

**HEADING OF DECISION IN THE ORIGINAL SUIT.
DIST: KHORDHA.**

**IN THE COURT OF THE SENIOR CIVIL JUDGE, KHORDHA
PRESENT :-**

*Sri Raj Kishore Lenka
Senior Civil Judge, Khordha.*

Dated this the 29th day of September, 2014

C.S. 168/ 2003

Indumati Baitharu, aged about 48 yrs, W/o- Prasanna Kumar Baitharu,
At/P.O./P.S.- Bolagarh, Dist- Khordha.

..... Plaintiff.

-Versus-

1. Indumati Martha, aged about 50 yrs, W/o- Radha Krusha Martha
of Vill.- Pananagar, PO.- Rajasunakhala, P.S.- Bolagarh, Dist- Khordha.
2. Sanjukta Sahoo, aged about 36 yrs, W/o- Bijaya Kumar Sahoo
of Vill.- Ratanapur, P.O.- Soran, P.S.- Tangi, Dist- Khordha.
3. Manjulata Sahoo, aged about 33 yrs, W/o- Ramesh Chandra Sahoo
of Vill.- Baniasahi, P.O.- Sanpur, P.S.- Bolagarh, Dist- Khordha.
4. Pradepta Kumar Sahoo, aged about 28 yrs, S/o- Late Kapileswar Sahoo
of Vill.- Hadapatanasahi, P.O.- Rajasunakhala, P.S.- Bolagarh, Dist- Khordha.
5. Anupama Khuntia, aged about 50 yrs, W/o- Rama Chandra Khuntia
of Vill.- Laxmibazar, Main road, Rajasunakhala, P.O.- Rajasunakhala,
P.S.- Ranpur, Dist- Nayagarh.

..... Defendants.

..... Prof. Defendants.

Counsel for Plaintiff

...

Sri N. N. Mishra & Associates
Advocates, Khordha

Counsel for defendant No. 1 . . . Sri B. Samantasinghar & Associates
Advocates, Khordha
Counsel for defendant No. 4 . . . Sri R.C. Das & Associates
Advocates, Khordha
Counsel for defendant Nos. 2, 3 & 5 . . . Ex-parte.

Date of conclusion of Argument – 18.09.2014
Date of pronouncement of Judgment – 29.09.2014

JUDGMENT

This is a suit for partition, declaration along with other consequential reliefs.

02. The plaintiff's case as reveals from the record is that the disputed property recorded under khata No. 35, plot No. 557, total measuring Ac. 0.059 decimals out of total Ac. 0.090 decimals of mouza Pananagar (hereinafter referred to be suit land), originally belonged to deceased Kapileswar Sahoo. The plaintiff and defendant Nos. 2 & 3 are three daughters of late Kapileswar Sahoo. Defendant No. 4 is the natural son of the plaintiff but adopted by Late Kapileswar Sahoo and his wife Sashi sahoo as they have no male issue. Defendant No-4 was 11 years old when such adoption was taken place and from the date of adoption he has been recognized as the son of Kapileswar Sahoo and gradually he took care of the property affairs of kapileswar Sahoo as well as his adoptive parents. In the year 2002, Kapileswar Sahoo died. By that time no deed of adoption was executed in favour of the defendant No. 4.

Therefore, his adoptive mother Sashi Sahoo in token of their earlier adoption executed one registered deed of adoption in favour of defendant No. 4 vide document No. 2 dt. 01.03.2002. Thereafter, dissension cropped up among the natural born daughters of Sashi Sahoo and Kapileswar Sahoo relating to the property left by Kapileswar. For which the defendant No. 4 filed one suit for partition and declaration bearing C.S. No. 188/2002 before this court against his adoptive mother and three daughters of kapileswar including the plaintiff. The suit was decreed in favour of the defendant No. 4 on 17.09.2003. However, during the pendency of the above suit, Sashi Sahoo executed partition among herself and her three daughters along with the proforma defendant No. 4 under registered deed of partition bearing No. 664 dt. 10.06.2003 by allotting 1/5th shares each including herself. Basing on which one unregistered agreement was also executed in favour of her adopted son such as the defendant No. 4 declaring thereby to keep her life interest and making defendant No. 4 as the owner in respect of her share after her death. The defendant Nos. 2 & 3 had also taken leading initiative towards execution of the deed of partition and the agreement. The further case of the plaintiff is that few days after Sashi Sahoo expired and the defendant NO. 4 being her adoptive son observed the SUDHI ceremony and other formalities of Sashi Sahoo. Thereafter the plaintiff and defendant No. 4 stayed for a month in the house of Kapileswar and during those period they came to know that the suit land has not been included in the registered deed of partition dt. 10.06.2003. Similarly, out of the Ac. 0.090 decimals, kapileswar Sahoo during his life time had sold Ac. 0.031 decimals to proforma defendant No. 5 through a registered sale deed dt. 31.03.1994.

They further came to know that the defendant Nos. 2 & 3 managed to sale Ac. 0.050 decimals from eastern side out of the suit plot in favour of defendant No. 1 through their deceased mother Sashi Sahoo by virtue of sale deed No. 1008 dt. 05.10.2002. The plaintiff has to say that the defendant Nos. 2 & 3 by exercising fraud sold the land measuring Ac. 0.050 decimals out of the suit land in order to deprive the plaintiff and proforma defendant No. 4 from their legitimate interest over such property. Whereas, Sashi Sahoo has no exclusive right, title, interest or possession over the suit land and she has no necessity at all to sale the said property of Ac. 0.050 decimals and the defendant Nos. 2 & 3 used Sashi Sahoo for the said purpose and executed the sale deed, which is not tenable in the eye of law. The plaintiff has to say that the cause of action arose on 05.10.2002, when the sale deed was executed and on 10.08.2003, when the defendant No. 1 disclosed about purchase of such property and lastly on 08.09.2003, when he obtained certified copy of the sale deed in question. The plaintiff has sought for the relief of declaration of the sale deed bearing No. 1008 dt. 05.06.2002 to be void and not binding on her, confirmation of possession of the suit land, recovery of possession as well as partition by providing 1/4th share each to the plaintiff, defendant Nos. 2 & 3 and proforma defendant No. 4 respectively.

03. The defendants' No. 1 to 3 have submitted their joint written statement by disputing the whole case of the plaintiff over the suit land. They have firstly contended that the suit is not maintainable, barred by law of limitation, mis-joinder of parties as well as for lack of cause of action. Their specific case is that defendant No. 4 was never adopted by Kapileswar Sahoo and his wife Sashi Sahoo at any point of

time. The plaintiff has managed to obtain a deed of adoption through Sashi Sahoo in favour of proforma defendant No. 4 by misguiding her, who put her signature on the deed of adoption with a notion of executing a power of attorney in favour of defendant No. 4 to look after her property. The proforma defendant No. 4 at no point of time was treated as the son of Kapileswar and neither his wife nor defendant No. 4 has ever taken care of them. But, after death of Kapileswar and his wife Sashi, defendant No. 4 being their grandson only performed the SUDHIKRIYA but all the expenditure of SUDHIKRIYA and other rituals were incurred by defendant Nos. 2 & 3. It is again contended by the defendants that while Sashi Sahoo came to know that the plaintiff has fraudulently obtained a deed of adoption in favour of defendant No. 4, the said Sashi Sahoo executed a registered deed of cancellation of the alleged deed of adoption on 20.09.2002 against defendant No. 4. They have further to say that defendant No. 4 had filed one Civil Suit vide C.S. No. 188/2002 and by practicing fraud he obtained an ex-parte decree in his favour and for which the order passed by the Civil Court in C.S. No. 188/2002 is not binding on Sashi Sahoo and the present defendants. The defendants admitted that during pendency of the C.S. No. 188/2002, Sashi Sahoo, her three daughters and defendant No. 4 effected partition in respect of the properties left by late Kapileswar Sahoo, except the suit land and accordingly the partition deed bearing No. 664/2003 was executed. As because the defendant No. 4 was looking after the health of Sashi Sahoo for a very short span of time, he was given some property out of affection in the said partition. But, Sashi Sahoo at no point of time has executed an agreement in favour of the proforma defendant No. 4 to get her life

interest and making defendant No. 4 entitled to receive her share after her death. The defendants have expressed their ignorance about sale of any land measuring Ac. 0.031 decimals by Kapileswar Sahoo to defendant No. 5. The defendants have further contended that the land measuring Ac. 0.050 decimal was sold by Sashi Sahoo to defendant No. 1 to meet the legal necessity. During the life time of Kapileswar Sahoo and Sashi Sahoo, they have incurred a substantial amount of loan from different persons for the purpose of giving marriage of their youngest daughter, defendant No. 3. Similarly, Sashi Sahoo alone had incurred loan from different persons for funeral ceremony of her husband Kapileswar Sahoo and only to clear up the loan amount, Sashi Sahoo has sold away Ac. 0.050 decimals of land to defendant No. 1. After death of Kapileswar Sahoo, his wife Sashi Sahoo was managing the property affairs as the 'KARTA' of the family. She voluntarily and willfully executed the sale deed in favour of defendant No. 1 after receiving the actual consideration and delivered possession of the same to defendant No-1 and as such the plaintiff got no locus standi to dispute such alienation. Defendant N0-1 has been staying over such land peacefully and continuously till date by operating his business over the said property. It is finally contended by the defendants that, the whole claim of the plaintiff is not tenable in the eye of law and for which the suit is liable to be dismissed with cost.

04. Defendant No. 4 has submitted his separate written statement by admitting the whole claim of the plaintiff and by imposing himself to be the adopted son of kapileswar Sahoo and Sashi Sahoo. The suit against defendant No. 5 was set ex-parte on 17.12.2005 and against 2 and 3 on 07.05.2014.

05. Steering by the factual disputes between the parties and in order to adjudicate the disputes lawfully and purposefully the following issues have been settled.

I S S U E S.

- i) Is the suit maintainable in its present form?
- ii) Is there any cause of action to bring the suit against the defendants?
- iii) Is the suit barred by law of limitation?
- iv) Is the suit bad for mis-joinder of necessary parties?
- v) Whether the Regd. Sale deed bearing No. 1008 dt. 05.10.2002 executed by Sashi Sahoo in favour of defendant No. 1 is to be declared void and not binding on the plaintiff?
- vi) Whether the plaintiff is entitled to a decree of confirmation of possession in respect of the disputed property as described in schedule of the plaint?
- vii) Whether the plaintiff is entitled to a decree for recovery of possession of the disputed property from the defendants?
- viii) Whether the plaintiff is entitled to an alternative decree for partition of the disputed property in the event, if the sale deed is not declared void and the plaintiff may be allotted with her specific share of 1/4th from the disputed property through process of the court?
- ix) What relief, if any, the plaintiff is entitled to?

- x) Whether the defendant No. 4 Pradipta Kumar Sahoo is the adopted son of Kapileswar Sahoo and Sashi Sahoo of Vill.- Hudapatanasahi?

06. In order to substantiate her case, two witnesses have been examined on behalf of the plaintiff including the plaintiff herself as P.W. 1. The plaintiff has also relied upon five documents, that has been marked as Ext. 1 to Ext. 5 respectively.

Similarly, one witness has been examined on behalf defendant No. 4, who is none else than the defendant No. 4 himself as D.W. 1. Similarly, three witnesses have been examined on behalf of defendant No. 1. Nine documents have been relied upon and exhibited as Ext. A to Ext. J respectively on behalf of defendant No. 4, but no document has been exhibited on behalf of defendant No. 1.

FINDINGS.

Issue No. x .

07. The above issue is pivotal because of the reason that unless the same is decided, no effective discussion can be put forwarded relating to the other issues. Therefore, the same is taken up first for decision.

The plaintiff's case is that proforma defendant No. 4 is her natural son, but adopted by her parents namely Kapileswar Sahoo and Sashi Sahoo at his age of 11 years. Even though an elaborate pleading has not been advanced by the plaintiff in the present case to prove the factum of adoption, she has to say that this court has already finally decided the question of adoption in a previous suit bearing No. C.S. 188/2002. Defendant No. 1, who only challenged the said claim has to say that proforma

defendant No. 4 has never been adopted by Kapileswar Sahoo and his wife Sashi Sahoo and the judgment has been obtained in the aforementioned suit on ex-parte as well as by exercising fraud. It has also been urged by the defendant No-1 that she was not a party in the said suit and as such the decision of the court is a nullity in present suit.

From the material available in the record, it is learnt that P.W. 1 & 2 have supported the case of adoption of proforma defendant No. 4 by Kapileswar Sahoo and Sashi Sahoo. To that effect they have only relied upon the certified copy of the acknowledgment to adoption being executed by Sashi Sahoo. The plaintiff's case is that after adoption, proforma defendant No. 4 was recognized as the son of Kapileswar Sahoo and Sashi Sahoo and he also took responsibility of the family matters of his adoptive parents. After death of Kapileswar Sahoo, his widow Sashi Sahoo has executed one registered deed of adoption vide document No. 02/2002. The original deed of adoption has not been filed in this case, but the certified copy has been filed, which has been marked as Ext. 4 with objection. It is true that the plaintiff has not taken any steps as per the provision of law for production of the original deed executed by Sashi Sahoo in order to enable the court to accept the certified copy of such document in term of secondary evidence. Defendant No. 4 has also supported the case of the plaintiff. The specific plea of the defendants is that Sashi Sahoo has subsequently executed a deed of cancellation of such acknowledgment to adoption, but no such document has been relied upon from the side of the defendants. Coming to the case of defendant No. 4 who has examined himself as D.W. 1, has specifically

contended that he is the adopted son of Kapileswar Sahoo and Sashi Sahoo. In support his claim he relied upon several documents. Ext. C is the legal heir certificate issued by the Tahsildar, Bolagarh mentioning him to be the legal heir of Kapileswar Sahoo. Ext. D is the income certificate in respect of proforma defendant No.4, wherein the Tahsildar, Bolagarh has mentioned that proforma defendant No. 4 is the son of Kapileswar Sahoo. The residential certificate, driving license, the voter i.d. Card and the Adhar card have been exhibited as Ext. E, F, G & H respectively, wherein it has been clearly mentioned that Pradeepta Kumar Sahoo, proforma defendant No. 4 is the son of Kapileswar Sahoo. These are the public documents and it can be inferred from the above documents itself that those are not prepared only for the purpose of the case. The defendant No. 1, who has disputed that proforma defendant No. 4 to be not the adopted son of Kapileswar Sahoo and Sashi Sahoo failed to substantiate her claim by providing any cogent evidence to that effect.

08. No doubt that the question involving in the present issue is guided by the section 5 to 11 of "Hindu Adoption and maintenance Act, 1956". Particularly, section 11 of the Act, deals with the conditions for a valid adoption. Section 11(vi), express that there must be actual giving and taking of the child with intend to transfer the child from the family of its birth to the family of his adoption. The physical act of giving and receiving is absolutely necessary for the validity of an adoption under the law. On that score the defendant No- 1 has relied upon the judgments reported in *66 (1988) CLT 738*, *53 (1982) CLT 335*, *77 (1994) CLT 503*, *69 (1990) CLT 388 & 118 (2014) CLT 495*. True that the plaintiff and defendant No-4 have not advanced their

case to prove validity of adoption because of the reason that the above issue has already been finally decided by this court in a former suit vide C.S. No. 188/2002. Initially the proforma defendant No. 4 has filed the suit as noted above before this court for partition by claiming himself to be the adopted son of Kapileswar Sahoo. The certified copy of the judgment passed by this court on 17.09.2003 has been produced and marked as Ext. J. In the said case Sashi Sahoo and the three daughters of Kapileswar Sahoo are made as parties. But they have not challenged the case of the proforma defendant No. 4 and as such the suit was decreed ex-parte in favour of the defendant No-4 who was the plaintiff in that case. In the said case this court has declared the proforma defendant No. 4 to be the son of Kapileswar Sahoo and Sashi Sahoo. The said judgment has never been challenged either by Sashi Sahoo or by the three daughters of Sashi Sahoo. Defendant No-1 is not a necessary party to the said suit as she is just a stranger to the family of the concerned parties and also to the matter involving therein. Reason being so, defendant No-1 cannot claim that since she was not a party to the former suit, the decision of the court is not binding on her. Therefore, once the issue has been finally adjudicated by a competent court, the same cannot be raised again or adjudicated as barred by Sec. 11 of CPC. At this stage the defendant No. 1 has relied upon a judgment reported in *1998 (II) OLR 174*, a case between Bhagabati Sahoo and others Vrs. Trilochan Sahoo and after him Lakhapati Sahoo and others. The Hon'ble Court in the said judgment has held that:-

“CODE OF CIVIL PROCEDURE, 1908- order 20, rule 13 –
Partition – The suit is deemed to be pending till the final decree is passed – Court may

take into consideration all subsequent events from time to time and make inquiries and pass preliminary decrees as those are necessary in the interest of justice and for just disposal of disputes of parties – Properties liable for partition can be added at any state”

The said judgment has been cited in this court only to show that the judgment and decree passed in C.S. No. 188 of 2002 cannot be treated to be final as the preliminary decree is pending before this court and as such the provision U/S-11 of C.P.C shall not be applicable. Even though no pleading has been advanced by the defendant No. 1 on that aspect, this court thinks it proper to have a discussion on the relevancy of the above judgment to the present suit. In the said judgment the Hon'ble Court has held that a suit is deemed to be pending until the final decree is passed and the Hon'ble Court has passed the order while deciding the question of addition of legal heirs of a deceased party at the time of final decree proceeding. But, so far as the final adjudication of an issue case is concerned, it should be remembered that the final decree proceeding sets about the decision of issues. While one issue is finally adjudicated and not challenged or any reversed order has not been passed in any forum, the judgment over a certain issue is deemed to be the conclusive finding and adjudication by the court. Even though the final decree is pending the facts and findings of a judgment cannot be said to be not conclusive only because of the reason that the findings of the court have not been executed. Defendant No. 1 is unable to perceive the intention of the said judgment in its letter and spirit. Finally, answering to the above issue, it is the

conclusive opinion of this court that Pradeepta Kumar Sahoo, proforma defendant no-4 is the adopted son of Kapileswar Sahoo and Sashi Sahoo.

Issue Nos. v.

08. Coming to the next most vital issue, it is worthwhile to mention the admitted position of the case. The suit land along with the other properties belongs to deceased Kapileswar Sahoo. Sashi Sahoo is the wife of Kapileswar Sahoo. They have only three daughters such as Indumati Baitharu, who is the plaintiff in this case. Sanjukta Sahoo and Manjulata Sahoo, are the defendant Nos. 2 & 3 respectively. It is further admitted by both the parties that during the pendency of the suit vide C.S. No. 188/2002, Sashi Sahoo executed a registered deed of partition by allotting 1/5th share each to herself and her three daughters and proforma defendant No. 4. By that time Kapileswar Sahoo was dead. It is further admitted by both the parties that the suit land measuring Ac. Ac. 059 decimals out of total Ac. 0.090 decimals under plot No. 557 was also the property of Kapileswar Sahoo. The said Kapileswar Sahoo during his life time alienated Ac. 0.031 decimals of land to proforma defendant No. 5 vide a registered sale deed dt. 31.03.1994. Now, the plaintiff has to say that the suit land Ac. 0.059 decimals was kept out of partition. But on perusal of the record, it came to light that Ac. 0.050 decimal of land out of total Ac. 0.059 decimals (suit land) was sold by Sashi Sahoo on 05.10.2002 and the deed of partition was executed on 10.06.2003. This implies that the land extending Ac. 0.050 decimal was alienated by Sashi sahoo much prior to execution of the registrar deed of partition. The claim of the plaintiff as

well as proforma defendant No. 4 is that the said property being the joint family property, Sashi Sahoo is not entitled to sale the same without the consent of others. The plaintiff has advanced other facts further by saying that the defendant Nos. 2 & 3 have manufactured the above sale deed fraudulently with an intention to deprive the plaintiff and proforma defendant No. 4 out of the suit land and they succeed to alienate Ac. 0.050 decimals out of total Ac. 0.059 decimals. Whereas the defendant No. 1, who is the purchaser/ vendee to the above sale deed has challenged the same by saying that it was executed properly. With regards to the said claim, plaintiff has relied upon the certified copy of the registered sale deed vide Est. 5. Original sale deed has not been produced nor the plaintiff has taken any endeavor to call for the registered sale deed from defendant No. 1 and very surprising fact is that the defendant No. 1 has not also come to the court to adduce her evidence and her son is examined as D.W. 4 and he has also not relied upon the concerned sale deed. But, since it has been admitted that the sale deed has been executed by Sashi Sahoo in favour of defendant No. 1 and the certified copy of the sale deed, which has been marked as Ext. 5 without any objection, this court has taken up the certified copy of the sale deed, which is a secondary evidence for discussion. Admittedly, the sale deed has been executed by Sashi Sahoo. But, so far as the question of fraud and manipulation is concerned to that effect the evidence of the plaintiff is silent and more particularly since she was absent at the time of execution of the sale deed and at a belated stage came to know about such execution, she in the present contest is quite helpless to say whether it was executed properly or not. P.W. 1 has also admitted that

the suit land is now in possession of defendant No. 1. Around 8 to 10 years back she effected her possession over the suit land. The above admitted position of the case is sufficient to provide inference to the court that part of the suit land has been alienated by Sashi Sahoo and the defendant No. 1 took possession of the said land measuring Ac. 0.050 decimals and for the above reason, this court finds no reasonable ground to believe that the sale deed has been executed fraudulently without the knowledge of Sashi Sahoo or the same was a manufactured one. Therefore, it would be good enough for the court to shift to the legality of execution of the sale deed as well as the authority of Sashi Sahoo pertaining to alienation of a joint Hindu family property in absence of other co-owners.

09. It is evident from the record that prior to partition of their joint family property, the part of the suit land extending 50 decimals had been alienated by Sashi sahuo to defendant No-1. The plaintiff has to say that the suit land being a part and parcel of joint Hindu family property, alienation of a part of it by their mother alone is illegal and void. At this stage, the claim of defendant No. 1 is completely different. She has claimed that Sashi Sahoo and Kapileswar Sahoo had incurred substantial amount of loan from different persons for the purpose of giving gold ornaments, utensils and other articles at the time of marriage ceremony of his youngest daughter, who is defendant No. 3 in this case. Sashi Sahoo alone had incurred some loans from different persons for funeral ceremony of her husband Kapileswar Sahoo. Finding no alternative, to clear up the above loans, Sashi Sahoo being the manager and KARTA of the properties of her husband sold the said land for a consideration amount of Rs. 1,

80,000/- in favour of defendant No. 1. Therefore, the sale deed bearing No. 1008 dt. 05.10.2002 is a valid sale deed and effective one.

10. The general rule of succession in case of a male Hindu is guided U/s- 8 of "Hindu Succession Act, 1956". Schedule of the act in the matter of Succession to the property of Hindu dying intestate is to laid down a set of general rules for succession to the property of a male Hindu. The subsequent provision U/s- 8 to 13 provides the rules relating to ascertainment of the share. As per the Sec. 8 of Hindu Succession Act, the property of a male Hindu dying intestate shall devolve according to the provision of the chapter. The said Section provides that the property of a male Hindu dying intestate shall firstly devolved upon his class – I heirs and in absence of the class – I heirs the same shall be devolved upon the class – II heirs and so on as provides by law. Kapileswar Sahoo died intestate and as such his whole property including the suit land automatically devolved upon his wife Sashi Sahoo, his three daughters, who are the plaintiff, defendant Nos. 2 & 3 respectively as well as proforma defendant No. 4, who are the class – I heirs of Kapileswar Sahoo. They have equal interest over the entire property of Kapileswar Sahoo . Except the suit land all the properties have already been partitioned by metes and bounds. The said rule is also applicable to the suit land and it has not been disputed that all the legal heirs as mentioned above have equal interest over the said Ac. 0.059 decimals of land (suit land).

11. While the defendant has claimed that out of legal necessity the plaintiff alienated Ac. 0.050 decimals to her, the onus is on defendant No. 1 to prove the same.

Defendant No. 1 has also adduced evidence of three witnesses for her case out of whom D.W. 2 & 3 in their evidence in chief have not stated anything with regards to the cause of alienation of the sale deed by Sashi Sahoo in favour of defendant No. 1. In the cross-examination D.W. 2 has stated that the contents of his affidavit evidence in chief are not his statement. Similarly, D.W. 3 has stated that what has been reflected in his evidence in chief was stated by Indumati Martha (D-1). Here this court has already pointed out that the defendant No. 1 has not come to the court as a witness and his son has deposed evidence as D.W-4. His evidence cannot be taken up as the evidence of defendant No. 1 as D.W. 4 has admitted that he has not been authorized by his mother to depose evidence. He has stated that his mother is unable to talk being suffering from high depression. Her illness being not supported by any medical certificate and while defendant No-3 has stated that the contents of his evidence in chief was stated by Indumati Martha (D-1), it is the clear assertion of this court that defendant No-1 is very much active in her case but avoided to depose her evidence and the reason may be best known to her. The evidence of D.W. 4 has no avail to the defendant's case relating to the genuineness of the sale deed vide Ext-5. He is not a competent witness to the claim of her mother as he has no personal knowledge about the execution of the sale deed.

12. Now this court has perused the certified copy of the sale deed executed by Sashi Sahoo, wherein it has been mentioned that she has alienated Ac. 0.050 decimals of land to defendant No. 1 to meet the legal necessity. The amount of loan incurred by Sashi Sahoo and the purpose of loan as well as the other description have

not been find place in the alleged sale deed nor by the defendant No-1 throughout the proceeding of this case. No witness has been examined to substantiate the said claim. Unless and until the fact as advanced by the party has not been substantiated with cogent, reliable and concrete evidence, it is not possible for the court in a civil proceeding to ascertain the reliability of such claim. Defendant No. 1 is the best witness to substantiate the claim, but she did not come to the court and her three witnesses are completely silent towards such claim as they are not the competent witness to substantiate the said fact. This question of non examination of a party in his case has been considered by the Privy Council in the case of [Gurbaksh Singh v. Gurdial Singh](#). The relevant head-note is as follows:

"It is the bounden duty of a party, personally knowing the whole circumstance of the case, to give evidence on his own behalf and to submit to cross examination. His non appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case."

In the case of **Pirgonda v. Vishwanath, AIR 1956 Born. 251**, the following is the material head note:

"Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box, it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons..."

13. Coming to another aspect of the case with regards to the status of a widow as a KARTA of the family and alienation of the estate of the deceased husband by widow, it is quite needful to mention that under the Hindu Law a widow only possesses a life-interest in the property inherited from her husband and she has no power to alienate it even in the presence of blood-relations except for necessity. The same rule applies to the case of a widow holding a life-interest under custom and she had not any wide power of alienation than a widow who holds a similar estate under Hindu Law.

According to the principles of Hindi law, the restrictions on Hindu widow's powers of alienation are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death and she can therefore alienate her share only for necessity or benefit of the estate. It is well settled that woman, cannot become a karta because a karta has to necessarily be a coparcener. But now, with the amendment of 2005, Section 6 of the Hindu Succession Act, 1956 gives equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Even now the Hindu Succession Act, 1956 does not accept a woman as karta in normal circumstances. She can be a karta only in 2 certain special circumstances: – in the absence of male members and in case there are minor male members in the family, which is prescribed by the ancient Hindu law.

In the present case proforma defendant No. 4 being the adopted son of Kapileswar Sahoo and Sashi Sahoo and attended majority by that time of death of his adoptive father Kapileswar Sahoo, become KARTA of the family. Sashi Sahoo has

got 1/5th interest out of the suit land. The said Sashi Sahoo has executed three documents such as the acknowledgment to adoption, partition and one unregistered deed of conditional relinquishment of his interest in favour of defendant No. 3. But, she nowhere in any of the document as mentioned about has mentioned about the loan incurred by himself or by her husband Kapileswar. Defendant No. 4 being the adopted son of Sashi Sahoo became the KARTA of the family and he is responsible to all the outstanding dues incurred by his parents namely Sashi and Kapileswar Sahoo. Therefore, it would be prudent enough for Sashi Sahoo to alienate the land if any, in presence of defendant No. 4. But, the alleged sale deed vide Ext. 5 has been executed by Sashi Sahoo and her two daughters such as defendant Nos. 2 & 3 by ignoring the plaintiff and defendant No. 4. The reason of avoiding the other co-sharers at the time of execution of Ext. 5 remains undisclosed. There is absolutely no pleading or evidence adduced therein to prove that Sashi Sahoo has any enmity with the plaintiff and defendant No. 4 by the time of execution of Ext. 5. If the relationship between all the parties were normal, it would not be prudent enough for Sashi Sahoo to ignore the plaintiff and defendant No. 4 from the execution of Ext. 5. The intention of making a the sale deed by avoiding the other co-sharers by Sashi Sahoo, who has a limited interest over the property appears to be quite doubtful and the same has been made in a unscrupulous manner.

14. Apart from that, if one go through the written statement of defendant Nos. 1 to 3, they have specifically contended that proforma defendant No. 4 being their grandson, only perform the *sudhikriya*, but all the expenditure of *sudhikruya* and

other rituals were incurred by defendant Nos. 2 & 3. If such statement be taken up as admission of the above defendants, they have incurred all the family expenditures and Sashi Sahoo has not spent a single pie relating to the *sudhikriya* and other rituals of Kapileswar. Therefore, no occasion arises for Sashi Sahoo to incur any loan either for the marriage of defendant No. 3 or for the other rituals of her deceased husband. Since all those circumstances are self explanatory and inconsistent with the case of the defendants, it is not possible for the court to accept the defendant's case without any basis. But so far as the nature and application of the sale deed vide Ext-5 is concerned the same can only be determine after final discussion of the following issues.

Issue Nos. vi, vii, viii & ix.

15. Coming to the question of recovery and confirmation of possession over the suit land. It is the very admitted case that defendant No. 1 is in possession of her Ac. 0.050 decimals of her purchased land out of the total Ac. 0.059 decimals of suit land. If the case of both the parties will be accepted, the plaintiff is only entitled for 1/5th share and that can only be recovered from the possession of the defendant No-1 in case it is held by this court that the sale deed executed by Sashi Sahoo is voidable to the extent of her share. At this stage, it may further be noted that the plaintiff has made an alternative prayer by saying that if the sale deed executed by Sashi Sahoo is declared to be voidable then the plaintiff may be allotted with the specific share of 1/4th out of the suit land through partition. This court has already discussed about the genuineness of the sale deed and it has already been held that execution of Ext. 5 by Sashi Sahoo is not itself a void document. Sashi Sahoo has

ample scope to sale any portion of joint Hindu family on certain conditions. The law is also well settled that a co-owner cannot alienate his interest in any specific joint family property for the reason that no co-sharer can before partition claim any such property as his own and for which any such alienation would remain valid only to the extent of the seller's interest in the alienated property. On perusal of the sale deed it is quite clear that Sashi Sahoo while executed the sale deed vide Ext. 5, the defendant Nos. 2 & 3 were very much present and they have also given their consent for such sale. In the written statement they have also admitted the execution of the sale deed to be a valid document. This denotes that by virtue of the sale deed, Sashi Sahoo and defendant Nos. 2 & 3 have alienated a major portion of the suit land and they have never claimed their interest over the land alienated to defendant No. 1 neither in the suit nor in any forum. Sashi Sahoo is dead and defendant Nos. 2 & 3 have nothing to say about such alienation. Therefore, the sale deed vide Ext. 5 in true sense is an alienation of the share of Sashi Sahoo and defendant Nos. 2 & 3 and such the sale deed can only be valid up to their share and voidable to the rest. Therefore, the possession of defendant No. 1 over the suit land is permissible only to the $\frac{3}{5}$ th share, which belongs to Sashi Sahoo and defendant Nos. 2 & 3 and her possession to the rest is illegal. But, to identify such land either the plaintiff or the defendant No. 1 or any of the party may effect partition to carve out their share. This being the factual position of the case it is also prudent enough again to clarify that the plaintiff and proforma defendant No. 4 are entitled for $\frac{1}{5}$ th share each whereas defendant No. 1 is entitled for the rest $\frac{3}{5}$ th share out of the entire suit land. Accordingly the above issues are

answered and the plaintiff is only entitled for the relief as surfaced in the above paragraphs.

Issue Nos. i, ii, iii & iv.

16. After an elaborate discussion of the fact and circumstances of the case it is well asserted that all the parties involving in the matter under dispute have been rightly impleaded by the plaintiff in this suit and the matter was heard and adjudicated. So far as the question of limitation and overall claim of maintainability is concerned the defendants have neither pressed the above two issues nor assigned any such reason to put a question mark on the maintainability of the suit either by law or fact. The plaintiff has also pointed out the cause of action specifically and the whole discussion as above is sufficient enough to satisfy the reason behind filing of the suit and the maintainability of the claim of both the parties and reliefs sought for therein. The suit is maintainable in all respect. Hence it is order.

ORDER.

The plaintiff is only entitled for the decree of partition and as such the present suit of the plaintiff be and the same is preliminarily decreed on partition on contest against defendant Nos. 1 & 4 while ex-parte against defendant Nos. 2, 3 & 5. The plaintiff and defendant No. 4 are entitled for 1/5th share each out of the suit land and the defendant No-1 is entitled for the rest 3/5th share of the suit land. The parties are hereby directed to effect partition among themselves within three months hence.

Failing of which, any of the party is at liberty to execute the order through the process of the court. The other prayers of the plaintiff are hereby dismissed.

Advocates fees are at contested scale.

Senior Civil Judge, Khordha.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 29th day of September, 2014.

Senior Civil Judge, Khordha.

List of witnesses examined on behalf of Plaintiff :-

P.W. 1 Indumati Baitharu.

P.W. 2 Ajay Kumar sahuo.

List of witnesses examined on behalf of Defendant :-

D.W. 1 Pradeepta Kumar Sahoo.

D.W. 2 Pitabas Martha.

D.W. 3 Pramod Kumar Swain.

D.W. 4 Prakash Chandra Martha.

List of documents admitted in the evidence on behalf of the Plaintiff :-

Ext. 1 Regd. Partitioin deed No. 664 dt. 10.06.2003.

Ext. 1/a Signature of P.W. 1 on Ext. 1.

Ext. 1/b to 1/e Signature of Sashi Sahoo, Pradeepta Kumar Sahoo, Sanjukta Sahoo, Manjukta Sahoo on Ext. 1 respectively.

Ext. 2 Certified copy of ROR under khata No. 35 of mouza Pananagar.

Ext. 3 Unregistered agreement executed by Sashi Sahoo dt. 10.06.2003.

Ext. 3/a Signature of P.W. 1 on Ext. 3.

Ext. 3/b to 3/e Signature of Sashi Sahoo, Pradeepta Kumar Sahoo, Sanjukta Sahoo, Manjukta Sahoo on Ext. 3 respectively.

Ext. 4 Certified copy of Regd. Deed for declaration of adoption No. 2 dt. 01.03.2002.

Ext. 5 Certified copy of Regd. Sale deed No 1008 dt. 04.10.2002.

List of documents admitted in the evidence on behalf of Defendant :-

Ext. A Registered deed of partition.

Ext. A/1 Signature of D.W. 1 on Ext. A.

Ext. B Un-registered deed of agreement.

Ext. B/1 Signature of D.W. 1 on Ext. B.

Ext. C Letter No. 154 dt. 24.01.2008 issued by Tahasildar, Bolagarh.

Ext. D Income certificate of Pradeepta Kumar Sahoo.

Ext. E Residence certificate dt. 27.08.2010.

Ext. F Driving license of Pradeepta Kumar saho.

Ext. G Voter list of Pradeepta Kumar saho.

Ext. H Adhar Card.

Ext. J Judgment of this court dt. 17.09.2003.

Senior Civil Judge, Khordha.