

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.168 of 2017
and CMP No.3377 of 2017
Cross Objection No.29 of 2018

Orders reserved on 21.06.2018	Orders pronounced on 23.07.2018
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1.Radhika
2.C.Ramasamy @ Moorthy
3.Chinnasamy
4.Marayammal
5.A.S.Palanisamy
6.Rajalakshmi
(Appellants/Appellants/Defendants)
... Appellants in SA No.168 of 2017 /
Respondents in Cross Objection No.29 of 2018
Vs.

1.K.P.Ponnusamy @ Thirumalaisamy
2.K.P.P.Rathinam
Respondents/Respondents/Plaintiffs
... Respondents in SA No.168 of 2017 /
Cross Objectors in Cross Objection No.29 of 2018

PRAYER IN S.A. NO.168 OF 2017: Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 30.11.2016 made in A.S.No.17 of 2015 on the file of the learned Sub Court, Bhavani confirming the judgment and decree dated 23.02.2015 made in O.S.No.154 of 2007 on the file of the learned First Additional District Munsif Court, Bhavani, Erode District.

PRAYER IN Cross Objection NO.29 OF 2018: Cross Appeal filed under Order 41 Rule 22 of CPC against the judgment and decree of the learned Subordinate Judge, Bhavani in A.S.No.17 of 2015 dated 30.11.2016.

For Appellants : Mr.N.Manokaran
in SA No.168/2017 &
Respondents in
Cross Obj.No.29/2018

For Respondents : Mr.T.V.Ramanujam
in SA No.168/2017 Senior Counsel for
& Cross Objectors in M/s.M.Naraayanaswamy
Cross Obj.No.29/2018

COMMON JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 30.11.2016 made in A.S.No.17 of 2015 on the file of the learned Sub Court, Bhavani confirming the judgment and decree dated 23.02.2015 made in O.S.No.154 of 2007 on the file of the learned First Additional District Munsif Court, Bhavani.

2. The Cross Objection has been filed against the judgment and decree of the learned Subordinate Judge, Bhavani in A.S.No.17 of 2015 dated 30.11.2016.

3. The appellants are the defendants in O.S.No.154 of 2007 and respondents in Cross Objection No.29 of 2018. The respondents are the plaintiffs in O.S.No.154 of 2010 and Cross Objectors in Cross Objection No.29 of 2018. The appellants are challenging the concurrent findings of the courts below. Originally, the respondents filed the suit against the appellants for declaration that adoption deed dated 20.09.1995 is void and for permanent injunction restraining the appellants from interfering with their peaceful possession and enjoyment of the suit property. Subsequently, they filed I.A.No.470 of 2009 deleting the relief of declaration. By order dated 11.12.2009, the amendment was ordered and the suit was restricted to the relief of permanent injunction only.

4(a) According to the respondents, the suit "A" schedule property was bequeathed to the parents of the first respondent by will dated 31.10.1942 by his grandfather Athi Gounder. After the death of Athi Gounder, the parents of the first respondent inherited the "A" schedule property. Further, Athi Gounder bequeathed money lending business to his second wife Palaniammal and after her death, to his daughter Vangallammal, mother of the first respondent. After death of Athi Gounder and his second wife, the mother of the first respondent became absolute owner of the money lending business also. From and out of the income derived from "A" schedule property, father of first respondent purchased "B" schedule property. The father of the first respondent was absolute owner of $\frac{1}{2}$ share in "A" & "B" schedule properties and it is his separate and self-acquired property.

4(b) The mother of the first respondent, out of the income from "A" schedule property, purchased "C" schedule property in the name of first respondent by three sale deeds dated 23.06.1966, 17.09.1968 and 18.09.1968. After the death of the mother of the first respondent, sister of first respondent orally relinquished her share in the properties and received cash. The second respondent, out of her savings and amounts given by her father, purchased "D" schedule property in the name of her first son Elango by three sale deeds dated

27.11.1982, 27.03.1986 and 15.07.1987. Before they could purchase any property in the name of their second son Elavarasu, he committed suicide. The first son Elango also died in a motor accident. On the death of Elango, the second respondent became the absolute owner of the "D" schedule property. "A", "B" and "C" schedule properties are separate properties of the first respondent. Even if it is joint family property, on the death of two sons of first respondent, the second respondent became absolute owner of 2/3rd share as their two sons were to be treated as co-parcenors. After the death of their two sons, the second respondent wanted to adopt a female child and the first respondent consented for the same.

4(c) Appellants 5 & 6 have agreed to give their daughter, the first appellant to second respondent in adoption. As per custom and usage of their community, a child has to be given in adoption before the family deity of adoptive parents. As per the said custom, on 11.09.1995, the appellants 5 & 6 jointly gave the first appellant in adoption to respondents 1 & 2 before Ayiamman Temple in Pappampalayam, Kathantanni Village, Perundurai Taluk in the presence of priests and witnesses and the same is contrary to the intention of the second respondent as she alone wanted to take the first appellant in adoption as daughter. The said adoption is contrary to the provisions of The Hindu Adoptions and Maintenance Act, 1956. The first appellant has completed 15 years of age and she was 21 years at the time of adoption. There is no custom or usage in the community of the respondents and appellants to adopt the child or to give the child in adoption aged more than 15 years or adopt the child by two persons jointly or give a child in adoption jointly. In ignorance of provisions of the Act, adoption deed dated 20.09.1995 was executed and registered. When the respondents consulted their Advocate, they were informed that adoption is void and they need not take any action for cancellation of adoption deed. When they informed the same to the appellants 5 & 6 about the invalid adoption, they requested the respondents to treat the first appellant as their foster child.

4(d) The first appellant was given in marriage to the second appellant who is the son of appellants 3 & 4. After the marriage, the appellants 1 & 2 were living alongwith appellants 3 & 4 in the village of the appellants 2 to 4. The first respondent's sister Deivanayagi's son was assisting the respondents in their agricultural work. The respondents were monetarily helping Deivanayagi and her son. The appellants became jealous of the same and threatened the respondents 1 & 2 to settle all the properties in the name of the first appellant. The respondents refused the same. On 06.05.2007, the appellants came to the house of the respondents and threatened them that they would oust the respondents from the suit property, unless they execute settlement deed in favour

of the first appellant. The first appellant has no love and affection for the respondents and all the appellants have no regard for law and order and at any time, they may indulge in any unlawful act. Even if adoption is valid, the first appellant is not entitled to any right, title in the suit properties. The appellants have no right to interfere with the possession and enjoyment of the suit properties of the respondents. The first appellant would only have to work out the remedy by filing a suit for partition and establish her right over the suit properties.

5. The first appellant filed written statement and the same was adopted by appellants 2 to 6. The appellants denied all the averments made by the respondents in the plaint. According to the appellants, the adoption of the first appellant by the respondents is valid and it is as per custom and usage of the community of the appellants and respondents. There is no prohibition for the parents of child to give a child in adoption jointly to adoptive parents, i.e. husband and wife jointly. The age limit fixed in the Act is only with regard to difference in age between the adoptive father and adoptive daughter and adoptive mother and adoptive son. After adoption, the first appellant was residing with the respondents and was acting as per the instructions of the first respondent. After marriage, the appellants 1 & 2 were residing with the respondents and all the transactions of business including agriculture, banking, functions and festivals done together by the appellants 1 & 2 and the respondents. Only at the instigation of some relatives, the respondents have filed the present vexatious suit.

5(a) Both "C" and "D" schedule properties are joint family properties as those properties were purchased from and out of the income derived from "A" & "B" schedule joint family properties. The first respondent and appellants are entitled to equal share in "A" & "B" schedule properties. The second respondent is entitled to $\frac{1}{2}$ share in "C" & "D" schedule properties and the first respondent and appellants are entitled to $\frac{1}{4}$ th share each. The execution and registration of documents dated 20.09.1995 and performance of Marriage of appellants 1 & 2 on 03.12.1995 are well within the intention and decision of the respondents.

5(b) The appellants filed additional written statement and contended that at the time of adoption, the respondents and appellants 5 & 6 knew about the usage and custom in the locality and among their community and adoption that took place on 11.09.1995 is after following the formalities. The respondents took the first appellant in adoption knowing fully well that law permits adoption of child more than 15 years as per usage and custom. The contention of the respondents that after adoption, they consulted a lawyer and they were advised by their Advocate that there is no necessity to execute the deed of cancellation as adoption itself is void. This

contention of the respondents is after thought. By amendment, the respondents gave up the prayer of declaration. A suit for bare injunction without the relief of declaration is not maintainable. The first appellant, as daughter is entitled to have share in all the properties since the properties are joint family properties.

6. Based on the pleadings, necessary issues were framed. Before the Trial Judge, first respondent was examined as PW1 and two other witnesses as PW2 and PW3. The first appellant was examined as DW1, 5th appellant as DW2 and 7 others as DWs3 to 9. 20 documents were marked as Exs.A1 to A20 on the side of the respondents. On behalf of the appellants, 48 documents were marked as Exs.B1 to B48.

7. The learned Trial Judge, considering the pleadings, oral and documentary evidence and arguments of the counsel for parties, decreed the suit holding that the suit properties are separate properties of the respondents and appellants do not have any right over the same. The respondents have proved their possession. The respondents have not claimed declaration with regard to adoption and no finding need be rendered by the account. The properties are self-acquired properties of respondents and they are in possession and there is no necessity for the respondents to pray for declaration of title.

8. Against the said judgment and decree dated 23.03.2015 made in O.S.No.154 of 2007, the appellants filed A.S.No.17 of 2015 before Sub Court, Bhavani. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge, considering the materials on record, judgment of the Trial Court as well as the arguments of the learned counsel for the appellants and respondents, dismissed the appeal confirming the judgment and decree of the Trial Court, but held that the adoption of the first appellant by the respondents is valid.

9. Against the said judgment and decree dated 30.11.2016 made in A.S.No.17 of 2015, the appellants have filed the present Second Appeal No.168 of 2017. The respondents have filed Cross Objection No.29 of 2018 challenging the finding of the First Appellate Court that the adoption of the first appellant by the respondents is valid.

10. At the time of admission, the following substantial questions of law were framed:

- (i) whether the courts below are right in holding that the suit properties are the separate properties of the plaintiffs, by overlooking the recitals found in Ex.A.14 dated 11.09.1990, receipts dated 11.07.1958 marked as Ex.A.3 and Ex.A.4 and the admission made by the first plaintiff (PW1) in his deposition ?

(ii) When the First Appellate Court has come to a conclusion that the defendant is the adopted daughter of the plaintiffs, is it correct to deny her right over the suit properties by misquoting the nature of the acquisitions of the suit properties by the plaintiffs ?

(iii) Whether the conclusion of the courts below are perverse in not drawing an adverse inference against the plaintiffs for deleting the relief of declaration relating to the adoption, and for overlooking the recitals found in Ex.A.14 and admission made in the evidence of PW1 ?

11. The Cross Objection filed by the respondents was numbered and taken on file. The respondents have challenged in Cross Objection the findings of the First Appellate Judge that the first appellant was validly adopted by the first respondent. The learned counsel for the appellants contended that Cross Objection filed by the respondents is not maintainable as they failed to represent the cross-objection filed earlier. In view of the Cross Objection, the second substantial question of law is re-framed as follows -
Re-framed substantial question of law No.2

(ii) Whether the First Appellate Court committed an error in holding that the first defendant/first appellant was validly adopted by the plaintiffs/respondents and whether the First Appellate Judge is right in not granting any right to the first defendant/first appellant in suit properties ?

12. In view of the above arguments of the learned counsel for the appellants, the following additional substantial question of law is framed.

Additional substantial question of law

(iv) Whether the present Cross Objection filed by the respondents is maintainable when they failed to re-present the earlier Cross Objection filed by them ?

13. The learned counsel for the appellants/respondents in Cross Objection contended that -

(a) Originally the respondents filed suit for declaration that adoption deed dated 11.09.1995 is null and void and not binding on them and for permanent injunction. Subsequently, the plaint was amended deleting the relief of declaration in respect of adoption deed. The respondents are claiming only permanent injunction in respect of the suit properties.

(b) There are four properties described in Schedule A, B, C and D in the plaint. "A" schedule property belonged to grandfather of the first respondent Athi Gounder. He, by will dated 31.10.1942, marked as Ex.A1 bequeathed the said

property to the father of the first respondent who is the brother-in-law of Athi Gounder and also his son-in-law being husband of his daughter Vangalammal. Athi Gounder, by Ex.A1 bequeathed the "A" schedule property to both father and mother of the first respondent. Athi Gounder was also having money lending business which was run by his first wife. Athi Gounder bequeathed the said business to the second wife after the lifetime of his first wife and after the lifetime of the second wife, his daughter Vangalammal will inherit the said business absolutely. After the death of Athi Gounder and his two wives, the parents of the first respondent became absolute owners of "A" schedule property and the first respondent's mother became absolute owner of money lending business. The parents of the first respondent inherited "A" schedule property from Athi Gounder and therefore the same is ancestral joint family property.

(c) The first respondent's mother, from and out of the income derived from the joint family "A" schedule property and ancestral money lending business, purchased "B" Schedule property in the name of first respondent's father. The first respondent's mother purchased "C" schedule property in the name of first respondent by three sale deeds. "D" schedule property was purchased in the name of her son Elango by three sale deeds. Schedule B, C and D properties are purchased from and out of joint family income from "A" schedule property and all the four properties are joint family properties in the hands of first respondent. The first respondent, by deed of exchange marked as Ex.A14 exchanged certain portions of "A" schedule property equivalent to "B" schedule property. In the exchange deed, the first respondent has stated that "A" schedule property is his ancestral property. Athi Gounder, in the will Ex.A1 directed payment of Rs.1,500/- each to his two daughters. As per the said terms, amounts were paid and receipts Exs.A3 & A.4 were obtained from sisters of Vangalammal (two daughters of Athi Gounder). These three documents reveal that the properties in the hands of the first respondent are joint family properties.

(d) After the death of their two sons in the year 1989 and 1994, the respondents adopted first appellant as their daughter on 11.09.1995 before the family deity, in the presence of priests and other witnesses as per the usage and custom of their community. The first appellant is daughter of sister-in-law of first respondent. At the time of adoption, the first appellant was 21 years. As per the custom and usage of the community of the appellants and respondents, a person can be adopted even if she or he is more than 15 years. As per Section 10 (4) of the Hindu Adoptions and Maintenance Act, 1956, there is an exemption for adoption of a person aged more than 15 years, if custom and usage of the community to which adoptive parents and the person who gives child in adoption belong. The respondents executed an adoption deed which was registered on 20.09.1995 and marked as Ex.A.15. The

respondents have not taken any steps to cancel the adoption deed Ex.A.15. They have also not filed any suit for declaration that the said adoption deed is null and void, within three years of adoption and deed of adoption as per Article 59 of Limitation Act.

(e) According to the respondents, within few days of adoption deed, the respondents consulted their Advocate and were informed that the adoption deed is void and there is no necessity to cancel the same. According to the respondents, they informed the first appellant and appellants 5 & 6 about the same and at their request, they treated the first appellant as their foster daughter. These contentions are after thought of respondents.

(f) The respondents only conducted the marriage of the first appellant with the second appellant and invitation had been printed in the name of the respondents.

(g) The respondents filed suit after 12 years of the adoption and deed of adoption for declaration that the adoption deed is null and void and for permanent injunction. The first appellant filed written statement and other appellants adopted the same. In the written statement, appellants have stated that the adoption is valid and suit for declaration is barred by limitation. They also contended that the suit properties are ancestral properties.

(h) The respondents amended the plaint by filing I.A.No.470 of 2009 and as per the order passed in the said Interlocutory Application, prayer for declaration was deleted. The respondents having deleted the prayer, did not delete the averments with regard to adoption. The learned Trial Judge framed issues with regard to adoption but did not give any finding.

(i) The court has to frame the issue based on the pleadings and not based on the prayer. The court, having framed issue with regard to validity of adoption deed, ought to have given finding as per Order XIV Rules 1 & 2 CPC. Once issues are framed, findings should be given to all the issues.

(j) The first appellant has let in evidence as DW1 and also examined DWs 5 & 6 witnesses of adoption deed Ex.A15 and proved the genuineness of Ex.A.15. The respondents also did not dispute the execution and registration of Ex.A.15. As per Section 16 of Hindu Adoptions and Maintenance Act, 1956 when valid adoption deed is produced, there is a presumption that there is a valid adoption, unless and until, it is disproved. The appellants have let in evidence to prove that respondents took the first appellant in adoption before family deity, in the presence of priests and witnesses. The same is recorded and registered by Ex.A.15. The appellants have examined DWs 4 & 5, witnesses to Ex.A15 and proved the genuineness and

validity of Ex.A15. The respondents have not let in any evidence to rebut the said presumption. In Section 10 (iv) of the Act, there is a prohibition to adoption of a person aged more than 15 years. At the same time, the said section contains exemption. As per the exemption contained in Section 10 (iv) of the Act, a person aged more than 15 years can be adopted, if custom and usage of the community permits.

(k) The appellants have examined DWs6, 7 & 8 who belong to the same community of appellant and respondents and proved that there exists custom and usage in the community to adopt a person aged more than 15 years. The respondents examined PW2 & PW3 who belong to the same community to disprove the contention of the appellants that there is no custom and usage in the community to adopt a person aged more than 15 years. The learned Trial Judge, on erroneous consideration rejected the evidence of DWs6, 7 & 8 and accepted the evidence of PWs2 & 3 of the respondent and held that there is no custom and usage in the community of appellants and respondents to adopt a person aged more than 15 years and erroneously held that there is no valid adoption of first appellant. On the other hand, the learned First Appellate Judge, elaborately considered the materials on record and held that the respondents have validly adopted the first appellant.

(l) The respondents have filed Cross Objection challenging the said finding of the learned First Appellate Judge. Originally, the respondents filed Cross Objection and the same was returned by the Registry and was not represented. Subsequently, the respondents filed another Cross Objection which is now numbered. The respondents cannot file two cross objections in respect of same issue in the same appeal.

(m) The courts below without properly considering Exs.A3, A4 & A14 and admission of the first respondent as PW1, held that the suit properties are not ancestral joint family properties. Once first respondent has admitted both in plaint and evidence that properties are joint family properties in the hands of first respondent, the properties cannot be held as separate properties of first respondent.

(n) The suit for bare injunction without relief of declaration is not maintainable.

(o) The respondents have to prove their case and they cannot succeed on the weakness of the appellants. The respondents cannot approbate and reprobate.

13(a) The learned counsel for the appellants relied on the following judgments -

(i) 1998 (8) SCC 701 [Mst.Deu and others v. Laxminarayan & Ors.]

"2. Once the respondent filed an application for substitution and produced a registered deed

of adoption, the trial court should have substituted him in place of Smt Phulla on being satisfied that the conditions of Section 16 of the Hindu Adoptions and Maintenance Act, 1956 had been complied with. Section 16 of the Act reads as follows: "16. Presumption as to registered documents relating to adoption.--Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

3. In view of Section 16 aforesaid whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the persons mentioned therein, the court shall presume that the adoption has been made in compliance with the provisions of the said Act unless and until it is disproved. According to us, it was not open to the defendants of the said suit for partition to collaterally challenge the said registered deed of partition. In view of Section 16 of the aforesaid Act it was open to them to disprove such deed of adoption but for that they had to take independent proceeding. The High Court was fully justified in directing that the respondent be substituted in place of Smt. Phulla on the basis of the registered deed of adoption produced before the court."

(ii) 2002 (3) SCC 634 [Jai Singh v. Shakuntala]

"2. The Section thus envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the Statute is rather definite since the Legislature has used "shall" in stead of any other word of lesser significance. Incidentally, however the inclusion of the words "unless and until it is disproved" appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession - thus onus of proof is rather heavy. Statute has allowed

some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words "unless and until it is disproved" shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption. Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed above. On the wake of the aforesaid the observations of the learned single Judge in *Modan Singh vs. Mst. Sham Kaur & Ors.* (AIR 1973 P&H 122) stands confirmed and we record our concurrence therewith. "

(iii) 2010 (14) SCC 466 [Atluri Brahmanandam (dead) thro' LRs v. Anne Sai Bapuji]

"12. We are concerned for the purpose of this case with clause (iv) of Section 10 which provides that a person to be adopted should not have completed the age of 15 years. But there is also an exception provided therein to the aforesaid required qualification which provides that if there is a custom or usage applicable to the parties permitting persons who have completed the age of 15 years being taken in adoption, such a person could also be validly adopted. On the other hand, the effect and the implication of Section 16 of the Act is that if there is any document purporting to record an adoption made and is signed by the person giving as well the person taking the child in adoption is registered under any law for the time being in force and if it is produced in any Court, the Court would presume that the adoption has been made in compliance of the provisions of the Act unless and until it is disproved.

13. There is no denial of the fact in the present case that the respondent was more than 15 years of age at the time of his adoption. But the respondent has relied upon the exception provided in section 10 (iv) and has proved by leading cogent and reliable evidence like Ex. A-8 that there is a custom in the "Kamma" community of Andhra Pradesh for adoption of a boy even above the age of 15 years. Therefore, the aforesaid exception which is engrafted in the same part of the provision of Section 10 of the Act was satisfied. Since the aforesaid custom and aforesaid adoption was also recorded in a registered deed of adoption, the Court has to presume that the adoption has been made in compliance with the provisions of the Act, since

the respondent has utterly failed to challenge the said evidence and also to disprove the aforesaid adoption."

(iv) 2013 (4) SCC 97 [Laxmibai (dead) through Lrs and another v. Bhagwantbuva (dead) through Lrs and others]

"22.1. The adopted child was 8 years of age at the time of adoption. Laxmibai, the adoptive mother, was 70 years of age at the relevant time and there is in fact, a registered adoption deed. Therefore, there is a presumption under Section 16 of the Act 1956, to the effect that the aforementioned adoption has been made in compliance with the provisions of the Act, 1956 until and unless such presumption is disproved. In the event that a person chooses to challenge such adoption, the burden of proof with respect to rebutting the same, by way of procedures accepted by law, is upon him."

(v) 2013 (3) SCC 182 [Board of Trustees of Port of Kandla v. Hargovind Jasraj and another]

"27. The termination of the lease deed was by an order which the plaintiffs ought to get rid of by having the same set aside, or declared invalid for whatever reasons, it may be permissible to do so. No order bears a label of its being valid or invalid on its forehead. Any one affected by any such order ought to seek redress against the same within the period permissible for doing so. We may in this regard refer to the following oft quoted passage in Smith v. East Elloe Rural District Council (1956) 1 All ER 855. The following are the observations regarding the necessity of recourse to the Court for getting the invalidity of an order established:

An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

This must be equally true even where the brand of invalidity is plainly visible : for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without

distinction between patent and latent defects.

28. The above case was approved by this Court in *Krishnadevi Malchand Kamathia & Ors. v. Bombay Environmental Action Group and Ors.* (2011) 3 SCC 363, where this Court observed:

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the Petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person.

39. Setting aside the decree passed by all the Courts and referring to several cases, this Court held that if the party aggrieved by invalidity of the order intends to approach the Court for declaration that the order against him was inoperative, he must come before the Court within the period prescribed by limitation. "If the statutory time of limitation expires, the Court cannot give the declaration sought for".

(vi) 2013 (5) SCC 470 [*Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corporation Limited and Another*]

"I. Approbate and Reprobate

15. A party cannot be permitted to blow hot-blow cold, fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience. (Vide: *Nagubai Ammal & Ors. v. B. Shama Rao & Ors.*, AIR 1956 SC 593; *C.I.T. Madras v. Mr. P. Firm Muar*, AIR 1965 SC 1216; *Ramesh Chandra Sankla etc. v. Vikram Cement etc.*, AIR 2009 SC 713; *Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.*, AIR 2011 SC

1869; Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited, (2011) 10 SCC 420; and V. Chandrasekaran & Anr. v. The Administrative Officer & Ors., JT 2012 (9) SC 260).

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

(vii) 1991 (2) SCC 218 [Kondiba Rama Papal @ Shirke (dead) by his heirs and Lrs and another v. Narayan Kondiba Papal]

"At the time when the plaintiff was adopted he was about 22 years old, but even though there is a difference of opinion between various schools as to the age when a boy may be adopted, so far as the Bombay State is concerned the position is well settled in view of more than one judicial decision. As pointed out in Mulla's Hindu Law, 14th Edition at page 550, in the Bombay State a person may be adopted at any age though he may be older than the adopter and though he may be married and have children. The adoption is not invalid although it took place after the thread ceremony of the boy was performed. Thus the custom is judicially recognised in the Bombay State as regards adoption of child at any age. Once the custom is judicially recognised, it is not required to be independently proved in subsequent cases. The plaintiff and the defendant No.1 belonged to the area which was part of the old Bombay State and accordingly such a custom prevailed amongst them as regards adoption of a child at any age. Even independently of this position, in the old Bombay State evidence was led of two instances of adoption of persons belonging to the same caste as the plaintiff where a child was adopted at the age above 15 years after the Act came into force. Thus in my opinion, in view of the settled position in law as judicially recognised, if the factum of the adoption is established its validity cannot be challenged on the ground that the adopted child had completed the age of 15 years at the

time of his adoption."

14. Per contra, the learned Senior Counsel for the respondents contended that -

(a) Suit properties are separate properties of respondents 1 and 2.

(b) Originally, "A" schedule property belonged to Athi Gounder, the grandfather of the first respondent. He, by Ex.A1 will, bequeathed the said property to father and mother of the first respondent. The first respondent's father is the brother-in-law as well as son-in-law of Athi Gounder. He is not a co-parcenor. "A" schedule is not joint family property and it is a separate property of Athi Gounder, as evidenced by Ex.A1 wherein he has stated that "A" schedule property is his property.

(c) The parents of the first respondent did not acquire the said property by survivorship. They got the suit property by document Ex.A1 will and the said property is separate property in their hands.

(d) Athi Gounder also bequeathed money lending business to his daughter, mother of the first respondent after the lifetime of his two wives. "B" schedule property was purchased by mother of the first respondent in the name of father of the first respondent, from and out income from her $\frac{1}{2}$ share in the "A" schedule property and income from money lending business. "C" schedule property is purchased by the mother of the first respondent in the name of the first respondent, from and out of the income from "A" schedule property. "D" schedule property was purchased by the second respondent in the name of her son Elango from and out of her money and also from the amounts given to her by her father.

(e) The statement of the first respondent that the properties are ancestral properties will not make the separate properties of respondents as joint family property. A wrong admission will not be an estoppel. The respondents did not admit that the properties are joint family properties. Athi Gounder died in the year 1942 and during that time, daughter is not a co-parcenor.

(f) The statement in Ex.A14 exchange deed that property is ancestral property will not amount to that suit properties are joint family properties. Similarly, Exs.A3 & A.4 receipts issued by Nachayammal and Sellammal has no relevance to decide the issue whether the suit schedule properties are separate properties or joint family properties of respondents. "A" schedule properties is separate property of parents of the first respondent. "B" and "C" schedule properties which are purchased from and out of the income from "A" schedule property is also separate properties in the hands of first respondent.

(g) Both the courts below have concurrently held based on the evidence that suit properties are separate properties of first respondent. No substantial question of law is raised based on the evidence with regard to nature of suit properties. It is not open to the learned counsel for the appellants to re-argue the Second Appeal on facts.

(h) Once it is held that suit properties are separate properties of the respondents, even if the first appellant is the adopted daughter of the respondents, she will not get any right in the suit properties.

(i) The first appellant, in her evidence as DW1 has stated that she does not want the property but her husband and natural parents only want the property. From her evidence, it is clear that the appellants 2, 5 & 6 are creating mischief and are instigating the first appellant. The respondents are claiming only permanent injunction and both the courts have granted the said relief. The respondents are satisfied with the decree of permanent injunction.

(j) As far as the adoption of first appellant is concerned, according to the pleadings, she was adopted on 11.09.1995 when she was 21 years and the same was recorded by Ex.A15 adoption deed. According to the respondents, the said adoption deed is void and there is not necessity for them to take action for cancellation of Ex.A15. As per Section 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956 a person aged more than 15 years cannot be given or taken in adoption except if there is any custom or usage in the locality or community or in the family of a person adopting a person more than 15 years. The respondents have stated that there is no custom or usage in their community permitting adoption of a person aged more than 15 years. They have stated that custom is to give and take adoption in the presence of family deity. Custom and usage is defined under Section 3 of the Act. The appellants claim that there is a custom and usage in their community to adopt a person aged more than 15 years.

(k) The respondents obtaining orders from court, deleted the relief of declaration that adoption deed dated 20.09.1995 marked as Ex.A15 is null and void. The appellants persisted that their claim that first appellant was adopted as per their custom and usage of their community by the respondents. In such circumstances, the appellants became plaintiffs in respect of such relief and it is for them to prove that there is custom and usage in the community to adopt a person aged more than 15 years. The usage and custom must exist for a long time and it must be continuously followed. The best person to prove the custom and usage prevailing in the community will be the priests, poojari and elders of the community. The appellants did not examine any poojari or elders of their community to prove their custom and usage. The respondents examined PW2 & 3 and proved that there is no

custom and usage in their community. On the other hand, the appellants have examined Dws 6, 7 & 8 to prove the existence of custom and usage in their community. The learned Trial Judge, considering their evidence elaborately in proper perspective rejected their evidence and held that appellants failed to prove custom and usage in their community. The learned First Appellate Judge, on erroneous consideration of evidence of Dws 6 to 8 and without considering the reasons given by the learned Trial Judge for not accepting the evidence of Dws 6 to 8 held that first appellant is the adopted daughter of the respondents. The reasons given by the learned First Appellate Judge are invalid and without any acceptable evidence let in by the appellants.

15. As per Section 16 of the Hindu Adoptions and Maintenance Act, 1956 when a valid document is produced for having adopted a person, there is a presumption that the adoption is validly done, unless contrary is proved. The appellants have not proved the existence of custom and usage. On the other hand, appellants 1, 5 and 6 gave up their stand that the first appellant was adopted on 11.09.1995 when she was aged 21 years and the same was recorded in Ex.A15. They have come out with new case that the first appellant was adopted by the respondents when she was aged 10 years when the two sons of the respondents were alive. The first appellant has categorically stated in her evidence that she was not adopted on 11.09.1995 when she was aged 21 years but she was adopted when she was 10 years in the presence of family deity by the respondents. DW3 & 4 who are witnesses to Ex.A15 also deposed that first appellant was adopted when she was aged 10 / 11 years and not on 11.09.1995, as stated in Ex.A15. From the above evidence, the respondents have rebutted the presumption of valid adoption as per Ex.A15.

15(a) The contention of the learned counsel for the appellants that respondents have filed two cross objections in the same Second Appeal and present cross objection is not maintainable is not correct. The respondent initially filed cross objection petition and the same was returned. The respondents did not re-present the same but filed present cross objection with condone delay petition. The learned counsel for the appellants did not oppose the condone delay petition and hence the delay was condoned and cross objection was numbered and the same is before this court. The plea of abandonment or provisions of Order XXIII are not applicable. Only when the suit, appeal or application is numbered and the person does not pursue the same, withdraws without permission of the court to file fresh suit, appeal or application, then subsequent proceedings will be barred and not maintainable. The cross objection filed by the respondents earlier were not numbered and the respondents did not abandon the cross objection, after being numbered and taken on file or did not withdrew the same without leave of the court.

15(b) The learned First Appellate Judge having held that suit properties are self-acquired properties and having granted decree of injunction is not correct in holding that the first appellant is the adopted daughter of the respondents without there being a prayer for such a relief. The learned First Appellate Judge failed to see that the Trial Court, considering the evidence in proper perspective held that appellants failed to prove the custom and usage in the community. The learned First Appellate Court failed to consider the evidence in entirety and erroneously held that the first appellant is the adopted daughter of the respondents.

15(c) The learned Senior Counsel for the respondents, in support of his contention, relied on the following judgments -

(i) 2003 (9) SCC 606 [Banarsi and Others v. Ram Phal]

"10. The CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment

amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent. "

(ii) 2013 (1) CTC 38 [Olympic Cards Limited v. Standard Chartered Bank]

"13. The abandonment of suit as provided under Rule (1) of Order XXIII does not involve any such adjudication on merits. This rule is essentially based on public policy that a fresh suit on the basis of the very same cause of action should not be permitted at a later point of time, unless leave was taken for such institution. This provision therefore can be invoked only in case there was a valid proceedings which was abandoned midstream without obtaining consent from the Court. The bar is against the institution of a fresh round of litigation on the basis of the very same cause of action. Since the provision bars a later litigation on account of a former litigation on the very same point, the Court, before axing the subsequent suit, must be convinced that a suit was instituted earlier and it was taken on file by the Court and inspite of the readiness of the Court and the defendant to decide the suit on merits, the plaintiff has withdrawn the proceedings without liberty. "

(iii) AIR 1953 SC 495 [C.N.Arunachala Mudaliar v. C.A.Mruganatha Mudaliar and another]

<https://hcservices.ecourts.gov.in/hcservices/> 11. In view of the settled law that a

Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants, it is in our opinion not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest. This extreme view, which is supposed to be laid down in the Calcutta case(1) referred to above, is sought to be supported on a two-fold ground. The first ground is the well known doctrine of equal ownership of father and son in ancestral property which is enunciated by Mitakshara on the authority of Yagnavalkya. The other ground put forward is that the definition of "self-acquisition" as given by Mitakshara does not and cannot comprehend a gift of this character and consequently such gift cannot but be partible property as between the donee and his sons.

12.But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion. We think has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate category altogether and in more places than one has declared them exempt from partition. "

(iv) 2009 (4) CTC 440 [K.V.Ramasamy v. K.V.Rahgavan and 3 others]

"40. This question has been answered in different ways by different High Courts and with the result there has been a considerable diversity of judicial opinion and the Honourable Apex Court In AIR 1953 Supreme Court 495 (C.N.Arunachala Mudaliar Vs. A.Muruganatha Mudaliar and another) has held that in view of

settled law that a mithakshara father has absolute right of disposition over his self-acquired property to which in exception can be taken by his male descendants, it is not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest."

(v) 2008 (13) SCC 119 [Salekh Chand (Dead) by Lrs v. Satya Gupta and others]

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

(vi) 2006 (13) SCC 627 [Bhimashya and others v. Janabi alias Janawwa]

"23. It is well established principle of law that though custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication. (See The Magistrate of Dunbar v. The Duchess of Roxburgha (1835) 6 ER 1642), Noble v. Durell (1789) 100 ER 569). A custom may not be illegal or immoral; but it may, nevertheless, be invalid on the ground of its unreasonableness. A custom which any honest or right-minded man would deem to be unrighteous is bad as unreasonable.

26. Is a law not written, established by long usage, and the consent of our ancestors? No law can oblige a free people without their consent: so wherever they consent and use a certain rule or method as a law, such rule etc., gives it the power of a law and if it is universal, then it is common law: if particular to this or that place, then it is custom. Custom is one of the main

triangles of the laws of England; those laws being divided into Common Law - Statute Law, and Custom. India is a land where there are very many customs appropriate to certain areas of territory; families or castes.

"14(3) A "custom", in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian Conditions. (See Thakur Gokalchand v. Parvin Kumari AIR 1952 SC 231).

"A custom is local Common Law. It is Common Law because it is not Statute Law; it is Local Law because it is the law of a particular place, as distinguished from the general Common Law. Local Common Law is the law of the country (i.e., particular place) as it existed before the time of legal memory" (per Jessel, M.R., Hammerton v. Honey). "

16. The learned counsel for the appellants in reply reiterated the averments and submitted that adoption ceremony was conducted on 11.09.1995 and the same was registered after nine days, i.e. On 20.09.1995. The respondents, in para 10 of the plaint and the first respondent in his evidence have categorically admitted the adoption. The adoption was given effect to and it is for the respondents to prove that the adoption has been cancelled. Even if Ex.A15 is a void document, it must be challenged in a competent court of law and it is for the court to decide whether the said document is void or not. It is not open to the respondents to let in oral evidence contrary to the registered document Ex.A15. It is not the case of the respondents that there is no custom or usage to adopt a person aged more than 15 years. The learned First Appellate Judge having held that the first appellant was validly adopted, ought to have partly allowed the First Appeal.

17. The learned Senior Counsel for the respondents, in rejoinder has contended that appellants have stated that without relief of declaration that adoption deed dated 20.09.1995 is void, the respondents are not entitled to decree of permanent injunction. The respondents are claiming decree of permanent injunction with regard to their properties and appellants are not disputing that respondents are owners of properties. In such a situation, there is no necessity to

pray for declaration of title of the suit properties and suit for permanent injunction is maintainable.

18. Substantial questions of law 1 & 3 :-

The contention of the respondents with regard to suit properties is that it is their separate properties. On the other hand, it is the contention of the appellants that the suit properties are joint family properties in the hands of first respondent. To decide the nature of suit properties in the hands of first respondent, the sources and mode by which the first respondent acquired the suit property are the relevant factors. The following are admitted facts with regard to suit property -

(a) The property described in "A" schedule property originally belonged to Athi Gounder, the grandfather of first respondent.

(b) Athi Gounder, by will marked as Ex.A1 bequeathed the said property to the father of the first respondent who is his brother-in-law as well as son-in-law and to his daughter Vangalammal equally.

(c) He also bequeathed the money lending business to his first wife for lifetime and after that, for his second wife for lifetime. After the lifetime of his second wife, he bequeathed the money lending business to his daughter Vangalammal. In the will, he described "A" schedule property as "his property". After the death of Athi Gounder, the parents of the first respondent became absolute owner of "A" schedule property.

(d) After the death of two wives of Athi Gounder, mother of the first respondent became absolute owner of money lending business.

(e) Father of the first respondent from and out of income from "A" schedule property purchased "B" schedule property in his name.

(f) Mother of the first respondent from and out of income of her share in "A" schedule property and money lending business purchased "C" schedule by three sale deeds in favour of the first respondent.

(g) "D" schedule property was purchased in the name of respondents' first son Elango.

19. From the above admitted facts, it is seen that in the Will Ex.A1, Athi Gounder has stated that "A" schedule property is "his property". It is not joint family property holding the same with any other co-parcenor. The father of the first respondent is not the son of Athi Gounder but he is his brother-in-law as well as son-in-law. The other beneficiary of "A" schedule property by Will Ex.A1 is Vangalammal, mother of first respondent. Only lenieal male descendants become co-parceners. Daughter was not co-parcenor during that time.

Similarly, brother-in-law or son-in-law cannot be co-parcenor along with brother-in-law or father-in-law. The parents of first respondent did not become owner of "A" schedule property by survivorship. They became owners by a document being beneficiary under the Will Ex.A1. It is the absolute separate property of parents of first respondent and it is not a joint family property. Similarly, money lending business was given to the mother of the first respondent by very same Will. As per the said Will, Athi Gounder instructed his second wife to pay a sum of Rs.1,500/- to each to his two daughters and accordingly, she paid the same and obtained receipts Exs.A3 & A4.

20. The properties described in "B" & "C" schedule were purchased from and out of the absolute properties of parents of first respondent. After the death of father of first respondent, he inherited "B" schedule property and his sister relinquished orally her share in favour of the first respondent not claiming any right in any of the suit properties. According to the respondents, the second respondent, from and out of her funds and funds given by her father, purchased "D" schedule property by three sale deeds in the name of her first son Elango. The appellants denied the said contention and contended that "D" schedule property is also joint family property of first respondent. From the materials, it is seen that in the three sale deeds, it was not mentioned that second respondent purchased the property in the name of her son. The appellants have not produced any materials to show that the income from "A" schedule property was utilised for purchasing "D" schedule property and has not substantiated their claim that "D" schedule property is also joint family property. In any event, even if "D" schedule property was purchased from and out of the income from "A" schedule property, "D" schedule property will not become joint family property as "A" schedule property is separate property of first respondent.

21. The learned counsel for the appellant contended that in Ex.A14, exchange deed and Exs.A3 & A4 receipts, it has been stated that "A" schedule property is ancestral property and the first respondent, as PW1 has admitted that "A" schedule property is his ancestral property. In view of such admission, "A" schedule property is joint family property in the hands of first respondent. Having admitted so, the first respondent is estopped from contending that suit properties are his separate properties. These contentions are untenable. Already it is held that suit properties are separate properties of first respondent and therefore any wrong admission will not make separate property as joint family property. In this regard, the contention of the learned Senior Counsel for the respondents that the first respondent has stated that it is his ancestral property but he did not admit that it is his joint family property. Even otherwise, there will not be estoppel against wrong admission. The

courts elaborately considered the above facts and by giving cogent and valid reason, have held that suit properties are separate properties and not joint family properties. The First Appellate Judge has considered what is a family and what is a joint family and who can be members of joint family. The said consideration and findings of the First Appellate Judge that there was no joint family and first appellant is not a member of joint family alongwith the first respondent are valid and legal. The learned counsel for the appellant has not raised any acceptable grounds for interfering with the concurrent finding of facts with regard to nature of suit properties by courts below.

22. Initially, respondents filed suit for declaration that adoption deed Ex.A15 is void and for permanent injunction. After the appellants filed written statement, the respondents deleted the relief of declaration after obtaining orders of amendment of the plaint and retaining the relief of permanent injunction in respect of suit property. From the materials on record, it is held that the suit properties are separate properties of respondents and they are not joint family members. The appellants also do not dispute the title of the first respondent. They dispute only the contention of the first respondent that it is his separate property. They also do not dispute that respondents are in possession and enjoyment of the suit properties. When the title and possession of respondents are not disputed, the respondents are entitled to file suit for permanent injunction simpliciter. There is no necessity for the respondents to file a suit for declaration with regard to their title also. In such circumstances, the deletion of prayer for the relief of declaration with regard to adoption deed will not prevent the respondents from maintaining the suit for permanent injunction and obtaining decree for the same. As already held, while deciding the first substantial question of law that recital in Ex.A14 will not be an admission by the first respondent that suit properties are joint family properties. These substantial questions of law are answered against the appellants.

Substantial question of law No.2

23. Initially the respondents filed suit for declaration that adoption deed is null and void and for permanent injunction. Subsequently, they deleted the prayer for declaration and retained the prayer for permanent injunction restraining the appellants from interfering with their peaceful possession and enjoyment of the suit property. According to the respondents, by mistake they adopted the first appellant on 11.09.1995 contrary to provisions of Hindu Adoptions and Maintenance Act, 1956. The said adoption is invalid as there is no custom to adopt a person aged more than 15 years. On 11.09.1995, the first appellant was aged 21 years. In view of adoption is invalid, the adoption deed

dated 20.09.1995 Ex.A15 is void and they have not taken any steps to cancel the adoption deed Ex.A15. They prayed for injunction as appellants tried to interfere with their peaceful possession and enjoyment of the suit properties. The appellants, in their written statement contended that as per custom prevailing in their community, adoption of a person aged more than 15 years is valid. The first appellant was taken in adoption as per the custom and usage of their community. The said adoption is valid. The suit for declaration is barred by limitation.

24. The respondents deleted the prayer for relief of declaration after obtaining order for amendment. The appellants filed additional written statement and persisted that adoption is valid as per the custom and usage of their community. An issue was framed in this regard. The respondents are denying the existence of custom and usage and they cannot prove a negative by positive evidence. It is the appellants who are claiming the existence of custom and usage in their community. Then it is for them to prove the same. Section 3 (a) of the Hindu Adoptions and Maintenance Act, 1956 defines custom and usage. Section 4 is a saving provision. Section 3(a) and 4 of the Act read as follows -

3. Definitions. - In this Act, unless the context otherwise requires, - (a) the expression "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family :

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family ;

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

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

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

25. As per Section 3(a) of the Act, a custom or usage must be in existence continuously and uniformly for a long

time. It also must have obtained the force of law among Hindus in any local area, tribe, community, group or family. This custom and usage has been considered by various High courts and it has been held that only if it is proved that a custom is in existence for a long time and is continuously observed, the said custom acquire legal sanction. Once a tribe, a community or a family proves the existence of such a custom in a court of law, subsequently it need not be proved by repeatedly filing suits.

26. A person can rely on the earlier judgments. In the present case, the respondents denied the existence of custom. The appellants contended that existence of custom and the first appellant was adopted as per custom of the community. The appellants have pleaded in the written statement that custom and usage to adopt a person aged more than 15 years is in existence for long time and is continuously practised and observed. To prove the existence of custom and usage, the appellants examined DWs 6 to 8 who are the members of the community. DW 6 deposed that one Subbayan was adopted at the age of 22 years. He has not produced any document to substantiate such a claim. The said Subbayan was not examined.

27. DW 7 deposed that he was adopted when he was more than 15 years. The respondents have produced sale deed and lease agreements to show that DW 7 has been mentioned as son of his biological father not son of his adoptive father. DW 8 also deposed that he was adopted by his uncle when he was more than 15 years. From the documents produced, it is seen that his uncle has settled the property not only on DW 8 but on all the brothers of DW 8 stating that they are his foster children. The Trial Court considered the evidence of DWs 6 to 8 extensively and held that they are not reliable witnesses and they have not proved the existence of custom and usage. By giving valid reason, the learned Trial Judge rejected their evidence. The First Appellate Judge, without properly appreciating the evidence of DWs 6 to 8 and reasoning of the learned Trial Judge for rejection of the evidence of DWs 6 to 8, accepted their evidence and erroneously held that the appellants have proved the existence of custom and usage through DWs 6 to 8. The reasoning of the learned First Appellate Judge is not valid. The learned First Appellate Judge failed to see that the appellants have not pleaded the existence of custom and usage for such a long time and continuous usage. DWs 6 to 8 has deposed with regard to only stray incidents of adoption beyond the age of 15 years but they failed to prove the said adoptions also by any acceptable evidence.

28. It is pertinent to note that the first appellant, as DW 1 and her father 5th appellant as DW 2 have given up their case in the written statement that first appellant was adopted on 11.09.1995 validly when first appellant was 21 years as per

their custom and usage before the family deity of respondents 1 & 2. They have come up with a new case that the first appellant was adopted when she was aged 10 years before the family deity of respondents. From that day onwards, the first appellant was the adopted daughter of the respondents but the appellants have not produced any document or oral evidence from independent witnesses with regard to such an adoption. The learned First Appellate Judge has not considered that appellants cannot let in any evidence without pleading or contrary to the pleadings. The learned First Appellate Judge has brushed aside the said new and contrary case of the appellants by simply stating that such a stand has no significance.

29. The learned First Appellate Judge has deviated from the established procedure and judicial pronouncement in not rejecting the case of the respondents in view of the said evidence of appellants 1 and 5 as DW1 and DW2 are without pleadings. The appellants 1 and 5 have deposed in their evidence that first appellant was not given in adoption to respondents on 11.09.1995 but the adoption has taken place when the appellant was aged 10 years. DWs4 & 5 are witnesses to Ex.A15, the adoption deed. They also deposed that the first appellant was adopted when she was aged 10 years and not on 11.09.1995 when the first appellant was 21 years old. DW4 has stated that he does not personally know about the adoption. DWs4 & 5 have stated that they do not know whether Ex.A15 is the record for adoption that took place on 11.09.1995 or earlier adoption when first appellant was aged 10 years old. A reading of Ex.A15 shows that it is only a record of adoption alleged to have taken place on 11.09.1995. The appellants 1 & 5 as well as two of the witnesses to Ex.A15, i.e. DWs 4 & 5 have stated that no adoption took place on 11.09.1995. In such a case, Ex.A15 is void.

30. The contention of the learned counsel for the appellants that when a registered adoption deed is produced and when the parties are signatories to the adoption deed, there is a presumption that there is a valid adoption. Per contra, the learned Senior Counsel for the respondents contended that presumption is rebuttable and party can prove that said deed is invalid. Both the learned counsel for the appellants as well as the learned Senior Counsel for the respondents relied on Section 16 of the Hindu Adoptions and Maintenance Act, 1956 which reads as follows -

Section 16 of the Act

16. Order of succession and manner of distribution among heirs of a female Hindu

The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place, according to the following rules, namely :-

Rule 1. - Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2. - If nay son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3. - The devolution of the property of the intestate on the heirs referred to in clause (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or ht mother's or the husband's as he case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

31. As per Section 16 of the Act, if a valid registered adoption deed is produced, there is a presumption with regard to adoption of said person. At the same time, the opposite party has a right to disprove the same. In the present case, the appellants 1 & 5 as DWs1 & 2 and DWs4 & 5 who are two witnesses to adoption deed have stated that no such adoption took place on 11.09.1995 as alleged in Ex.A15 dated 20.09.1995. When the appellants themselves have come forward with a case that first appellant was not adopted on 11.09.1995 when she was aged 21 years but she was adopted when she was 10 years, the contents of Ex.A15 is invalid. The presumption in Section 16 of the Act in such circumstances is not available to the appellants.

32. Within 2½ months from the date of alleged adoption deed dated 11.09.1995, the first appellant was given in marriage to the second appellant. In the marriage invitation Ex.A16, the first appellant was shown as daughter of appellants 5 & 6 and foster daughter of respondents. The appellants 5 & 6 also was party to the said invitation. As per Ex.59, which is an application by the first appellant to Bharathiar University, Coimbatore, she has stated that her father is A.S.Palanisamy, the 5th appellant herein. The said application is dated 05.10.1996.

33. Considering all the materials on record and evidence on the parties, it is clear that appellants have not proved the existence of custom and usage permitting the respondents 1 & 2 to adopt first appellants who was aged 21 years at the

time of adoption contrary to Section 10 (iv) of the Act. They also failed to prove that first appellant was adopted at the age of 10 years. In view of the above facts, the findings of the learned First Appellate Judge that first appellant was adopted validly by respondents 1 & 2 is liable to be set aside and it is hereby set aside. From the materials, it is held that suit properties are separate properties. First appellant is not validly adopted by respondents. The substantial question of law No.2 is answered against the appellants.

Substantial question of law No.4

34. The respondents filed Cross Objection challenging the findings of the learned First Appellate Judge that first appellant was validly adopted by the respondents. There was a delay in filing the cross objection. The delay was condoned being satisfied with the reasons given by the respondents as well as the appellants did not oppose the said application and recording the no objection for the appellants. The cross objection was numbered and was taken on file. The contention of the learned counsel for the appellants is that present cross objection is not maintainable as respondents have earlier filed cross objection but did not pursue the same and abandoned it. The present cross objection which is a second cross objection is not maintainable. Per contra, the learned Senior Counsel for the respondents 1 & 2 contended that earlier cross objection was returned by the Registry and it was not re-presented. The respondents have not abandoned their claim in the cross objection as the earlier cross objection was returned by the Registry and it was not re-presented. The respondents have not abandoned their claim in the cross objection as the earlier cross objection was not numbered and taken on file.

35. Only when the proceedings is on file and it is abandoned or withdrawn without permission of a court to file a fresh proceedings on the same cause of action, then only subsequent proceedings will be barred and not maintainable. The learned counsel for the respondents referred to Order XXIII CPC. The contention of the learned Senior Counsel for the respondents has considerable force and is acceptable. When earlier cross objection was not numbered and not taken on file, it cannot be said that respondents have abandoned their claim. For the above reason, I hold that the present cross objection filed is maintainable and the substantial question of law is answered in favour of the respondents.

36. Considering the facts and circumstances of the case, the judgments of the learned counsel for the appellants do not advance their case. On the other hand, the judgments relied on by the learned Senior Counsel for the respondents are squarely applicable to the facts of the present case.

37. In the result, this Second Appeal filed by the appellants is dismissed and the Cross Objection filed by the

respondents is allowed. The finding of the learned First Appellate Judge that the adoption of the first appellant by the respondents is valid, is hereby set aside. In other aspects, the judgment and decree dated 30.11.2016 made in A.S.No.17 of 2015 on the file of the learned Sub Court, Bhavani and judgement of the learned trial Judge dated 23.02.2015 made in O.S No.154 of 2007 are confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

rgr

To

- 1.The Sub Court, Bhavani, Erode District
- 2.The First Additional District Munsif Court, Bhavani.
- 3.The Section Officer, V.R. Section, High Court, Madras.

+1cc to Mr.M.Narayanaswamy, Advocate SR.NO.48761

+1cc to Mr.N.Manokaran, Advocate SR.NO.49149

RSK(CO)

sm:28.8.2018

S.A.No.168 of 2017 and
Cross Objection No.29 of 2018

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