IN THE COURT OF THE ADDL.DISTRICT JUDGE, BHUBANESWAR

Present:

Shri A.C.Behera, LL.B.,
Addl. District Judge,
Bhubaneswar.

R.F.A. No.103/20/04/14/04 of 2013/07/06/03

(Arising out of Judgment and decree dated 18.02.2003 & 06.03.2003 passed by the learned Civil Judge, (S.D.),Bhubaneswar in T.S. No.389/1997)

Dated, this the 16th day of May ,2014

1. Nilu Panigrahi @ Ashok Kumar Mishra,
aged about 24 years, Natural son of
Pravakar Panigrahi,
Adopted son of Lokanath Mishra,
Late a minor, by Pravakar Panigrahi,
His next friend, but now having attained
majority of village/P.O.- Jhintsasan,
P.S.-Balipatna, Dist.-Khurda.

..... Appellant.
(Defendant in the Court below)

-Versus-

1. Lokanath Mishra, aged about 70 years,
S/o-Late Udayanath Mishra,

2. Pramila Kumari Mishra, aged about 60 years,
wife of Lokanath Mishra,
Both are of village-Alishisasan, P.O.-Darada
P.S.-Balipatna, Dist.-Khurda.

…… Respondents.
(Plaintiffs in the Court below)

Counsel for the Appellant : Sri J.Mohanty, Advocate
Counsel for the Respondents : Sri. J.N.Das, Advocate.

Date of Argument :29.04.2014
Date of Judgment : 16.05.2014

J U D G M E N T

This is an appeal U/s.96 r/w. O.41 R.1 of the Civil Procedure Code, 1098, which has been preferred by the appellant challenging the judgment and decree dtd.18.02.2003 and 06.03.2003 respectively passed in T.S.No.389 of 1997 I by the Learned Civil Judge(Sr.Divn) Bhubaneswar, wherein the suit vide T.S.No.389 of 1997 was decreed on contest but without costs.

2. The appellant and respondents were the deft and plaintiffs respectively before the learned court below in T.S.No.389 of 1997 I.

3. The case of the respondents/plaintiffs against the appellant/deft before the Learned court below as per the averments made in their plaint in nut-shell was that, they(plaintiffs) both are husband and wife respectively and they are Hindu Brahimns. The defendant is the son of the brother in law of plaintiff No.1 and the son of own brother of plaintiff No.2. As the plaintiffs had/have no issues, for which, by taking the advantage of the old age and simplicity of the plaintiff No.1, the father of the defendant (who is the brother in law of the plaintiff No.1) influenced the

plaintiff No.1 to create documents in favour of his son i.e. defendant picturising him (defendant) therein as his (Plaintiff No.1's) adopted son in order to perpetuate his line of succession only. So, on being influenced by the aforesaid proposal of the father of the defendant, the Plaintiff No.1 was agreed for the same, but the same was without the knowledge of the Plaintiff No.2. Thereafter, in order to grab the properties of the plaintiffs, the father of the defendant had managed to execute two deeds on the same day i.e. on 29.11.1996 from the Plaintiff No.1 in favour of his son i.e. defendant by setting up the scribe and witnesses for the same without making aware to the import and contents of the said deeds to him(Plaintiff No.1). Out of the said two deeds dtd.29.11.1996, one was a deed of acknowledgment of adoption in order to admit defendant as their adopted son and other was the deed of gift with regard to donating his properties to defendant, as he (defendant) is his adopted son. But in fact, the contents of the said acknowledgment deed of adoption vide deed No.32 and gift deed No.1401 dtd.29.11.1996 were not explained to the so called executant there of i.e. to plaintiff No.1 and the contents there-of were also not correct at all and the same were managed to have been executed and registered behind the back of plaintiff No.2 and so also without her knowledge and consent. The contents of the aforesaid deeds vide deed No.32 and 1401 dtd.29.11.1996 were not at all correct, because the defendant was/is not the adopted son of the plaintiffs and they(plaintiffs) have not adopted him(defendant).

But, the father of the defendant has managed to create the aforesaid two deeds in favour of defendant through fraud and misrepresentation in order to grab the properties of the plaintiffs. When subsequent thereto, the plaintiff No.1 came to know that, the father of the defendant has managed to create the deed of acknowledgment of adoption from him vide deed No.32 dtd.29.11.1996 by practising fraud and misrepresentation, then he(plaintiff No.1) immediately cancelled the same through a deed of cancellation bearing No.15/dtd.23.05.1997 and thereafter plaintiffs approached to the Learned court below by filing the suit vide T.S.No.389 of 1997 against the defendant and prayed for the reliefs i.e. for declaration that, the defendant is not their adopted son and also to declare that, the deed of acknowledgment of adoption bearing No.32 dtd.29.11.1996 and the deed of gift bearing No.1401 dtd.29.11.1996 as void documents and also to declare that the same are not binding on them and the same are also to be cancelled being in operative and not acted upon with other reliefs to which they are entitled for as per law and equities.

4. Having been noticed from the court, the defendant made his appearance on being represented through his father guardian and contested the aforesaid suit of the plaintiffs by filing written statement.

In the written statement of the defendant, though he admitted to the averments of the plaintiffs made in paras nos.1,2 and 4 of their plaint with regard to the relationship between the plaintiffs

and his father Pravakar Panigrahi, but, he(defendant) denied to the averments of the plaint in other paras.

5. According to the pleadings/plea of the defendant in his written statement, the suit of the plaintiffs is not maintainable. They had no cause of action to file the suit. The suit of the plaintiffs is bad for non joinder of necessary party. The further case of the defendant was that, he(defendant) is adopted son of the plaintiffs. In order to perpetuate the line of succession of the plaintiffs, the adoption of defendant was taken place on the day of Dolapurnima i.e. on 23.03.1989 in the house of the plaintiffs with a Satyanarayan Puja, wherein, the giving and taking of defendant was made and since then the defendant is the adopted son of plaintiffs with his new name. Thereafter in support of such adoption the plaintiffs inconsulting each other had executed the deed of acknowledgment of adoption vide deed No.32 dtd.29.11.1996 and as well as deed of gift vide gift deed no.1401 dtd.29.11.1996 in favour of defendant. On the strength of such gift deed, the land covered therein has been mutated to the name of the defendant from the name of the plaintiff No.1 and accordingly, he(defendant) has become the owner of the properties covered under the said gift deed. As the defendant is the adopted son of the plaintiffs as per law and the aforesaid deeds vide deed nos.32 and 1401 dtd.29.11.1996 have been lawfully executed, for which, the question of declaring that, he(defendant) is not the adopted son of plaintiffs and also to declare the aforesaid deeds executed by the

plaintiff No.1 as void and in operative including cancellation of the same does not arise. As such, the suit of the plaintiffs is liable to be dismissed with costs.

6. Basing upon the aforesaid matters in controversies between the parties according to their pleadings altogether six members of issues were framed by the Learned court below and the said issues are :-

I S S U E S

i. Is the suit maintainable in the eye of law ?

ii. Have the plaintiffs any cause of action to bring this suit?

Iii. Is the suit bad for non-joinder and misjoinder of necessary parties?

iv. Is the suit barred by law of estoppel ?

v. Are the plaintiffs entitled for declaration that the registered deed of acknowledgement of adoption No.32 dt. 29.11.1996 as well as the registered gift deed no.1401 dt. 29.11.96 are void and are not acted upon and the same are liable to be cancelled ?

vi. To what other relief, if any the plaintiffs are entitled ?

7. In order to substantiate the case of the plaintiffs, they had examined altogether three numbers of witnesses including both the plaintiffs as P.W.1 & 2 and they had proved documents vide Ext.s 1 to 3 including the impugned deeds in question.

But, the counter part of the plaintiffs i.e. the defendant has examined four witnesses from his side including his father and

mother as P.Ws 1 and 4. He(defendant) has also proved two documents on his behalf vide Ext.A & B.

8. After conclusion of trial and on perusal of the materials and evidence available in the record, the Learned court below answered issue Nos.1,2 and 5 in favour of the plaintiffs and answered issue No.6 against them(plaintiff) without answering issue No.3 and 4, as the same were not pressed. Basing upon the aforesaid answers on the issues, the learned court below finally decreed the suit of the plaintiffs on contest against the defendant without cost vide his judgment and decree dtd.18.02.2003 and 06.03.2003 respectively and declared that, the registered deed of acknowledgment of adoption bearing No.32 dtd.18.11.1996 (Ext.2) and the registered gift deed No.1401 dtd.29.11.1996 (Ext.1) as void documents and the same are cancelled. The Learned Court below also further declared that, the defendant is not the adopted son of the plaintiffs.

9. On being aggrieved with the aforesaid judgment and decree dtd.18.02.2003 and 06.03.2003 respectively passed in T.S.No.389 of 1997 by the Learned Civil Judge(Sr.Divn) Bhubaneswar against the defendant, he (defendant) has challenged the same by preferring this appeal against the plaintiffs after taking several grounds in his appeal memo.

10. I have already heard from the Learned counsels of the parties and so also have perused the materials and evidence available in

the record.

11. During course of hearing of the appeal from the side of the appellant/defendant, his Learned counsel contended that, there is no material in the record to show any cause of action for plaintiff No.2 to file the suit, for which, the institution of suit on her behalf is bad under law. He(Learned counsel for the appellant) also contended that, though there is allegations in the plaint against the father of the defendant with regard to fraud and misrepresentation but, he has not been made party in the suit, for which, the suit of the plaintiff is bad for non joinder of necessary party. He(learned counsel for the appellant) also contended that, the execution of deed of cancellation vide Ext.3 by plaintiff No.1 is the indirect admission of the execution of ext.1 and 2 by him, for which, the learned court below should not have declared Ext.1 and 2 as void on the ground of fraud and like wise without any specific issue for adjudication, whether the defendant was the adoption son of plaintiffs, the learned court below should not have made declaration about the same in the impugned judgment. So, in support of the aforesaid contentions of the learned counsel for the appellant, he relied upon the following decisions to nullify the findings and observations of the learned court below in the impugned judgment and decree and the said decisions are :-

(i) 1961(III) O.J.D-196 Agani Bewa (v) Bhaskar Mallick
(ii) 37(1971) C.L.T.-587 Shyam Sundar (V) Dharanidhar

(iii) 1971(2) C.W.R-36 M.K.Murty (v) M.C.Yerrayya

(iv) AIR 1943 (Patna)-68 Kasipalei(v) Radhika Dei

(v) 2004 SAR (Civil) 174 K Balakrishna (v) K.Kamadev

(vi) AIR 1963(S.C.) 1526 K.CVenkatramiah (v) Seetherman Reddy

(vii) 1985 (1) O.L.R-76 Chandra Sekhar Pal(v) Musmat Tapoi

(viii) AIR 1987(Orissa) 179 Achutananda (v) Dhruba.

12. On the contrary, the Learned counsel for the respondents/plaintiffs argued in support of the findings made by the Learned court below in the impugned judgment and in order to make the said judgment and decree sustainable and to show that, the same is in-conformity with law, he(learned counsel for the respondents) relied upon the following decisions :-

1. AIR 1982 ORISSA 114 – Krushna Vrs. Pradeepta
2. 2002 (II) OLR 235 – Shyam Sundar Vrs. Sribatcha
3. 1974 (I) CWR 403- Bauri Vrs. Dasarathi.
4. AIR 1977 ORISSA 69- Md. Aftabudin V. Chandan Bilasini
5. 1973 (I) CWR 68- Nimei Charan Baral Vrs. Uttam Bewa
6. 66 (1988) CLT 738- Chandramani Vrs. Radhamani
7. 108 (2009) C.L.T.380- Kumari Sumati Sundara Vrs. Spl.Land Acquisitoin Officer.
8. 2010 (II) OLR 305- Nayana Sundari Vrs. Subash
9. 2005 (I) OLR 680- Nimai Vrs. Commissioner
10. AIR 2004 ORISSA 30- Indramani Pati Vrs. Krushna Ch. Pati
11. 53 (1982) CLT 552-State Bank of India V.M/s.Ashok Stores and others

12. 69 (1990) CLT 584 – Parbati Vrs. Duryadhan

13. 2014(I) OLR (SC) 544 – Govt. of Karnataka Vrs. K.C. Subramanya

14. 2011 (I) Civil Court cases 132(Bombay)-Dattatrayo Narayan Vrs. Bhaskar Narayan

15. Civil Appeal No.6373-6374 & 6375-6376 of 2002 decided on 12.01.2001 between Ghisalal Vrs. Dhapubai by (SC)

16. Appeal (Civil) 9469 of 1996 decided on 14.03.2002 between Jai Sing Vrs. Sakuntala by SC

17. SAO No. 10 of 2006 decided on 20.06.2007 between Krushna Chandra Vrs. M/s. Orissa Sanitary by Hon'ble High Court of Orissa.

18. 80 (1995)CLT 837- Lokanath Behera Vrs. Balaram Behera.

19. 1997 (2) Civil .L.J.-502 SC.- Baby Ammal Vrs. Rajan Asari

20. Civil Appeal No.1172 of 1980 decided on 1.8.1996 between Lal Man Vrs. Deputy Director of Consolidation and others by SC.

13. Basing upon the rival submissions of the Learned counsels of the parties, the maters in controversies between them according to their pleadings, the findings made by the Learned court below in the impugned judgment and the grounds taken by the appellant in his appeal memo, the following points are required to be determined for just decision of the appeal and the said points are :-

(i) Whether the averments of the plaint indicate any cause of action for the plaintiff No.2 (Pramila Kumari

Mishra) to institute suit against the defendant ?

(ii) Whether in absence of the father of the defendant i.e. Pravakar Panigrahi the suit of the plaintiffs is maintainable ?

(iii) Whether the Learned court below was authorized under law to declare the Exts.1 and 2 as void on the grounds of fraud and mis representation inspite of execution of cancellation deed vide Ext.3 by the plaintiff No.1 admitting the existence and execution of said Ext.1 and 2 ?

(iv) Whether the documents vide Exts.2 and 1 i.e. deed of acknowledgment of adoption and gift deed are sufficient for the proof of alleged adoption of defendant by the plaintiffs as their adopted son ?

(v) Whether the Learned court below had jurisdiction to declare the gift deed vide Ext.1 as void, which is indirectly touching the title of the properties covered therein, when there is no specific prayer in the plaint in respect of the properties thereof ?

(vi) Whether the Learned court below had jurisdiction to declare that, the alleged adoption was not acted upon without any specific issue for the same?

14. So far the first point, i.e. whether, the averments of the plaint indicate any cause of action for the plaintiff No.2 (Pramilla Kumari Mishra) to institute suit against the defendant is concerned ;

During the hearing of the arguments of the appeal, the Learned

counsel for the appellant/defendant contended that, this point relates to issue Nos.1 and 2 which touches the root of the suit regarding its maintainability. Because, in the Para Nos.16 and 19 of the plaint, the plaintiffs/respondents have specifically stated that, the cause of action for filing of the suit arose on dtd.29.11.1996 i.e on the date of execution of gift deed and the deed of acknowledgment. For which, they(plaintiffs) have prayed for declaration that, the said deeds as void and not binding on them and so also for cancellation of the same. As the plaintiff No.2 is not a party to the said deeds dtd.29.11.1996, for which, the cause of action for the aforesaid reliefs in respect of the deeds is not applicable to the plaintiff No.2 Pramilla Kumari Mishra and as such there is no material in the pleadings to show any cause of action for the plaintiff No.2 to file the suit, for which, the suit as a whose is not maintainable.

But the aforesaid argument of the Learned counsel for the defendant/appellant that, no cause of action was shown for the plaintiff No.2 to file the suit is not sustainable under law. Because, the provisions of law envisaged in Section.31 and 34 of the specific relief act clarify that, where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed as per Section-31. But, if a non-executant seeks annulment of a deed, he has to seek a declaration that, the deed is invalid or non-est or illegal or that is not binding on him/her as per Section-34.

15. The meaning of cause of action i.e. the basis and reason for filing a suit has been well clarified in catena of decisions of the Apex Court. Wherein it has been stated that, cause of action means, a right to sue, which consists bundle of facts, which are necessary to be proved in a case in order to support the right to the judgment of the court and it must include some act done by the defendant.

16. The law has also been further clarified in the ratio of several decisions including in the decision reported in 2012(1) Civil Law Times Page-52 (Calcutta), (2007) Civil Law times (S.C.) 235 and (2005) Civilo Law times (S.C.) 187 that, "pleadings to be read in its entirety and the same is to be construed liberally not in pedantic manner. Pleadings must be construed reasonably. Contention of parties in their pleadings must be culled out from reading the same as a whole. Pleadings forming part of plaint can not be compartmentalized, dissected and segregated. In order to ascertain its import, plaint is to be read as a whole.

So in view of the above propositions of law, on the reading of the entire plaint of the plaintiffs as a whole, it is forthcoming that, the plaintiffs including the plaintiff No.2 have challenged the status of the defendant to the claim of his sonship with them as their adopted son praying for declaration that, the defendant is not their adopted son alongwith declaration that, the aforesaid deeds dated 29.11.1996 vide Exts. 1 & 2 said to have been executed on the basis of such adoption as void and not binding upon them.

17. It is very fundamental in law that, a suit challenging the status of a person as son, wife or husband i.e. for declaration that, the defendant is not the wife, husband or son of the plaintiff is maintainable.

Here in this case at hand, when the plaintiffs including plaintiff No.2 being husband and wife both have challenged to the claimed status of the defendant as their adopted son and have prayed for declaration that, he defendant is not their adopted son and have also prayed that the deeds dated 29.1.1996 vide Exts. 1 & 2 created in favour of defendant on the basis of such adoption is not binding on them by making averments in the plaint that, the cause of action for the suit arose on dated 29.11.1996 i.e. on execution of gift deed and acknowledgment deed of adoption, then at this juncture, in view of the principles of law stated above it cannot at all be said that, the averments of the plaint does not indicated any cause of action for plaintiff No.2(Pramilla Kumari Mishra) to institute the suit against the defendant. Because, she (Plaintiff No.2) being a non executant of the said deeds dtd. 29.11.1996 vide Exts. 1 & 2 has sought for its annulment which is coming within the purview of Section-34 of the Specific Relief Act. So the findings of the learned Court below with regard to the maintainability of the suit filed by the plaintiffs having cause of action in their favour are not in-acceptable.

18. So far the second point i.e. whether in absence of the father

of the defendant i.e. Pravakar Panigrahi the suit is maintainable is concerned;

This point has been raised by the learned counsel for the appellant/defendant by contending that, as fraud and misrepresentations have been specifically alleged by the plaintiffs regarding the execution and registration of the deeds dated 29.11.96 vide Exts. 1 & 2 against the father of the defendant i.e. Pravakar Panigrahi and admittedly defendant is a minor, for which, in absence of the said pravakar Panigrahi and without making him as a party, the suit of the plaintiff is not maintainable: Because, the said Pravakar Panigrahi(father of the defendant) was the necessary party to the suit and accordingly the suit is liable to be dismissed due to lack of compliance of the provisions of Order I Rule 9 of the C.P.C. On the contrary, the learned counsel for the plaintiffs/respondents submitted to nullify the aforesaid arguments of the learned counsel for the defendant by contending that, though the said Pravakar Panigrahi has not been made as a party to the suit in pen and paper, but the documents available in the record are going to show that, the said Pravakar Panigrahi is the real contestant in the suit. Because the W.S. has been filed by the defendant through his representation with verification made by him and he (said Pravakar Panigrahi) has deposed as D.W.1 on behalf of defendant.

19. On perusal of the records of the learned count below and as

well as the records of this appeal, it is forthcoming that, in fact the said Pravakar Panigrahi is contesting the suit of the plaintiffs knowing fully well to all the allegations made in the plaint against him as a father guardian of minor defendant, although technically he has not been made as a party in his individual capacity. On that score: the law has been clarified in the ratio of the decision reported in 2008 (II) O.L.R. 125 that, "trial Court should not succumbed to the technicalities, while doing substantial justice." The law has also been further settled that, "when the law of technicality and course of substantial justice are pitted against each other, the course of substantial justice are deserved to be preferred."

20. Here, in this case at hand, when the father of the defendant has been contesting the suit in Practical form till yet from the very beginning by posing him as the father guardian of the defendant, then at this juncture, the mere technicality i.e. non-impleading him as defendant in his individual capacity will not make the suit non maintainable on that ground only.

That apart, when the status of the defendant as well as the deeds vide Exts. 1 & 2 said to have been exeucted in favour of defendant are under challenge and the defendant is the beneficiary of the said disputed deeds, for which, the father of the defendant i.e. Pravakar Panigrahi cannot and shall not be termed as a necessary party to the suit. Because his presence is not necessary to pass the effective decree in the suit in respect of the aforesaid

reliefs prayed for by the plaintiffs.

21. So far the third point i.e. whether the learned count below was authorized under law to declare the Exts.-1 & 2 as void on the ground of fraud and misrepresentation inspite of execution of cancellation deed vide Ext.3 by the plaintiff No.1 admitting the existence and execution of said Exts. 1 & 2 is concerned ;

Though the cancellation deed vide Ext.3 executed by plaintiff No.1 regarding the cancellation of Ext.2 is his indirect admission to the execution of Ext.2 by him, but, hear in this case, fraud practised on law regarding the execution of Exts.1 & 2 has been alleged. Because the plaintiffs have specifically alleged that, the legal paraphernalias those are required under law to be complied with for creation of status of the defendant as their adopted son through the so-called deeds vide Ext.1 & 2 have not at all been complied with. So, due to the aforesaid allegations alleged by the plaintiffs in their plaint and evidence, the learned court below was not incompetent under law to declare the Exts. 1 & 2 as void on the ground of fraud and misrepresentation under law even there was a deed of cancellation vide Ext.3 by plaintiff No.1 regarding cancellation of Ext.2.

22. So far the fourth point i.e. whether the documents vide Exts.2 and 1 i.e. deed of acknowledgment of adoption and gift deed are sufficient for the proof of alleged adoption of defendant by the plaintiffs as their adopted son is concerned;

In order to upset the findings of the learned court below on this point, the learned counsel for the appellant/defendant argued that, the execution of cancellation deed vide Ext.3 regrding the cancellation of Ext.2 by the plaintiff No.1 itself showing due execution of the Ext.2 by him in favour of the defendant admitting him (defendant) as his adopted son. In support of his above contention, he (learned counsel for the appellant/defendant) relied upon the ratio of the decisions reported in 1961 (III) O.J.D. 196 Ageni Bewa (V) Bhaskar Mallick XXXVII (1971) C.L.T. 587 Shyam Sundar Padhi (V) Dharanidhar Padhi, 1971(2) CWR page-36 Manishi krishna Murty (V) Manishi Chinna A.I.R. 30 (1943) Para-68 Kashi Palei (V) Radhika Dei.

23. In the aforesaid decisions relied upon by the learned counsel for the appellant, it has been held that, "where a deed acknowledging adoption has been executed by a person stating that, a valid adoption has already taken place, in that case such an adoption should be given its full weight unless it is shown through evidence that, the admission was untrue or was made by mistake, fraud or other vitiation circumstances. Courts shall presume as to adoption, when there are documents to that effect as per section 16 of the Hindu adoption and maintenance Act 1956. The evidence led on the side of the plaintiff can at best be said to cast a doubt about the plea of adoption. But raising a doubt is not rebuttal. The plaintiff has to lead cogent and credible evidence of rebuttal in

order to succeed. In a case, where the document is executed by the adoptive parents in favour of the adopted son and the natural father has lent his signature to the document, there is sufficient compliance of the requirement of the section 16 of the Hindu adoption and Maintenance Act, 1956."

By relying upon the aforesaid decisions cited by him, the learned counsel for the appellant contended that, when in this suit at hand, the plaintiffs have asked for a declaration that, the alleged adoption is invalid, the burden is on them to make out a prima facie case that, the adoption challenged by them is invalid in law, or the same was never taken place in fact. Because, the deed of acknowledgement of adoption vide Ext.2 and so also deed of gift vide Ext.1 are giving full weight by showing about the valid adoption of defendant by plaintiffs and there is no material on behalf of the plaintiffs to rebut the presumptions and evidentiary value attached with the said document vide Ext.2 in favour of the defendant.

But the learned counsel for the plaintiffs/ respondents vehemently objected to the aforesaid contentions of the learned counsel for the appellant/defendant and contended that, the decisions cited above by the learned counsel for the appellant/defendant are not at all applicable to the facts and circumstances of present and the same are quite distinguishable from this case and accordingly, the same are inapplicable and he (learned counsel for the respondents) argued in support of the

impugned judgment of the learned court below.

24. Like this case at hand, when adoption of the defendant is under challenged in a suit filed by the adoptive parent and when the defendant try to establish his adoption as valid by relying upon any deed of acknowledgment like Ext.2 of this case at hand, the propositions of law regarding its manner of proof and standard of proof has been highlighted in the ratio of the following decisions including the decisions of the Apex Court.

AIR 1977(ori) 69 Md Abtabuddin (v) Chandan Bilasini:-

Hindu Adoptions and Maintenance Act, 1956- Section-16- Burden of proof -As by an adoption, the natural line of succession is disrupted, heavy onus lies on the party propounding an adoption.

1973 (1) C.W. R 68- Nimei Charan Baral (V) Uttam Bewa and others:-

Hindu law-Adoption-onus of proof-Evidentiary value of document containing admission about adoption - In a suit for declaration by the plaintiff that, the defendant is not the adopted son, the initial onus is on the plaintiff. But the onus being a negative onus can be discharged by bare denial.

108(2009) C.L.T. 380 Kumari Sumati Sundara (V) The Spl Land Acquisition Officer, Khurda.

Adoption- person who pleads the factum of adoption is to prove the same and onus lies on him.

Appeal (Civil) 9469 of 1996 (SC) -Decided on 14.03.2002-

Jai Singh (V) Shakuntala (1987) 2 SCC 338- Adoption- onus of proof – As an adoption displaces natural succession, the burden to establish the adoption is squarely on the person who propounds and that burden is heavy.

A.I.R. 1959 (S.C.) 504 – Keshorilal (V) Mas Chalti Bai :-

When the adoption in question is under challenge- the evidence regarding adoption should be free from all suspicions.

2010(II) C.L.R. 922:- Naim Sundari Bewa (v) Subash Adoption- Ceremony of giving and taking- Nature of proof should be free from suspicions- Documents can not substitute the proof of formalities, by which adoption is established.

A.I.R. 1961 (S.C.) 1378 – Laxman Singh Kothari(V) Smt. Roop Kanwar:-

Adoption-Ceremony- Giving and taking- Giving and taking are absolutely necessary to the validity of an adoption- The party, who is trying to sustain adoption is to prove the same by making free from suspicion and fraud and should be consistent and probable as to leave no occasion for doubting its truth.

(2002) 11 Civil law Times (S.C.) 19:-

Hindu Adoption and Maintenance Act, 1956-S-16-Presumption as to registered document relating to adoption- No specific ceremony is noted-Neither any evidence is tendered pertaining to adoption-Give and take sine qua non for valid adoption not proved- Adoption negated.

80 (1995) C.L.T.-837-Raghunath Behera (V) Balaram

Behera & another:-

Adoption- Evidence and proof-Deed of acknowledgment of adoption – omission of day or date or adoption in the deed is very vital-such a deed looses all its significance.

Civil Appeal No. (S.C.) 1172 of 1980 Decided on 01.08.1996 Lal Man (V) Deputy director of Consolidation :-

Adoption-Validity of adoption challenged – Certain fact mentioned in the adoption deed proved incorrect- the same raises suspicion doubting the adoption.

1974(1) C.W.R Page 403- Bauri Dei & others (V) Dasarathi Sahu and others:-

Hindu Law-Adoption-Evidentiary value of a document purporting to be an acknowledgment of adoption-Omission of the day or date of adoption in such a document is very vital -Deed of acknowledgment of adoption therefore looses all its significance.

25. In view of the propositions of law enunciated in the ratio of the decisions cited above by the learned counsels of both the side, the law on the score of adoption is well clarified that, in order to sustain an adoption in a suit filed by the adoptive parent like this case at hand against the adopted son (defendant)disputing the adoption in question, heavy burden lies on the defendant to establish the adoption by proving the ceremony i.e. giving and taking through legally admissible evidence. Because the said

ceremonies are the operative part, which transfer the boy (defendant) from one family to another. The defendant who is trying to sustain adoption is to prove the same by making free from suspicion and fraud and should be consistent and probable as to leave no occasion for doubting its truth.

26. The law has also been further clarified in the said decisions that, creation of documents are not substitute of the fact of giving and taking and the said documents can not be considered as proof of adoption. Validity of adoption depends upon the proof of various facts with compulsory proof of giving and taking ceremony. Hundred documents cannot substitute the proof of formalities by which adoption is required to be established. But once an adoption is established, status of an adopted son cannot be revoked by any subsequent instrument. Because a valid adoption once made cannot be cancelled.

27. So, by keeping the above principles of law in mind, this point is required to be discussed and analysed to ascertain, whether the defendant has become able to establish lawfully about his claimed status as adopted son of the plaintiffs, when the same is under challenge by them (plaintiffs) in the suit.

In order to discharge the above onus, which lies upon him (defendant), he (defendant) has relied upon the deed of acknowledgment of adoption vide Ext.2.

28. On perusal of the said deed vide Ext.2, it appears that, the said deed does not contain or whisper about any day or date of adoption including specific ceremony to that effect. For which in view of the ratio of the decisions cited above reported in (2002) II Civil Law Times (S.C.) 19, Civil Appeal No. 1172 of 1980 (S.C.) Decided on 01.08.1996 (1995) C.L.T. 837 and 1971(I) CWR 403, the said deed vide Ext.2 looses its significance.

29. That apart, the said deed vide Ext.2 reveals that, the name of plaintiff No.1 has been indicated in the school as the father of the defendant, as, he (plaintiff No.1) has admitted him(defendant) into the school for his education. But the evidence of the own witness of the defendant, i.e. D.W.4 (Anupama Panigrahi) who is the mother of the said defendant has contradicted the same in para-7 of her deposition i.e. in her cross-examination by stating that, in the school admission Register her name and her husband's name i.e. Pravakar Panigrahi has been mentioned as the father and mother of defendant. The above evidence of D.W. 4 is going to show that, there is no indication/mention of the names of the plaintiffs in the school admission Register of the defendant as his parent, which is ultimately falsifying the contents of Ext.2 in respect of admitting the defendant in to the school by the plaintiff No.1. The above falsification of the contents of Ext.2 through evidence of D.W.4 is invalidating the adoption in question of defendant by the plaintiffs.

The above conclusion finds support from the ratio of the following decision.

4 (2007) Civil Law Times – Page 215(Jharkhand)-Biswanath Mandal & others (V) Ajay Kumar Katri:-

Adoption -Even after alleged adoption, defendant No.1 continued living with defendant Nos. 2 & 3 (Natural parents)-Defendant Nos. 2 & 3(Natural parents) shown as parents in school register where defendant No.1 got admitted- Adoption invalid.

30. In addition to that, any of the witnesses to Exts.1 & 2 have not been examined in the suit as witness on behalf of the defendant to prove the adoption of defendant. There are two witnesses in Exts.1 & 2, they are Manoranjan Mishra and Sadananda Panigrahi. Out of them, Sadananda Panigrahi is the own elder brother of D.W.1. There is no plausible explanation on behalf of the defendant regarding the cause of non examination of the said witnesses to the Exts. 1 & 2, those are the kin relatives of the parent of defendant i.e. D.Ws. 1 & 4. Accordingly, non of the family members and relatives of D.Ws. 1 & 4, those were alive and supposed to attend the alleged adoption ceremony have been examined on behalf of the defendant to prove the adoption. Their non-examination without reasonable explanation is also ultimately creating doubt on the adoption of defendant.

The above conclusion finds support from the ratio of the following decision.

2010(II) O.L.R.-305 Nayana Sundari Bewa (V) Subash

Chandra Behera :- Adoption-Family members and relatives who were alive and were supposed to attend the adoption ceremony have not been examined- Held, the adoption is doubtful.

31. Likewise, there is no material in the record to show about any consent of the plaintiff No.2 at any point of time in taking defendant in adoption as her son. Because the signature or L.T.I. of plaintiff No.2(P.W.2) are not available on the Exts.1 & 2 to show her consent or voluntary willingness to adopt defendant. But inspite of non availability of the signature and L.T.I. of plaintiff No.2(P.W.2) on the Exts.1 & 2, the learned counsel for the appellant argued by stating about the drawing of presumptions in respect of her willingness and consent, for such adoption to her husband (plaintiff No. 1), as she (P.W.2) has deposed in para-3 of her cross-examination by answering to the question of the learned counsel for he defendant that, " She is pulling on well with her husband. There was never any dissension between her and her husband. Whatever they do, they do it jointly".

The above statement of the P.W.2 made in her cross-examination to the answer of the learned counsel for the defendant with regard to her pulling well with her husband (Plaintiff No.1) and doing works jointly, which are general and omnibus in nature will never lead to a presumption of her active consent to her husband for adopting defendant as son, when she (P.W.2) has been specifically stating in her evidence that, she has not at all

adopted defendant.

It is the well clarified position of law as per Section 7 of the Hindu Adoption and Maintenance Act that, A male Hindu like plaintiff No.1, if he has a wife living like Plaintiff No.2, he (Plaintiff No.1) cannot and shall not adopt except with the consent of his wife

The nature, import and meaning of such consent has been clarified by the Apex Court in Civil Appeal Nos.6373-6374 and 6375-6376 of 2002 between Ghisalal (V) Dhapubai (Dead) by L.Rs and others (decided on 12.01.2011) at para-20 that,

" If the adoption by a Hindu Male becomes subject matter of challenge before the court, the party supporting the adoption has to adduce evidence to prove that, the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that, wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the Husband to take a son or daughter in adoption.

But, even the presence of wife as a spectator in the assembly of people, who gathered at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the court can not presume the consent of wife, simply because, she was present at the time of adoption. The wife's silence or lack of protest on her part can not give rise to an inference that, she had consented to the adoption".

If the above principles of law regarding wife's consent in adoption will be applied to this case at hand, then the above evidence of the P.W.2 on which the defendant is relying can not be sufficient for drawing an inference under law that, plaintiff No.2 had ever given any consent for adoption of defendant, when she plaintiff No.2 (P.W.2) is denying through positive evidence to the alleged adoption. So, the defendant has failed to show any consent of the plaintiff No.2 to his alleged adoption.

32. The learned court below has also unambiguously stated in the impugned judgment at the time of answering issue No.5 that, the defendant has failed to establish the giving and taking of the defendant through any ceremony or otherwise.

As stated above when there is no material in the record either oral or through documentary evidence to establish and prove the giving and taking of the defendant in adoption, the above findings of the learned court below against the defendant cannot be held to be unreasonable.

So, the above circumstance i.e. the schooling of the defendant through admission by his father Prabhakar Panigrahi (D.W.1) contradicting the contents of Ext.2, non examination of any of the family members and relatives of the father of the defendant including the witnesses of Ext.2, absence of consent of plaintiff No.2 to alleged adoption, non proving of sine qua non of adoption i.e. giving and taking and non mention of date, time and

ceremony of adoption in Ext.2, the said documents vide Exts. 2 & 1 are not substitute or sufficient for the proof of alleged adoption of defendant by the plaintiff as their adopted son.

33. As stated above, when the learned court below has given his specific findings in the impugned judgment that, inspite of ample opportunities with the defendant during trial, he (defendant) failed to examine the witnesses of the deeds vide Exts. 1 & 2 i.e. Sadasiba Panigrahi and Manoranjan Mishra and the defendant has also failed to prove the giving and taking of the defendant in adoption through proper ceremony, then at this juncture, the petition dated 07.08.2003 of the appellant U/O.41 R.27 of the C.P.C. 1908 at this appellate stage for additional evidence to examine the witnesses of the said deeds vide Exts. 1 & 2 including the writer thereof i.e. Sadasiba Panigrahi, Manoranjan Mishra and Jay Ram Pala and to prove the photographs and negatives connected with the alleged adoption of the defendant is not entertenable. Because, when the learned Court below has negatived to the claim of the appellant in the impugned judgment by stating the grounds about the failure of the appellant/defendant to examine and prove the aforesaid witnesses and documents to whom he (appellant/defendant) is proposing to establish through additional evidence, then after his failure on that ground alongwith others, the same cannot be allowed again through additional evidence in order to patch up his lacunas. So at this juncture, it cannot be said that, not withstanding the exercise of due diligence, such evidence (to

whom he/defendant is proposing to adduce as additional evidence)was not within his knowledge or he (defendant) could not, after exercise of due diligence be produced when the impugned decree was passed by the learned Court below. For which, the petition dated 7.8.2003 U/O.41. R.27 of the C.P.C. for additional evidence (which was posted from 17.02.2011 to be decided finally with this appeal) of the appellant/defendant stands rejected.

34. So far, the 5th point i.e. whether the learned Court below had jurisdiction to declare the gift deed vide Ext.1 as void, which is indirectly touching to the title of the properties covered therein, when there is no specific prayer in the plaint in respect of the properties thereof is concerned ;

It appears from the contents of the gift deed in question vide Ext.1 that, the basis of execution of the same in favour of defendant was for no other reason, but the reason was that, the defendant was his adopted son. So, the intention of the so-called donor of the gift deed in question vide Ext.1 in executing the same in favour of the defendant was for the sole reason of adoption of defendant by him as an adoption son.

The law on date score has been highlighted in the decision reported in 80(1995) C.L.T.-Page-837- Raghunath Behera Vrs. Balaram Behera and another at para 10 that :-

"Transfer of Property Act, 1982 -Section 122- Gift-validity of – where a gift or bequest is made to a person, who is described as an adopted son, but such person is not adopted at all, or if he was adopted, his adoption is held to be invalid, validity of the gift or request depends upon the intention of the donor or testator to be gathered from the language of deed of gift or will and from the surrounding circumstances. But if the assumed fact of adoption is "the reason and motive of gift and a condition of it" then the gift cannot take effect, if the adoption is pronounced invalid. Since adoption has been pronounced to be not proved, the gift cannot take effect."

35. The law has also been further settled in the catena of decisions that where fraud is pleaded and proved as to character of a document, the said document in question is void, then in such a circumstance, there is no necessity under law to make specific prayer in the plaint in respect of the properties/ transactions made through the said document in question for seeking any relief in respect of the properties covered therein. Because, when the document in question like Ext.1 (the gift deed in question) was executed by describing the beneficiary thereof i.e. defendant as an adopted son of the so-called donor i.e. plaintiff No.1 and when for the reason stated above it is held that he was not the adopted son of the plaintiff No.1, then the said document vide Ext.1 is called and termed as void one, for which under the above circumstance there was no necessity for making specific prayer in the plaint by the

plaintiffs in respect of the properties covered under the said deed. It is very fundamental in law that, when a transaction like Ext.1 is attacked as being void, in that case, it is not necessary to ask for setting aside the transfer as a consequential relief, as the document itself containing the properties of so called transfer is a void and non-est. So, the learned Court below had jurisdiction to declare the gift deed vide Ext.1 is void, which is indirectly touching the title of the properties covered therein, even there was no specific prayer in the plaint in respect of the properties covered therein.

36. So far the sixth and last point i.e. whether the learned court below had jurisdiction to declare that, the alleged adoption was not acted upon without specific issue for the same is concerned;

In fact, there is no specific issue in the impugned judgment of the learned Court below to adjudicate, whether the defendant is the adopted son of the plaintiffs or not. But without any specific issue to that effect, the learned Court below has specifically stated in para-8 of the impugned judgment at the time of answering issue No.5 that, the moot question for adjudication of this suit hinges on the issue as to whether the defendant has been validly adopted by the plaintiffs. There after by assessing the materials on record i.e. oral and documentary evidence of both side, the learned court below has given finding in para No.12 of the impugned judgment that, the adoption of the defendant has failed and finally in the ordering portion of the judgment, the learned court

below has given declaration that, the defendant is not the adopted son of the plaintiffs.

As the above relief of declaration that, the defendant is not the adopted son of the plaintiffs has been given by the learned court below in the impugned judgment, for which, the learned counsel for the appellant has contended during argument and so also has filed a petition on dtd. 02.05.2006 U/O.41. R. 25 of the C.P.C. that, the above findings of the learned court below in the impugned judgment without framing any specific issue for the same has caused prejudice to the defendant seriously. Because, he (defendant) did not get any opportunity to plead and say on that finding as there was no specific issue for the same. For which, the suit is required to be referred to the learned court below U/O.41 R.25 of the C.P.C. after framing that specific issue to take additional evidence and also to give findings thereon and to sent the same to this Appellate Court for proper adjudication.

37. It is the settled propositions of law on that score that, mere non framing of specific issue will not be sufficient to remand the suit U/O.41 R.25 of the C.P.C., if the parties have led evidence and gone into the trial after knowing the real nature of the dispute involved. The appellate Court should consider whether the pleadings and evidence on record already covers the new issue proposed to be framed and could have come to its conclusion on that aspect.

38. Here, in this case at hand, it is very much clear from the pleadings of the parties i.e. plaint and W.S. that, the plaintiffs have specifically prayed for declaring that, the defendant is not their adopted son by making averments in the plaint in support of their such prayer and the defendant has pleaded in his W.S. to nullify the same and accordingly knowing fully well about the above real nature of dispute between them regarding the above prayer for declaration of status of the defendant, both parties have gone into the trial and have led evidence. So, the evidence available in the record are sufficient to cover the above proposed new issue sought to be framed as stated by the appellant/defendant. The learned Court below has given declaration in the impugned judgment in support of the prayer of the plaintiffs that, the defendant is not their adopted son by taking into account the aforesaid pleadings and evidence of the parties in that regard.

As stated above, when, there is final findings of the learned Court below in the judgement by declaring that, the defendant is not the adopted son of the plaintiffs as per the pleadings and evidence of the parties to that effect in absence of the specific issue in that regard, the said findings of the learned court below can not be held to be erroneous. For which, the question of remanding the suit for its adjudication by framing specific issue in that regard does not arise at all. Because the above propositions of law finds support from the ratio of the following decisions of Apex

Court and the said decisions are:-

2008(I) Apex.C.J. (Para-II) (S.C.) 473 Kannan (V) S.Pandurangam:- CIVIL TRIAL-Omission to frame an issue does not vitiates the trial, where parties went to trial fully knowing the rival case and led evidence in support of their respective contentions and to rebut the contentions of the other side. A.I.R. 1963 (S.C.) 884. A.I.R. 2003 (S.C.) 2985 & A.I.R. 1970 (SC) 61 relied on.

2005 (2) Apex.C.J. (Para-39) (S.C.) 471 Swami Atmananda (v) Sri Ramakrishna Tapavanam :- CIVIL TRIAL- Non framing of a particular issue- Parties going to trial knowing fully well the real issues involved and adduced evidence-Objection as to non-framing of a particular issue cannot be raised.

39. When it is held that, the evidence on record are fully covering the new issue sought to be framed and there is finding in the judgement covering the proposed issue, then at this juncture, there is no justification to allow the petition U/O.41. R.25 C.P.C. dated 02.05.2006 of the appellant (which was posted vide order dtd. 17.2.2011 to be decided with the appeal at the time of judgment). For which, the petition dated 02.05.2006 U/O. 41. R.25 C.P.C. of the appellant stands rejected.

40. On analysis of the facts and circumstances of the appeal as per the discussions observations made above, when it is held that, the findings and observations made by the learned court below in

answering the issues are not erroneous, for which, there is no justification under law for making any interference with the same in this appeal filed by the appellant. So, there is no merit in the appeal of the appellant. The same must fail. Hence, ordered.

O R D E R

The appeal filed by the appellant is dismissed on contest, but under the circumstances without costs. The impugned judgment and decree passed on dated 18.02.2003 and 06.03.2003 respectively in T.S. No. 389 of 1997 by the learned Civil Judge, Senior Division Bhubaneswar is hereby confirmed.

Pronounced the judgment, in open Court this the 16th day of May, 2014 under my seal and signature.

Dictated & corrected by me

Addl.District Judge,
Bhubaneswar.

Addl.District Judge,
Bhubaneswar