Nagarathar Community is not specifically pleaded. No one is examined to prove the existence of such a custom and the adoption as per that custom. Having regard to the vagueness in the plea and absence of evidence about custom and applying the

principles of law enunciated in the above ruling, this court finds that the defendants have also not proved the factum of customary adoption. It is relevant to note that The Hindu Adoption and Maintenance Act 1956 came into force on 21.12.1956. Prior to this Act a widow can adopt only under an authority from her husband. Prior to the 1956 Act, natural father and mother have to give the child in adoption, and does not permit adoption without the consent or knowledge of parents. A woman could adopt a son only for her husband and in such a case, the consent of the husband is must. A married man cannot be adopted. Person adopting should be lawfully capable of taking an adoption, person giving adoption should be lawfully capable of giving. The person adopted should be lawfully capable of being taken in adoption. Adoption to be done by an actual "giving" and "taking". The Ceremony named "Datta Homam" should be performed.

29. After the enactment of the Hindu Adoption and Maintenance Act 1956, as per Sec 9 (2), the father has the right to give adoption only with the consent of the mother. As per Sec 10 (3) of the Act, the person adopted should not be married unless there is a custom. As per Section 11 of the Act, if the adoption is by a female and the person to be adopted is a man, the adoptive mother should be at least 21 years older than the person to be adopted. Of the 3 periods which was suggested by DW1 as to the period, when the adoption could have been made, the earliest period is 1948-49, when the law mandates that the consent of the husband is mandatory and that such consent ought to have been obtained prior to the death of the husband, here Chellappa Chettiar.

The Privy Council in a ruling reported in Balasubrahmanya Pandya Thalaivar v. M. Subbayya Tevar - AIR 1938 PC 34, has held that though the factum of adoption is proved or admitted, the adoption is valid only if it is made under the authority of the lady's husband.

Again in the judgment reported in K. Gopalaswami Reddiar v. Peria Siddammal - 1958 (II) MLJ 107, a Division Bench of our High Court has held that the validity of adoption also should be proved by sufficient evidence. In this case also the proof of authority of the husband is held to be an important requirement where the adoption was by the widow after the death of husband.

In Smt. Shanti Bai v. Miggo Devi - AIR 1980 SC 2008, the Hon''ble Supreme Court after holding that the factum of adoption is proved, refused to uphold adoption on the ground that validity of adoption is not proved. The Hon''ble Supreme Court dealt with a case where the adoption was prior to the Hindu Adoption and Maintenance Act. Where the adoption pleaded was by a widow after the death of her husband, the Hon''ble Supreme Court held that the adoption is not proved to be valid as it is not proved that prior to the death of husband, he gave authority to his wife to adopt a son after his death.

30. Further, it is seen from the evidence of DW1 that Chellappa Chettiar died prior to 1928 and the date of death of Chellappa Chettiar's widow is not known.

In this case, defendants 1 and 2 have failed to prove as to whether Chellappa Chettiar gave consent to his wife to adopt a son for him. The eldest member in the family was the sixth defendant, who was the wife of the brother of Chellappa Chettiar and she ought to have been examined to prove the above fact. In the absence of such a proof, it is irresistible to hold that the validity of adoption has not been proved in accordance with the law. Of the 3 periods which was suggested by DW1 as to the period, when the adoption could have been made, 2 are subsequent to the enactment of the Hindu Adoption and Maintenance Act. So far as such adoptions are concerned, the actual giving and taking of adoption have to be proved. In a judgment by the Hon"ble Division Bench of our High Court reported in V. Ravichandran v. R. Ramesh Jayaram and others. 1999 (I) MLJ 223, it has been held as follows:

In Para 21 to 23:

"21. The provision to Section 11 of the Act prescribes, that even the performance of the Homam is not necessary, but the giving and taking of the child in adoption is essential. The object of the corporeal giving and taking in adoption is to secure due publicity. To achieve this, it is essential to have a formal ceremony. For a valid adoption, the physical act of giving and taking is essential requisite, a ceremony imperative in all adoptions, whatever the caste. The evidence to prove the ceremony of giving and taking should be such that it is free from all suspicions of fraud and so consistent and probable as to give no occasion for doubting its truth.

22. As held by the Apex Court, the oral evidence of the witnesses deposing about the ceremony of adoption shall be trustworthy and there should be details of the events in ceremony ending with the usual feast following it. In the ceremony it is very much essential that the natural parent shall give the child in adoption and the adoptive parents shall declare in the presence of the relatives and friends, who attended the ceremony that they accepted the child in adoption. As stated earlier, the object of this declaration in the midst of members of both the families is to secure due publicity. If no such ceremony is performed, then the intention of the parties cannot be gathered.

23. Moreover, when there is no registered document pertaining to adoption under Section 16 of the Act, then the Court has to be very cautious and extremely alert to guard the persons against being ensnared by the unscrupulous persons who indulge in grabbing the properties. Further, as held by the Apex Court, the plaintiff has a heavy duty to prove the ceremony of adoption, in the absence of any registered document to explain to the satisfaction of the conscience of the Court regarding such an adoption by producing accounts to show that there were expenses incurred due to the ceremony of adoption and by examining the Priest who performed the. Ceremony."

In another judgment of Hon"ble Supreme Court reported in 2007 (1) MLJ Page 41 (SC) M. Gurudas and others v. Rasaranjan and others it has been held that

"to prove valid adoption, it would be necessary to bring on record that there had been an actual giving and taking ceremony and that there was performance of "Datta Homam" which is imperative, subject to just exceptions."

In the judgment reported in 2000 (1) MLJ Page 54 - N. Lakshmsnan Servai and others v. Duraipundi it has been held that the factum of giving and taking adoption should be proved and that mere performance of funeral rights will not establish a valid adoption. Similarly it is reiterated that the ingredients required under Section 11 (vi) have to be proved satisfactorily.

31. The defendants 1 and 2 have failed to prove the actual giving and taking of adoption as mandated in the above rulings and in the absence of such proof, the acceptance of the plea of adoption by the courts below is perverse and the same is liable to be set aside. The defendants 1 and 6 in the suit, as petitioners, have obtained a succession certificate in O.P. No. 5 of 1984 on the file of the Subordinate Judge of Pudukkottai. The seventh defendant has filed a petition in I.A. No. 80 of 1984 to revoke the said Certificate. Ex.B2, is the order passed in the said interlocutory application. In the said order, the Succession Court, had dismissed the petition to revoke the Succession Certificate on the ground that there is no concealment of fact and there is no fraud played by the respondents for obtaining the Succession Certificate and that the question whether the petitioner is the natural son of Swaminathan Chettiar and there is no severance from the natural family is left open to be decided in a suit. In Ex.B2, the court did not direct the seventh defendant to compulsorily file a suit, nor had the court conclusively decided the question of his status as to whether he is the natural son of Swaminathan Chettiar or the adopted son of Chellappa Chettiar. In fact, the said question has been left open to be decided in a suit. Therefore, the respondents 2 to 5 and 9 cannot contend that the order passed in I.A. No. 80 of 1984 in O.P. No. 5 of 1984 (Ex.B2) operates as res judicata. The trial court has also rightly held that the said order will not operate as res judicata. But, it erroneously held that it operates as an estoppel. The said finding of the trial court is perverse, for the seventh defendant has not made any statement and resiled therefrom, for, the plea of estoppel can be raised against a person, only if he had made a statement and resiled therefrom.

32. The plaintiffs bought (1/2) 5/10th share in the suit properties from the seventh defendant under Ex.A9 dated 16.02.1983. Thus, the sale deed is about 2 years prior to the order dated 21.01.1985 passed in I.A. No. 80 of 1984 in O.P. No. 5 of 1984 (Ex.B2). But the courts below have erroneously observed that the seventh defendant has been attempting to face the issue indirectly through the plaintiffs by executing Ex.A9 sale deed. The courts below ought to have found that the plaintiffs have filed the suit to enforce their rights and not to enforce the right of the seventh defendant in the suit properties. The courts below ought to have also found that in answer to the claim of the plaintiffs, the defendants 1 and 2 have set up a plea of adoption and have failed to prove the same in accordance with the law.

33. The courts below have proceeded on the footing that the allotment of 83 acres of land in Rajavayal to the seventh defendant was towards his share as the adopted son of Chellappa Chettiar. But there is no material in the case to support such a conclusion. Further, DW1 admits that in order to escape from Land Ceiling Act, lands were divided between him, the seventh defendant and his father. Therefore, DW1 disproves his own case that the seventh defendant was allotted half of the property due to the share of Chellappa Chettiar. Thus, the finding of the courts below that the allotment of 83 acres of land was towards the share of seventh defendant as the adopted son of Chellappa Chettiar is a perverse one. The courts below have held that since the plaintiffs have failed to examine the seventh defendant, they have failed to discharge their burden that no such adoption of seventh defendant by the widow of Chellappa Chettiar was ever made. It is the basic tenet of law that a person who alleges a fact must establish the same. Contra, the courts below have wrongly placed the burden of proof upon the plaintiffs. Further, one cannot be required to prove a negative. Under Section 16 of the Hindu Adoption and Maintenance Act, 1956, only when an adoption is evidenced by a registered document, an adoption could be presumed. In none of the other cases, it has to be proved as a matter of fact, the simple reason being, it displaces the natural succession of property. Thus, the adoption propounded by the defendants falls to the ground and it is held that the seventh defendant is the son of Swaminathan Chettiar and is entitled to ? share in the suit properties. Looking from any angle, the defendants 1 and 2 have failed to prove the factum of adoption of seventh defendant by the widow of Chellappa Chettiar and in the absence of such a proof, the findings of the courts below upholding such adoption are perverse. Thus, there is neither plea nor proof regarding the case of adoption set up by the defendants 1 and 2 and in the absence of such plea, the status of a person as adopted cannot be upheld and a party cannot be required to prove the negative and adoption cannot be presumed on the ground of lapse of time. Accordingly, the substantial questions of law 1, (a), (b) and (c) are answered in favour of the plaintiffs and the findings of the trial court and the lower appellate court are set aside in this regard.

34. The next substantial question of law which arises for consideration is whether the registered sale deeds executed by the fifth defendant and seventh defendant can be rejected as sham and nominal on the ground that payment of sale consideration charged on the property is recited to be postponed till the possession is delivered?

It can be seen that Exhibits A9 and A11 are the sale deeds executed by the seventh defendant and fifth defendant respectively. Even though, it was stated that the fifth defendant was also given in adoption, the defendants 1 and 2 have failed to prove this fact also. The motive alleged by the defendants 1 and 2 for the execution of Ex.A11 cannot be accepted, for the simple reason that the vendees under Ex.A11 are plaintiffs and not the seventh defendant. Further Ex.A11 came into being much prior to Ex.B2. It has already been held that the seventh defendant is the son of Swaminathan Chettiar and is entitled to ? share

in the suit properties. Ex.A9 is the sale deed executed by the seventh defendant in favour of the plaintiffs on 16.02.1983. The sale deed is in respect of half portion of the suit properties. The seventh defendant has received Rs. 1,50,000/- and the balance is retained by the purchaser. Exhibit A10 is the receipt given by the seventh defendant in favour of the first plaintiff. The counsel for the seventh defendant has also conceded these facts. Exhibit A11 is the other sale deed dated 19.10.1983, executed by the fifth defendant, one of the sons of the first defendant, in favour of the plaintiffs. The fifth defendant has received Rs. 25,000/- under the sale deed itself and the balance is retained by the purchaser till the possession and subdivision is effected. Ex.A12 is the receipt given by the fifth defendant for Rs. 300/- towards interest for the unpaid sale consideration. Exs.A13, A14, A15, A16 are the receipts issued by the fifth defendant in favour of the plaintiffs. Exs.A9 to A16 proved the passing of sale consideration and the fact that the sale deeds were intended to be acted upon. Under Section 54 of the Transfer of Property Act, consideration may be part paid and part promised. Therefore, the retention of part of sale consideration by the vendees under Exs.A9 and A11 cannot be a ground to disbelieve the said documents and to hold that no title has been transferred under the said documents.

In support of this contention, the learned counsel for the appellants has cited a ruling reported in *Vidhyadhur v. Mankikrao and another* - AIR 1999 SC 1441 in Para 35. In para 35 of the said judgment it has been held:

"the definition says that the transfer of ownership has to be for a "price paid or promised or part paid and part promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part paid or part promised indicate that actual payment of whole of the price at the time of execution of the sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/- the sale would be complete."

Thus, as per the above decision it can be held that when a sale deed is registered and executed, there is a prima facie transfer of title to the vendee. The mere non-payment of consideration does not arrest the transfer of title of immovable property. Therefore as per Section 54 of Transfer of Property Act, Exhibits A9 and A11 satisfy the requirements contemplated under law. Moreover, there is no specific prayer challenging Exhibits A9 and A11 in this case. Thus, Exs.A9 and A11 cannot be construed as sham and nominal and they are valid and supported by consideration. Hence, the second substantial question of law is also answered in favour of the appellants/plaintiffs and the findings of the trial Court and the lower appellate Court are set aside. Thus, the plaintiffs are entitled to 7th share in the suit properties. However, in order to get the relief of partition, the plaintiffs are bound to pay to the defendants 7 and 5, the balance of sale consideration under Exs.A9 and A11 or to deposit the same into court.

35. On considering the facts and circumstances of the case and on perusing the

written submission submitted by the learned counsel for the appellants and on perusing the records of the Courts below and the view expressed by this Court, the Second Appeal is hereby allowed and the judgment and decree of the trial Court made in O.S. No. 163 of 1987 by the Subordinate Judge, Pudukkottai dated 13.09.1994 and the judgment and decree dated 15.12.1999 made in A.S. No. 77 of 1995 by the Principal District Judge of Pudukkottai are hereby set aside and a preliminary decree for partition of 7th share of the appellants/plaintiffs in the suit "A" and "B" schedule properties is hereby passed and the appellants/plaintiffs are hereby directed to deposit the balance of sale consideration under Exs.A9 and A11 into the Trial Court with interest thereon at the rate of 12% p.a. from the date of sale till the date of payment, less interest already paid under Exs.A10, A12 to 16, within a period of 3 months from the date of receipt of the order.

36. In the result, the above second appeal is allowed. No costs.