

**HEADING OF DECISION IN CIVIL SUITS  
IN THE COURT OF 1<sup>st</sup> ADDL.SENIOR CIVIL JUDGE, BHUBANESWAR**

***Present :- Pranab Kumar Routray,  
1<sup>st</sup> Addl. Senior Civil Judge,  
Bhubaneswar***

**T.S. no.26/364 of 2010/1997**

1. Bhaskar Swain (**Dead**)
  - 1(a) Dhirendra Nath Swain, (**Dead**)
    - A1. Smt. Hemalata Swain, aged about 58 years,  
W/o Late Dhirendra Nath Swain,  
Plot No.84,Saheednagar,  
P.O./P.S:Saheednagar Bhubaneswar-7,  
Dist.Khurda.
    - A2. Pratyush Ranjan Swain, aged about 37 years,  
S/o Late Dhirendra Nath Swain,  
Plot No.84, Saheednagar,  
P.O/P.S.Saheednagar, Bhubaneswar-7,  
Dist.Khurda.
    - A3. Sri Tapan Kumar Swain, aged about 29 years  
Son of Late Dhirendra Nath Swain,  
Plot No.84, Saheed Nagar,  
P.O/PS.Saheednagar  
Bhubaneswar-7, Dist.Khurda.
    - A4. Tapaswini Swain, aged about 35 years,  
D/o.Late Dhirendranath Swain,  
W/o.Sangram Keshari Ray,  
Plot No.304(A) Saheednagar,  
PO/PS. Saheednagar, Bhubaneswar-7,  
Dist.Khurda.
    - A5. Tejaswini Swain, aged about 33 years,  
D/o Late Dhirendra Nath Swain,  
W/o Patitapaban Sahani,  
Qrs. No.D-72/1, Sector-20, Rourkela,  
Dist.Sundargarh.

- 1(b) Surendra Nath Swain, aged about 50 years,  
S/o Late Bhaskar Swain,
- 1(c) Sakhi Dei, (since dead)  
W/o Late Bhaskar Swain,
- 1(d) Saudamini Nayak, aged about 63 years,  
D/o Late Bhaskar Swain,  
W/o Late Sadhu Charan Nayak,
- 1(e) Kanakalata Parida, aged about 54 years,  
D/o Late Bhaskar Swain,  
W/o Brahmananda Parida,

Sl. Nos.1(b) to 1(e) are resident of  
Plot No.84, Sahidnagar,  
P.O./P.S.- Saheednagar,  
Bhubaneswar-7, Dist.Khurda.

... **Plaintiffs**

- **Versus** -

- 1. Radhamani Dei, aged about 69 years,  
W/o Late Dwijaraj Swain  
Mohantipara, P.O.Kafla, P.S.Lalbag,  
Dist.Cuttack.
- 2. Rabindra Nath Swain, aged about 59 years,
- 3. Debendra Nath Swain, aged about 56 years,
- 4. Nagendra Nath Swain, aged about 53 years,

Sl. Nos.2 to 4 are sons of  
Late Ganeswar Swain,  
Village/P.O.- Dihasahi, Via- Tirana,  
P.S.Erasama, Dist.Jagatsinghpur.

- 4(a) Gouripriya Dei, aged about 91 years,  
Daughter of Parsuram Swain, and  
wife of Late Jayaram Biswal,  
C/o Pramila Bala Biswal,  
Plot No.439, Kamala Press, Unit-6,  
C.D.A, Dist.Cuttack.

- 4(b) Premalata Parida, aged about 75 years,  
W/o Bikram Kishore Parida,  
At- Mahima Nagar, Pota Pokhari,  
P.O.- Nuabazar, Dist.Cuttack-4.
- 4(c) Ashalata Pradhan, aged about 73 years,  
W/o Late Bishnu Charan Pradhan,  
Vill/P.O.- Paida, P.S.Erasama,  
Dist.Jagatsinghpur.
- 4(d) Manorama Nayak, aged about 62 years,  
Wife of Ramanath Nayak,  
Plot No.143, Baramunda, P.O.Baramunda,  
Bhubaneswar, Dist.Khurda.
- 4(e) Sarajabala Das,  
W/o Prashanta Kumar Das,  
Vill.- Addankuda, P.O.Pandua, P.S.Tirtol,  
Dist.Jagatsinghpur.

Defendant Nos.4(b) to 4(e) are Daughters of  
Late Ganeswar Swain

5. Smt. Brajabala Parija, aged about not known,  
W/o Surendra Kumar Parida,
6. Biswajit Parija, aged about not known,
7. Satyajit Parija, aged Not known,

Both are sons of Surendra Kumar Parija,  
From Sl. Nos.2 to 7 are of Village: Sakini,  
P.O.Pandua, P.S.Tirtol, Dist.Jagatsinghpur,  
at present Plot No.3270/2, Lalitashree,  
Sriram Nagar, Bhubaneswar-2, Dist.Khurda.

8. Special Secretary, General Administrative  
Department, Odisha, Bhubaneswar.
9. Director of Estate, G.A. Department,  
Government of Odisha, Odisha Secretariat,  
Bhubaneswar.
10. Chairman, GRIDCO, Bhubaneswar.

11. Chief Engineer, P.H.D, Odisha,  
Bhubaneswar.
  12. Chairman, Bhubaneswar Municipal  
Corporation, Bhubaneswar.
  13. Sudhanshu Patra, aged about 46 years,  
S/o Late Harihar Patra,  
Sarbodaya Road, Puri-2, Dist.Puri.
  14. Chief Executive Officer,  
Central Electricity Supply Company,  
CESCO, 2<sup>nd</sup> floor, IDCO Tower,  
P.O.Bhoi Nagar, P.S.Saheednagar,  
Bhubaneswar, Dist.Khurda.
  15. Superintending Engineer, CESCO,  
At/P.O.Bhoinagar, P.S.Capital,  
Bhubaneswar, Dist.Khurda.
- ... **Defendants**

**COUNSEL APPEARED**

- For Plaintiffs : Shri Bhaktahari Mohanty and  
associates.
- For Defendant  
nos.1, 5 to 7 & 13 : Shri Hrudananda Routray and  
associates.
- nos.2, 3, 4 & 4(a) to 4(e) : Ex parte
- nos.8, 9 & 11 : Government Pleader
- no.12 : Shri Sidartha Das
- nos.10, 14 & 15 : Shri Dhaneswar Mohanty

Date Of Conclusion Of Argument : **19-05-2015**

Date Of Judgment : **19-06-2015**

**( After Summer Vacation)**

## **J U D G M E N T**

This is a suit for partition with other reliefs.

2. The case of the plaintiff in brief is that, the plaintiffs and defendant nos.1 to 4 and 4(a) to 4(e) are governed under Mitakshyara School of Hindu Law. One Parsuram Swain is their common ancestor. He died in the year 1958 leaving behind his three sons namely Ganeswar, Bhaskar and Dwijaraj and a daughter namely Gouri Priya who relinquished her share in favour of her three brothers. Bhaskar is the original plaintiff but substituted by his legal representatives. Ganeswar died in the year 1997 leaving behind defendant nos.2, 3 and 4 and four daughters namely Premalata, Ashalata, Manorama and Sarojabala, defendant nos.4(b) to 4(e) respectively. Dwijaraj died in the year 1996 leaving behind his widow namely Radhamani, the defendant no.1 as his sole legal heir. The properties left by the common ancestor Parsuram has been succeeded by his three sons namely Ganeswar, Bhaskar and Dwijaraj having equal interest. He had about 9 acres of landed property in his native village locality yielding sufficient income of the joint family and had also a grocery shop from which the joint family was getting good income. His three sons having sound income were jointly utilising the funds for the joint family. Parsuram purchased an area of Ac. 0.18 decimals of land on 15-02-1932 in Mouza- Singharasahi in the name of his youngest son Dwijaraj who was then minor and also purchased one acre of land on 26-08-1949 from joint family

funds. Dwijaraj was working in Cuttack Collectorate. Ganeswar was working as a Revenue Inspector. Bhaskar was working for a short period in a private service at Kolkata but came back to village sometime in 1952-53 to look after the landed property as Parsuram became extreme old and unable to act as Karta of family. Dwijaraj was considered to be the most efficient and cunning among the brothers. He married to Radhamani ( Defendant no.1) in 1946 but they have no issue. In 1955-56, he suggested to acquire a piece of land at Cuttack. His two brothers contributed money from joint nucleus for acquisition of the land and entrusted Dwijaraj with the said work. But Dwijaraj on 20-06-1956 cleverly obtained the sale-deed in the name of one Pradeep Kumar Routray aged about 2 years S/o Baidyanath Routray, acting as guardian of the minor as his father's sister's husband. In fact the said minor is not related to the family rather his father Baidyanath Routray had intimacy with Dwijaraj. A house has been constructed on the said purchased land with joint family funds. While the joint family was in possession of the land and the building, Dwijaraj in 1963 got a deed of relinquishment from the said minor in favour of his own wife Radhamani defendant no.1 and in the said document Dwijaraj himself acted as guardian of the said minor. In the mean time Radhamani claiming to have succeeded to the said property as the sole legal heir of Dwijaraj had executed a nominal gift deed on 20-09-1991 transferring the entire property in favour of her sister Brajabala Parida defendant no.5 and two sons of Brajabala namely Biswajit and

Satyajit who are defendant nos. 6 and 7 respectively. It is claimed that the plaintiffs are not bound by this fraudulent and nominal transfer and the ostensible donees have not acquired any title on the basis of the gift deed. It is further claimed that even if it is held that the gift deed as a genuine one, it is valid to the extent of 1/3<sup>rd</sup> share of defendant no.1 and plaintiffs are entitled to re-purchase that share. This property is described in Schedule 'B' of the plaint.

3. It is the further case of plaintiffs that the land described in Schedule-C of the plaint is also acquired in the name of Dwijaraj vide registered lease deed no.4391 dtd.13-05-1964, yet it is acquired from joint family funds for a sum of Rs.692.15 paisa. Dwijaraj with his ill motive had kept the lease deed and other documents of title with him. A house over the said property has been constructed with joint family funds. The plaintiff no.1 since deceased alongwith his family was staying there and after his death his legal heirs are staying and have been paying energy charges, water tax and holding tax and land revenue to the concerned authority. Ration card of the control commodities is also issued in the name of plaintiff no.1 since deceased and his son in respect of the house standing over Schedule-C landed property.

4. Dwijaraj retired from Government service in 1974 and started staying at Cuttack, by then dissension arose among three brothers. Dwijaraj fell ill and to meet his medical

expenses he sold away his 1/3<sup>rd</sup> interest in his ancestral property at his native place in the year 1977 in favour of plaintiff no.1(b) and Hemalata Swain W/o Plaintiff no.1(a). The character and joint possession of the suit properties is evident from the records of O.L.R Case No. 1354 of 1976 in the Court of Tahasildar, Kujanga. It is also pleaded that during consolidation operation, the three brothers namely Ganeswar, Bhaskar and Dwijaraj jointly filed an application for partition of their erstwhile joint family properties of their native place Singharasahi. The plaintiffs have specifically pleaded that there is no separate application filed by any of them for preparation of separate Khata and if any such application would be forthcoming then that must be a forged and fabricated one. The Consolidation Authorities have already prepared separate khata in conformity with the allotment furnished in the application filed by the said three brothers.

5. The plaintiffs claim 1/3<sup>rd</sup> share in both Schedule 'B' & 'C' properties on the ground that acquisition of land and construction building was done from joint family fund. Alternatively, although these properties have been acquired in the name of defendant no.1 and her husband Dwijaraj yet the same have been thrown to joint family hotchpotch and blended with joint family property. Defendant no.1 mutated her name in respect of Schedule 'C' property behind the back of plaintiffs suppressing the fact of acquisition of the same out of joint family nucleus, and, hence, the suit mutation can not create

exclusive title in her favour. She was contacting purchasers to alienate the Schedule 'C' property for which plaintiff no.1 since deceased demanded for partition and on being refused, this suit for partition with further prayer that defendant no.1 or defendant nos.5, 6 and 7 may be directed to transfer the share of defendant no.1 in favour of the plaintiffs at the same price as mentioned in the gift deed with alternative prayer that if the gift deed is held valid then it is valid to the extend of the share of defendant no.1. Similarly the lispensens transfer of Schedule ' C ' property in favour of defendant no.13 does not affect the interest of the plaintiffs and such transfer is subject to the result of the suit. Since consolidation operation is in progress in respect of the ancestral property situated in the native village as described in schedule-D of the plaint, no relief for partition is sought for.

**6.** Defendant no.1 filed written statement and two additional written statements challenging the suit on its maintainability, cause of action, non-joinder of necessary party, principles of resjudicata as well as law of estoppel and locustandi of plaintiff to file the suit for partition. She refuted the claim of the plaintiff that schedule-B and C properties are joint family properties. It is denied that the three brothers Ganeswar, Bhaskar and Dwijaraj owned and possessed the landed property to the extent of an area of Ac.9.00 decimals in and around their native place or the landed property was giving sufficient income to the joint family. It is also denied existence

of any grocery shop and was managed by joint family giving good income for the family. It is further pleaded that she married to Dwijaraj in 1942 and the three brothers Ganeswar, Bhaskar and Dwijaraj were separated in 1947 due to family quarrel and poor economic condition and there was partition among the three brothers in the year 1947 having 1/3rd share each in respect of Schedule ' D ' property. Ganeswar had 7 children, Bhaskar had 4 children whereas Dwijaraj had no issue. Bhaskar was an uneducated person who was literate to the extent of putting his signature, Ganeswar was working as Assistant to a Moharir and after separation of family he worked as Assistant in local R.I. Office and later promoted as R.I at the fag end of his service whereas Dwijaraj was the sole earning member who joined in Government service in Class III post in the year 1936. Therefore, the joint family funds were insufficient to maintain 18 members including father Parsuram Swain rather the entire family was running through poverty and leading life of just hand to mouth. It is claimed that separation in the joint family in the year 1947 is evident from the written statement of Ganeswar Swain before Consolidation Officer, Rahama and Amin report in the Hal Consolidation proceeding. It is pleaded that she and her husband were extremely religious minded persons and were disciple of Baya Baba. They are vegetarian and were leading simple life for which they had sufficient surplus funds to purchase properties. It is denied that acquisition of land and construction of building over schedule B and C property was made from joint family

nucleus. It is claimed that schedule-B property is the self acquired property of defendant no.1 purchased out of her stridhan and C-schedule property is the exclusive property of Dwijaraja which was leased out in his favour on 13-05-1964 for a premium of Rs.692.15 paisa while he was working as Asst.Sales Tax Officer in Commercial Tax Department under the State Government of Odisha and was drawing monthly salary of more than Rs.900/- per month. It is submitted that the plaintiff's son was working as a stenographer in O.S.R.T.C at Chhatrapur and transferred to Bhubaneswar in the year 1995. He being nephew of Dwijaraj was allowed to stay in one room in the building standing over C-schedule property, but without consulting Dwijaraj, he managed to obtain ration card in his name from the concerned authority. So far as D-schedule property is concerned, it is stated that there was family partition among the three brothers in the year 1947 having 1/3<sup>rd</sup> share each in respect of the said property. After retirement from government service Dwijaraj did not want to stay at his native place for which he sold away his share. After death of Dwijaraj, she being the only legal heir inherited C-schedule property and accordingly her name has been mutated vide memo No.7756 dtd. 23-07-1997 of Government of Odisha in G.A Department. On 16-11-1999 defendant no.1 sold Schedule-C property in favour of Sudhansu Patra defendant no.13 and delivered possession of the same but due to mistake of plot number mentioned in the sale deed the same was rectified by another deed bearing no.1621 dtd.08-03-2001. So, in gist, it is submitted

that schedule-B property is the self acquired property of Radhamani defendant no.1 from one Pradeep Kumar Routray in 1963 and schedule-C property is self acquired property of Dwijaraj and buildings standing over both the landed properties have been constructed from the income of Dwijaraj and both the properties have been transferred. The brothers of Dwijaraj have no share in the said properties. Hence, it is prayed for dismissal of the suit.

7. Defendant no. 4(a) Gouri Priya Dei, sister of the three brothers filed separate written statement averring therein that her father Parsuram had sufficient fertile agricultural landed properties situated in different villages in the locality of their native village to the extent of 7 to 8 acres. Her brother Ganeswar was working as Revenue Inspector and was getting good salary. Bhaskar was working at Calcutta for some time and thereafter came to village and stayed and was managing a grocery shop and the other brother Dwijaraj first joined as a Clerk under Government of Odisha who retired from Government service from Commercial Sales Tax Department. It is claimed by her that the joint family of her brothers had sufficient nucleus and from that nucleus the land in Cuttack i.e schedule-B property was acquired. Dwijaraj was given charge of doing all the work for acquisition of the said property out of the joint family fund provided by Bhaskar and Ganeswar. It is also pleaded that joint family funds has been utilised for purchase of C- schedule property in the name of Dwijaraj as he

was working under the State Government. Construction of building on both the properties were also made out of joint family fund. The son and daughter-in-law of Bhaskar are residing in C-schedule property and defendant no.1 was residing in B-schedule property. During last settlement operation the agricultural landed property has been partitioned among three brothers, but schedule-B and C properties have not yet been partitioned which should be partitioned amongst her three brothers as she has no claim over any property.

**8.** Defendant nos.5, 6 and 7 have filed a joint written statement and additional written statement challenging the suit on its maintainability, cause of action and locus standing of the plaintiff to claim partition over B-schedule property. It is pleaded that severance of joint family status among the three brothers had taken place in the year 1947 which is evident from the consolidation proceeding wherein the three brothers had submitted joint application stating inter alia to make separate holding according to their respective possession of 1/3<sup>rd</sup> share each. It is stated that marriage of defendant no.1 had taken place in the year 1942 but not in the year 1946 as defendant no.5 being her sister witnessed the marriage. She has witnessed that Bhaskar was never serving in Kolkata rather he was a daily labourer at village. Their paternal landed property was very less to manage the family and the condition of the family was miserable to the extent that rice was purchased out of the income of Dwijaraj till 1947 as he was in Government service.

It is stated that Dwijaraj was a very honest and pious person. The other brother Ganeswar was a Peskar and was earning very less amount. It is claimed that the joint family property was not yielding good income so as to form nucleus for future acquisition of property. As regards B-schedule property, it is pleaded that Dwijaraj had no issue for which he and his wife defendant no.1 had love and affection towards said Pradeep, nephew of Dwijaraj and thus defendant no.1 out of her stridhan purchased the said property in the name of said Pradeep in 1956 wherein Dwijaraj was shown as minor guardian. Subsequently when defendant no.1 did not pull on well with Baidyanath, father of Pradeep, a deed of relinquishment was executed in favour of defendant no.1 in 1963 which is known to every one including the plaintiffs. After retirement, Dwijaraj and his wife decided to execute a gift deed in favour of defendant no.5 and her two sons (defendant nos. 6 and 7) out of special affection as they were rendering all types of service to them during their old age and accordingly gift deed was executed and possession was delivered to them within knowledge of other brothers of Dwijaraj. Hence, these contesting defendants have every right, title and interest over B-schedule property.

**9.** In the additional written statement it is averred about the amended paragraph-10 of plaint regarding joint possession of the suit property that as evident from record of O.L.R case No.1354/1976 one Pranakrushna Parida filed the case U/s.33(A) of OLR Act impleading the three brothers

Bhaskar, Ganeswar and Dwijaraj to take benefit of the said section claiming himself as “Bhag tenant” wherein Bhaskar and Dwijaraj filed their written statement stating that the said section is not applicable as they have less than three standard acres of land and they submitted detail of their ancestral properties as well as self acquired properties in order to calculate and to show whether they have three standard acres or more. Bhaskar was looking after the said O.L.R proceeding and Dwijaraj had signed on some documents in the said proceeding on good faith. It is stated that the three brothers had filed application before Consolidation Officer in partition case no.5/79 wherein they have mentioned about their previous partition taken place in 1947.

**10.** Defendant no.11, Chief Engineer, P.H.D filed a separate written statement on 22-10-2003 challenging the suit on its maintainability, cause of action and non-joinder of necessary party etc and stated that he has no knowledge about acquisition of C-schedule property and whether construction has been made thereover out of joint family income, rather it is the plaintiff to prove the same. It is submitted that no water supply connection has been given to plot no.1499, Khata no.310 in Mouza-Saheednagar as indicated in schedule-C of the plaint. However, a permanent water supply connection has been sanctioned in favour of Dwijaraj in Plot no.84, Saheednagar for six numbers of tap point bearing consumer no.A0064. Water charges has been paid up to July, 2003. It is prayed that since

the plaintiff has not sought for any relief against him, the suit be dismissed with cost.

**11.** Defendant nos.14 and 15, the Chief Executive Officer and Superintending Engineer of CESCO respectively have filed a joint written statement and averred that the suit is not maintainable against them and there is no cause of action against them as they are neither necessary parties nor proper parties in the suit and hence they do not want to give unnecessary reply to the plaintiff's averments. Hence, the suit be dismissed against them with cost.

**12.** Defendant no.13 filed a written statement alongwith **Counter claim** in respect of plaintiff's Schedule ' C ' property which is described in Schedule-1 of the counter claim. He fully adopts the averments of plaintiff no.1. It is pleaded by him that Dwijaraj being a Government servant and a member of Capital Building Cooperative Society was allotted 'C' Schedule Property on permanent lease basis by the Government in April, 1964. After his death, the said property inherited by his only legal wife, the sole legal heir and accordingly was mutated in the name of his wife defendant no.1 on 23-07-1997 who on permission of Government made the lease hold land as a free hold land by deed of conveyance bearing no.6017 dtd.16-11-1999. Thereafter, for her legal necessity defendant no.1 sold the 'C' schedule land to him vide R.S.D no.6562 dtd.20-12-1999 for a consideration of

Rs.4,99,999/- and delivered possession. There was mistake in plot number mentioned in the deed which was rectified vide Rectification deed dtd.08-03-2001. In the counter claim he has narrated as to how 'C' schedule property was acquired by Dwijaraj and as to how the plaintiff's son was given a temporary accommodation in the building existing thereover. It is specifically pleaded that after purchasing the property, he time and again approached the original plaintiff Bhaskar and his son to vacate the house but with some plea or other they were delaying and dragging the matter and ultimately refused to vacate the house. Hence, he filed this counter claim for declaration of title, eviction and permanent injunction against the plaintiffs.

13. With the aforesaid pleadings on record, the following issues have been settled :

### ISSUES

- 1) Whether the suit is maintainable ?
- 2) Whether there is cause of action to file the suit ?
- 3) Whether the suit is bad for non-joinder of necessary parties ?
- 4) Whether the suit hits under principle of resjudicata and estoppels ?
- 5) Whether the suit- B & C schedule property are the joint family property of the plaintiff and defendant nos.1, 2, 3 and 4 or self acquired property of late Dwijaraj Swain ?
- 6) Whether the plaintiff is entitled for the relief of partition and 1/3<sup>rd</sup> interest over schedule- 'B' & 'C' property ?

- 7) Whether the defendant no.13 has right, title, interest over schedule 'C' property ?
- 8) Whether the defendant no.13 is entitled for relief of eviction of plaintiff over Schedule-C property ?
- 9) Whether the sale made by defendant no.1 of Schedule-C in favour of defendant no.13 is valid and legal ?
- 10) Whether the defendant no.13 is entitled to recovery of possession of the suit land by virtue of his said sale ?
- 11) Whether the transfer made by Dwijaraj in favour of defendant no.1 in respect of Schedule-B property is valid and whether defendant no.1 is competent to gift away the same to defendant nos.5, 6 and 7 which followed by delivery of possession and they are in possession over it ?
- 12) Whether the transfer of the Schedule-C property by way of sale by defendant no.1 in favour of defendant no.13 is valid and legal as the same is made when the status-quo order was subsisting ?
- 13) Whether the Gift Deed executed by the defendant no.1 in favour of defendant nos.5, 6 & 7 in respect of Schedule-B property is valid and legal ?
- 14) Whether the defendant no.13 is entitled for relief of injunction over Schedule-C property ?
- 15) To what other relief, the plaintiff and defendant no.13 is entitled to ?

With the aforesaid evidence on record the issues as framed are to be answered.

## FINDINGS

### **14. Issue no.5**

This is the principal issue in this suit, and, hence, taken up at first for decision. At the outset, it is pertinent to reflect that no relief for partition is sought for in respect of property described in Schedule D of the plaint since consolidation operation is in progress in respect of the said property situated in native village of plaintiffs and defendant nos.1 to 4. Hence, in this issue, it is to be decided as to whether schedule B' and C' property are joint family property of the aforesaid parties or self acquired property of late Dwijaraj ( husband of defendant No.1).

**15.** Evidence on record both oral and documentary is bulky and therefore it need not be reflected in detail rather vital portion of oral evidence and the required documents will be reflected as per requirement for decision of the dispute. Before delving into evidence, it is felt necessary to reflect the gist of argument advanced from both sides. Learned counsel for defendant no.1 submitted that onus is on the plaintiffs to prove Schedule B and C properties are joint family properties and to prove this fact, they are to prove that there was joint family funds and there was nucleus and the nucleus has been utilised for purchase of these properties. If plaintiffs succeed in their attempt then onus will shift to defendant no.1 to prove that it is self acquired property of her husband Dwijaraj. It is forcefully argued that evidence on record says that there

was very low income of joint family which consists of many members and Dwijaraj was the only member having sound income and plaintiffs have failed to prove that there was joint family funds and there was nucleus in the joint family funds and the nucleus has been utilised for purchase of B and C properties. It is also argued that Schedule B property is Stridhan property of defendant no.1 and therefore can not be put to partition. Another point raised by learned counsel is that there was severance of joint status and there was family partition among the three brothers as evident from the consolidation proceeding of 1979 vide Ext.B and from the sale deed vide Ext.N, under which Dwijaraj has sold away his entire 1/3rd interest to plaintiff no.A1 and 1(b) in the year 1977. On the other hand, learned counsel for the plaintiffs forcefully contended that the pleadings as well as admission of defendant no.1 to the effect that some properties have been purchased in the name of her husband Dwijaraj by his father in 1932 in the native village while Dwijaraj was only aged about 15 years shows that there was surplus amount of money to purchase property and therefore no further evidence is required to prove this fact. Learned counsel also left it to the Court to scan the evidence which will definitely reveal about existence of joint family and joint family fund and utilisation of the same in acquisition of the said properties. It is further argued that purchasing B' property in the name of minor by Dwijaraj in 1956 and again executing a relinquishment deed by the said minor in favour of wife of Dwijaraj and that too without

obtaining permission from District Judge which is mandatory under Section 8 of Hindu Minority and Guardianship Act, 1956 shows about conduct of Dwijaraj, and hence, applying theory of preponderance of probability, it is gathered that Dwijaraj had intention to grab B' property which was acquired from joint family funds. In reply, learned counsel for defendant no.1 contended that the sale deed of 1956 vide Ext.C is a benami transaction as per the plaintiffs, and, hence, without seeking for declaration that Ext.C is a benami transaction and the property purchased thereunder was from joint family funds, the plaintiff can not ask for partition. Learned counsel for the plaintiffs denied about severance of joint status and prior partition by submitting that Ext.18, certified copy of proceedings in O.L.R Case no.1354/1976 which was filed for partition of property of three brothers Ganeswar, Bhaskar and Dwijaraj shows about jointness of family including Schedule B and C properties.

**16.** It is first to be examined for the sake of convenience that as to whether there was severance of joint status in the family and whether there was partition among the three brothers Bhaskar, Ganeswar and Dwijaraj prior to acquisition of Schedule B and C properties. It is the pleadings of defendant no.1 that there is separation in the joint family in the year 1947 as evident from the written statement of Ganeswar Swain before Consolidation Officer, Rahama and also evident from Amin Report in the Hal consolidation proceeding.

The written statement of defendant no.1 and para 9 of examination in chief of D.W.1 reveals that there was consolidation case in 1979 wherein Ganeswar admitted that there was partition between the three brothers. The said consolidation proceeding of 1979 is marked as Ext.B. On perusal of Ext.B, it is found that Ganeswar Swain had applied before the consolidation officer of Krushnachandrapur Camp mentioning therein that he and his two brothers Bhaskar and Dwijaraj have amicably partitioned their agricultural and homestead property in 1947 during lifetime of their father and possessing the same as per their respective allotted share and each have got 1/3<sup>rd</sup> share and prayed to prepare separate khata in respect of their separate properties. The Amin report available in Ext.B reveals about separate possession of land of Mouza Singharsahi by the said three brothers and he prepared Kachha Pharda keeping some properties in jointness but his report does not reveal about any amicable partition taken place in 1947 or in which year. P.W.2 in para 12 of cross-examination admitted that in the consolidation proceeding, one specific share in the homestead and cultivable land have been demarcated. He further stated that separate records were made in respect of landed properties. The properties have been divided into three equal shares. The said witness in para 13 stated about submission of joint application by the three brothers. On further perusal of Ext.B, it is found that joint application by three brothers was also filed but it does not reveal about partition taken place in 1947. Similarly Ext.N, the

sale deed executed by Dwijaraj Swain in 1977 in favour of plaintiff nos.A1 and 1(b) reveals that the three brothers were in possession of their respective 1/3<sup>rd</sup> share of their ancestral property and the 1/3<sup>rd</sup> share of Dwijaraj was sold to the said plaintiffs for construction of concrete house at Cuttack and for medical treatment. PW 1 in para 41 of her cross-examination admitted that Dwijaraj had transferred his 1/3<sup>rd</sup> share in her favour which also included dwelling house. On further perusal, Ext.N does not reveal about partition taken place in the year 1947. But it is submitted by learned counsel for defendant no.1 that if Ext.B and Ext.N will be read conjointly, the Court will come to the conclusion that there was partition in 1947.

**16(a)** Learned counsel for the plaintiffs submitted that Ext.18, certified copy of proceeding in OLR Case no.1354/1976 clearly reveals about jointness of family and properties including Schedule B and C properties and therefore it can not be said that there was severance of joint status or there was prior partition. On this point, it is argued by learned counsel for defendant no.1 that Ext.18 was filed by a bhag tenant namely Prana Krushna Parida under Section 36(A) of the OLR Act and Dwijaraj had signed in the said proceeding in order to save Bhaskar from the bhag tenant. His such contention finds support from the admission of P.W.1 in para 43 of her cross examination. Relying on a decision reported in AIR 1976 SC 376 learned counsel contended that admission made in ignorance of legal rights or under duress can not bind the maker

of the admission and further submitted that in the case at hand admission of Dwijaraj was for the benefit of family and in order to save family property from the bhag chasi. On the other hand, it is contended by learned counsel for the plaintiff that the effect of admission in Ext.18 can not be avoided in any manner and the ratio decided in the case AIR 1976 SC 376 is not applicable to the present case because the statement of P.W.1 is made in answer to a suggestion given during cross examination which does not amount to explaining the admission.

17. On perusal of Ext.B it is found that the joint application filed by three brothers does not reveal about partition taken place in 1947. This apart, the property mentioned in Ext.B relates to Mouza Singhar Sahi only whereas the parties have also joint family properties in other nearby villages. Secondly, it is not understood though plaintiffs have pleaded about filing of joint application by the three brothers before the Consolidation Authority and preparation of separate Khata but as to why they have pleaded that no separate application is filed and if any such application would forthcoming, then its a forged and fabricated one. This shows that plaintiffs were aware about filing of a separate application by Ganeswar mentioning therein about prior partition taken place in 1947. Thirdly it is also not understood as to why the urban property located at Cuttack and Bhubaneswar ( ' B ' and ' C ' property) were included in Ext.N when objection was filed in OLR case. However, there is no material that all the properties of Parsuram located in his native

village and other nearby villages have been partitioned among his three sons Ganeswar, Bhaskar and Dwijaraj by metes and bounds in 1947 or prior to 1956. But considering Exts.B and recital of Ext.N and oral evidence of defendant no.1, this much is gathered that there is severance of joint status taken place long long back.

**18.** Law is well settled that there is no presumption that any property standing in the name of a member of a joint Hindu family becomes joint family property. Hindu law does not prohibit a member of joint family from acquiring any property for his own benefit unless it can be shown that the property was acquired with the aid of joint family, the property so acquired by individual member does not become joint family property. Law is further well settled that proof of existence of joint family property does not lead to the presumption that the property held by any member of the family is joint. Initial burden rests upon the one who asserts any item of property as joint – then only burden shifts to the party asserting self acquisition affirmatively that a property was acquired without the aid of joint family property and from out of his income from independent source. Reliance can be placed in the matter in the recent decisions reported in 2014 (Supp-1)-1089 between Subash Chandra Panigrahi-Vs.-Rajiv Lochan Panigrahi and in the decision reported in 2013(Supp-II) OLR 1075.

**19.** Keeping this principle in mind it is required to scan the evidence of plaintiffs in order to find out whether plaintiffs have discharged their burden of proving the suit schedule B and C properties as joint family properties. Therefore, it needs careful appreciation to find out whether plaintiffs could be able to establish that there was nucleus in the joint family property and that nucleus has been utilized for acquisition of the suit land and construction of houses thereon.

**20.** Regarding joint family funds and nucleus therein it is pleaded in para-5 of the plaint, that there is about 9 acres of landed property in the native place yielding sufficient income for the joint family and there was grocery shop managed by the joint family which gives sound income. It is further pleaded that purchase of a land measuring Ac.0.18 decimal in the year 1932 by Parsuram in the name of Dwirajaj when he was minor and purchase of one acre of land by Parsuram in the year 1949 in the native place also shows there was sufficient joint family funds. This apart Ganeswar, Bhaskar and Dwijaraj were getting monthly salary and jointly utilizing the funds for the betterment of joint family.

**21.** So far as Schedule B' property is concerned, it was first acquired in the name of one minor namely Pradeep Routray, aged about 2 years by Dwijaraj on 20-06-1956. Dwijaraj acted as guardian of the minor as husband of his father's sister and thereafter a deed of

relinquishment was made in favour of defendant no.1. Now it is to be seen whether plaintiffs have proved that there was joint family funds in the year 1956 and there was nucleus in the funds and that nucleus has been utilized to purchase B' property at Cuttack in the name of said minor Pradeep Routray by Dwijaraj. On perusal of examination-in-chief of the witnesses from the side of plaintiffs it is found that they have reproduced the plaint story stating that there was sufficient property of joint family and there was sufficient nucleus in the joint family fund and out of the surplus fund this property was purchased but in the name of Dwijaraj. They have also stated that Parsuram had about 9 acres of landed property in his native village and nearby villages and had a grocery shop. P.Ws.1 and 2 do not have personal knowledge about acquisition of the property but their source of knowledge is from Bhaskar. P.W.1 in para 38 of her cross-examination admitted that she could not say as to what was the quantum of joint family funds at the time of her marriage. She could not say about the contribution of Ganeswar in the joint family. She also could not say what was the contribution of individual co-sharers for construction of house over B' schedule properties. PW 2 in para 14 of his cross-examination admitted that he is unable to show any document regarding income, expenditure and surplus income from the cultivation of the suit land situated in the native village. He even could not say as to what was the surplus joint family funds generated from cultivation during the period 1955 to 1965. It is stated by him in para 16 of his cross-examination

that Bhaskar had contributed a sum of Rs.1000/- to Dwijaraj for purchase of house situated at Cuttack (B schedule property). In the same para he has admitted that he had heard about the matter but can not file any document to substantiate the aforesaid payment made by Bhaskar. He has admitted not to have seen the original document in respect of the property. On the other hand, the documents in original produced from custody of defendant no.1. In para 18, P.W.2 clearly admits that he has no knowledge about the quantum of surplus money in the hands of joint family at the time of acquisition of B' property because at that time he was aged about only 9 years. If source of knowledge of this witness is proper regarding acquisition of property from joint family funds, then he should have obtained the information regarding income and expenditure and surplus of funds in the joint family during that relevant period. In para 15, he has answered that an area of Ac.6.52 decimals are cultivated by them whereas other lands were given to bhag tenants and all the lands are dependant on rain as there was no facility of irrigation. He could not answer the exact area of cultivable land, bagayat, homestead land out of the aforesaid land of Ac.6.52 decimals. In the same para, he has admitted that he is unable to give detail regarding annual income and expenditure of the joint family. He could not say about the annual income and expenditure of the grocery shop of Parsuram or the salary of Ganeswar or the amount contributed by Ganeswar to joint family out of his salary. But he says that Ganeswar and Dwijaraj were contributing half of their salary to the joint family.

22. P.W.3 is a co-villager of the plaintiffs who deposed that he knows Parsuram since his childhood and Parsuram had nine acres of landed property in his native village and other nearby villages and also deposed in his examination in chief about sufficient income of the joint family. In cross-examination, he has stated that Parsuram used to cultivate all the lands on his own and no bhagh tenants were engaged by his family rather the cultivable lands of Parsuram have been given to bhagh tenants for cultivation since 1999. It is already seen from the evidence of P.W.2 that the lands are not irrigated. Hence, from such evidence of P.W.3 that Parsuram was cultivating his entire land, it can not be gathered that the lands yielded sufficient income by the year 1956 with surplus amount in joint family to purchase land at Cuttack city. Besides this, the said witness could not say about the income and expenditure in the house of Parsuram and his family. His evidence further reveals that he does not have any idea about contribution of Ganeswar and Dwijaraj in to the house. He could not tell about the consideration amount paid for purchase of B' property. Hence, it is gathered that P.W. 3 has no knowledge about joint family income and the surplus of joint family funds and also as to how B' schedule property has been acquired at Cuttack.

23. P.W. 4 is another co-villager who like P.W.3 has deposed in examination in chief that Parsuram had nine acres of landed property and his three sons were serving in different places but Bhaskar left his service and came to village

to manage joint family property as Parsuram became very old and Bhaskar was running a grocery shop. He has deposed that there was sufficient joint family funds being maintained by Bhaskar and residential houses have been constructed over their land in Cuttack and Bhubaneswar from joint family savings. He is cross-examined at length. As it reveals from his cross-examination, this witness could not say about the annual yield of usufructs from the land of Parsuram situated in the native village and other near by villages. He could not tell about age of children of Bhaskar or children of Ganeswar by the year 1953 though he claims that in the year 1953 he was aged about 15 to 16 years. He further stated that the total value of articles kept in the shop of Parsuram in the year 1953 was Rs.10,000/- but has not kept any information regarding income of the said shop. This statement of witness seems to be unbelievable because a person who is not able to say age of the children of Bhaskar, income from the shop but at the same time he is claiming that the value of the articles kept in the shop was Rs.10,000/- and ' B ' schedule property was acquired from joint family funds being managed by Bhaskar. Similarly in Para 4 in examination in chief this witness has deposed that when he comes to Cuttack, he used to stay in the house of Bhaskar situated at Tulsipur Cuttack where the wife of Dwijaraj was/is now staying. In cross-examination, he could not say the length and breadth of the house situated at Cuttack nor could say the name of the adjoining house owners. This shows that he is not well acquainted with ' B ' property.

24. Evidence from the side of plaintiffs does not clearly speak that what was the joint family income in the year 1956 and what was the surplus amount. By simply deposing that Parsuram had sufficient landed property yielding sufficient income does not prove that there was sufficient income of joint family. On perusal of the RORs, it is found that an area of only Ac.2.18 decimal in total is in occupation of the joint family. It is already found that cultivation in the lands depend on rain as there is no irrigation facility which shows the landed property yielded low income. There is no document as regards to existence of a grocery shop, the account of the grocery shop has not been furnished nor there is any evidence as regards to monthly income of grocery shop in the year 1956. Hence, evidence on record does not reveal that there was nucleus in the joint family funds in the year 1956 and the same has been utilized for purchase of ' B ' property. Admittedly, an area of Ac.0.18 decimals was purchased by Parsuram in the year 1932 in the name of Dwijaraj. But this is not suffice to hold that there was joint family funds and there was nucleus in the joint family funds after 22 years i.e. in the year 1956. The evidence further reveals that the joint family is a big family where as Dwijaraj had no issue and was serving at Cuttack and was also staying there. There is no dispute that he joined in service in the year 1937. The land purchased in 1956 i.e after about 19 years of his service. It is deposed by P.W.1 that Dwijaraj was a devotee of baya baba and was a vegetarian and was leading simple life which means he was not spending more money and must have

sufficient savings. It is claimed by defendant no.1 that there was severance of joint status prior to 1956. It is also observed that severance of joint status taken place long long back. The entire evidence reveal that Dwijaraj was the sound earning member among the three brothers. Hence, it is gathered that Dwijaraj who was serving at Cuttack and was staying there has acquired the property from his own independent income. Explanation is given by the contesting defendants that as to why Dwijaraj purchased the said property in the name of minor. This explanation is available in para 21 of cross-examination of D.W.2 wherein he has answered the family of Dwijaraj and Baidyanath Routray were staying as neighbours at Cuttack and there was close relationship between the families and as Radhamani(defendant No.1) was issue less, treating Pradeep as her son purchased the schedule ' B ' land in his name. There is no dispute that one relinquishment deed has been executed by the said minor wherein Dwijaraj acted as guardian and the property was relinquished in favour of wife of Dwijaraj. But, so far as argument of learned counsel for the plaintiffs that permission of District Judge was not obtained, it may be safely held that this transaction is a voidable transaction and can only be challenged by the said minor within three years of attaining majority and therefore, the plaintiffs have nothing to say on it. Applying the theory of preponderance of probability in acquisition of B' property, it can not be said that as the property was purchased in the name of a minor by Dwijaraj and subsequently the said minor executed deed of relinquishment in

favour of wife of Dwijaraj, that proves that consideration money was paid by the brothers of Dwijaraj when it is already found that among the three brothers Dwijaraj was the only brother having sound income by the year 1956 and he was already in service for 19 years. There is no dispute that ' B ' schedule property has already been gifted away by defendant No.1 in favour of defendant Nos.5 to 7 in the year 1991. But one interesting fact noticed is that PW 1 has deposed that she came to know about execution of such deed in the year 1997 after filing of the suit. The cause of action as mentioned in the plaint reveals that the plaintiffs came to know about such fraudulent activity of Dwijaraj when their demand for partition made in the year 1997 was delayed and dragged by defendant no.1. This shows that the plaintiffs were not aware about the transaction made in the year 1956 or about the subsequent execution of relinquishment deed in the year 1963 and execution of gift deed by defendant No.1 in the year 1991 and came to know in the year 1997 all about the alleged fraudulent activities of Dwijaraj and his wife. This is just improbable that the parties who are claiming a property as joint family property and are also claiming that the said property has been acquired from joint family funds but did not enquire about the status of property or about their title since 1956 till 1997. This shows that preponderance of probability theory rather goes against the plaintiffs. Hence, considering evidence on record it is held that plaintiffs have failed to discharge the burden that ' B ' property has been acquired from joint family funds. On the

other hand, it is found that the same has been acquired by Dwijaraj from his independent income.

25. So far as property under Schedule C is concerned, there is no dispute that it is a lease hold property granted by Government of Odisha in favour of Dwijaraj in the year 1964 vide Registered Lease Deed no.4391. It is claimed by the plaintiff that this property is acquired from joint family funds for a sum of Rs.692.15 Paise. It is only stated by P.W.1 in para 7 of her examination-in-chief that on transfer Dwijaraj came to Bhubaneswar and by that time he was persuading his brothers to take land on lease at Bhubaneswar because by the year 1964, it was very easy to get a lease land in the growing city of Bhubaneswar and the price of the land was very low. It is further stated by her that as per the proposal of Dwijaraj, consideration amount as well as registrations fees etc. contributed from the joint family income was given to Dwijaraj out of which he acquired C schedule land and that it was felt necessity of having a house over the said land and again also out of joint family nucleus, on the supervision of Bhaskar and his son Dharendra, a house was constructed over it in which not only Dwijaraj but also Bhaskar and his sons alongwith their children were residing. Similarly, P.W.2, Surendra who is son of Bhaskar in para 7 of his examination-in-chief just reproduced the same version of P.W.1. The other two witnesses P.Ws.3 and 4 have not deposed about the joint family income and the surplus amount in the joint family fund and as to how the

surplus amount has been utilized in acquisition of C schedule property. They have not even deposed in their examination-in-chief that in which year this property was acquired. These witnesses have been subjected to lengthy cross examination. On perusal of their cross examination it is found that P.W.1 has stated in para 25 that defendant nos.2 to 4 who are sons of Ganeswar Swain are not residing in C' property at Bhubaneswar nor were residing earlier rather they used to come occasionally. This statement of P.W.1 clearly shows that the other brother of Dwijaraj namely Ganeswar and his children do not come and reside in C property. This witness has no knowledge regarding contribution of Ganeswar in the joint family in a month as seen from para 38 of her cross examination. In para 40, she has stated that by the time of acquisition of C' schedule land she was not married. So, she has no direct knowledge about the joint family funds and the surplus amount by the time of acquisition of C' property. Para 41 of her evidence reveals that the total number of members in the house of Ganeswar is 19 including his daughters-in-law and family of Bhaskar consist of 15 members including his daughters and daughters-in-law. It is further stated by her that at the time of her marriage the house at Bhubaneswar consisted of two rooms having pucca roof. Bhaskar had paid all the money for construction of the aforesaid house. She further answered that she does not have any document to show that Bhaskar had incurred the expenditure for construction of the house but claimed that the documents in relation to expenses incurred for the construction has been filed

in this case. In para 42 she could not say about the amount contributed by Bhaskar, Dharendra, Surendra or herself. Evidence of P.W.2 available in para 12 reveals that he has not attained the age of discretion at the time of purchase of Schedule B' and C' properties. In para 18 of his cross examination, he has stated that he had contributed Rs.53,000/- for construction of house at Bhubaneswar but could not show any document regarding the aforesaid expenditure incurred by him. On the other hand, he could not answer about the expenditure incurred for the construction of roof house over C' property. He further answered that he started the asbestos roof house in the year 1980 and completed its construction in the year 1985 but he could not tell when construction of the RCC roof house was started and when the same was completed. As observed earlier, this witness could not say about the joint family income, expenditure or surplus amount.

**25(a)** From the evidence of P.Ws.1 and 2 it is found that they are unable to say about the joint family income and existence of nucleus therein by the year 1964 and utilisation of the same in acquiring ' C ' property.

**26.** P.W.3 in para 6 admits that he does not have any idea as to how much amount Ganeswar and Dwijaraj used to contribute to the house and so also how much they take from the house. His evidence reveals that he has no knowledge about income of the joint family. Similarly cross examination of

P.W.4 reveals that he has not kept any information about income of the shop of Parsuram. He could not say about the annual income and expenditure of Parsuram but Parsuram had big family. He could not say about the length and breadth of the house located at Bhubaneswar. His answer reveals that he has no direct knowledge regarding year of purchase, amount contributed by the co-sharers but has heard from the parties about purchase of such property.

**26(a)** As seen from evidence of P.Ws.3 and 4 irresistible conclusion is drawn that they have no idea about the joint family funds and whether there was nucleus in the joint family property and they have also no idea about acquisition of C' property.

**27.** Dwijaraj joined in service in the year 1937. He retired from service in the year 1974 as Assistant Sales Tax Officer. He acquired ' C ' schedule property in 1964 when his salary was more than Rs.900/- per month. The premium deposited is Rs.692.15 Paise which is much less than his one month salary. D.W.1 has deposed that her family expenditure was Rs.200/- per month by then. Further the family of his brothers consist of many members whereas Dwijaraj had no issue. It is already observed that he was leading simple life and must had sufficient surplus amount. Evidence of P.Ws.1 and 2 shows that it was very easy in the year 1964 to get a lease land at Bhubaneswar because the price of land was very low. So it

appears improbable that as to why Dwijaraj would ask his brothers to contribute money for acquisition of C' property which was available in a low price. Another fact noticed from evidence of D.W.1 wife of Dwijaraj is that her husband obtained approved building plan in the year 1982 for construction of house over C' schedule property. Ext.N, sale deed executed in the year 1977 by Dwijaraj in favour of plaintiff nos.A1 i.e. P.W.1 and 1(b) i.e. P.W.2 shows that Dwijaraj had sold away his entire share in the ancestral property in his native place in order to construct house at Cuttack and Bhubaneswar and to meet medical expenditure. So, it is clearly found that Dwijaraj had sufficient funds for construction of the house. When it is already found that none of the witnesses from the side of plaintiffs could say about joint family funds or existence of nucleus in the joint family funds and utilization of nucleus in acquisition of C property whereas on the other hand it is found that Dwijaraj had sufficient independent income to pay premium for the property which is much less than his one month salary and this payment was made after about 27 years of his service and he had also sold away his 1/3rd share in the ancestral property, irresistible conclusion is drawn that ' C ' schedule property has not been acquired nor construction of house made thereon from joint family funds rather the same has been acquired and house has been constructed thereon by Dwijaraj from his independent income and therefore, it is his self acquired property.

**28.** The plaintiffs' claim that son of Bhaskara has got ration card in the year 1982 vide Ext.23 and the voter identity card of Bhaskar Swain since deceased vide Ext.25 and voter identity card of plaintiff no.A1, since deceased vide Ext.26 and the telephone bills, electricity bills etc are proof of the fact that schedule C property is joint family property or in alternative it has been blended to the joint family. On perusal of Exts.23, 25 and 26, it is found that no where the plot number of Schedule C property is mentioned. On the other hand it is the claim of defendant No.1 that the son of Bhaskar i.e. plaintiff no.A1 since deceased was serving in OSRTC and was posted at Chhatrapur but he came to Bhubaneswar on transfer in the year 1995 to whom Dwijaraj gave temporary accommodation in the suit house on his request and either the original plaintiff Bhaskar or his son might have managed to obtain ration card from concerned authority. The electricity bills and telephone bills are found to be independent documents. On this point it may be strongly said that these aforesaid documents filed by the plaintiffs can not prove that ' C ' schedule property was acquired from the surplus amount of joint family funds. So far as use of these documentary evidence to prove blending of this property in joint family hotch potch, it will be dealt in subsequent paragraph.

**29.** Learned counsel from both sides have placed lengthy argument on the question of partiability of lease hold property. Without reflecting arguments in detail as raised on

this point that whether this lease was granted under Government Grants Act or under the provision of OGLS Act, there is no dispute that C' property is a lease hold property originally granted by Government of Odisha in favour of Dwijaraj Swain being a member of Capital Building Cooperative Society. On perusal of the lease deed vide Ext.E/Ext.17, it does not appear from the grant that it was intended for the benefit of joint family of the said member. Hence, it can not be put to partition.

**30.** It is alternatively claimed by the plaintiffs that though both B and C property have been acquired in the name of Dwijaraj but the same have been blended with joint family. Law is well settled that alternative pleas can be taken but inconsistent pleas can not be taken. The plaintiffs have all through their plaint averments have taken the plea that Schedule B and C properties have been purchased from joint family funds but only in one sentence in para 11 of the plaint they have pleaded that the said properties have been thrown to joint family hotch potch and blended with joint family property. This is an inconsistent plea. Defendant No.1 is not admitting about blending of the properties rather claiming that ' B ' property is her self acquired property and ' C ' property has been acquired by her husband Dwijaraj from his independent income. Hence, the plea taken by the plaintiffs is not sustainable.

**31.** Considered from all angles, it is held that neither B schedule property nor C schedule property are joint

family property rather both the properties were acquired by Dwijaraj from his independent income. This issue is answered in negative and against the plaintiffs.

**32. Issue No.6**

This issue relates to relief of partition and entitlement of 1/3rd interest of plaintiffs over B and C property. It is already held under Issue No.5 that Schedule B and C property are not the joint family property but the self acquired properties of Dwijaraj. Hence, plaintiffs are not entitled for the relief of partition and 1/3rd interest over the said properties. This issue is answered accordingly.

**33. Issue Nos. 11 and 13**

These issues relates to validity of transfer made by Dwijaraj in favour of his wife defendant No.1 in respect of B property and thereafter gift of the said property by defendant No.1 in favour of defendant Nos.5,6 and 7. It is already held under Issue No.5 that schedule B property is self acquired property of Dwijaraj. Admittedly, defendant no.1 acquires title over B schedule property through a deed of relinquishment vide Ext. C executed by minor Pradeep Routray wherein Dwijaraj has acted as his guardian. It is already held that the transaction being a voidable one can only be challenged by the said minor within three years of attaining majority and plaintiffs have no locus standi to challenge the said transaction. In view of the matter, it can not be held that the transfer made

by Dwijaraj in favour of defendant No.1 in respect of B property is invalid. Defendant No.1 having right title and interest over the said property, she has every right to deal with the property and therefore, the gift executed by her in favour of defendant Nos.5,6 and 7 in respect of the said property which followed by delivery of possession is legal and valid as she is competent to do so. These two issues are answered accordingly in negative and against the plaintiffs.

**34. Issue Nos.7, 9 and 12**

These three issues relates to whether the sale made by defendant No.1 in respect of Schedule C property in favour of defendant No.13 is legal and valid and in consequence to the sale deed whether defendant No.13 acquires right, title and interest over the said property and it is also to be decided whether the sale made by defendant No.1 is valid when the status quo order was subsisting.

There is no dispute that Schedule ' C ' property has been sold away by defendant No.1 in favour of defendant no.13. The said sale deed is marked as Ext.K executed on 20-12-1999 for a consideration of Rs.4,99,999/-. Admittedly Schedule ' C ' property was initially leased out by Government of Odisha in favour of Dwijaraj Swain in the year 1964. Ext. K is the conveyance deed executed between Governor of Orissa and defendant No.1 on 27-10-1999 i.e after death of Dwijaraj Swain. Ext. H reveals that by order of

Government in General Administration department vide order No.LD-34/94-2216 dated 08-02-2000 the lease hold property converted into free hold with Stitiban status with effect from 16-11-1999. Thereafter, she has sold C' property in favour of Sudhansu Patra defendant No.13 through registered sale deed vide Ext.K which was subsequently rectified through Ext.L. It is already held that Schedule ' C ' property is the self acquired property of Dwijaraj, the late husband of defendant no.1. Evidence says after death of Dwijaraj, lease deed executed in favour of defendant no.1 and the lease hold property became freehold. Hence, sale executed by defendant no.1 in favour of defendant no.13 is legal and valid and defendant no.13 acquires right, title, interest over the same.

**34(a)** Plaintiffs are claiming that the sale in favour of defendant No.13 is not valid and legal as the sale is made when status quo order was subsisting. Relying on decision reported in (2012) 8 SCC 384 in the case between Vidur Impex and Traders Private Limited and Others vrs. Tosh Apartments Private Limited and Others, it is submitted that the sale deed executed by defendant No.1 in favour of defendant No.13 does not convey title or interest in favour of defendant No.13 since the same has been executed in violation of injunction. On the other hand, learned counsel for defendant No.13 forcefully argued that the sale is a lis pendence sale and doctrine of lis pendence does not annul transaction/transfer made during pendency of lis. It merely makes such transfer subject to right of

parties to the suit. He placed reliance in the matter on the decision of two judge Bench of Hon'ble Apex Court in the case between Thomson Press ( India) Ltd. Vrs. Nanak Builders and Investors Private Ltd. and Others reported in AIR 2013 SC 2389. It is further held in the decision that doctrine of lis pendence is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a Court in a suit should be binding not only on the litigating parties but on those who derive title pendentelite. The provision of this Section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation. In the said decision it is further held that the transfer made in teeth of injunction prohibiting transfer is not void rather party guilty of breach may however be liable to be punished.

**34(b)** The decision relied on by learned counsel for defendant No.13 is subsequent to the decision of Hon'ble Apex Court as relied on by plaintiffs. In the case at hand, a proceeding for violation is pending. On perusal of evidence of defendant no.13 who is D.W.6 it is found that in his cross-examination he has answered that he did not know about pending of the present suit at the time of purchase of ' C ' property. Further, with utmost regard to the decision relied on by learned counsel for plaintiffs, the same is distinguishable from the facts and circumstances of this case. In view of ratio of the latest decision of Hon'ble Apex Court as relied on by

learned counsel for defendant No.13 the sale made by defendant No.1 in favour of defendant No.13 in respect of C property can not be held to be invalid. Therefore, defendant No.13 has acquired right, title and interest over C property. These issues are answered accordingly.

**35. Issue Nos.8, 10 and 14**

These issues relate to entitlement of defendant no.13 for the relief of eviction, recovery of possession and permanent injunction against plaintiffs over ' C ' Schedule property. Defendant No.13 has filed counter claim claiming his right, title and interest over the property mentioned in Schedule-1 of counter claim which is the property mentioned in Schedule ' C ' of the plaint. He also prayed for eviction of plaintiff from the said property and delivery of vacant possession of the same and permanent injunction against the plaintiffs. It is already held under issue No. 7 that defendant No.13 has right, title and interest over the said property. Though it is seen from his cross-examination that Bhaskar Swain was staying in the suit house at the time of purchase of the property and it is also found that he is not staying in the suit house and he had been to the suit house for the last time in the year 2001, yet he being lawful owner having right, title and interest over the property, the possession of the plaintiffs over the said property held to be illegal and they are liable to be evicted. Therefore, defendant No.13 is entitled for the relief to get vacant possession and permanent injunction against the plaintiffs. These issues are answered accordingly.

**36. Issue Nos.1, 2, 3, 4 and 15**

These issues are formal in nature. The contesting defendant nos. 1,5 to 7 and 13 have not properly explained as to how the suit is bad for non-joinder of necessary party and as to how it is hit under principle of res judicata. However, in view of findings on the aforesaid issues, there is no cause of action to bring the suit and the suit so filed is not maintainable. The plaintiffs are neither entitled for any relief claimed nor for any other relief. Hence, it is ordered.

**ORDER**

The suit for partition be and the same is dismissed on contest against defendant Nos.1, 5 to 7, 8, 9, 11, 13, 14 and 15 and ex parte against other defendants without cost. The Counter claim filed by defendant no.13 is allowed on contest against the plaintiffs but without cost. It is hereby declared that Sudhanshu Patra, defendant No.13 has right, title and interest over Schedule-1 property as mentioned in the counter claim which is also Schedule ' C ' property of the plaint. The plaintiffs are directed to give delivery of vacant possession of the said property to defendant no.13 within two months hence and are permanently restrained from interfering in his peaceful possession failing which defendant No.13 is at liberty to get the decree executed through process of Court.

***1st. Addl. Senior Civil Judge,  
Bhubaneswar***

The judgment is typed to my dictation by the typist attached to this Court directly on the computer provided under E-Court Project and corrected during summer vacation and pronounced by me in the open Court after summer vacation on the 19th day of June, 2015 under my seal and signature.

*1st. Addl. Senior Civil Judge,  
Bhubaneswar*

**List of Witnesses examined for the Plaintiffs:**

- P.W.1: Hemalata Swain
- P.W.2: Surendranath Swain
- P.W.3: Sri Babaji Charan Swain
- P.W.4: Kailash Chandra Parida

**List of Witnesses examined for the Defendants :**

- D.W.1: Smt. Radhamani Dei
- D.W.2: Sri Surendra Kumar Parija
- D.W.3: Sri Ajaya Kumar Mohapatra
- D.W.4: Rama Chandra Swain
- D.W.5: Sri Gangadhar Jena
- D.W.6: Sudhanshu Patra

**List of Documents marked as Exhibits for the Plaintiffs:**

- Ext.1: Certified copy of R.O.R of Khata no.450 of Mouza Singharsahi ;
- Ext.2: Certified copy of R.O.R of Khata no.463 of Mouza Singharsahi ;
- Ext.3: Certified copy of R.O.R of Khata no.464 of Mouza Singharsahi ;

- Ext.4; Certified copy of R.O.R of Khata no.749 of Mouza Singharsahi ;
- Ext.5: Certified copy of R.O.R of Khata no.52 of Mouza Singharsahi ;
- Ext.6: Certified copy of R.O.R of Khata no.684 of Mouza Singharsahi ;
- Ext.7: Certified copy of R.O.R of Khata no.768 of Mouza Singharsahi ;
- Ext.8: Certified copy of R.O.R of Khata no.63 of Mouza Serapur ;
- Ext.9: Certified copy of R.O.R of Khata no.143 of Mouza Serapur ;
- Ext.10: Certified copy of R.O.R of Khata no.23 of Mouza Paida ;
- Ext.11: Certified copy of R.O.R of Khata no.311 of Mouza Paida ;
- Ext.12: Certified copy of R.O.R of Khata no.79 of Mouza Raijanga ;
- Ext.13: Certified copy of R.O.R of Khata no.99 of Mouza Raijanga ;
- Ext.14 : Certified copies of registered sale deed bearing numbers 456 dtd.20-06-1956 ;
- Ext.15: Certified copy of registered sale deed bearing number 7393 dtd.29-11-1963 ;
- Ext.16: Certified copy of registered gift deed bearing number 4410 dtd.20-09-1991 ;
- Ext.17: Certified copy of lease deed no.4350 dtd.13-05-1964 ;

Ext.18: Certified copy of order sheets alongwith enquiry report in O.L.R Case no.1354/1976 ;

Ext.19: Certified copy of order of Sub-Collector, Bhubaneswar on Mutation Appeal Case no.19/2000 ;

Ext.20: Certificate issued by Headmaster of Saheed Nagar M.E. School ;

Exts.21 & 21/a to 21/d : Holding Tax receipts ;

Exts.22 & 22/a to 22/c: Rent receipts ;

Exts.23 and 24: Rations cards ;

Exts.25, 26 & 27 : Voter identity cards of Bhaskar Swain, Dhirendranath Swain and Hemalata Swain respectively ;

Ext.28 Series(85 nos.): Electricity bills ;

Ext.29 Series(108 nos.): Electricity receipts ;

Ext.30 Series(90 nos.): PHD Water bills ;

Ext.31 Series(104 nos.): Receipts relating to water charges ;

Ext.32 Series(51 nos.): Telephone bills ;

Ext.33 Series (55 nos.): Telephone bills payment receipts.

**List of Documents marked as Exhibits for the Defendants:**

Ext.A: Affidavit-evidence of D.W.1 ;

Ext.A-1: Registered sale deed bearing number 4410 dated 20-09-1991 ;

Ext.A-1/a: Signature of D.W.1 on Ext.A-1 ;

Ext.A-1/b: Signature of Dwijaraj Swain on Ext.A-1 ;

Ext.B(with objection): Certified copy of the order sheet including the Amin's report in the case bearing C.A. No.559 dated 11-12-2001 ;

Exts.B-1 & B-1/a & 1/b: Rent receipts paid in respect of the suit property situated at Cuttack ;

Ext.C: Sale deed of 1956 in respect of Schedule-B property was purchased in favour of Pradip Kumar Routray ;

Ext.C-1: Original mutation R.O.R of Khata no.2/8 of Mouza Saheed Nagar ;

Exts.C-2, C-2/a & C-2/b: Rent receipts in respect of the rent paid in respect of the suit land ;

Ext.C-2/c: Rent receipt in respect of the suit land in respect of the rent paid by D.W.1 ;

Ext.C-3: Original approved plan of the building situated over the 'C' Schedule land ;

Ext.D: Deed of relinquishment dtd.29-11-1963 executed by said Pradip in D.W.1's name ;

Ext.E: Certified copy of the registered lease deed dtd.11-04-1964 in respect of Schedule-C property ;

Ext.F: R.O.R of 1988 in respect of Schedule-C property ;

Exts.G & G/1: Ground rent receipts ;

Exts.G/2 to G/4: Holding tax receipts of Schedule-C property ;

Ext.H: Order of G.A. Department for conversion of Schedule-C property from lease hold to free hold ;

Ext.K: Registered sale deed bearing the number 6562 dtd.20-12-1999 ;

Ext.K/1: Signature of D.W.1's on Ext.K ;

Ext.K/2: Signature of D.W.6 on the last page ;

Ext.L: Registered deed of rectification of the sale deed  
bearing no.1621 dtd.08-03-2001 executed by D.W.1 ;

Ext.L/1: Signature of D.W.1 on Ext.L ;

Ext.M: R.O.R of Schedule-B property ;

Ext.N(with objection): Certified copy of the registered sale deed  
dtd.08-11-1977 executed by D.W.1's  
husband in favour of Hemalata Samal  
and Surendra Swain.

***1st. Addl. Senior Civil Judge,  
Bhubaneswar***

