

***HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

+APPEAL SUIT No.2328 OF 1995

%Date: 28-11-2014

Between:

K. Satyamma (died), W/o. Karagaon Lachanna,
Aged 62 years, Agriculture, R/o.Basar village,
Adilabad District and 7 others. - - -
Appellants.

And

\$ Smt. Bhoodevi, W/o.Venkat Rao, 45 Years,
Agriculture, Nadapur Village, Navipet Mandal,
Nizamabad District. - - -
Respondent.

! Counsel for Appellant/s : Mr. V. Ravinder Rao.

^ Counsel for Respondent/s : Mr. Mr. Damodar Rao.

< Gist :

> HEAD NOTE :

? Cases referred :

1. (2005) 4 SCC 120
2. (2000) 6 SCC 301
3. 2014 (4) ALT 241
4. AIR 1973 HP 71
5. AIR 1991 MP 18
6. AIR 2005 SCC 217
7. 2003 (4) ALD 302 (DB)
8. 1986 (2) WLN 713
9. AIR 1990 SC 1153
10. AIR 1967 SC 1761
11. 1964 (1) AWR 166
12. AIR 1974 SC 878
13. AIR 2003 SC 1735
14. 2000 40 ALR 714
15. AIR 2001 SC 266
16. (1955) 1 SCR 1

This Court made the following :

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No. 2328 OF 1993

JUDGMENT:

The defendants 1 to 4 in Original Suit No.4 of 1989, on the file of the Court of Subordinate Judge (Now Senior Civil Judge), Nirmal, Adilabad District (For short, 'the trial Court'), preferred this Appeal against the impugned decree and judgment dated 30.07.1993; wherein, the Suit filed for declaration and recovery of possession of the suit schedule property, which is more fully described in the schedule annexed to the plaint, was decreed in favour of the plaintiff.

2. During pendency of this Appeal, 1st appellant herein died and her legal representatives i.e., 5th appellant herein was brought on record and 2nd appellant herein died and his legal representatives i.e., appellants 6 to 8 were brought on record as per the orders of this Court in A.S.M.P. Nos.1565 and 1562 of 2013, dated 28.02.2014.

3. The appellants 1 to 4 herein were the defendants and the respondent herein was the plaintiff before the trial Court, in O.S. No.4 of 1989. For convenience of reference, the ranks given to the parties in O.S. No.4 of 1989 will be adopted throughout this judgment.

4. The plaintiff filed the Suit for declaration of title and recovery of possession of the plaint schedule property of an extent of Ac.14.00 guntas of dry land out of Ac.27.39 guntas in S.No.518 and Ac.0.39 guntas of wet land in S.No.407/C situated at Basar village, which is more fully described in the schedule annexed to the plaint, alleging that she purchased the schedule property from one Sayamma, wife of

Dharmanna, in the year 1980, who initially sold to the plaintiff Ac.10.00 guntas in S.No.518 and Ac.0.39 guntas in S.No.407/C for total consideration of Rs.43,500/- under a registered sale deed dated 10.09.1980, marked as Ex.A-1; subsequently, she sold another piece of Ac.4.00 guntas of dry land in S.No.518 to the plaintiff for consideration of Rs.15,000/- under a registered sale deed dated 16.09.1980, marked as Ex.A-2, delivered vacant possession of the schedule property to the plaintiff on the date of execution of the sale deeds itself. After purchase of the schedule property, the name of the plaintiff was mutated in the revenue records and effected transfer of patta in her favour. Originally, the schedule property belongs to the husband of Sayamma, who died prior to 1956, and after his death Sayamma became absolute owner of the schedule property and she was in possession and enjoyment till she sold the property to the plaintiff. While the matter stood thus, the 3rd defendant without any manner of right forcibly occupied the schedule property in the month of June, 1998 with the aid of defendants 1, 2 and 4.

5. Plaintiff herein is the cousin of Sayamma, PW.2. 3rd defendant is the adopted son of Sayamma, PW.2. 4th defendant is the wife of 3rd defendant and daughter of 1st defendant. 2nd defendant is the son of 1st defendant.

6. When the defendants threatened to dispossess the plaintiff from the suit schedule property, she earlier filed a suit in O.S. No.76 of 1982 on the file of the Court of District Munsif, Bhainsa for injunction simplicitor in respect of Ac.14.00 guntas of land in S.No.518, certified copy of which is marked as Ex.B-16, which ended in dismissal and carried the matter in appeal in A.S. No.39 of 1984 on the file of the Court of Subordinate Judge, Nirmal, certified copy of which is marked as Ex.A-8, was also dismissed holding that the plaintiff could not prove her possession as on the date of filing suit, while setting-aside

the other findings of the trial Court, recorded a finding that the 3rd defendant is the adopted son of Sayamma and the sale deeds are genuine and supported by consideration. The plaintiff was dispossessed by the defendants on 15.06.1988.

7. The plaintiff having purchased the schedule property under valid sale deeds, Exs.A-1 and A-2, became absolute owner of the property and the defendants have no right, whatsoever, to continue in possession of the property claiming right over it. Hence, the suit for declaratory relief declaring that she is the absolute owner of the schedule property and to recover possession of the same.

8. Defendants filed common written statement denying material allegations of the plaint; *inter-alia* contending that father's name of Sayanna, 3rd defendant, is one Dharmanna, husband of Sayamma, as he was taken in adoption by Sayamma, wife of Dharmanna, in the year 1956. Since then, he was brought up by Sayamma, performed his marriage with 4th defendant and all the parties to the suit are closely related to each other. According to the caste custom, Sayamma entered into an agreement with the natural father of 3rd defendant agreeing to give half share in the schedule property to her adopted son and, in case of differences among themselves, she also agreed that she will not dispose of the property in any manner. However, contrary to the agreement, she executed Exs.A-1 and A-2 sale deeds, nominally, also filed declaration before the Land Reforms Tribunal, Nirmal in C.C. No.1305 of 1975 deposing before the Tribunal that 3rd defendant is her adopted son and, thereby, she was declared as non-surplus holder by order dated 31.01.1977.

9. A panchayat was held on 13.05.1979 at Basar village; wherein Sayamma agreed to the family arrangement; according to the said arrangement, 3rd defendant should cultivate the property and give

‘batai’ share in her half share of the schedule property. Thus, the sale of property in favour of the plaintiff by Sayamma, PW.2, is contrary to the family arrangement and settlement in the panchayat. Therefore, the plaintiff would not acquire title to the schedule property and cannot be declared as owner of the schedule property. The sales in favour of the plaintiff are not legal, and they are collusive, sham and nominal, not supported by consideration and brought into existence to harass 3rd defendant. Thereby, the plaintiff is not entitled to claim any share against the defendants. The defendants while admitting filing of O.S. No.76 of 1982 by the plaintiff on the file of District Munsif, Bhainsa for perpetual injunction in respect of Ac.14.00 guntas of dry land contended that the suit was dismissed disbelieving the case set-up by the plaintiff and attained finality, consequent upon dismissal of the appeal and since then 3rd defendant alone is in continuous possession and enjoyment of the property. Defendants 1, 2 and 4 are neither necessary nor proper parties to the suit, hence, the suit is liable for dismissal on the ground of *misjoinder* of proper and necessary parties.

10. It is further contended that the findings of the trial Court and appellate Court in O.S. No.76 of 1982 and A.S. No.39 of 1984 are unwarranted as there was no necessity to frame 1st issue in the suit with regard to validity of sale deeds executed by Sayamma in favour of the plaintiff; the final conclusions arrived by the appellate Court are unwarranted regarding the validity of sale deeds. Hence, the finding in the earlier suit with regard to validity of sale deeds would not come in the way of the plaintiff to claim any legal right in the schedule property. Finally, it is contended that the alienation in favour of the plaintiff by Sayamma, PW.2, is not legal, valid and binding on the 3rd defendant and, consequently, the plaintiff is not entitled to claim any relief against the defendants and prayed to dismiss the suit.

11. Basing on the above pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiff is owner of suit lands and whether she is entitled to recover the same as prayed for?
- 2) Whether the suit is bad for *misjoinder* of parties (D-1, D-2 and D-4)?
- 3) To what relief?

12. During course of trial, on behalf of the plaintiff, PWs.1 to 5 were examined and Exs.A-1 to A-8 were marked. On behalf of the defendants, DWs.1 to 3 were examined and Exs.B-1 to B-16 were marked.

13. Upon hearing argument of both the counsel, considering oral and documentary evidence available on record, the trial Court decreed the suit holding that the plaintiff is the absolute owner of the schedule property by virtue of purchase under Exs.A-1 and A-2, dated 10.09.1980 and 16.09.1980 respectively, and that the 3rd defendant is in illegal, wrongful or unlawful possession of the property, directed the 3rd defendant to deliver vacant possession of the schedule property.

14. Aggrieved by the impugned decree and judgment, the defendants therein preferred this appeal raising various contentions. The following are the main contentions raised by the defendants in this appeal:

- a) The trial Court did not take into consideration the categorical and evidentiary admissions of PW.2, about her statement before the Land Reforms Tribunal, with regard to agreement to give half share in the joint family property, though it is supported by Exs.B-1 and B-2, and if Exs.B-1 and B-2 are considered in proper perspective, the trial Court would not have granted a decree in favour

of the plaintiff;

b) The trial Court also failed to consider Section 13 of the Hindu Adoptions and Maintenance Act, 1956 and, erroneously, concluded that PW.2 is the absolute owner of the property consequent upon death of her husband prior to commencement of the Hindu succession Act, 1956, thereby, the finding of the trial Court that the schedule property is the separate property of PW.2, Sayamma, is erroneous and it is only a coparcenary property;

c) It is finally contended that after adoption of 3rd defendant, which relates back to the date of death of husband of PW.2, he became a coparcener on account of his introduction into the adopted parents' family. Thereby, he is entitled to claim entire property, but the trial Court did not appreciate specific contentions raised in the written statement which are supported by both oral and documentary evidence and, committed an error, finally, prayed to allow this appeal setting-aside the decree and judgment of the trial Court.

15. During course of argument, Mr. V. Ravinder Rao, learned counsel for the defendants-appellants, would contend that the sale in favour of the plaintiff by Sayamma, PW.2, is invalid in view of the registered agreement executed by her, after adoption of 3rd defendant, wherein she agreed to give half share in the property of the family but contrary to the terms and conditions of agreement, she sold the property by executing nominal sale deeds in favour of the plaintiff, marked as Exs.A-1 and A-2 and, therefore, those sale deeds are not binding on the plaintiff and they are not legally valid; thereby, the plaintiff would not acquire any title to the schedule property under Exs.A-1 and A-2. While recording the finding in the earlier suit in O.S.

No.76 of 1982, filed for injunction simplicitor, the trial Court framed several issues which were not required to be framed, recorded unwarranted findings without considering the scope of the trial in a injunction suit and, similarly, the appellate Court in A.S. No.39 of 1984, erroneously recorded several unwarranted findings without considering the scope of the claim; therefore, the findings whatever recorded in the suit in O.S. No.76 of 1982 and appeal in A.S. No.39 of 1984 would not operate as *res-judicata*.

16. Finally, it is contended that the 3rd defendant alone is in possession and enjoyment of the property from the date of settlement between the parties in the panchayat held at Basar village on 13.05.1979, paying '**batai**' share in the half share of Sayamma, PW.2, and never took forcible or high handed possession of the schedule property from the plaintiff and, in fact, such taking forcible possession would not arise, as 3rd defendant alone is in possession and enjoyment of the property, but the trial Court failed to appreciate those specific contentions in proper perspective and prayed to allow the appeal setting-aside the decree and judgment of the trial Court.

17. *Per contra*, Sri Damodar Rao, learned counsel for the plaintiff-respondent, would submit that consequent upon death of Dharmanna, husband of PW.2, prior to commencement of the Hindu Succession Act, the property vested/devolved upon Sayamma, PW.2, wife of Dharmanna, as he died issueless. Therefore, by virtue of Section 14(1) of the Hindu Succession Act, Sayamma, PW.2, became absolute owner of the property as it stood vested on her prior to commencement of the Hindu Succession Act, thereby, she is entitled to sell the property; the 3rd defendant, adopted son of PW.2, cannot divest any property vested on any person on account of his adoption in view of bar under Section 12 clause (C) of Hindu Adoptions and Maintenance Act, thereby, the sale in favour of the plaintiff by Sayamma, PW.2, is

valid and binding on the defendants.

18. There was no agreement between PW.2 and natural parents of 3rd defendant agreeing to alienate the property and, in the absence of any such agreement, PW.2 is competent to enjoy and sell the schedule property, therefore, the defendants are not entitled to question the same. In the earlier suit in O.S. No.76 of 1982, the trial Court framed several issues and both the parties went on trial and adduced evidence on those issues, thereby, the trial Court recorded a finding in O.S. No.76 of 1982. However, in the Appeal in A.S. No.39 of 1984, certain findings recorded by the trial Court were reversed and the appellate Court recorded specific findings regarding validity and genuineness of Exs.A-1 and A-2, marked in the present suit, and competency of Sayamma, PW.2, to execute registered sale deeds, while upholding the adoption of 3rd defendant by PW.2. Those findings were not questioned by the defendants by preferring Second Appeal against the decree and judgment in A.S. No.39 of 1984 and allowed to attain finality; thereby, those findings would operate as *res-judicata*. Consequently, the defendants at this stage are not entitled to contend that those sale deeds, marked as Exs.A-1 and A-2, are sham, nominal and not supported by consideration as the said plea is hit by Section 11 of C.P.C. and prayed to dismiss the Appeal, confirming the decree and judgment of the trial Court.

19. Considering rival contentions, perusing the oral and documentary evidence, including the decree and judgment under challenge, the points that arise for consideration are:

- 1) Whether the findings recorded by the District Munsif Court, Bhainsa in O.S. No.76 of 1982 and findings recorded by the Subordinate Judge Court, Nirmal in A.S. No.39 of 1984 would operate as '*res-judicata*' regarding validity and genuineness of Exs.A-1 and A-2 and

adoption of 3rd defendant, if not, whether 3rd defendant is competent to challenge those findings in the present suit?

2) Whether Sayamma, PW.2, vendor of the plaintiff became absolute owner of the property by virtue of Section 14(1) of the Hindu Succession Act, and competent to execute registered sale deeds in favour of the plaintiff, if so, is the plaintiff became absolute owner of the schedule property?

2) Whether adoption of 3rd defendant took place prior to commencement of the Hindu Succession Act, and Hindu Adoptions and Maintenance Act, if not, whether the 3rd defendant is entitled to divest the property already vested on PW.2 in view of bar under clause (c) of proviso to Section 12 of Hindu Adoptions and Maintenance Act?

4) Whether the plaintiff is entitled to a decree declaring that she is the absolute owner of the property and recover possession of plaint schedule property?

20. **POINT No.1:** One of the contentions of learned counsel for the defendants-appellants is that the findings recorded in O.S. No.76 of 1982, marked as Ex.B-16 and findings recorded in A.S. No.39 of 1984, marked as Ex.A-8, would not operate as *res judicata*, thereby the finding of the appellate Court under Ex.A-8 with regard to competency of Sayamma, PW.2, to execute registered sale deeds and her ownership are not binding for the reason that in the earlier suit in O.S. No.76 of 1982, the dispute was only with regard to grant of permanent injunction. Therefore, this Court has to record a specific finding with regard to right of Sayamma, PW.2, to execute registered sale deeds, Exs.A-1 and A-2 but the trial Court did not record any finding with regard to competency of Sayamma, PW.2, to execute registered sale deeds; whereas, learned counsel for the plaintiff-respondent would

contend that the findings under the original of Ex.B-16 and A-8 attained finality and thereby the un-assailed adverse findings recorded against the defendants would operate as *res-judicata*.

21. A bare look at the contents of original of Ex.B-16, though the suit was filed for bare injunction, the trial Court framed several issues including validity of the sale deeds, executed by Sayamma, in favour of the plaintiff; so also the agreement between the Sayamma and 3rd defendant, recorded finding on point Nos.1 and 2 against the plaintiff, Bhoodevi. In the said suit, though the suit was filed for injunction simplicitor, the parties went on trial knowing about the points to be decided, adduced evidence in support of their contentions to substantiate their respective claims on point Nos.1 and 2 therein, which were held in favour of the 3rd defendant herein. The decree and judgment in O.S. No.76 of 1982 are assailed in A.S. No.39 of 1984; In A.S. No.39 of 1984, the Subordinate Judge Court, Nirmal, while the deciding the appeal reversed those findings and framed the following points:

1) Whether Exs.A-4 and A-5 sale deeds set up by the plaintiff/appellant are true, valid and supported by consideration?

2) Whether the alleged agreement not to alienate the property pleaded by D-3 on the ground that he is the adopted son of PW.2 is true?

3) Whether the appellant/plaintiff was in possession of the suit land on the date of suit?

4) Whether she is entitled to relief of permanent injunction sought for?

22. Upon hearing argument of both the counsel, the appellate Court held issue No.1 therein in favour of the plaintiff herein setting-aside the finding recorded by the trial Court. Similarly, 2nd point was held in

favour of the plaintiff holding that even if the adoption is true, as the same was not specifically denied by PW.2, there can be no restriction on the power of alienation of PW2, real owner of the suit property in the absence of agreement to the contrary. The remaining two points were held against the plaintiff herein. Undoubtedly, the earlier suit in O.S. No.76 of 1982 was only filed for injunction simplicitor but the parties inviting finding on several points, went on trial and called upon the Court to decide several controversies and, accordingly, the Court therein recorded its findings. In the suit and appeal, when the parties went on trial knowing the points to be decided, the findings whatever recorded are binding on the parties. A specific plea was raised by the defendants in written statement that the findings in earlier suit are not binding since the scope of injunction suit is limited where the Court is expected to record a finding about lawful possession as on the date of filing of the suit; so also infringement or invasion of legal right but transgressing the powers of the Court, the Court therein recorded several findings. Hence, the findings are not binding but this contention cannot be upheld in view of the law laid down by the Apex Court in ***Commissioner of Endowments and others Vs. Vittalrao and others***^[1], wherein the Apex Court rejected such plea and ruled as follows:

“The test is whether the Court considered the adjudication of the issue, though not formally framed, material and essential for its decision. If the issue of title was raised in the earlier suit and the basis of the grant of relief of injunction is the finding would operate as res judicata in the latter suit for declaration of title.”

23. In ***Madhvi Amma Bhawani Amma and others Vs. Kunjikutty Pillai Meenakshi Pillai and others***^[2], the Apex Court held as follows:

“In order to apply the general principle of res judicata, the Court must first find, whether an issue in a subsequent suit was directly and substantially in issue in the earlier suit or proceedings, was it between the same parties, and was it

decided by such Court.”

It observed:

“Thus there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no such issue is raised and if on any other issue, incidentally any finding is recorded it would not come within the periphery of the principle of res judicata.”

24. If the principle laid down by the Apex Court in ***Madhvi Amma***², is applied to the present facts of the case, though the earlier suit was for a bare injunction, an issue was framed with regard to legality of Exs.A-1 and A-2, competency of PW.2 to execute Exs.A-1 and A-2 in favour of the plaintiff, the Court therein recorded a finding against the plaintiff but the appellate Court framing similar points reversing the finding of the trial Court held the point in favour of the plaintiff holding that the sale deeds EXs.A-1 and A-2 are valid and binding and Sayamma, PW.2, is competent to execute registered sale deeds. Therefore, the finding was not incidental to the main issue involved in the earlier suit, though the issue was outside the purview of the injunction suit. When the parties went on trial by adducing evidence to substantiate their contentions, the finding is binding on both the parties and operates as *res judicata*. This Court in ***Malireddy Satyanarayana Murthy (died) per LRs Vs. Malireddy Jagannadha Rao (died) per LRs and others***^[3], relying on the earlier judgments, held as follows:

“In a suit for injunction though the issue is confined to possessory aspect, if the right of plaintiff to possession of property for the grant of relief of injunction cannot be decided without deciding the title to property and if such issue is decided, though not formally framed, in favour of the party, it would operate as res judicata in a subsequent litigation on the issue of title to such property.”

25. In view of the law declared by the Apex Court and this Court though the scope of trial in the earlier suit, filed for bare injunction, is limited but still the parties went on trial and invited findings, based on

their pleas, which attained finality, since the adverse findings recorded against the defendants were not challenged by filing any appeal against the original of Ex.A-8. Hence, the findings are binding on the defendants-appellants.

26. To apply the principle of *res judicata*, the questions involved in the latter suit and in the earlier suit must be identical and the parties must be the same and the issues in the latter suit must be directly and substantially in issue in the earlier suit. If any finding is recorded on the issues involved in the earlier suit which are directly and substantially in issue in the latter suit, such findings would operate as *res judicata* under Section 11 of C.P.C. If the above test is applied to the present facts of the case, based on the law declared by the Apex Court and this Court, the findings recorded by the appellate Court which attained finality on point Nos.1 and 2 therein would operate as *res judicata*.

27. Though the learned counsel for the defendants-appellants raised a specific defence that this appeal suit is not barred by *res judicata*, he did not bring to my notice any law declared by the Apex Court or this Court contrary to the law laid down by the Apex Court referred in the earlier paragraphs. In those circumstances, this Court is unable to accept the contentions of the defendants-appellants. Hence, the finding recorded by the trial Court about the right of PW.2 and her competency to execute Exs.A-1 and A-2 and its genuineness has become final and the defendants are precluded to raise the same plea questioning the rights of Sayamma, PW.2, and genuineness of Exs.A-1 and A-2 by applying the principles of *res judicata* under Section 11 of C.P.C. Hence, the point is held in favour of the plaintiff-respondent and against the defendants-appellants.

28. **POINT No.2:** The main contention of learned counsel for the plaintiff-respondent is that the Sayamma, PW.2, succeeded the property from her husband, who is the last male heir, and by virtue of

Section 14(1) of the Hindu Succession Act, became absolute owner of the property, thereby she is competent to execute registered sale deeds EXs.A-1 and A-2 in favour of the plaintiff.

29. To substantiate the claim, the plaintiff herself was examined as PW.1 as she asserted her title to the property by virtue of Exs.A-1 and A-2 and also examined PW.2, Sayamma, the vendor of the plaintiff, who succeeded the estate of her husband before commencement of the Hindu Succession Act. At this stage, it is useful to advert to Section 14(1) of the Hindu Succession Act, and the same is extracted hereunder for better appreciation:

“14. Property of a female Hindu to be her absolute property: (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
(2)

30. By introduction of Section 14(1) and (2) of the Hindu Succession Act, the female heir, who succeeded the estate of deceased male heir, will become absolute owner of the property and the earlier fetter on the female that she shall not possess the property, was removed to empower women removing the disability of a female to acquire and hold property as an absolute owner and convert any estate already held by a woman on the date of commencement of the Act as a limited owner into absolute estate. Therefore, the step taken by introducing Section 14(1) and (2) is in practical recognition of equality of the sexes and meant to elevate women from a subservient position in the economic field to a higher pedestal, where they could exercise full powers of enjoyment and disposal of property held by them as owner untrammelled by artificial limitations placed on the right of ownership by the society in which the will of the dominant male prevailed to bring about a subjugation of opposite sex. Thus, the intention of the legislature in incorporating Section 14 of the Hindu succession Act is to protect women from destitution and for their

alleviation to higher pedestal on par with men on the principle of equality removing the disqualification on the basis of sex to hold the property.

31. Admittedly, the husband of PW.2, Dharmanna, died prior to commencement of the Hindu Succession Act and she continued in possession and enjoyment of the property by the date of commencement of the Hindu Succession Act. Therefore, the property vested on her continuous possession by the date of commencement of Hindu Succession Act, she became absolute owner of the property. In ***Hari Ram and another Vs. Harbans Singh and others***^[4], the High Court of Himachal Pradesh and in ***Dharmawati Bai Vs. Shiv Singh***^[5], the High Court of Madhya Pradesh is of the consistent view that after the Hindu Succession Act came into force, a Hindu female possessing the property of her husband becomes absolute owner and if she subsequently sells the same, the purchaser gets absolute rights in the property.

32. In view of the principles laid down by Himachal Pradesh and Madhya Pradesh High Courts in ***Hari Ram***⁴ and ***Shiv Singh***⁵, Sayamma, PW.2, became absolute owner of the property in view of Section 14(1) of the Hindu succession Act and competent to enjoy the property in her own right as absolute owner and deal with the property as she likes.

33. In fact, in the earlier suit in O.S. No.76 of 1982 and the appeal in A.S. No.39 of 1984 under the original of Exs.B-16 and A-8, a finding was recorded by the appellate Court on point No.1 and held that Exs.A-1 and A-2 sale deeds, executed by Sayamma, PW.2, are valid and genuine and she is the absolute owner of the property and this finding became final, as it remained unchallenged by filing any appeal by the defendants-appellants. Therefore, this finding would operate as

res judicata in view of my discussion on point No.1. Even assuming for a moment that, it is not barred by *res judicata*, still, she became absolute owner by virtue of Section 14(1) of Hindu Succession Act and entitled to sell the property. The sale deeds executed in favour of the plaintiff marked as Exs.A-1 and A-2 are valid and binding. Hence, the finding of the trial Court is hereby confirmed holding this point in favour of the plaintiff and against the defendants.

34. **POINT No.3:** One of the contentions of the defendants-appellants is that the plaintiff would not acquire any title to the property by virtue of Exs.A-1 and A-2 sale deeds for the reason that PW.2, Sayamma, adopted 3rd defendant, Sayanna, about 30 years ago and thereby he became a coparcener in the schedule property and, apart from that, she executed an agreement dated 29.02.1956 in favour of the 3rd defendant's parents, as per which, PW.2 agreed to give half share in the property but the alleged agreement though pleaded in the earlier suit was not brought on record as evidence on behalf of 3rd defendant and even before the trial Court in this suit the same is not marked as exhibit on behalf of the 3rd defendant to substantiate his contention that there is an agreement between PW.2, Sayamma and his natural parents. Even assuming for a moment that, PW.2 agreed to give half share to the adopted son, 3rd defendant, the total property own and possessed by the plaintiff is Ac.27.39 guntas and the suit schedule property is only Ac.14.00 guntas of dry land in S.No.518 and Ac.0.39 guntas of wet land in S.No.407/C, thus the remaining extent of Ac.13.00 guntas is still available.

35. When the 3rd defendant contended that there was an agreement executed by PW.2, Sayamma, to give half share in the family property to him, it is for the 3rd defendant to produce the document, when the document is reduced into writing and registered; obviously for different reasons the 3rd defendant did not produce the

document. As there is no dispute with regard to adoption, I need not dwell upon to decide the validity of adoption and agreement as learned counsel for the plaintiff-appellant fairly conceded that the 3rd defendant is the adopted son of Sayamma, PW.2. Even otherwise, the finding recorded by the learned District Munsif in O.S. No.76 of 1982 and confirmed by the learned Subordinate Judge in A.S. No.39 of 1984, respectively, attained finality. Hence, the 3rd defendant is an adopted son of Sayamma, PW.2.

36. In the evidence of PW.2, she admitted at Page 2, that she took 3rd defendant in adoption about 24 or 25 years ago and 4th defendant is the daughter of 1st defendant and wife of 3rd defendant. This admission is suffice to establish the adoption. In her entire cross-examination, the year of adoption was not questioned by suggesting that 3rd defendant was taken into adoption prior to commencement of Hindu Adoptions and Maintenance Act. PW.2 was examined on 08.09.1992. If 24 or 25 years is calculated backwards, adoption might have taken place in or about 1967 or 1968. Therefore, the adoption might have taken place only subsequent to advent of the Hindu Adoptions and Maintenance Act.

37. The 3rd defendant was aged 38 years in 1989 and it is an undisputed fact; therefore, he might have born in the year 1951. Gangamani @ Ammai, was examined as DW.1 being power of attorney holder of 3rd defendant; she was aged 35 years by the date of her examination on 23.03.1993.

38. One of the contentions of learned counsel for the plaintiff-respondent is that the defendants failed to establish their claim by examining 3rd defendant who is competent to testify about his right in the schedule property, but examined his wife as DW.1, on his behalf being a power of attorney holder. As per the settled law laid down by the Apex Court in

Vashdeo Bjhojwani Vs. Indusind Bank Limited^[6], Division Bench of this Court in ***Secretary to Government of India, Ministry of Defence, New Delhi and another Vs. Indira Devi and another***^[7] and judgment of the Rajasthan High Court (Jaipur Bench) in ***Shambhu Dutt Shastri Vs. State of Rajasthan***^[8], power-of-attorney holder cannot testify as a party to the suit; at best, the evidence of power-attorney-holder is only like any other witness. Undoubtedly, Section 120 of Indian Evidence Act, 1872 says that in a civil proceedings either of the spouse is competent witness but when DW.1 was aged 35 years by the date of her examination i.e., on 23.03.1993 by the date of alleged division, she might not have born by the date of commencement of the Hindu Succession Act and the Hindu Adoptions and Maintenance Act. Therefore, DW.1 is incompetent to speak about the date of adoption of her husband, 3rd defendant, and as such her evidence cannot be accepted.

39. In ***Vashdeo Bjhojwani***⁶, the Apex Court held as follows:

“12. The power of attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.”

40. In ***Shambhu Dutt Shastri***⁸, the Rajasthan High Court held as follows:

“A general power of attorney holder can appear, plead and act on behalf of the party, but he becomes a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness-box on behalf of himself. To appear in a witness-box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.”

41. In ***Indira Devi***⁷, the Division Bench of this Court, ruled as follows:

“16. Therefore, the requirement is that when GPA-holder is representing the party, the Judge is required to record in writing that he is permitted to appear and act on behalf of the party. In the instant case, the procedure prescribed under Rule 32 of Civil Rules of Practice has been followed. The case dealt with by the learned Single Judge of Rajasthan High

Court was on a different footing. Apart from that, thus when once a person files a suit on behalf of the party, as a GPA holder he enters into the shoes of that party and except to the extent of personal knowledge, he is entitled to depose on other facts. In the instant case, what was relied upon by the plaintiffs is entirely documentary evidence, which are public documents and no personal knowledge was required to be pressed into service to establish the case of Plaintiff.”

42. In view of the principles laid down by the Apex Court in ***Vashdeo Bhojwaní***⁶ and Division Bench of this Court in ***Indira Devi***⁷, DW.1 is incompetent to testify on behalf of 3rd defendant, and when 3rd defendant avoided to enter into the witness box tendering himself for cross-examination by the adversary, an adverse inference shall be drawn that what he pleaded is not true.

43. However, the documentary evidence produced before the trial Court marked as Exs.B-1 and B-2 established that 3rd defendant was taken in adoption and the 2nd defendant was declared as non-surplus holder as the land held by PW.2 is 0.6976 units and, apart from that, there is a stray observation at the end of Page 4 of the order that the declarant established that she adopted Sayanna alias Sanjeeva Rao, 3rd defendant herein about 20 years ago. The order was passed on 31.01.1977; if 20 years is calculated backwards, the adoption might have taken place in the year 1957. Thus, there is some inconsistency in the evidence on record regarding adoption and it is difficult for this Court to decide whether the adoption took place prior to or after commencement of the Hindu Adoptions and Maintenance Act or the Hindu Succession Act. In any view of the matter, even according to uncontroverted testimony of PW.2, the adoption of 3rd defendant had taken place in or about 1967 or 1968 or at the worst in the year 1957, assuming for a moment that, the observations made in Exs.B-1 and B-2 are true. Therefore, the evidence available on record established that the 3rd defendant was taken in adoption after the advent of Hindu Adoptions and Maintenance Act. The total case of the plaintiff-

respondent rests on the documentary evidence coupled with oral evidence. However, the oral evidence is not much important for the reason that the real dispute with regard to title was already decided in the earlier suit in O.S. No.76 of 1982 and proceedings before the Tahsildar, Land Reforms.

44. One of the contentions of learned counsel for the defendants-appellants is that after adoption of 3rd defendant, it relates back to the date of death of husband of PW.2, Sayamma, and thereby PW.2 is disentitled to execute registered sale deeds Exs.A-1 and A-2 in favour of the plaintiff but this contention was not accepted by the trial Court placing reliance on the judgments of the Apex Court in ***Dina Ji and others Vs. Daddi and others***^[9], wherein it was held as follows at Para 7:

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

45. In ***Sawan Ram and others Vs. Kala Wanti and others***^[10], the rights of widow to adopt the child and vesting of property by adopted son came up for consideration before the Apex Court, wherein it was held that a female widow is competent to adopt the child in view of disability removed by Section 8 of the Hindu Adoptions and Maintenance Act and the adoption would not relates back to the date of death of husband of the adopter (widow), doctrine of relation back cannot be applied in view of Section 12 proviso (C) of Hindu

Adoptions and Maintenance Act, distinguishing the Division Bench judgment of this Court in ***Nara Hanumantha Rao Vs. Nara Hanumayya and another***^[11] while disagreeing with the judgment of this Court held as follows:

“10..... A question naturally arises what is the adoptive family of a child who is adopted by a widow, or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive. It is well recognized that, after a female is married, she belongs to the family of her husband. The child adopted by her must also, therefore, belongs to the same family. On adoption by a widow, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow. Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family.”

In Para 11 of the judgment it was further held as follows:

“11..... Under the Shastric Law, if a child was adopted by a widow, he was treated as natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (c) of the proviso to s. 12, and section 13 of the Act were incorporated. In that respect, the rights of the adopted child were restricted. It is to be noted that this restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted child cannot. Therefore, in our opinion, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband.”

46. In ***Shripad Gajanan Suthankar Vs. Dattaram Kashinath Suthankar and others***^[12], similar question came up for consideration before the Apex Court and the Apex Court while deciding the rights of a Hindu widow reviewing old judgments of different High Courts held as follows:

“17. The doctrine of relation back will not extend to a case where a transfer has already been made either by the sole surviving coparcener or by his heir. The

principle is that when a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, no rights of a son who is subsequently adopted can affect that portion which is disposed.”

47. In ***Namdev Vyankat Ghadge and another Vs. Chandrakant Ganpat Ghadge and others***^[13], the Apex Court considering the scope of Sections 12 and 13 of the Hindu Adoptions and Maintenance Act ruled as follows:

“An adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of adoption as is evident from the main part of Section 12, proviso C to Section 12, in clear terms states that the adopted child shall not divest any person of any estate, which vested in him or her before the adoption.”

48. Similar view is expressed by the Apex Court in ***Rajendra Kumar Vs. Kalyan (D) by legal representatives***^[14]. The facts in ***Rajendra Kumar***¹⁴ are almost identical to the present facts of the case including consideration of Section 14(1) of the Hindu Succession Act. After enacting the Hindu Succession Act, removing the disability on women to whom the property under the Hindu Womens Rights to Property Act, 1937, the wife of the deceased Mohanlal succeeded the property under Section 14(1) of the Hindu Succession Act and a child was adopted and he became member of the Mohanlal’s family and the adopted child can claim rights in the family property by succession during life time but by virtue of Section 12 Proviso (C) to of the Act, the adopted child would not get any right in the property.

49. In the present case also, Sayamma, PW.2, became absolute owner of the property by virtue of Section 14(1) of the Hindu Succession Act as she is in possession of the property by succession prior to commencement of the Hindu Succession Act, later adopted 3rd defendant in view of the uncontroverted testimony of PW.2. In other words, the adoption took place after commencement of the Hindu

Adoptions and Maintenance Act and Hindu Succession Act. Therefore, the 3rd defendant, at best, is entitled to claim share in the property by succession by virtue of adoption and cannot divest the property already vested on the widow, Sayamma, PW.2, in view of the interdict under Section 12 proviso (C) of the Hindu Adoptions and Maintenance Act unless there is an agreement to the contrary. Here, the 3rd defendant pleaded an agreement between the adopted mother and his natural parents. Strangely, the said agreement was not brought on record and marked as exhibit for consideration of this Court. In the absence of any agreement, restricting right of adopted mother as contemplated under Section 13 of the Hindu Adoptions and Maintenance Act, the widow of deceased Dharmanna, by name Sayamma, P.W.2, is competent to deal with the property as an absolute owner and thereby she executed Exs.A-1 and A-2 in favour of the plaintiff and, consequently, the plaintiff became absolute owner of the property. Therefore, the widow of Dharmanna by name Sayamma, PW.2, is competent to execute registered sale deeds and the bar under Section 13 of the Hindu Succession Act, has no application to the present facts of the case.

50. The well recognized doctrine of relation back under the Hindu law is not applicable after the advent of Hindu Adoptions and Maintenance Act; however, the doctrine is applicable to adoption that took place under the un-codified Hindu law. In view of language used in clause (c) of proviso to Section 12 of the Hindu Adoptions and Maintenance Act, the adopted child is entitled to claim rights in adopted family, only from the date of adoption and not from the date of death of husband of adopter, PW.2, in this case, and at the most the adopted child is entitled to claim rights by inheritance. In similar situation, the Apex Court in ***Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others***^[15], wherein it was held as follows:

“That the fiction that an adoption relates back to the date of death of adoptive father applies only when the claim of adopted son relates to the estate of death of adoptive father, but where the succession to property of a person other than the adoptive father is involved, the principle applicable is not the rule of relation back but the rule of inheritance once vested cannot be divested.”

51. The law declared in ***Shrinivas Krishnarao Kango***¹⁵ is applicable to the adoption under un-codified Hindu law. After enacting the Hindu Adoptions and Maintenance Act the fiction i.e., doctrine of relation back is not applicable in view of clause (c) of proviso to Section 12 of the Hindu Adoptions and Maintenance Act. Hence, old doctrine of relation back is not applicable to the present case. Accordingly, I find no substance in the contentions of learned counsel for the defendants–appellants.

52. Learned counsel for the plaintiff-respondent while contending that unless there is a fetter by an agreement to deal with the property by the widow of deceased Dharmanna, she can get the property with absolute rights, drawn the attention of the Apex Court to ***Chiranjilal Srilal Goenka (dead) by LRs Vs. Jasjit Singh and others***^[16]. The Apex Court while considering the scope of Sections 12 and 13 of the Hindu Adoptions and Maintenance Act held that the adoptive parents are competent to dispose of their property by will unless it is limited agreement contrary between the parties.

53. In ***Chiranjilal Srilal Goenka***¹⁶, it was held as follows:

“20. The next question would be whether the said letter, if considered as an agreement, restraining or limiting the rights of adoptive father to bequeath the property requires registration? In support of this contention, learned Counsel Mr. Bobde referred to the decision of this Court in *Dinaji v. Dadd'*. [MANU/SC/0213/1990](#)[□] : AIR 1990 SC 1153. In that case Hindu widow adopted a son on April 28, 1963 by executing the deed of adoption. The document was not registered and the trial court admitted the same in evidence in proof of adoption. Subsequently, by registered sale deed dated April 28, 1966,

she transferred Immovable property including agricultural land and houses in favour of the appellant Dinaji. On the basis of the sale deed, suit for injunction and possession was filed against the adopted son. After considering the provisions of Section [12\(c\)](#), this Court held that after the Hindu Succession Act came into force, widow became absolute owner of the property of her husband and, therefore, merely by adopting a child, she could not be deprived of any of her rights in the property. The Court further held "the adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the Scheme of Section [12](#) proviso (c)." Thereafter, the Court considered Section [13](#) of the Act and observed that "this section enacts that when the parties intend to limit the operation of proviso(c) to Section [12](#), it is open to them by an agreement and it appears that what she included in the present deed of adoption was an agreement to the contrary as contemplated in Section [13](#) of the Hindu Adoptions and Maintenance Act."

54. Viewed from any angle, in view of law declared by the Apex Court on the controversy between the parties, it is clear that the right vested on the adopted mother, Sayamma, PW.2, cannot be divested by adoption of 3rd defendant, since the evidence on record established that adoption of 3rd defendant took place only subsequent to commencement of the Hindu Succession Act and the Hindu Adoptions and Maintenance Act and there is no agreement as contemplated under Section 13 of the Hindu Adoptions and Maintenance Act. Therefore, 3rd defendant is not entitled to claim any right during life time of Sayamma, by succession. Even according to the contentions of 3rd defendant, Sayamma, PW.2, agreed to give half share in the family property, the total land vested on Sayamma, PW.2, after death of her husband, Dharmanna is Ac.27.39 guntas. Out of the said land, PW.2, Sayamma, sold the schedule property to an extent of Ac.14.39 guntas under Exs.A-1 and A-2 but it is just little more than half share allegedly agreed to be given to the 3rd defendant under the agreement in existence, if any. In such circumstances, after purchase of the property under Exs.A-1 and A-2, the plaintiff is continuing in possession and

enjoyment of the same, mutated her name in the revenue records and to substantiate the said contention the plaintiff placed reliance on Exs.A-3 and A-4 '*faisal patti*' for the years 1980-81 and also relied on Exs.A-5, 6 and 7, pahanies for the years 1954-55, 1986-87 and 1987-88. All the five documents established that the plaintiff-respondent is paying land revenue to the Revenue Department and mutated her name as owner of the property. Therefore, the plaintiff became owner by virtue of purchase under Exs.A-1 and A-2 and the sale deeds Exs.A-1 and A-2 executed by Sayamma, are valid enforceable under law and, apart from that, these sale transactions were upheld in the earlier suit in O.S. No.76 of 1982 and appeal in A.S. No.39 of 1984. Hence, I find that the plaintiff became absolute owner of the property.

55. **POINT No.4:** According to Section 34 of the Specific Relief Act, 1963 the Court is competent to declare the legal character, or right to any property, any person may institute a suit against any other person, who denied or interested to deny the title or right by exercising his discretion. The general principle is that in a suit for declaration of title, the plaintiff has to establish his or her case, independently, and cannot be allowed to take advantage of weakness in the case of adversary. If the person who is claiming right or interest in the property established title or right to the property, the Court may exercise discretion to grant the relief of declaration of title and such discretion must be exercised judiciously. Therefore, by exercising discretion conferred on this Court, I have no hesitation to hold that the plaintiff-respondent established her title and right over the schedule property. Hence, the trial Court also exercised its discretion judiciously and I find no perversity warranting interference of this Court in the finding recorded by the trial Court. Hence, the finding of the trial Court is hereby confirmed holding that the plaintiff is entitled to declaration of her title to the schedule property.

56. The plaintiff-respondent claimed recovery of possession

alleging that the defendants forcibly took possession of the property after disposal of suit in O.S. No.76 of 1982, but this allegation appears to be false for the reason that the trial Court and appellate Court under the originals of Exs.B-16 and A-8 concluded that the plaintiff herein failed to establish her lawful possession over the schedule property, as on the date of filing suit and this finding attained finality. Thus, the alleged taking forcible possession by the defendants, during pendency of the suit is not acceptable. However, undisputedly, 3rd defendant is in possession and enjoyment of the property and did not claim title by adverse possession. When once the title is passed to the plaintiff by virtue of Exs.A-1 and A-2, she is entitled to recover her possession, unless her claim is barred by limitation, but the question of limitation does not arise, in this case, as the defendants did not set up plea of adverse possession against the plaintiff. Therefore, the plaintiff-respondent is entitled to recover possession of the property under Section 5 of the Specific Relief Act. As the relief of recovery of possession is an individual civil right and it is not merely enforceable by a penal law. According to Section 4 of the Specific Relief Act, the Court can grant the specific relief for the purpose of enforcing individual civil right; thereby recovery of possession is only to enforce the civil right of an individual. Hence, the trial Court rightly accepted that the plaintiff is the absolute owner of the property and granted the relief of declaration and recovery of possession.

57. On reappraisal of entire evidence, considering the grounds of appeal and the documentary evidence on record, I find no perversity in the findings recorded by the trial Court warranting interference of this Court. Hence, the findings of the trial Court are hereby confirmed holding this point in favour of the plaintiff and against the defendants.

In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 30.07.1993, passed in Original Suit No.4 of 1989 by the Subordinate Judge, Nirmal.

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

**M. SATYANARAYANA MURTHY,
J**

Date: 28-11-2014.

Note:

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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- [1] (2005) 4 SCC 120
[2] (2000) 6 SCC 301
[3] 2014 (4) ALT 241
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[8] 1986 (2) WLN 713
[9] AIR 1990 SC 1153
[10] AIR 1967 SC 1761
[11] 1964 (1) AWR 166
[12] AIR 1974 SC 878
[13] AIR 2003 SC 1735
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[15] 1955 (1) SCR 1
[16] AIR 2001 SC 266