APPELLATE CIVIL.

Before D. K. Mahajan, J.

SHERA,—*Appellant.*

versus.

JIWANI,—*Respondent.*

Regular Second Appeal No. 1754 of 1961.

July 14, 1972.

Hindu Adoption and Maintenance Act (LXXVIII of 1956)—Sections 4, 5, 9, 10 and 11 (vi)—Adoptions of a child and an adult—Distinction between—Stated—Non-performance of the ceremony of give and take in the case of an adult—Whether invalidates the adoption.

Held, that from the combined reading of sections 4, 5, 9, 10 and 11 of the Hindu Adoption and Maintenance Act, 1956, it is clear that there exists a distinction between an adoption of a child and an adoption of an adult. The Act does not permit the adoption of an adult unless that adoption is justified by custom and this is clear from clause (vi) of section 11. The authority to give in adoption has been vested in the parents or the guardian and this concept implies that it merely pertains to persons, who are not *sui juris*, i.e., who are minors. A major or an adult cannot be handed over either by a guardian or by the parents. He can only be adopted with his consent. Therefore, the ceremony of giving and taking loses all its significance so far as an adult is concerned because he alone can give his consent for being adopted. He cannot be given in adoption. Section 11(vi) is wholly inappropriate as well as inapplicable to him. Hence the non-performance of the ceremony of give and take in the case of an adult does not invalidate the adoption.

Regular Seconda Appeal from the decree of the Court of Shri Chetan Das, Additional District Judge, Hissar, dated 31st July, 1961, affirming that of Shri B. R. Guliani, Sub-Judge 1st Class, Bhiwani, dated 12th August, 1960, dismissing the suit with costs.

Tirlok Nath Bhalla, Advocate, *for the appellant.*

H. L. Sarin, Sr. Advocate with M. L. Sarin, Advocate, *for the respondents.*

JUDGMENT

MAHAJAN, J.—This second appeal is directed against the concurrent decisions of the Courts below dismissing the plaintiff's suit.

(2) The plaintiff is one Shera. By a written registered deed of adoption he was adopted by Mst. Patori. In the deed of adoption it was clearly provided that her daughter or the daughter's children would have no interest in the property after her death, and it will pass on to the adopted son. However, Mst. Patori made gifts of the entire property by two registered deeds, dated 30th June, 1959 and 31st July, 1959, in favour of her daughter and daughter's son. This led to a suit by the adopted son. He challenged the alienations on the ground that he being the adopted son, the property vested in him and Mst. Patori could not alienate the same.

(3) On the pleadings of the parties the following issues were framed :—

(1) Whether the suit is properly valued for purposes of court-fee and jurisdiction ?

(2) Whether the suit is properly framed and is maintainable in the present form ?

(3) Whether the plaintiff was validly adopted; if so, to what effect?

(4) Whether the plaintiff is entitled to challenge the alienation in the lifetime of the vendor ?

(5) Whether the parties are governed by custom; if so, whether defendant No. 1 was not competent to dispose of the property in suit under custom ?

(6) Whether the property is ancentral; if so, whether it is inalienable either under custom or law ?

(7) Whether the plaintiff is estopped from alleging the adoption ?

(4) Issue No. 1 is no longer in dispute. So far as issues 4, 5, 6 and 7 are concerned, they have not been decided by the lower appellate Court though they were decided by the Subordinate Judge 1st Class. The trial Court found that the adoption was invalid inasmuch as the ceremony of giving and taking had not taken place and that the adoptee was above the age of 15 years and was a married person. The plaintiff's suit was accordingly dismissed. Against this decision, an appeal was preferred to the lower appellate Court by the plaintiff and the lower appellate Court came to the conclusion that there was no bar to a married person being adopted. But as the ceremoney of giving and taking had not taken place the adoption was held

to be bad in law. The lower appellate Court, however, did not decide the remaining issues, and indeed they did not arise after the finding that there was no valid adoption.

(5) Mr. Bhalla, learned counsel for the plaintiff-appellant, raises the contention that the decision of the lower appellate Court as well as the trial Court on the question of validity of adoption is bad in law. Before I deal with this contention, it will be proper to set out the relevant provisions of the Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956). There is no dispute that the Act applies to the parties.

(6) Section 4 gives the overriding effect of the Act and is in the following terms:—

> "4. 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 apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Section 5(1) provides that the adoptions have to be regulated in accordance with the provisions of Chapter II and is in the following terms:—

> "5(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this chapter, and any adoption made in contravention of the said provisions shall be void."

Section 9 specifies the persons who are capable of giving a child in adoption and is in the following terms:—

> "9. (1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (3), the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have been declared by a court of competent jurisdiction to be of unsound mind, the guardian of a child (whether a testamentary guardian or guardian appointed or declared by a court) may give the child in adoption with the previous permission of the court.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

* * *".

(7) Section 10 enumerates the persons who can be adopted and is in the following terms:—

"10. No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

Section 11 prescribes the conditions for a valid adoption and the principal condition on which reliance has been placed by the lower appellate Court is condition No. (iv) which is in the following terms:—

"the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption:

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption."

(8) One thing is obvious from the combined reading of these provisions that there is a clear distinction between an adoption of a child and an adoption of an adult. The Act does not permit the adoption of an adult unless that adoption is justified by custom. Clause (vi) of section 11 itself gives a clue to what I have said. The authority to give has been vested in the parents or the guardian and this concept implies that it merely pertains to persons who are not *sui juris* i.e., who are minors. A major or an adult cannot be handed over either by a guardian or by the parents. He can only be adopted with his consent. Therefore, I would not be wrong to keep in view the distinction between a child and an adult in the matter of adoption which has been clearly recognised by the statute. It appears to me that this distinction was lost sight of by the Courts below. The ceremony of giving and taking loses all its significance so far as an adult is concerned because he alone can give his consent for being adopted. He cannot be given in adoption. Without his consent he cannot be adopted. Therefore, in his case section 11(vi) would be wholly inappropriate as well as inapplicable.

(9) The trial Court also lost sight of section 10(iv) when holding that a married person or a person above the age of 15 could not be adopted. On this matter, the rule of custom has been saved. So far as the State of Punjab is concerned, one has merely to refer to Rattigan's Digest of Customary Law wherein scores of authorities

would be found where adoption of married person amongst Jats has been held to be valid. The lower appellate Court was also forced to come to this conclusion but it merely held the adoption to be bad on the ground that the ceremony of giving and taking had not been proved. On the facts of the present case that ceremony had no meaning and the question of its taking place could not arise.

(10) I am, therefore, clearly of the view that the Courts below were in error in holding that the adoption was bad. In my opinion, it was a perfectly valid adoption and I hold accordingly.

(11) I have already observed that the lower appellate Court did not decide the remaining issues. It will, therefore, be proper to remit this case to the lower appellate Court for decision of the same. The parties are directed to appear before the lower appellate Court on 7th August, 1972.

N.K.S.

FULL BENCH

Before Harbans Singh, C.J., Bal Raj Tuli and Prem Chand Jain, JJ.

M/S. SADHU RAM-BALI RAM,—*Petitioners.*

versus

M/S. GHANSHAM DASS-MADAN LAL,—*Respondents.*

Civil Revision No. 688 of 1971.

October 17, 1973.

Code of Civil Procedure (Act V of 1908)—Section 115—Evidence Act (1 of 1872)—Sections 101, 102 and 103—Order of a subordinate Court refusing to change the onus of an issue—Revision against—Whether lies to the High Court.

Held, that placing of onus of an issue in the light of the provisions of sections 101 to 103 of Indian Evidence Act, 1872 is of great importance. When the plaintiff alleges existence of certain facts on which he bases his claim, an obligation is cast on him to prove the existence of those facts and it is he who would lead evidence to