A PHAREZ JOHN ABRAHAM (DEAD) BY LRS.

v.

ARUL JOTHI SIVASUBRAMANIAM K. & OTHERS

(Civil Appeal Nos.7207-7208 of 2008)

B JULY 02, 2019

[L. NAGESWARA RAO AND M.R. SHAH, JJ.]

Family Law – Christian Law – Adoption – Share of adopted child in the property – One 'JDA', died intestate leaving behind his wife (defendant no.1), two sons and two daughters, namely, the appellant-defendant no.2, 'TKJ' and 'V' (defendant no.3) & late 'M', the adopted children – After 'TKJ' died, her husband and two children (plaintiffs) instituted suit for partition of the suit property belonging to 'JDA', on the ground that 'TKJ' had 1/4th share therein – 'M' died, his widow and daughter were brought on record as defendant nos.4 & 5 – Suit dismissed – Appeals filed by the plaintiffs as well defendant nos.3-5 – Allowed by the High Court – Held: High Court erred in holding that the plaintiffs would have 1/4th share in the suit property being the heirs of deceased 'TKJ' – It was the specific case of defendant nos.1 & 2 that at the time of marriage of 'TKJ' with plaintiff no.1, she converted to Hinduism despite opposition and she was paid Rs.50,000/- and some gold ornaments for relinquishing her right, if any, in the suit property belonging to 'JDA'– During her life time, 'TKJ' never claimed any share/partition in the suit property – Considering the said conduct on the part of 'TKJ' during her life time, the trial Court rightly accepted the defence of defendant nos.1 & 2 that 'TKJ' relinquished her share in the suit property – Further, the defendant no.2 even incurred the expenditure from his income for the improvement of the property – Part of the judgment passed by the High Court holding that plaintiffs shall be entitled to 1/4th share in the suit property being heirs of 'TKJ', set aside – However, submission of the defendant no.2 that appeal at the instance of defendant nos.35 was not maintainable, cannot be accepted –In the written statement, defendant nos.1 & 2 admitted that defendant no.3 and late 'M' were the children of 'JDA' – Nothing has been pointed out that unlike in Hindu law, there is any law prohibiting the Christian couple to adopt male or female child,

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although they may have natural born male or female child – By virtue of adoption, child gets transplanted into a new family and is deemed to be a member thereof as if he or she were born son or daughter of the adoptive parents having same rights which natural daughter or son had– Defendant no.1-wife of 'JDA' had died, therefore the suit property is to be divided amongst the defendant no.2-5 – Defendant nos.2, 3 and defendant nos.4 & 5 (jointly) shall have 1/3rd share each in the suit property – Decree passed by the High Court modified to that extent – Code of Civil Procedure, 1908 – s.96 – Suit.

Practice & Procedure – Cross objection – Meaning of – Held: A memo of cross objection is nothing but one form of appeal and it takes the place of cross appeal – Code of Civil Procedure, 1908 – s.96.

Code of Civil Procedure, 1908 – s.96 – Appeal under – Aggrieved party to file such appeal, who can be – Suit filed for partition of the suit property amongst the plaintiffs and the defendants including defendant nos.2-5 – Dismissed – Appeals filed by the plaintiffs and defendant nos.3-5 –Plea of the appellant-defendant no.2 that as the defendant nos.3-5 did not file any counter claim in the suit claiming their specific share and the suit was dismissed, the appeal at their instance was not maintainable – Held: In a suit for partition, every co-sharer would have a right to claim the share/partition– If a person is prejudiced or adversely affected by the judgment and decree, he can file an appeal – In the present case, in the written statement filed by the defendant nos.3-5, they specifically stated that they had 1/4th share each in the suit property –Therefore, when the suit for partition was dismissed, defendant nos.3-5 can be said to be aggrieved by the decree passed by the trial court dismissing the suit– Suit.

Allowing the appeal, the Court

HELD: 1.1 The High Court has completely erred in holding that the plaintiffs would have 1/4th share in the suit property being the heirs of deceased 'TKJ' – the daughter of 'JDA'. It was the specific case on behalf of defendant nos.1 & 2 that at the time of marriage of 'TKJ' with original plaintiff no.1, she converted to Hinduism and her name was changed to ASM. It was the specific

case on behalf of defendant nos.1 & 2 that at the relevant time when the said 'TKJ' had married to original plaintiff no.1 and converted to Hinduism, there was opposition. However, despite the same, the said *'TKJ'* converted to Hinduism and married to original plaintiff no.1 and she was paid Rs.50,000/- and some gold ornaments for relinquishing her right, if any, in the suit property belonging to 'JDA'. The trial Court believed the case on behalf of defendant nos. 1 & 2, both on appreciation of evidence as well as on conduct of *'TKJ'*. 'JDA' died intestate in the year 1964. *'TKJ'*, the eldest daughter married to original plaintiff no.1 in 1979. She died in 1986. During her life time, she never claimed any share/partition in the suit property belonging to 'JDA'. Only after the death of *'TKJ'*, the plaintiffs claiming to be her heirs instituted the suit for partition contending, inter alia, that *'TKJ'* had 1/3rd share in the suit property. Therefore, considering the aforesaid conduct on the part of *'TKJ'* during her life time, the trial Court rightly accepted the defence on behalf of original defendant nos.1 & 2 that the said *'TKJ'* was paid Rs.50,000/- and some gold ornaments at the time of her marriage with original plaintiff no.1 and she relinquished her share in the suit property. Original defendant no.2 even incurred the expenditure from his own income for the purpose of improvement of the property. Original defendant no.2 was serving in army and therefore he was having independent income. Considering the aforesaid facts and circumstances, the plaintiffs would not be entitled to any share of *'TKJ'*. Therefore, the trial Court rightly dismissed the suit which was not required to be interfered with by the High Court. In the facts and circumstances of the case, that part of the impugned judgment and order passed by the High Court holding that original plaintiffs shall be entitled to 1/4th share in the suit property being heirs of *'TKJ'* deserves to be quashed and set aside. The suit was for partition of the suit property amongst the plaintiffs and the defendants including original defendant nos. 3 to 5. In a suit for partition, every co-sharer would have a right to claim the share/partition. Even considering the written statement filed on behalf of original defendant nos. 3 and 4 & 5, they had specifically stated that they are having 1/4th share each in the suit property. Therefore, when the suit for partition was dismissed,

original defendant nos. 3 to 5 can be said to be aggrieved by the judgment and decree passed by the trial court dismissing the suit for partition and therefore considering Section 96 of the CPC, the appeal at their instance would be maintainable. If a person is prejudiced or adversely affected by the judgment and decree, he can file an appeal. Even otherwise, it is required to be noted that in an appeal preferred by the original plaintiffs challenging the judgment and decree passed by the trial Court dismissing the suit for partition, it would be open or permissible for original defendant nos. 3 to 5 to file cross objection. A memo of cross objection is nothing but one form of appeal and it takes the place of a cross appeal. In the present case, instead of filing the cross objection, original defendant nos. 3 to 5 filed a separate appeal challenging the judgment and decree passed by the trial Court dismissing the suit for partition in which they also claimed share, in the written statement. Therefore, original defendant nos. 3 to 5 can be said to be aggrieved by the judgment and decree passed by the trial Court dismissing the suit. As such no plea that the appeal at the instance of original defendant nos.3 to 5 was not maintainable, was taken by the appellant before the High Court. Therefore, the submission on behalf of the appellant-original defendant no.2 that appeal at the instance of defendant nos. 3-5 was not maintainable, cannot be accepted. [Paras 9, 10, 10.1] [24-D-H; 25-A-H; 26-B-E]

1.2 Initially defendant nos. 3 to 5 were not joined as parties to the suit. However, on the objection being taken by defendant nos. 1 & 2 that defendant no.3 and late 'M' are also the heirs of deceased 'JDA' and therefore the suit is bad for non-joinder of proper parties, the plaintiffs amended the suit and joined defendant nos. 3 to 5 as parties in the suit. In the written statement, defendant nos. 1 & 2, in fact, admitted that defendant no.3 and late 'M' were the children of 'JDA'. But in the course of evidence and arguments, it was stated that defendant no.3 and late Maccabeaus were not the natural born children but they were adopted children. Therefore, all proceeded on the premise that defendant no. 3 and late 'M' were the adopted children. Therefore, the present case is also proceeded on the assumption that defendant no.3 and late 'M' were the adopted children of 'JDA'.

In the Christian Law, there is no prohibition against adoption. Nothing has been pointed out that unlike in Hindu law, there is any law prohibiting the Christian couple to adopt male or female child, although they may have natural born male or female child, as the case may be. Once, it is observed and held that original defendant no. 3 and late 'M' were the adopted children of 'JDA', both of them were entitled to the share in the property of 'JDA'-adoptive father. By virtue of adoption, a child gets transplanted into a new family whereafter he or she is deemed to be member of that family as if he or she were born son or daughter of the adoptive parents having same rights which natural daughter or son had. The right which the child had to succeed to the property by virtue of being son of his natural father, in the family of his birth, is thus, clearly to be replaced by similar rights in the adoptive family, and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son. Thus, original defendant no.3 and defendant nos. 4 & 5 (heirs of late 'M') are rightly held to be the co-sharers in the suit property belonging to 'JDA' and they are entitled to the respective shares in the suit property. Original defendant no.1-the wife of 'JDA' had died and therefore the suit property is required to be divided amongst original defendant no.2, defendant no.3 and defendant nos. 4 & 5. Therefore, original defendant no.2, original defendant no.3 and original defendant nos. 4 & 5 (jointly) shall have 1/3rd share each in the suit property. Therefore, the impugned judgment and decree passed by the High Court holding that the original plaintiffs shall have 1/4th share, original defendant nos. 2 & 3 shall have 1/4th share each and original defendant nos. 4 & 5(jointly) would have 1/4th share is required to be modified to the aforesaid extent holding that original defendant nos. 2 & 3 would have 1/3rd share each and original defendant nos. 4 & 5 jointly would have 1/3rd share in the suit property. [Paras 11.1, 11.2] [26-G-H; 27-A-H]

1.3 The impugned judgment and order passed by the High Court in appeal preferred by the original plaintiffs is hereby quashed and set aside and the judgment and decree passed by the trial Court dismissing the suit is hereby restored. Civil Appeal preferred by original defendant nos. 3 to 5 is hereby partly allowed and the impugned judgment and order passed by the High Court

is hereby modified and it is held that original defendant no.2, original defendant no.3 and original defendant nos. 4 & 5 (jointly) shall have 1/3rd share each in the suit property originally belonged to 'JDA'. [Para 12] [28-A-C]

Benoy Kumar Mondal v. Panchanon Majumdar **AIR 1956 Calcutta 177 ;** *Philips Alfred Malvin v. Y.J. Gonsalvis* **AIR 1999 Kerala 187;** *Baldev Singh v. Surinder Mohan Sharma* **(2003) 1 SCC 34 : [2002] 4 Suppl. SCR 43 – referred to.**

Case Law Reference

AIR 1956 Calcutta 177	**referred to**	**Para 4.2**
AIR 1999 Kerala 187	**referred to**	**Para 4.3**
[2002] 4 Suppl. SCR 43	**referred to**	**Para 10.1**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7207-7208 of 2008

From the Judgment and Order dated 22.11.2006 of the High Court of Karnataka at Bangalore in RFA Nos. 546 and 940 of 2004

N. Vasudevan, Ms. Anitha Shenoy, Advs. for the Appellants.

Ms. Shalini Kaul, Chaman Lal Choudhary, Advs. for the Respondents.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 22.11.2006 passed by the High Court of Karnataka at Bangalore in R.F.A. No. 546/2004 and R.F.A. No. 940/2004, the appellant herein – original defendant no.2 has preferred the present appeals.

2. The facts leading to the present appeals in nutshell are as under:

That one John D. Abraham is the propositus. That original defendant no.1 is the wife of the said John D. Abraham. Original defendant no.2, defendant no.3, one TrizaKalyani John (wife of original

A plaintiff no.1) and one late Maccabeaus are the children of propositus. That the suit schedule house is the estate of the propositus. That original defendant no.1 – wife of the propositus – John D. Abraham died intestate during the pendency of the suit. That after the demise of the propositus, his daughter Triza Kalyani John married with original plaintiff no.1, who was a Hindu. At the relevant time, Triza Kalyani John – daughter of the propositus got herself converted to Hinduism and changed her name as A.S. Meenakshi. Original plaintiff nos. 2 and 3 are the children born out of the said wedlock. Triza Kalyani John died in the year 1986. That thereafter and after the death of the said Triza Kalyani John, the original plaintiffs – husband of Triza Kalyani John and their two children instituted original suit no. 591/1987 in the Court of learned City Civil Judge, Bangalore for partition and separate possession of the suit schedule property. Original plaintiffs filed the suit seeking share of Triza Kalyani John (A.S. Meenakshi). It was the case on behalf of the plaintiffs that the said A.S.Meenakshi @ Triza Kalyani John was having 1/4th share in the suit property – property belonged to propositus – John D. Abraham. The plaintiffs sought the following reliefs in the suit:

i) for partition and separate possession of their one third right and share, in absolute estate and title, in and in relation to the properties and premises described in the schedule 'A' hereunder, by metes and bounds, having due regard to the quality of soil, utility and access to the buildings and premises thereon and convenience of enjoyment thereof, directing the defendants to put the plaintiffs in such exclusive possession and enjoyment thereof;

ii) appointing one or more Commissioners to inspect the suit properties and premises and submits proposals, together with plans and sketches of the buildings thereon and of the premises thereat, allotting one-third share and extent thereat to the plaintiffs;

iii) passing final decree in pursuance of the preliminary decree herein;

iv) directing the defendants to pay the plaintiffs their cost of the suit and

v) glaring such other reliefs and making such further orders as to it may deem fit and proper in the circumstances of this case."

2.1 It is required to be noted that initially the suit was filed only against the two defendants – wife of late John D. Abraham (defendant no.1) and the appellant herein – Pharez John Abraham, son of late John D. Abraham (defendant no.2).

2.2 The suit was resisted by defendant nos. 1 & 2 by filing the joint written statement. It was contended that John D. Abrahamhad another son and daughter, namely, Vasanthi and Maccabeaus. It was contended that the said Vasanthi and Maccabeaus were born to John D. Abraham on account of the intimate relationship of John D. Abraham with St. Pushpa. It was submitted that they are also entitled to share in the suit property of John D. Abraham. Therefore, it was requested to dismiss the suit on the ground of non-joinder of proper parties. It was also contended on behalf of defendant nos. 1 & 2 that Meenakshi @ Triza Kalyani John being a Christian opted to marry plaintiff no.1, a Hindu, much against the wishes of the members of the family. Meenakshi @ Triza Kalyani John expressed that she will marry plaintiff no.1 by converting herself to Hinduism and also that a share in the assets of John D. Abraham may be given. According to the defendants, in pursuance to the said demand put forth by Meenakshi @ Triza Kalyani John, a sum of Rs.50,000/- and certain gold ornaments were given to her as defendant nos. 1 & 2 felt that it was not proper to partition the living house or to induct a non-Christian to stay in the house. According to the defendants, Meenakshi @ Triza Kalyani John had taken her share in the assets of John D. Abraham and therefore the plaintiffs are not entitled to any share and the suit of the plaintiffs is liable to be dismissed.

3. The learned trial Court framed the following issues:

i) whether plaintiffs prove that they and the defendants are members of Hindu Joint Family?

ii) Do they further prove that late A.S. Meenakshi is the wife of 1st plaintiff and mother of 2nd and 3rd plaintiffs, dies(sic) as member of joint family and was in joint possession of the suit properties?

iii) whether defendants prove that there was a family arrangement or settlement and that late A.S. Meenakshi has given up her claim for Rs.50,000/-?

iv) whether the suit is bad for non-joinder of necessary parties?

v) What is the share of the plaintiffs, if any, in the suit properties?

A vi) Whether the settlement pleaded by the defendants is binding upon the parties?

vii) Whether the suit is properly valued and requisite court fee has been paid/

viii) To what relief, if any, the plaintiffs are entitled?

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3.1 That subsequently Vasanthi and Maccabeaus were also impleaded as parties to the suit and as Maccabeaus had died, his widow and his daughter were brought on record. They were joined as defendant nos. 3 to 5.

C 3.2 Both the parties led evidence, oral as well as documentary. That thereafter on appreciation of evidence and considering the evidence on record, the learned trial Court answered issue no.3 in the affirmative and held that there was a family arrangement or settlement and that late A.S. Meenakshi @ Triza Kalyani John has given up her claim for Rs.50,000/-. It was held by the learned trial Court that in that view of D the matter, the plaintiffs are not entitled to the partition and the share of late A.S. Meenakshi @ Triza Kalyani John. Consequently, the learned trial Court dismissed the suit. The learned trial Court also observed and held that the suit was barred by limitation as John D. Abraham died intestate in the year 1964 and in Christanity the property would be divided E immediately after the death of the intestate person and that during the life time Triza Kalyani John @ A.S. Meenakshi has not put forth any claim against the members of the erstwhile family after 1964 till her demise in the year 1986 and if she wanted any share in the assets of John D. Abraham, then she should have done so within three years. The learned trial Court also observed that for separate possession in the F suit property, the period would have been 12 years from the date of the death of John D. Abraham and accordingly the limitation got expired by 1976 itself.

4. Feeling aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court dismissing the suit, the original plaintiffs G preferred R.F.A. No. 546/2004 before the High Court. Original defendant nos. 3 to 5 also filed a separate appeal challenging the judgment and decree passed by the learned trial Court dismissing the suit by filing R.F.A. No. 940/2004.

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4.1 That by the impugned common judgment and order, the High Court has allowed both the appeals and has held that the trial Court erred in dismissing the suit and in rejecting the claim of defendant nos. 3 to 5. The High Court has also observed and held that as the first defendant died intestate during the pendency of the suit, the two daughters and two sons of John D. Abraham are entitled to 1/4thshare each. The High Court has held that consequently the plaintiffs together are entitled to 1/4thshare, the 3rd defendant is entitled to 1/4thshare, defendant nos. 4 & 5 are entitled to 1/4thshare and defendant no.2 is entitled to 1/4thshare. The High Court has directed to draw the preliminary decree accordingly.

4.2 While allowing the appeals, the High Court has observed and held that though the plaintiffs are Hindus and the property belongs to a Christian, still as per the Indian Succession Act plaintiffs can have partition of a Christian property if a Christian dies intestate. In support of the above, the High Court has relied upon and considered the decision of the Calcutta High Court in the case of *Benoy Kumar Mondal v. Panchanon Majumdar, reported in AIR 1956 Calcutta 177*. While allowing the appeals, the High Court also did not believe the case on behalf of defendant nos. 1 & 2 that A.S.Meenakshi @ Triza Kalyani John relinquished her share by taking Rs.50,000/-.

4.3 Now so far as the rights of defendant nos. 3 to 5 are concerned, the High Court has observed and held, considering the decision of the Kerala High Court in the case of *Philips Alfred Malvin v. Y.J. Gonsalvis, reported in AIR 1999 Kerala 187*, that even if defendant no.3 and late Maccabeaus can be said to be adopted children, adoption by a Christian couple is permissible and unlike the Hindu Law there is no law prohibiting the Christian couple to adopt male or a female child although they may have natural born male or female child, as the case may be. Relying upon the aforesaid decision, the High Court has held that defendant no.3 and defendant nos. 4 & 5 (being the heirs of late Maccabeaus) are entitled to a share, notwithstanding that the third defendant and late Maccabeaus are adopted children.

5. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court, the original defendant no.2 – Pharez John Abraham (now dead and represented through legal heirs) has preferred the present appeals.

A 6. Shri N. Vasudevan, learned Advocate has appeared on behalf of the appellant(s) and Ms. Shalini Kaul, learned Advocate has appeared for the respondents.

6.1 It is vehemently submitted by Shri N. Vasudevan, learned Advocate appearing on behalf of the appellants that in the facts and B circumstances of the case, the High Court has materially erred in not accepting the case of defendant nos. 1 & 2 that there was a family settlement by which Triza Kalyani John @ A.S. Meenakshi had given up her share.

6.2 It is vehemently submitted by Shri N. Vasudevan, learned C Advocate appearing on behalf of the appellants that at the relevant time Triza Kalyani John wanted to marry plaintiff no.1, who was a Hindu and there was opposition by her family members and therefore she converted herself to Hinduism and at that time she relinquished her share in the property/suit property of John D. Abraham by taking Rs.50,000/-. It is submitted that the High Court has materially erred in not accepting the D same on the ground that there is no Deed of Relinquishment executed by TrizaKalyani John @ A.S. Meenakshi and as such the Deed of Relinquishment is required to be registered. It is vehemently submitted by Shri N. Vasudevan, learned Advocate appearing on behalf of the appellants that family settlement need not be registered and that it can E be even oral.

6.3 It is vehemently submitted by Shri N. Vasudevan, learned Advocate appearing on behalf of the appellants that the settlement in favour of Triza Kalyani John @ A.S. Meenakshi has been proved on the basis of evidence on record and preponderance of probabilities. It is F vehemently submitted that John D. Abraham died intestate on 19.10.1964; that Triza Kalyani John in the year 1979 converted to Hinduism and changed her name to A.S. Meenakshi and she got married to plaintiff no.1 in the year 1979; that the said Triza Kalyani John @ A.S. Meenakshi died in the month of July 1986; that at no point of time the said Triza Kalyani John @ A.S. Meenakshi claimed her share in the property of G John D. Abraham. It is submitted that only thereafter and after the death of Triza Kalyani John @ A.S. Meenakshi, the original plaintiff no.1 filed a suit for partition and separate possession in the year 1987. It is submitted that therefore the aforesaid conduct of Triza Kalyani John @ A.S. Meenakshi of not claiming any share in the suit property during

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her life time though John D.Abraham died in the year 1964, would clearly show and suggest that Triza Kalyani John @ A.S. Meenakshi had relinquished her share by taking Rs.50,000/- at the time when she converted to Hinduism to marry plaintiff no.1. It is further submitted that even defendant nos. 1 & 2 also invested a huge amount in the repair of the suit house.

6.4 It is further submitted by Shri N. Vasudevan, learned Advocate appearing on behalf of the appellants that even considering the aforesaid facts and circumstances, the suit was barred by limitation. It is submitted that the High Court has materially erred in holding that the suit was within the period of limitation on the ground that the suit is filed within one year after demise of Triza Kalyani John @ A.S. Meenakshi. It is submitted that the High Court has not properly appreciated and considered that in Christianity, the property would be divided immediately after the death of intestate person. It is submitted that as John D. Abraham died intestate in the year 1964, and that she converted to Hinduism in the year 1979 and the suit was filed in the year 1987 and therefore considering the case from any angle, i.e., to claim the share within a period of three years and/or even the relief for separate possession in the property, the period of limitation would be 12 years from the death of John D. Abraham, the suit was clearly barred by limitation. It is submitted therefore the High Court has materially erred in holding the suit within the period of limitation.

6.5 It is further submitted by Shri N. Vasudevan, learned Advocate appearing on behalf of the appellants that even otherwise the High Court has materially erred in holding that defendant nos. 3 to 5 are also having 1/4thshare despite the fact that the 3rd defendant and late Maccabeaus were the illegitimate children who were baptised on 22.7.1951 and 5.6.1959 respectively. It is submitted that even otherwise the High Court has materially erred in holding that the adopted Christian children are entitled to his/her share in the property as it happens in a Hindu family.

6.6 It is vehemently submitted by Shri N. Vasudevan, learned Advocate appearing on behalf of the appellants that even otherwise defendant nos. 3 to 5 would not have claimed any share in absence of any counter claim. It is submitted that therefore as such the appeal filed by original defendant nos. 3 to 5 being R.F.A. No. 940/2004 would not at all be maintainable.

A 6.7 Making the above submissions, it is prayed to allow the present appeals.

7. Both these appeals are vehemently opposed by Ms. Shalini Kaul, learned Advocate appearing on behalf of the respondents herein – the original plaintiffs and the supporting defendants.

B 7.1 It is vehemently submitted by the learned Advocate appearing on behalf of the respondents that in the absence of any Deed of Relinquishment executed by Triza Kalyani John @ A.S. Meenakshi relinquishing her share and in the absence of any other evidence that A.S.Meenakshi @ Triza Kalyani John had given up/relinquished her share C by taking Rs.50,000/- and other gold ornaments, the High Court has rightly disbelieved the same and has rightly held that defendant nos. 1 & 2 have failed to prove that there was any relinquishment of her share by Triza Kalyani John @ A.S. Meenakshi.

7.2 It is vehemently submitted by the learned Advocate appearing D on behalf of the respondents that the High Court has rightly held, considering the provisions of the Indian Succession Act that even a non-Christian and in the present case Hindus can claim partition in the suit property of a Christian died intestate.

7.3 It is further submitted by the learned Advocate appearing on E behalf of the respondents that so far as the finding recorded by the learned trial Court on limitation is concerned, at the outset, it is required to be noted that there was no specific issue framed by the learned trial Court with regard to limitation. It is submitted therefore that in the absence of any specific issue framed on limitation, the learned trial Court ought not to have held that the suit was barred by limitation.

F 7.4 Now so far as the impugned judgment and order passed by the High Court recognising the share of defendant nos. 3 to 5 is concerned, it is vehemently submitted by the learned Advocate appearing on behalf of the respondents that, in fact, defendant no.3 and the deceased Maccabeaus were the children of deceased John D. Abraham out of his G marriage with St. Pushpa in the year 1951. It is submitted that assuming that they were the adopted children of deceased John D. Abraham, in that case also, even being the adopted children they are having the share in the property of deceased John D. Abraham, who died intestate.

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7.5 Now so far as the submission on behalf of the appellants – original defendant nos. 1 & 2 that in the absence of any counter claim by defendant nos. 3 to 5, the appeal filed by original defendant nos. 3 to 5 being R.F.A. No. 940/2004 was not maintainable at all and therefore the High Court has materially erred in passing the decree in their favour holding that original defendant no.3 and defendant nos. 4 &5 (being the heirs of deceased Maccabeaus) are having 1/4th share in the suit property is concerned, it is submitted that in a suit for partition, every heir of the deceased who died intestate would have a right and they can claim the share even without filing any counter claim. It is submitted that even otherwise such a plea/objection was never taken before the High Court and therefore now the appellants are not permitted to take such a plea/ objection after having lost before the High Court.

7.6 Making the above submissions, it is prayed to dismiss the present appeals.

8. We have heard the learned Advocates appearing for the respective parties at length.

8.1 At the outset, it is required to be noted and as stated hereinabove, the suit property initially belonged to one John D. Abraham. The said John D. Abraham died intestate in the year 1964 leaving behind him his wife –Esther Abraham – original defendant no.1 and four children – two sons and two daughters, namely, Pharez John Abraham (original defendant no.2); Triza Kalyani John @ A.S. Meenakshi (the eldest daughter of John D. Abraham and the wife of original plaintiff no.1); Vasanthi (original defendant no.3); and Late Maccabeaus (father of defendant nos. 4 & 5). That in the year 1979, Triza Kalyani John converted to Hinduism and married with original plaintiff no.1. That she died in the year 1986 leaving behind her the original plaintiffs. That after the death of Triza Kalyani John @ Meenakshi, the original plaintiffs – the husband and children of Triza Kalyani John @ Meenakshi instituted the present suit for claiming partition and a separate possession and claimed that Triza Kalyani John @ Meenakshi had 1/3rd share in the property of John D. Abraham, who died intestate. It is required to be noted that initially the plaintiffs, claiming to be the heirs of Triza Kalyani John @ Meenakshi joined original defendant nos. 1 & 2 - Esther Abraham, wife of John D. Abraham and Pharez John Abraham, son of

A John D. Abraham and stated that all the three namely original defendant no.1, original defendant no.2 and Triza Kalyani John @ Meenakshi had 1/3rd share each in the suit property. However, subsequently, original defendant nos. 3 to 5 came to be joined as parties. It was found that defendant no.3 – Vasanthi and late Maccabeaus were the adopted children of John D. Abraham. The learned trial Court dismissed the suit
B on merits as well as on the ground of limitation. In the appeals preferred by the original plaintiffs and original defendant nos. 3 to 5, the High Court has decreed the suit and has held that original plaintiffs, original defendant no.2, original defendant no.3 and original defendant nos. 4 & 5 (jointly) have 1/4th share each in the suit property. The impugned
C judgment and order passed by the High Court is the subject matter of present appeals at the instance of original defendant no.2 (now deceased and represented through the legal heirs).

9. Having heard the learned counsel for the respective parties and considering the evidence/material on record, we are of the view
D that the High Court has completely erred in holding that the plaintiffs would have 1/4th share in the suit property being the heirs of deceased Triza Kalyani John @ Meenakshi – the daughter of John D. Abraham. It was the specific case on behalf of defendant nos. 1 & 2 that at the time of marriage of Triza Kalyani John @ Meenakshi with original plaintiff
E no.1, she converted to Hinduism and her name was changed to A.S. Meenakshi. It was the specific case on behalf of defendant nos. 1 & 2 that at the relevant time when the said Triza Kalyani John @ Meenakshi had married to original plaintiff no.1 and converted to Hinduism, there was opposition. However, despite the same, the said Triza Kalyani John @ Meenakshi converted to Hinduism and married to original plaintiff
F no.1 and she was paid Rs.50,000/- and some gold ornaments for relinquishing her right, if any, in the suit property belonging to John D. Abraham. The trial Court believed the case on behalf of defendant nos. 1 & 2, both on appreciation of evidence as well as on conduct of Triza Kalyani John @ Meenakshi. The trial Court also dismissed the suit on
G the ground of limitation. It is to be noted that the John D. Abraham died intestate in the year 1964. Triza Kalyani John, the eldest daughter of John D. Abraham married to original plaintiff no.1 in the year 1979. She died in the year 1986. During her life time, she never claimed any share/ partition in the suit property belonging to John D. Abraham. Only after the death of Triza Kalyani John @ Meenakshi, the plaintiffs claiming to
H be the heirs of Triza Kalyani John @ Meenakshi instituted the suit for

partition contending, inter alia, that Triza Kalyani John @ Meenakshi had 1/3rd share in the suit property belonging to John D. Abraham, who died intestate. Therefore, considering the aforesaid conduct on the part of Triza Kalyani John @ Meenakshi during her life time, the learned trial Court rightly accepted the defence on behalf of original defendant nos. 1 & 2 that the said Triza Kalyani John @ Meenakshi was paid Rs.50,000/- and some gold ornaments at the time of her marriage with original plaintiff no.1 and the said Triza Kalyani John @ Meenakshi relinquished her share in the suit property. It is required to be noted that original defendant no.2 even incurred the expenditure from his own income for the purpose of improvement of the property. Original defendant no.2 was serving in army and therefore he was having independent income. Considering the aforesaid facts and circumstances, the plaintiffs would not be entitled to any share of Triza Kalyani John @ Meenakshi. Therefore, the learned trial Court rightly dismissed the suit which was not required to be interfered with by the High Court. In the facts and circumstances of the case, that part of the impugned judgment and order passed by the High Court holding that original plaintiffs shall be entitled to 1/4th share in the suit property being heirs of Triza Kalyani John @ Meenakshi deserves to be quashed and set aside.

10. Now so far as the impugned judgment and order passed by the High Court holding that original defendant nos. 3 to 5 are also having 1/4th share – defendant no.3 and defendant nos. 4 & 5 in the suit property is concerned, it is the case on behalf of defendant no.2 – the appellant herein that as the original defendant nos. 3 to 5 did not file any counter claim in the suit claiming their specific share and the suit was dismissed, the appeal at the instance of original defendant nos. 3 to 5 was not maintainable is concerned, it is required to be noted that the suit was for partition of the suit property amongst the plaintiffs and the defendants including original defendant nos. 3 to 5. In a suit for partition, every co-sharer would have a right to claim the share/partition. Even considering the written statement filed on behalf of original defendant nos. 3 and 4 & 5, they had specifically stated that they are having 1/4th share each in the suit property. Therefore, when the suit for partition was dismissed, original defendant nos. 3 to 5 can be said to be aggrieved by the judgment and decree passed by the learned trial court dismissing the suit for partition and therefore considering Section 96 of the CPC, the appeal at their instance would be maintainable.

A 10.1 At this stage, a decision of this Court in the case of *Baldev Singh v. Surinder Mohan Sharma, reported in (2003) 1 SCC 34* is required to be referred to. A three Judge Bench of this Court in the aforesaid decision has opined that an appeal under Section 96 of the Code would be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree. Thus, if a person is B prejudiced or adversely affected by the judgment and decree, he can file an appeal. Even otherwise, it is required to be noted that in an appeal preferred by the original plaintiffs challenging the judgment and decree passed by the learned trial Court dismissing the suit for partition, it would be open or permissible for original defendant nos. 3 to 5 to file cross C objection. As per the settled proposition of law, a memo of cross objection is nothing but one form of appeal and it takes the place of a cross appeal. In the present case, instead of filing the cross objection, original defendant nos. 3 to 5 filed a separate appeal challenging the judgment and decree passed by the learned trial Court dismissing the suit for partition in which they also claimed share in the suit property, of course in the written D statement. Therefore, original defendant nos. 3 to 5 can be said to be aggrieved by the judgment and decree passed by the learned trial Court dismissing the suit for partition claiming to be co-sharers. Even otherwise, it is required to be noted that as such no plea that the appeal at the instance of original defendant nos. 3 to 5 was not maintainable, was E taken by the appellant before the High Court. Therefore, the submission on behalf of the appellant – original defendant no.2 that appeal at the instance of defendant nos. 3 to 5 being RFA No. 940/2004 was not maintainable, cannot be accepted.

11. Now the next question which is posed for consideration before F this Court is, whether defendant nos. 3 to 5 would have any share in the suit property belonging to John D. Abraham?

11.1 It is required to be noted that initially defendant nos. 3 to 5 were not joined as parties to the suit. However, on the objection being taken by defendant nos. 1 & 2 that defendant no.3 and late Maccabeaus G are also the heirs of deceased John D. Abraham and therefore the suit is bad for non-joinder of proper parties, the plaintiffs amended the suit and joined defendant nos. 3 to 5 as parties in the suit. In the written statement, defendant nos. 1 & 2, in fact, admitted that defendant no.3 and late Maccabeaus were the children of John D. Abraham. But in the course

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of evidence and arguments, it was stated that defendant no.3 and late Maccabeaus were not the natural born children but they were adopted children. Therefore, all proceeded on the premise that defendant no. 3 and late Maccabeaus were the adopted children. Therefore, we may also proceed further with the case on the assumption that defendant no.3 and late Maccabeaus were the adopted children of John D. Abraham. It is required to be noted that in the Christian Law, there is no prohibition against adoption. Nothing has been pointed out that unlike in Hindu law, there is any law prohibiting the Christian couple to adopt male or female child, although they may have natural born male or female child, as the case may be. Once, it is observed and held that original defendant no. 3 and late Maccabeaus were the adopted children of John D. Abraham, both of them were entitled to the share in the property of John D. Abraham – adoptive father.

11.2 By virtue of adoption, a child gets transplanted into a new family whereafter he or she is deemed to be member of that family as if he or she were born son or daughter of the adoptive parents having same rights which natural daughter or son had. The right which the child had to succeed to the property by virtue of being son of his natural father, in the family of his birth, is thus, clearly to be replaced by similar rights in the adoptive family, and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son. Thus, original defendant no.3 and defendant nos. 4 & 5 (heirs of late Maccabeaus) are rightly held to be the co-sharers in the suit property belonging to John D. Abraham and they are entitled to the respective shares in the suit property belonging to John D. Abraham. Original defendant no.1 – the wife of John D. Abraham had died and therefore the suit property is required to be divided amongst original defendant no.2, defendant no.3 and defendant nos. 4 & 5. Therefore, original defendant no.2, original defendant no.3 and original defendant nos. 4 & 5 (jointly) shall have 1/3rd share each in the suit property. Therefore, the impugned judgment and decree passed by the High Court holding that the original plaintiffs shall have 1/4th share, original defendant nos. 2 & 3 shall have 1/4th share each and original defendant nos. 4 & 5(jointly) would have 1/4th share is required to be modified to the aforesaid extent holding that original defendant nos. 2 & 3 would have 1/3rd share each and original defendant nos. 4 & 5 jointly would have 1/3rd share in the suit property.

A 12. In view of the above and for the reasons stated above, Civil Appeal arising from R.F.A. No. 546/2004 is hereby allowed. The impugned judgment and order passed by the High Court in R.F.A. No. 546/2004 preferred by the original plaintiffs is hereby quashed and set aside and the judgment and decree passed by the learned trial Court dismissing the suit is hereby restored. Civil Appeal arising from R.F.A.
B No. 940/2004, preferred by original defendant nos. 3 to 5 is hereby partly allowed and the impugned judgment and order passed by the High Court is hereby modified and it is held that original defendant no.2, original defendant no.3 and original defendant nos. 4 & 5 (jointly) shall have 1/3rd share each in the suit property originally belonged to John
C D.Abraham. However, in the facts and circumstances of the case, there shall be no order as to costs.

Divya Pandey Appeal allowed.