

Biju Ramesh Vs. Vijayakumar

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Court : Kerala

Decided On : Feb-16-2005

Reported in : AIR2005Ker196; 2005(2)KLT960

Judge : V. Ramkumar, J.

Acts : [Guardians and Wards Act, 1890](#); [Hindu Adoptions and Maintenance Act, 1956](#); Indian Succession Act; [Constitution of India](#) - Articles 21 and 39

Appeal No. : A.S. No. 264 of 1992

Appellant : Biju Ramesh

Respondent : Vijayakumar

Advocate for Def. : N. Nandakumara Menon and; P. Gopakumaran Nair, Adv.

Advocate for Pet/Ap. : Suhara, Adv.

Disposition : Appeal dismissed

Judgement :

V. Ramkumar, J.

1. The 2nd defendant and additional 3rd defendant (who are assignees from defendants 1 and 4 respectively) in O.S.No. I 14/1984 on the file of the Prl. Sub Court, Thiruvananthapuram, are the appellants in this appeal. The said suit was

one for partition and separate possession of the plaintiff's one half share over the plaint A, B and C schedule properties. The plaint A schedule property is 20 cents of land with a building situated thereon called 'Grace Lodge' comprised in Chengazhassery Village of Thiruvananthapuram District. The plaint B schedule property is 40 cents of land with a building thereon situated in Cheruvakkal Village of Thiruvananthapuram District. The plaint C schedule is a 1971 model Fiat motor car bearing registration No. KLV 5422.

2. The case of the plaintiff can be summarised as follows:

The plaint A, B and C schedule properties belonged to late Johnstone who died on 2.7.1981. The 1st defendant is his widow and the plaintiff is their son. Johnstone was the Principal of English College, Johore Baru, Malaysia. After retirement from service he returned to India in the year 1966. At that time his wife, the 1st defendant, was residing in the building called 'Grace Lodge' situated in the plaint A schedule property. Johnstone did not take up residence with her in view of his strained relationship with her. Instead, he took up residence with his brother S.P. Stephen at the latter's house called 'Saralil' in Nanthen code, Thiruvananthapuram. Johnstone resided there until his death. The plaint C schedule motor car was purchased by Johnstone while he was residing there. After a few days of his death, the 1st defendant, with the object of securing possession of the said motor car, falsely instituted criminal proceedings against S.P. Stephen alleging that the car was taken away by him from her possession by criminally intimidating her. She had obtained custody of the car through Court. The criminal case eventually ended in dismissal. But the question of custody of the car is still pending consideration. Immediately after securing possession of the car, the 1st defendant had filed a suit for partition before the Sub Court, Thiruvananthapuram, as O.S.No. 324/1981 claiming that she was entitled to get one half share over the assets of deceased Johnstone and the plaintiff, who is the son, is entitled to the other half. In that suit the 1st defendant obtained an order of injunction against the plaintiff herein restraining him from interfering with her possession of the plaint A schedule property and her residence in the building situated in the property. Thereafter she tried to encumber the plaint schedule properties to strangers with a view to defeat the rights of the plaintiff. On

29.12.1982 she executed Ext.A-8 mortgage deed in favour of the 2nd defendant in respect of the plaint A schedule property with authority to make alterations and improvements in the building situated in the property. Accordingly the 2nd defendant is in possession of the property. The 1st defendant had no right or authority to execute Ext.A-8 mortgage deed which is void ab initio and not binding on the plaintiff or the plaint A schedule property. It was also executed pendente lite and therefore hit by lis pendens. The 1st defendant has only a mere right of enjoyment over half of the immovable properties owned by deceased Johnstone. The plaintiff being the only son of deceased Johnstone is entitled to succeed to the estate of deceased Johnstone. The 2nd defendant is only a name lender to Ext.A-8 mortgage and it is his father who, by virtue of his influence and power, entered into the said transaction. The 2nd defendant is trying to renovate the building in the plaint A schedule property without any authority to do so. He is also attempting to induct strangers in the plaint A schedule property to the detriment of the plaintiff who is the sole legal heir and reversioner in respect of the properties left behind by Johnstone. Johnstone during his life time had expressed his desire to give the plaint C schedule motor car to the plaintiff and to Stephen and his sons. The 1st defendant is not entitled to the said car. The 1st defendant has been taking the entire yield from the plaint schedule properties without accounting for the same to the plaintiff. The plaintiff is entitled to get mesne profits from her or her share in the properties estimated at Rs. 1,500/- and Rs. 2,400/- respectively per annum from the plaint A and B schedule properties. O.S.No. 324/81 filed by the 1st defendant for partition was dismissed as not pressed on 12.9.1983. The plaintiff is entitled to ignore Ext.A-8 mortgage created by the 1st defendant and seek partition and separate possession of his one half share over the plaint A and B schedule properties besides claiming the plaint C schedule motor car in its entirety. Hence the suit.

3. The suit was resisted by the 1st defendant contending inter alia as follows:

The suit is not maintainable and has been filed without any bona fides and with the only motive of harassing this defendant. The relationship of the plaintiff and the 1st defendant with deceased Johnstone is admitted. The plaint schedule properties belonged to deceased Johnstone. After his death this defendant had to borrow

large amounts from various persons to meet the funeral expenses of her husband and also to meet the expenses for her treatment. Hence this defendant executed Ext.A-8 mortgage in favour of the 2nd defendant who is in possession of the plaint A schedule property. Prior to the said mortgage, the plaint A schedule property and the building thereon were leased out by this defendant to contractor G. Ramesan on 3.11.1982 as per Ext.B-5 and he was put in possession of the property. In Ext.A-8 mortgage the 2nd defendant has been given the power to deal with the tenant under Ext.B-5. Ext.A-8 mortgage has been validly executed by this defendant and the same is binding on the plaintiff as well. The plaint C schedule motor car was purchased by Johnstone and it was taken away by his brother Stephen from the possession of this defendant and that necessitated the criminal proceedings initiated by her. The plaintiff does not have any absolute right over the said car. The father of the 2nd defendant who is in possession of the plaint A schedule property is a necessary party to the suit which is bad for nonjoinder of necessary parties. The cause of action alleged in the plaint is not correct and the suit is liable to be dismissed with costs.

4. With the permission of the Court the 1st defendant filed an additional written statement contending inter alia as follows:

The plaintiff was given in adoption to Rajamma, the sister of Johnstone and her husband Joseph six months after the plaintiff's birth. Joseph and Rajamma were residing in Madras and they had no children. Hence they adopted the plaintiff as their son. The baptism of the plaintiff was in a church at Madras. Thereafter the plaintiff was brought up and educated by Rajamma and Joseph. After his adoption the plaintiff was never treated as their son by deceased Johnstone and the 1st defendant. The plaintiff married a Muslim woman after converting himself into Islam. The entire properties of Rajamma were inherited by the plaintiff after her death as per Ext.B-1 Will dt. 30.6.1966 executed by Rajamma. While Johnstone was employed in Malaysia, he had expressed his desire as per Ext.B-3 letter dt. 5.1.1942 addressed to this defendant to give all his properties to their only daughter Vasanthakumari Fenn. After his return to India, Johnstone was residing along with the 1st defendant in 'Grace Lodge' situated in the plaint A schedule property. But during his last days he was residing at his brother's house at

Nanthencode for the convenience of consulting his doctor. O.S.No. 324/81 was filed by this defendant due to wrong legal advice and mistaken impression regarding the facts stated therein and the said suit was subsequently withdrawn after discovering the correct legal position regarding her rights over the plaint schedule properties. The encumbrance over the plaint A and B schedule properties were created by this defendant with the consent and knowledge of her daughter Vasanthakumari Fenn. The mortgage deed and the lease deeds in respect of the plaint schedule properties are not hit by lis pendens. The plaintiff is not the heir or reversioner of late Johnstone. This defendant and her daughter are his only legal heirs. The plaintiff is not entitled to get mesne profits from this defendant nor is he entitled to claim partition as prayed for. In the event of it being found that the plaintiff is entitled to a share, this defendant is also to be allowed 1/3rd share in the plaint schedule properties.

5. The 2nd defendant also resisted the suit by filing a separate written statement raising contentions which are similar to those raised by the 1st defendant. He raised the following additional contentions:

The plaintiff is not the son of deceased Johnstone and the 1st defendant. To his knowledge the plaintiff is the son of Rajamma and Joseph. This defendant has a right to make improvements in the plaint A schedule property as per the terms of Ext.A-8 mortgage. Similarly, the lessee in respect of the property has also got right to construct necessary structures since the property was leased out to him for industrial and commercial purposes. This defendant is not aware about the suit O.S.No. 324/81 or its dismissal. The suit is barred by limitation, estoppel and res judicata and is liable to be dismissed with costs.

6. Based on the contentions raised by defendants 1 and 2 additional defendants 3 and 4 were impleaded by the plaintiff. They also filed separate written statements who apart from raising contentions similar to those raised by defendants 1 and 2, made the following additional contentions:

The plaint A schedule property was leased out to the 3rd defendant by the 1st defendant as per Ext.B-5 lease deed dt. 3.11.1982 for industrial and commercial purposes on monthly rent of Rs. 250/- after receiving an advance of Rs. 40,000/-.

This was with the consent and knowledge of the 2nd defendant. The 3rd defendant has been in possession and enjoyment of the property after making necessary constructions. While so, Ext.A-8 mortgage was executed by the 1st defendant in favour of the 2nd defendant in respect of the property. The plaint B schedule property was leased out by the 1st defendant to one Raman Nair (D.W.2) and the 3rd defendant got assignment of the rights of Raman Nair. Subsequently the plaint A and B schedule properties were sold by defendants 1 and 4 as per Exts.B-8, B-9 and other sale deeds registered before the S.R.O., Thiruvananthapuram for valuable consideration. Hence these defendants are in possession and enjoyment of those properties as absolute owners. They have constructed a building in the plaint B schedule property by spending lakhs of rupees. They have also effected valuable improvements in the plaint A schedule property to the tune of Rs. 14 lakhs. The plaintiff has no manner of right over the plaint schedule properties and in the event of partition these defendants are entitled to the amounts spent by them.

7. The additional 4th defendant who is the daughter of Johnstone and the 1st defendant raised the following contentions in addition to those raised by the 1st defendant:

On the death of Johnstone the entire plaint schedule property devolved on her. The plaintiff has no right to challenge the documents executed by this defendant and her mother in favour of defendants 2 and 3. In the event of partition this defendant is entitled to 1/3rd share over the properties.

8. The Court below framed 11 issues for trial. On the side of the plaintiff he examined himself as P.W. 1 and got marked 39 documents as Exts. A-1 to A-39. On the side of the defendants the additional 3rd defendant and Raman Nair (the assignee under Ext.B-7) were examined as D.Ws.1 and 2. 17 documents were got marked as Exts.B-1 to B-17.

9. The learned Subordinate Judge as per judgment and decree dt. 15.12.1990 passed a preliminary decree for partition and separate possession of the 1/3rd share of the plaintiff over the plaint schedule properties with mesne profits the quantum of which was directed to be decided in the final decree proceedings. It is

the said decree which is assailed in this appeal by the 2nd and the additional 3rd defendant.

10. I heard Adv. Smt. Suhara appearing for the appellants, Adv. Sri. P. Gopakumaran Nair appearing for the 1st respondent/plaintiff and Adv. Sri. N. Nandakumara Menon for the 2nd respondent/1st defendant. There was no representation for the legal representatives of the 3rd respondent (4th defendant) who died pending appeal.

11. The learned counsel appearing for the appellants made the following submissions before me in support of the appeal:

The lease and the mortgage executed by the 1st defendant in respect of the plaint A and B schedule properties which were in her possession are valid in law and the plaintiff was not entitled to question the same. Similarly, the assignment of plaint A and B schedule properties by defendants 1 and 4 in favour of the 2nd and the additional 3rd defendant are also legally valid and cannot be assailed by the plaintiff. Ext.A-4 is the plaint in the earlier suit filed by the 1st defendant for partition as O.S.No. 324/81 before the Sub Court, Thiruvananthapuram. In paragraph 2 of the said plaint the 1st defendant therein who is the present plaintiff is described as Jaiswal Phanson Vijayakumar, S/o. J.J. Joseph. Such description was given by none other than the mother of the present plaintiff which strengthens the defence plea that the plaintiff was given in adoption to Joseph and Rajamma. In paragraph 6 of Ext.A-4 plaint it is specifically pleaded that immediately after his birth, the 1st defendant therein was given in adoption to the husband's sister and her husband of the plaintiff therein and that he was brought up as their son. The evidence of the plaintiff examined as P.W. 1 will also go to show that Rajamma and her husband Joseph had treated the plaintiff as their adopted son and that the plaintiff never associated himself closely with his natural parents. The decision reported in Philips Alfred Malvin v. Gonsalvis, 1999 (1) KLT 292, shows that the Canon Law or Christian Law does not prohibit adoption. In Ext.B-1 Will executed by Rajamma after the death of her husband Joseph, the plaintiff is described as their adopted son. The plaintiff has admittedly accepted the properties given to him under Ext.B-1 Will by his adoptive mother. Having accepted the properties

bequeathed thereunder, he cannot disclaim the description given to him in Ext.B-1 Will. The plaintiff has not produced any document to show that he is the son of Johnstone. At page 37 of his deposition P.W.1 has admitted that the plaint C Schedule motor car is also with him. The suit has been filed as though the car is in the possession of the 1st defendant. Ext.B-3 is a letter written by Johnstone expressing his desire to disinherit the plaintiff. The appellants cannot be mulcted with the claim for mesne profits. They came into possession as per valid documents executed by defendants 1 and 4 and in her written statement the 4th defendant has also admitted that she too had consented to the documents executed by her mother. If so, the plaintiff was disentitled to file a suit of this nature or question the validity of the documents executed by defendants 1 and 4. The suit for partition without seeking redemption of Ext.A-8 mortgage was not maintainable.

12. I am afraid that I cannot agree with the above submissions. Before going into the merits of the contentions it may be useful to refer to the relationship between the parties. Johnstone who died on 2.7.1981 was the Principal of English College, Johore Baru, Malaysia. The 1st defendant Bessie Johnstone is his widow and the plaintiff J.P. Vijayakumar and the 4th defendant Vasanthakumari Fenn are the children born to Johnstone and the 1st defendant. Johnstone referred to above had an elder brother by name S.P. Stephen who was residing at Nanthencode in Thiruvananthapuram. Besides S.P. Stephen, Johnstone had a sister by name Rajamma whose husband was one Dr. Joseph. Both Dr. Joseph and Rajamma are not alive now. It is the admitted case of the parties that after retirement from service in the year 1966, Johnstone came back to India and started residing with his elder brother S.P. Stephen at Nanthencode. The plaint A, B and C Schedule properties admittedly belonged to Johnstone. Even though the plaintiff claimed one half share over the plaint schedule properties, there is no dispute that after the decision of the Supreme Court in Mary Roy's case, 1986 KLT 508, the plaint schedule properties left behind by Johnstone have devolved equally on the 1st defendant his widow and the plaintiff and the 4th defendant, who are the son and daughter respectively of Johnstone. Subject to the contention regarding adoption, the plaintiff will have only 1/3rd share over the plaint schedule properties.

13. The A schedule property was admittedly leased by the 1st defendant to the additional 3rd defendant, a contractor who was examined as D.W.1, as per Ext.B-5 lease deed dt. 3.11.1982. Subsequently the 1st defendant mortgaged the very same property to the 2nd defendant (son of 3rd defendant) as per Ext.A-8 mortgage dt. 21.12.1982 of which Ext.B-6 is the original. The plaint B schedule property also was leased by the 1st defendant as per Ext.B-7 lease deed dt. 9.2.1983 to one Raman Nair who was examined as D. W.2. Raman Nair admittedly assigned his rights over the plaint B Schedule property to the additional 3rd defendant. Both defendants 1 and 4 had subsequently assigned their rights over the plaint A and B schedule properties to defendants 2 and 3. Exts.B-8 and B-9 are the assignment deeds executed by defendants 1 and 4 in respect of the plaint B schedule property. They had executed similar assignment deeds in respect of the plaint A schedule property as well.

14. I will first consider the defence contention that since the plaintiff was given in adoption to Rajamma and her husband Joseph, he is not entitled to succeed to the estate left behind by deceased Johnstone. When the Court below disposed of the suit, the decision reported in 1999 (1) KLT 292 (supra) had not been there. The old law of adoption among Hindus was developed by ancient commentaries by 'Dattaka Mimamsa' and 'Dattaka Chandrika'. It was peculiar only to Hindus and not recognised by other religions like Muslims and Christians. The object of the old Hindu law of adoption was based more on secular reasons and religious motives as was pointed by the Privy Council in *Bal Gangadhar Tilak v. Srinivas Pandit*, AIR 1915 PC 7, wherein it was observed as follows:

'Among Hindus the ceremony of adoptions is held to be necessary not only for the continuation of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit the soul of the deceased passing from Hades into Paradise.'

In a subsequent decision also rendered by the Privy Council in *Amarendra Mansing v. Sanatan Singh*, AIR 1933 PC 155, also it was observed as follows:

'Among the Hindus, a peculiar religious significance has attached to the son, through Brahminical influence, although in its origin the custom of adoptions was

perhaps purely secular. The texts of the Hindus are themselves inscribed with this doctrine of religious significance. The foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites having regard to the well established doctrine as to the religious efficacy of sonship.'

The Hon'ble Supreme Court also had occasion to advert to the old Hindu Law of adoptions. In the decision reported in *Chandrasekhara (VTS) v. Kulandaivelu*, AIR 1963 SC 18, it was observed as follows:

'It may be, therefore, safely held that the validity of adoption has to be judged by spiritual rather than temporal considerations and the devolution of property is only of secondary importance.' (see p.487 of 14th Edn. of Mayne's Hindu Law & Usage)

15. The main effect of adoption is to transplant the child adopted from the family of his birth to the adoptive family. From the date of adoption, the adoptee will be considered to be the natural child of the adoptive family and all his ties with the family of birth are severed. From the date of adoption the adoptee will be treated as if he/she were born in the adoptive family for all practical purposes.

16. The concept of adoption which we are concerned in the present proceedings should not be mistaken for the domestic and the inter-country adoptions which have been the subject-matter of innumerable directions by the Apex Court in public interest litigations mainly at the instance of Lakshmi Kant Pandey. Those are cases where foundlings, orphans or children born to unwed mothers are given to the custody of guardians through the process of Court under the provisions of the [Guardians and Wards Act, 1890](#) for their eventual fostering by those guardians styled as adoptive parents (vide *Lakshmi Kant Pandey v. Union of India*, AIR 1984 SC 469, *Lakshmi Kant Pandey v. Union of India*, AIR 1986 SC 272, *Lakshmi Kant Pandey v. Union of India*, AIR 1987 SC 232, *Karnataka State Council for Child Welfare & Anr. v. Society of Sisters of Charity St. Gerosa Convent & Ors.*, AIR 1994 SC 658, *Sumanlal Chhotalal Kamdar v. Miss Asha Trilokbhal Saha*, AIR 1995 SC 1892, *Indian Council Social Welfare & Ors. v. State of A.P. & Ors.*, (1999) 6 SCC 365, *Lakshmi Kant Pandey v. Union of India & Ors.*, (2001) 9 SCC

379 and Smt. Anokha v. State of Rajasthan & Ors., (2004) 1 SCC 382. See also the illuminating decision In the matter of Manuel Theodore D'Souza & Anr., II 2000 DMC 292, rendered by Mr. Justice F.I. Rebello of the Bombay High Court). Adoption has not so far been statutorily recognised in India among the Christian and Muslim communities. The only law on adoption enacted by the Indian Parliament is the [Hindu Adoptions and Maintenance Act, 1956](#). Paragraph 7 of the decision of the Supreme Court in Lakshmi Kant Pandey v. Union of India, AIR 1984 SC 469 (supra) indicates that all attempts thus far made to bring out a uniform law of adoption applicable to all communities including Christians, such as the Adoption of Children Bill, 1972, the Adoption of Children Bill, 1980 etc. have not been fruitful. Thus in India there is no statute law of adoption for Christians. Paragraph 32 of II (2000) DMC 29 (supra) observes that in England also adoption was not part of the common law or based on equity. If so, it may not be permissible for Courts to evolve a law of adoption for certain communities or religions. Local adoption and inter-country adoption referred to earlier is really the recognition of the right of the child -whether abandoned, orphaned or destitute for being fostered to a healthy and meaningful habitat as part of the right to life carved out from International Conventions to which India is a signatory, directive principles set out under Article 39(f) of the [Constitution of India](#) and parens patriae jurisdiction etc. which have been read into Article 21 of the [Constitution of India](#). Such is not the case of adoption with which we are concerned in these proceedings. In the case on hand the 1st defendant in her original written statement had no case that the plaintiff was given in adoption. The adoption pleaded by the 1st defendant in her additional written statement was disputed and the finding of the Court below is also that there was no adoption as alleged so as to disinherit the plaintiff. Under these circumstances I am not called upon to consider the soundness of the decision reported in Philips Alfred Malvin v. Gonsalvis, 1999 (1) KLT 292 (supra) where actually the factum of adoption was admitted. Even if the Christian Law recognises adoption, there must be evidence of the actual formality of the adoption by proving the physical act of giving and taking of the child. A mere expression of consent or the execution of a deed of adoption without proving the physical act of giving and accepting the boy or a girl in adoption will not be sufficient even under the principles of Hindu Law. See

Madhusudan Das v. Narayanibai, (1983) 1 SCC 35 and also paragraph 193 at pages 442 and 443 of Mayne's Hindu Law & Usage 14th Edn. In the case on hand except relying on the evidence of the 1st defendant and Ext.B-1 testamentary disposition by Rajamma wherein the plaintiff is described as the adopted son of Rajamma, the 1st defendant who is the natural and biological mother of the plaintiff, did not even step into the witness box to prove the necessary physical act of adoption. So also the 4th defendant who is admittedly the daughter of Johnstone and the 1st defendant and the only sister of the plaintiff also did not mount the witness box to substantiate her contention that the plaintiff was given in adoption. The date or the month or even the year of adoption has not been pleaded or proved, much less, the other details such as the person who gave the child in adoption (whether it was Johnstone himself or whether it was Johnstone and the 1st defendant together) and the person who received the boy in adoption (whether it was to Rajamma alone or to Rajamma and her husband Joseph together) etc. What was highlighted by the learned counsel in support of the adoption was the act of baptising the child in a church at Madras where Rajamma and Joseph alone participated as the parents of the child. The evidence on record indicates that upon getting employment as a teacher in Malaysia, Johnstone was proceeding to Malaysia along with his wife (the 1st defendant) by leaving the six month old child with his sister Rajamma who was then at Madras. There is nothing on record to evince an intention on the part of Johnstone to give the child in adoption to Rajamma. When admittedly Johnstone and the 1st defendant were not present when the child was baptised, naturally Rajamma and Joseph (in whose custody the child was) alone could have represented his parents during the baptism ceremony. That does not make them the adoptive father and mother of the plaintiff.

17. Reliance placed on the averments in Ext.A-4 plaint in the earlier suit for partition filed by the present 1st defendant is also of no avail to the defendants. In para.4 of Ext. A-4 plaint there is an admission in unequivocal terms that the plaintiff therein who is the 1st defendant in the present suit, gave birth to the present plaintiff and the present 4th defendant. No doubt, there is a subsequent averment that the present plaintiff was given in adoption. There also except a bald statement to that effect, none of the requirements or details of a valid adoption

such as the date of the alleged adoption or the physical act of delivery of the child etc. are not pleaded. In the subsequent suit filed by the 1st defendant again for partition as O.S.No. 216/84 evidenced by Ext.A-39 plaint also there is an unambiguous admission in para 2 that the defendant therein (who is the present plaintiff) is the son of Johnstone and the plaintiff therein. Equally misconceived is the reliance placed upon the description of the plaintiff in Ext.B-1 Will executed by Rajamma wherein the plaintiff has been described as her adopted son. Apart from the plaintiff being shown as the adopted son, it is also shown in Ext.B-1 in parenthesis that the plaintiff is the son of Johnstone. If, as a matter of fact, the plaintiff was taken in adoption by Rajamma and her husband as alleged, there was no need for Rajamma to execute Ext.B-1 Will in favour of the plaintiff who, even otherwise, would have inherited her assets being the only son of Rajamma and Joseph. The very fact that a Will had to be executed by Rajamma indicates that she had not treated the plaintiff as her adopted son capable of inheriting her properties without a testamentary disposition.

18. That there was no adoption and the plea of adoption now raised is a clear after thought is probalised by the recitals in Ext. A-8 mortgage by the 1st defendant in favour of the 2nd defendant. In fact, this document was executed after the filing of the written statement in Ext. A-4 suit. The recitals in Exts.B-5, B-7 and B-6 documents, all executed by the 1st defendant either in favour of the 2nd defendant or in favour of the 3rd defendant also falsify or improbabilise the adoption set up by the defence. In these documents there is not even a whisper that the plaintiff who is admittedly the son born to Johnstone and the 1st defendant does not have any share over the properties since he was given in adoption to the sister of Johnstone. Ext.B-8 dt. 16.8.1986 and Ext.B-9 dt. 9.2.1987 are sale deeds executed by defendants 1 and 4 respectively in respect of the plaint B schedule property to defendants 2 and 3. Here also there is no recital regarding the derivation of title consequent on the death of Johnstone. When the plaintiff is admittedly the son born to Johnstone and the 1st defendant, one would have expected a recital in these documents that since the plaintiff has been given in adoption, the property has vested absolutely in defendants 1 and 4. There is no such recital in both these documents which were executed after the filing of the written statement in this case. Hence without going into the question as to whether

the decision reported in 1999 (1) KLT 292 (supra) lays down the correct law, I endorse the finding recorded by the Court below that the contesting defendants have failed to establish that the plaintiff was given in adoption to Rajamma and Joseph as alleged by them.

19. There is nothing in Ext.B-3 letter to evince an intention on the part of Johnstone to disinherit the plaintiff from succession. The only desire discernible from Ext.B-3 letter is that soon after the war time, Johnstone was having some concern about the future of the young girl and wanted to see that the house is given to the daughter. From this letter it cannot be inferred by any stretch of imagination that Johnstone had any intention of disinheriting the plaintiff. If, as a matter of fact, Johnstone had given the boy in adoption, one would have expected Johnstone to mention in Ext.B-3 letter that all the assets should go to the daughter, his son having been given in adoption to his sister. Even if any desire to disinherit the plaintiff had been indicated in Ext.B-3, the same cannot shut the plaintiff from succeeding to the estate of Johnstone since Ext.B-3 is only a letter and not a testamentary disposition answering the requirements of a valid Will.

20. What is to be considered next is the validity of the documents executed by the 1st defendant. Admittedly the plaintiff is not a party to Ext.B-5 lease in respect of the plaint A schedule, Ext.B-7 lease in respect of the plaint B schedule, Ext.B-6 mortgage in respect of the plaint A schedule and Exts.B-8 and B-9 assignments in respect of the plaint B schedule property. In these documents the 1st defendant alone is a party and the rights of the plaintiff cannot be affected by any unilateral assertion made by the 1st defendant in these documents that the properties transferred thereunder belonged absolutely to her. In fact, there is no dispute that as per the provisions of the Indian Succession' Act, the 1st defendant as the widow has 1/3rd share, the balance 2/3rd share being vested equally in the plaintiff and the 4th defendant. If so, the documents executed by the 1st defendant can relate only to her 1/3rd share over the properties. The plaintiff who was not a party to the same cannot be compelled to redeem the mortgage given by the 1st defendant. The question as to whether the plaintiff was bound to redeem the mortgage loses significance in view of the equities directed to be worked out in the judgment under appeal. There is a direction in the impugned judgment that the

share of the plaintiff shall be so allotted leaving the improvements effected by defendants 2 and 3 to the other sharers as far as possible. The 4th defendant has conceded the allotment of her share in favour of the assignees. The 1st defendant also cannot take exception to the equitable allotment of her share as far as possible to the assignees to whom she transferred the properties after receiving consideration from them in the form of money.

21. What survives for consideration is the direction for payment of mesne profits. In the first place there is no specific period in respect of which the mesne profits was claimed by the plaintiff. In law, he could claim only 3 years' past profits. It is not discernible from the plaint whether he was claiming past mesne profits or future mesne profits. The preliminary decree also does not indicate the period for which the mesne profits is made payable. Even though defendants 2 and 3 are transferees for consideration under documents to which the plaintiff is not a party, those documents, so far as the interests of defendants 1 and 4 are concerned, are valid and binding on their share of the properties. No doubt, defendants 1 and 4 were executing those documents without the junction of the plaintiff and without having absolute rights over the property. But they particularly the 1st defendant, falsely misrepresented to the assignees/ appellants that they are the absolute owners of the properties. Such being the position, the assignees viz., defendants 2 and 3 cannot be made liable for the mesne profits. It was asserting that she is the absolute owner in possession of the plaint A and B schedule properties that the 1st defendant executed these documents. Therefore she should be made liable for the mesne profits, the quantum of which shall be decided in the final decree proceedings. The liability of the 1st defendant for mesne profits shall be only from the date of the suit. The decree of the Court below will stand modified to this extent.

Subject to the modification as aforesaid regarding mesne profits, the judgment and decree passed by the Court below are confirmed. This appeal is consequently dismissed. However, in the circumstances of, the case, the parties shall bear their respective costs.