HEADING OF DECISION IN CIVIL SUITS

IN THE COURT OF 1st ADDL.SENIOR CIVIL JUDGE,
BHUBANESWAR,

PRESENT:- ***Pranab Kumar Routray, LL.,M,***
1st Addl. Senior Civil Judge,
Bhubaneswar.

T.S. No.79/39 of 2010/1999

Smt. Anuradha Chand, aged about 40 years,
D/o Narayan Prasad Chand,
W/o Sri Banamali Bai,
of Qrs. No.IVR-11/2, Unit-I,
Ashok Nagar, Bhubaneswar,
P.S.- Capital, Dist.Khurda.

… **Plaintiff**

-**Versus**-

1. Narayan Prasad Chand, aged about 70 years,
S/o Late Suryananda Chand.
2. Nihar Ranjan Das @ Baya alias of Asheesbaran Chand,
aged about 31 years, S/o Suresh Chandra Das of
Village/P.O.- Makidia, Dist.Balasore, self
described as son of Narayan Prasad Chand.

Sl. No.1 & 2 both at present Plot No.65,
Goutam Nagar, P.O.Bhubaneswar-14,
P.S.- Badagada, Dist.Khurda

… **Defendants**.

3. Satyabhama Chand @ Dey, aged 44 years,
D/o Narayan Prasad Chand,
W/o Debendranath Dey of
Vill.Bagunai, P.O.Madhavnagar,
P.S./Dist.- Bhadrak.
4. Manorama Chand @ Pal, aged 38 years,
D/o Narayan Prasad Chand,
W/o Ramakant Pal of
At/P.O./P.S.- Tihidi, Dist.Bhadrak,
at present Puri Gramya Bank, Gania Branch,
At/P.O./P.S.- Gania, Dist.Nayagarh.

5. Yashodhara Chand @ Kuni, aged 36 years,
D/o Narayan Prasad Chand,
Plot No.65, Goutamnagar, Bhubaneswar-14,
P.S.- Badagada, Dist.Khurda.
6. Nirupama @ Kuni Chand @ Singh, aged 30 years,
D/o Narayan Prasad Chand,
W/o Akshaya Kumar Singh of
At. Brahmangaon, P.O./P.S.- Keonjhar,
Near D.D. College, Dist.Keonjhar.
7. Anusuya Chand @ Ani, aged 28 years,
D/o Narayan Prasad Chand, describing herself
as D/o Nilakantha Pati, at present Plot No.65,
Goutamnagar, Bhubaneswar-14, P.S.-Badagada,
Dist.Khurda.
8. Jogamaya Chand, aged about 26 years,
D/o Narayan Prasad Chand,
Plot No.65, Goutamnagar, Bhubaneswar-14,
P.S.-Badagada, Dist.Khurda.

... **Proforma Defendants**.

COUNSEL APPEARED

For Plaintiff : Sri Nilamadhaba Brahma and Associates

For Defendants

Nos.1 and 2 : Sri Jagannath Das and Associates

Nos.3, 4 & 8 : Sri B.K. Panda

No.5 : Sri P.K. Das Mohapatra

Nos.6 and 7 : Ex parte.

DATE OF CONCLUSION OF ARGUMENT : 08-08-2014
DATE OF JUDGMENT : 28-08-2014

J U D G M E N T

This is a suit for declaration of the adoption deed executed by defendant no.1 on dtd. 17-04-1995 adopting defendant no.2 as his son to be invalid, in-operative and for

declaration of the Gift Deed no.6769/6770 dtd.30-12-1998 executed by defendant nos.1 in favour of defendant no.2 as invalid and in-operative and for a further declaration that both the documents have been executed by exercising fraud and undue influence.

2. Case of the plaintiff in brief is that the Plaintiff and Proforma defendant nos.3 to 8 are the natural daughters of defendant no.1. Defendant no.2 claims to be the adopted son of defendant no.1. The property as described in the Schedule A of the plaint hereinafter referred to as suit property appertaining to Hal Khata no.2046, Plot no.220, G.A Department Plot no.65, area of Ac.0.088 decimals of size 55' x 70' belonged to erstwhile Political and Services Department now called as G.A. Department, Govt. of Odisha was leased out in favour of defendant no.1 by virtue of Registered Lease deed no.638 dtd.31-01-1967. Defendant no.1 constructed a house on the suit land from the sale proceeds of ancestral properties of the plaintiff and proforma defendants. The plaintiff who entered into service in the year 1982 also contributed money towards the same. Though the property was in the name of defendant no.1 but he had thrown the same to common stock and it became joint hold property of defendant no.1 and his daughters. It is the further case of the plaintiff that defendant no.2 came to Bhubaneswar after passing Matriculation in 1981-82 for higher study and took shelter in their house being a relation. During his stay he developed illicit love affair with defendant no.7 which was resisted by the wife of defendant no.1 during her life time but after her death he ultimately got married to her. On 27-11-1998 the plaintiff got reliable information that her

father had applied for permission from G.A Department to transfer the suit land and building thereon in favour of defendant no.2. She further came to know that defendant no.2 has submitted a Registered Deed of Adoption on dtd.17-04-1995 claiming himself as the adopted son of defendant no.1 and also submitted one affidavit dtd.27-05-1995 changing his name to Ashish Baran Chand. So the plaintiff brought this matter to the knowledge of her other sisters and filed an objection on 29-12-1998 before the Sub Registrar. The plaintiff is challenging the adoption of defendant no.2 by defendant no.1 is not valid. It is pleaded that defendant no.2 in connivance with defendant no.7 taking advantage of the old age and unsound mind of defendant no.1 have managed to execute adoption deed and gift deed in order to grab the suit property. Hence, the plaintiff approached this Court with prayer to declare the deed of adoption and gift to be invalid and both the deeds have been executed by exercising fraud and undue influence.

3. The proforma defendant nos.3 and 4 filed a joint written statement supporting the case of the plaintiff. The proforma defendant no.5 filed a written statement and her stand is also same with the plaintiff. A separate written statement is also filed by defendant no.8 admitting all the claims of the plaintiff. No written statement filed by defendant nos.6 and 7 and they have been set ex parte. Defendant nos.1 and 2 are really contesting the case and have jointly filed a written statement challenging the suit on maintainability, cause of action, non-joinder and mis-joinder of parties. It is denied that acquisition of the suit land and construction of building thereon were made from joint family

nucleus by selling the ancestral properties of the grandfather of the plaintiff and proforma defendant nos.3 to 8. It is also denied that defendant no.1 has thrown the suit property to common stock. Defendant no.1 has admitted about the adoption deed made by him in favour of defendant no.2 and stated that the plaintiff and proforma defendant nos.3 to 8 have no locus standi to challenge the said adoption. It is admitted by defendant no.1 to have executed gift deed in favour of defendant no.2 but the same is not a fraudulent one and the plaintiff along-with Proforma defendant nos. 3 to 8 have no right to challenge the same. It is the specific case of defendant no.1 that the suit property is his self acquired property which was acquired and the house was constructed thereon from his salary, house building advance loan from Secretariate bank, loan from GPF, cyclone advance & private loan from friends and the plaintiff and proforma defendant nos.3 to 8 have not contributed anything for construction of the same. It is also averred that on his request Govt. accorded permission to alienate the suit land and accordingly the suit land was alienated by gift in favour of defendant no.2 and without any undue influence excercised by defendant no.2. It is also pleaded that plaintiff and Proforma defendant nos.3 to 8 have no right of preemption over the suit land. Hence, prayed for dismissal of the suit.

4. On the basis of the aforesaid rival pleadings the following issues have been framed.

I S S U E S

1. Whether the suit is maintainable ?
2. Whether there is any cause of action to file the suit ?

3. Whether the suit is bad for mis-joinder of necessary parties ?
4. Whether the suit is properly valued ?
5. Whether the gift deed executed by Defendant no.1 in favour Defendant no.2 is valid ?
6. Whether the adoption deed executed by Defendant no.1 by purporting fraud or undue influence ?
7. Whether the suit property is the exclusive property of the Defendant no.1 or acquired out of joint family nucleus ?
8. Whether Defendant no.2 is the adopted son of Defendant no.1 or son-in-law of the Defendant no.1 ?
9. Whether the mutation ROR of the suit property is valid as the same has been done during pendency of the suit ?
10. Whether the daughters of the Defendant no.1 are entitled to enjoy the suit property along with the Defendant no.1 as of right ?
11. What other reliefs, if any, the plaintiff is entitled ?

5. In order to prove the case the plaintiff has examined as many as six witnesses of whom she herself is P.W.1 ; her husband Banamali Bai is P.W.2 ; One Jamuna Chand, relation of the plaintiff is P.W.3 ; and Proforma Defendant no. 8

Jogamaya Chand is examined as P.W.4 ; one Swarupananda Chand, relation of the plaintiff is examined as P.W.5 and one Debendranath Dey, the brother-in-law and also the eldest son-in-law of Defendant no.1 is examined as P.W.6. Besides examining six witnesses the plaintiff has brought a number of documents into evidence of which Ext.1 is a letter to defendant no.1 from one Radharanjan Das ; Ext.2 is information obtained from Orissa State Bar Council ; Ext.3 is Voter list of 1995 in respect of village Makidia Dist. Balasore; Ext.4 is R.O.R of Khata no.484 of the year 1988 of Mouza-Karanjagouri ; Ext.5 is the letter of Govt. Girl's High School, Unit-1, Bhubaneswar ; Ext.6 is letter no.3242 dtd.07-05-2010 from P.I.O. / Asst. Secretary, Board of Secondary Education, Orissa, Cuttack ; Ext.7 is Voter list of Unit -1, Bhubaneswar of 1995 ; Ext.8 and 9 are letters of one Radharanjan to Anuradha ; Ext.10 is letter of defendant no.2 to defendant no.7 ; Ext.11 is Sale Deed no.16/1935 dtd.02-04-1935 ; Ext.12 is Sale Deed no.807/1994 of N.P. Chand ; Ext.13 is Sale Deed no.3653 dtd.30-05-1977 of Suryananda Chand and two others ; Ext.14 is Sale Deed no.3654 dtd.30-05-1977 ; Ext.15 is Sale Deed no. 3655 dtd. 30-05-1977; Ext.16 is the self maintained acquittance Register of Anuradha Chand, the plaintiff ; Ext.17 is R.T.I no.162/10/11437 of G.A. Bhubaneswar and Ext.18 is Deed of adoption of defendant no.2.

On the other hand, defendant no.1 has examined himself as the sole witness from the side of defendants. Some documents have been brought into evidence from the side of defendants of which Ext. A is the Evidence affidavit of D.W.1 wherein Ext.A/1 is his signature ; Ext.B is certified copy of lease

deed dtd.20-01-67 in respect of the suit land ; Ext.C is certified copy of Deed of Adoption dtd.17-04-95 ; Ext.D is the certified copy of Gift deed executed in favour of Defendant no.2 in respect of the suit land ; Ext.E is the Gazette Notification dtd.10-11-95 showing change of name of defendant no.2 ; Ext.F is the letter of G.A. Department furnishing information on the petition filed by Sailabala Dey and others ; Ext.G is the sanction order of house building advance granted by Finance Department in favour of defendant no.1 ; Ext.H is letter of Finance Department requesting Accountant General to issue Authority slip ; Ext.J is building plan approval letter of N.A.C., Bhubaneswar ; Ext.K is a short story book written by defendant no.1 ; Ext.L is a book on Homeopathy written by defendant no.1 and Ext.M is the certified copy of adoption deed in respect of adoption of defendant no.7 by one Nilakantha Pati.

With the aforesaid evidence, both oral and documentary, the issues as framed are to be answered.

F I N D I N G S

Issue no.7 :

6. This being the principal issue is taken up first for consideration. It is the case of the plaintiff that the suit land has been acquired and building has been constructed thereon from the joint family nucleus. Sale proceeds of the ancestral properties and some portion of income of plaintiff and some of the proforma defendants have been utilised for acquisition of the suit land and construction of building thereon. After acquiring the suit land in the name of defendant no.1, the same was thrown to common stock.

The plaintiff and proforma defendant nos.3 to 8 being the daughters and legal heirs of defendant no.1 have right, title and interest over the said property. Whereas defendant no.1 is claiming the suit property as his self acquired property.

7. 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. The burden of proving the suit property as joint family property primarily rests on the plaintiff. If it is established that there was a nucleus of joint family property and that nucleus was such that it might have utilised for acquisition of the disputed property the onus shifts on the person who claims the property as self acquisition to affirmatively establish that the property was acquired without any aid from the joint family property. In view of such legal propositions the evidence on record is to be scanned in order to find out whether the suit property is joint family property of the parties or the self acquired property of defendant no.1.

8. Keeping this principle in mind, it is required to delve into the evidence of the plaintiff in order to find out whether the plaintiff has discharged her burden of proving the suit property as joint family property. So it is to be examined carefully that whether the plaintiff could be able to establish that there was a nucleus in the joint family property and that nucleus might have been utilised for acquisition of the suit land and construction of the house thereon.

9. The evidence with regard to nucleus in the joint family property and the nucleus was utilised for acquisition of the suit land and for construction of house thereon adduced by the

plaintiff as P.W.1 in her examination-in-chief is available in para 7 and 10. She has deposed that though the lease of the suit land was granted in favour of her father but it was thrown to their common stock and was enjoyed by the joint family. She joined in service in July 1982 in Odisha Secretariate but her salary was thrown to joint family common stock till 1997 even though she got married in the year 1993. It is further deposed by her that she was paying her salary to her mother's accounts which was maintained by her father. Even when her husband comes and stays with her, she used to pay to her mother for his maintenance. Her father retired in the year 1986 but the govt. quarters allotted to her father was further allotted in her name and all of them continued to stay in the said quarter till the year 1997. In para 10, she has deposed that the construction of the building over the suit land gradually developed from the sale proceeds of ancestral property situated at village Makidia in the district of Balasore and her salary thrown to common stock was also utilised. She has been cross examined at length wherein she has admitted that the case land is a lease hold property obtained from the G.A. Department allotted in the name of her father on 31-01-1967. By that time she was aged about 8 to 9 years old and her father had already served about 12 years in the Department. She could not say as to the amount of premium paid by her father to G.A. Department. In para 27 of her cross examination, she admitted that she could not show any document or letter to substantiate that she used to give her salary to her father. In para 29, she has deposed that her grandfather are three brothers and the landed properties at village Makidia were recorded in the name of all the three brothers and the said lands were sold by her

grandfather. On being asked, she could not show any document to the effect that the consideration amount in respect of the said land sold was thrown into the joint family fund.

10. P.W.2, the husband of P.W.1 deposed in para 3 that after his marriage he found that the entire family of defendant no.1 were staying in one joint mess and joint stock in 1997. All affairs of the joint family were maintained from joint common stock and the mother Sairendhri Chand was managing everything from common stock under proper accounts with the advice of defendant no.1. P.W.3, cousin sister of the plaintiff deposed in para 7 of her examination-in-chief that the sale proceeds of the ancestral property at Makidia have been utilised in the case house till completion of second floor in the year 1994 and the plaintiff was also giving her salary to the joint stock. During cross examination, in para 13, she deposed that she did not have any personal knowledge regarding the property sold in Village Makidia and was unable to tell the names of the vendors, vendee or the date of sale of the property. She was also unable to tell about the recitals made in the sale deeds regarding the legal necessity for selling the land. Similarly, P.W.4, sister of the plaintiff deposed in para 7 of her examination in chief that the sale proceeds of their ancestral landed property were thrown to common stock out of which major amount has been utilised for the construction of first and second floor of the case house whereas the ground floor was constructed by loan and from joint family fund. She was cross-examined in this light in para 40 to 43 which reveal about sale of one piece of ancestral property by defendant no.1 in the year 1994 for consideration of Rs.20,000/- for her mother's thyroid surgery and

the sale deed is marked as Ext.12. In para 41 of her cross examination she deposed that she was five years old in 1977. When the other sale deeds vide Exhibits 13, 14 and 15 were confronted to her, she could not say as to in which way her grandfather and brothers of his grandfather spent / used the sale proceeds. She admits in para 42 that she has no knowledge about the loan taken by her father during his service period. P.W.5, cousin brother of plaintiff and defendant nos. 3 to 8, similarly deposed in para 3 of his examination in chief that the sale proceeds of the ancestral property and paternal property of the plaintiff and defendant nos. 3 to 8 disposed of by defendant no.1 and his father have been used for construction and development of the house on the case land. He was cross examined and during cross examination he could not say whether the suit property was purchased by defendant no.1 or he got it by lease. He also could not be able to answer when the construction of the house started and when it was completed because he was not born by then. He also could not say as to in whose name the suit property stands recorded. Similar is the stand of P.W.6, husband of the elder sister of the plaintiff with regard to utilisation of the sale proceeds of ancestral property in construction of the house over the suit land. The relevant portion of his cross examination in this regard is found in para 13 of his evidence. He could not be able to say about the extent of area sold by the father of defendant no.1 and his brothers jointly or about the consideration amount received from the sale. In 1994 defendant no.1 had sold land but he could not say about the amount of consideration received by defendant no.1.

11. From the evidence reflected above, it is found that the evidence of P.Ws.2, 3, 5 and 6 seems to be not helpful to plaintiff to substantiate her claim because P.W.3, the cousin sister of the plaintiff admitted that she has no personal knowledge about the ancestral property sold. Similarly P.W.2 who got married to P.W.1 in the year 1993 certainly must not have direct knowledge about utilisation of the sale proceeds of the ancestral property sold in 1977. The evidence of P.W.5 reveals that he is unable to say whether defendant no.1 has purchased the suit land or has got it through lease and he is also unable to say when the construction of the house over the suit land was started and when it was completed. Similarly, P.W.6 was unable to say about the extent of area of ancestral property sold and the consideration amount received from the same and therefore his evidence with regard to development of the suit house from the sale proceeds of ancestral property seems to be a parrot like statement in support of the plaintiff. So the rest oral evidence and the documents exhibited are the evidence from the side of plaintiff to substantiate the claim that acquisition of the suit land and its development has been made from joint family fund.

12. There is no dispute that defendant no.1 joined in service in the year 1957 and the suit land wasallotted to him through lease in 1967. By that time the plaintiff was only aged about 8 to 9 years and some of the defendants were not even born. The lease deed in respect of the suit land is Ext.B which reveals that the premium price paid was Rs.592.17Paise. It is claimed by the plaintiff that the land has been acquired out of joint family fund i.e. from the sale proceeds of the ancestral property situated at village Makidia and the documents with regard to sale of ancestral

properties are Exts.11 to 15. On perusal of those documents it is found that Ext.11is a sale deed executed in the year 1935 for a consideration amount of Rs.200/- executed by one Kajamani Dei and Harimani Dei for the purpose of clearing debt and purchase of land near their house at village Makidia. Exts.13, 14 and 15 are the sale deeds of the year 1977 executed by Suryananda Chand (Grandfather of plaintiff) and his two brothers. The consideration amount mentioned in Exts.13, 14 and 15 are Rs.2500/-, Rs.5000/- and Rs.2500/- respectively and the purpose for sale mentioned in all the sale deeds was to purchase land. So the total consideration amount in the three sale deeds comes to Rs.10000/-. Ext.11 discloses that the land at village Makidia was sold by two persons for a consideration of Rs.200/- in 1935 but there is no evidence in the present case to come to a conclusion that what was the share of the grandfather of the plaintiff out of the said consideration amount and the same was given by their grandfather to their father to purchase a land at Bhubaneswar in 1967. So far as Exts.13, 14 and 15 are concerned, the total consideration amount is Rs.10000/- wherein the share of the grandfather of the plaintiff comes to Rs.3333/-. But interestingly the property under Exts.13 to 15 were sold in the year 1977 but the suit land has been acquired by defendant no.1 in the year 1967. Therefore, it cannot be held that the suit land has been acquired from the sale proceeds of the ancestral properties which were sold in the year 1977. There is also no evidence that the consideration amount which fell into the share of the grandfather of the plaintiff came to the hand of her father i.e. defendant no.1 and also what was the legal necessity of the karta of the plaintiff's family during the relevant period. Neither the

plaintiff nor any of the witness from her side have specifically stated about the amount of consideration money received from the sale proceeds of ancestral property. Even for the sake of argument it is said that the aforesaid consideration amount has been utilised for the construction of the case house then also it is not possible to construct the said house with the paltry sum of Rs.3333/-. There is also no evidence that the consideration amount was thrown to joint family stock. So far as Ext.12 is concerned, this has been executed by defendant no.1 in the year 1994 for a consideration of Rs.20000/- and the recital reveals that the legal necessity was to meet the expenditure of marriage of his daughter. Even P.W.4, sister of the plaintiff has deposed that this consideration amount of Rs.20000/- was utilised for thyroid surgery of her mother. Hence considering the recital of Ext.12 and evidence of P.W.4, it cannot be held that the consideration money received through Ext.12 have been utilised for construction of house over the case land. Besides this, no accounts has been furnished by the plaintiff to substantiate her claim that she was paying her salary to her mother or any account was maintained in that respect that the same was utilised for development of the case house. There is even no definite pleading with regard to joint family funds, expenditure of joint family and the surplus which are the mandate of law. Hence, considering the available materials on record irresistible conclusion is drawn that the plaintiff could not be able to establish that there was a nucleus in the joint family property and that nucleus has been contributed for acquisition of the suit land and for construction of house thereon.

13. It is the pleading as well as the evidence of defendant no.1 that he joined in service in 1957 and retired in 1986 who was staying in the Govt. quarters allotted to him and shifted to the suit land in 1997 which was a double storeyed building and the suit house was given on rent till then. It is his evidence that the suit land has been acquired from his income and taking loan from Utkal Banking Co-operative Society. The house over the suit land has been constructed by availing house building advance loan from Govt. and loan from GPF Account and other advances like motor cycle, flood, cyclone loan advances etc. and so also taking loans from friends. In respect of house building advances, defendant no.1 has produced and proved Exts.G and H, letters from Govt. of Odisha in Finance Department to the Accountant General Odisha which reveals that that total loan of Rs.17280/- was drawn for construction of the house. Ext. H reveals that by 07-05-1968 defendant no.1 has already availed Rs.8424/-and has constructed upto roof level for which request was made to Accountant General for the release of third instalment amounting to Rs.4536/- for completion of the house. Ext.J is the letter of Notified Area Council, Bhubaneswar to defendant no.1 which reveals that the building plan submitted by defendant no.1 on 08-05-67 was approved and he was to complete the construction of the building within one year from 08-05-67. There is no dispute that defendant no.1 has acquired the suit land after eight years of joining in service. There is no dispute that he has started construction over the suit land immediately after acquisition. P.W.1 in para-24 has deposed that 1st floor of the house was completed in the year 1972 by availing loan. There is also no dispute that he

alongwith his family shifted to the case house in 1997. There is also material that he was getting rent from the said suit house till 1997 i.e. till he shifted there and thereafter the second floor was constructed by defendant no.2 to whom he gifted the suit land. There is no dispute about receipt of pension by defendant no.1. Hence, it is not only found that the plaintiff has failed to prove about the nucleus in the joint family and utilisation of the same for acquisition of the suit land and construction of the house but also it is found that defendant no.1 establishes the fact that he acquired the suit land much prior to sale of ancestral property and also constructed the suit house up to first floor by availing loan and it is also before the sale of ancestral property. Under such circumstances it is safely held that the suit land with house thereon is his self-acquired property. Further, when the suit land is a lease hold property allotted in favour of defendant no.1 then in absence of the fact that defendant no.1 has waived or surrendered special right in that property by his own volition and expressed such intention the same cannot be said to have been thrown to the common stock.

14. In view of the aforesaid findings it is held that the suit property is not the joint family property of the parties but the exclusive property of defendant no.1. Accordingly, this issue is answered against the plaintiff.

Issue no.10 :

15. This issue relates to the rights of the daughters of defendant no.1 to enjoy the suit property alongwith defendant no.1. When it is already held that the suit property is the exclusive property of defendant no.1 and it has not been thrown to

common stock, the daughters of defendant no.1 can not claim right to enjoy the suit property alongwith Defendant no.1. This issue is answered accordingly.

Issue no.8 :

16. This is another vital issue. It relates to adoption of defendant no.2 by defendant no.1. It is the claim of the plaintiff that defendant no.2 is not the adopted son of her father defendant no.1 rather defendant no.2 after passing Matriculation in 1981-82 came to Bhubaneswar for higher studies and took shelter in their house being a relation but he developed illicit love affair with defendant no.7 which was resisted by their mother during her lifetime. The plaintiff also came to know that one Adoption Deed has been executed on dtd.17-04-95. The plaintiff is challenging the adoption and claims it to be invalid. On the other hand, defendant nos.1 and 2 have taken their stand in the Written Statement filed jointly admitting execution of the adoption deed but averred that the plaintiff and defendant nos.3 to 8 have no right to challenge the said adoption and further claim that the adoption is a valid adoption in the eye of law.

17. Law is well settled that the person who seeks to displace the natural succession to property by claiming an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. The evidence in proof of adoption should be free from all suspicion of fraud and consistent and probable as to give no occasion for doubting its truth. Nonetheless, the fact of adoption must be proved on the same way as any other fact (Madhusudan Das-Vs.-Narayani Bai in AIR 1983 SC 114). In view of these guidelines, in the present case,

burden is on defendant nos.1 & 2 to prove the fact of adoption. Defendant no.2 has not been examined. The only witness examined from the side of the said defendants is defendant no.1 as D.W.1 who by leave of Court adduced evidence prior to the plaintiff. Defendant no.1 examining himself as D.W.1 tries to prove the fact of adoption mainly through two documents. Ext.C, certified copy of deed of adoption executed on dtd.17-04-95 and Ext.E, Gazette Notification of dtd.10-11-1995 wherein defendant no.2 has changed his name from Nihar Ranjan Das to Ashis Baran Chand.

18. D.W.1 in his examination-in-chief filed in shape of affidavit has deposed only one sentence in para 10 as regards to taking in adoption to defendant no.2. He has deposed that he has executed Deed of Gift and Adoption in favour of defendant no.2 after fully understanding the contents thereof and that he was quite capable and was also in fit state of physical and mental health at the time of execution of gift deed as well as adoption deed. Besides this single sentence he has not deposed anything about taking in adoption to defendant no.2. He has brought certified copy of the deed of adoption dtd.17-04-95 into evidence as Ext.C. He has also proved the Gazette Notification Dtd.10-11-1995 marked as Ext.E showing change of name of defendant no.2 from Nihar Ranjan Das to Ashis Baran Chand. He was subjected to cross-examination by the plaintiff with regard to adoption. The relevant portion of his cross examination in this regard is available in para 24, 26, 27, 28 and 29 of his evidence. In his cross examination, when suggestion was given that Ext.C is not a deed acknowledging adoption but a deed of adoption, the said witness denied to the suggestion and says that Ext.C is the deed acknowledging adoption. It is deposed

by him that defendant no.2 was aged about 28 years on the date of registration of Ext.C. His evidence reveals that his wife died in the year 1994. In para 24, he has deposed that prior to death of his wife there was no discussion with her regarding adoption of a son. In the same para he has further stated that when his wife expired, the son of his brother Patitapabana Chand namely Babu administered " Mukhagni " and he performed the Sudhikriya. In para 27 it is stated that at the time of execution of the deed of acknowledging adoption, the natural father and mother of defendant no.2 were alive and they are still alive. In the same para, he has deposed that on 14-01-73 he adopted defendant no.2 as his son and also deposed as to who were the persons present at the adoption ceremony which was performed in his native place. It is deposed by him in para 26 that in the year 1973 defendant no.2 stayed in his quarter to prosecute study. In the same para he has further deposed that defendant no.2 is the son of his brother in law and after passing Matriculation from his Village School he came and stayed with him (defendant no.1) and prosecuted his study i.e. I.A., B.A., Law and Marine Engineering Course.

19. In the present case, as per the defendants Ext.C is a deed acknowledging adoption and not a deed of adoption. It is the evidence of defendant no.1 that the original of Ext.C was with him but reason best known to him as to why the original has not been produced. Neither his signature nor the signature of the natural father nor the attesting witness has been proved. The plaintiff is challenging the adoption. So the defendants should have produced the original of Ext.C and should have proved the signatures of himself, the natural father and also the attesting

witnesses. It is worthwhile to mention that the said defendants should have also examined the natural father who is alive to prove the fact of adoption and also to lead evidence on giving & taking ceremony. So far as Ext.E is concerned, it has not been clarified as to why the surname of defendant no.2 was not changed till the year 1995 though it is claimed that adoption was made in 1973. From this much of material, it appears that the said defendants have failed to prove that defendant no.2 was taken in adoption by defendant no.1 but relying on some authorities of law it is forcefully argued from their side that the adoption is valid in view of execution of Ext.C, a registered document unless and until the plaintiff disproves the fact of adoption. Learned Counsel for the defendants in course of argument forcefully contended that from the evidence of D.W.1 and pleadings in plaint it is proved that D.W.1 (defendant no.1) voluntarily executed the deed acknowledging adoption wherein he has admitted the factum of adoption and therefore such an admission should be given its full weight and the fact of adoption as well as its validity taken to be established.

20. The decision relied on by defendant nos.1 and 2 reported in 1961 (Vol-III) OJD-196 between Agani Bewa-Vs.-Bhaskar Mallick, it is contended that in the said decision it has been held by the Hon'ble Court that " there cannot be any better evidence of the adoption than the deed executed by the adoptive father himself. Where, thus, a deed is executed by a person stating that a valid adoption had already taken place, such an admission should be given its full weight in the absence of evidence showing that the admission is untrue or was made by mistake or

circumstances and the fact of adoption as well as validity must be taken to be established ". Other decision relied on by him is Volume XXXVII (1971) CLT 587 at page 589 wherein it is held that " *where there is a registered document evidence of adoption, the presumption has to be drawn in favour of adoption and it is then for the person disputing the adoption to disprove that no adoption has been made under the Act* ".

21. It is worthwhile to mention that deed of adoption and a deed acknowledging adoption are two different documents. In the case at hand, the only document relating to adoption is Ext.C, certified copy of a registered document. Its nomenclature is written as ' Deed of Adoption '. It is contended on behalf of defendant nos.1 and 2 that Ext.6 is not a deed of adoption rather a deed acknowledging adoption because the contents of Ext.C clearly reveals that Defendant no.2 was taken in adoption on dtd.14-01-73 and this deed is executed on 17-04-95 acknowledging the said adoption. Learned Counsel for the plaintiff forcefully contended that Ext.C cannot be treated as deed acknowledging adoption because it has been reflected in the said deed that from the execution of that deed onwards the adopted child will succeed to the estate of the adopted father and will take the title of the adopted father instead the title of the natural father. It is also contended by him that it is mentioned in the said deed that the adopted child will be taken care of and will be brought up as the natural born son of the adopted father. On perusal of Ext.C, it is found that the above facts submitted by learned counsel for the plaintiff by writing in Ext.C. But however, on careful perusal of the

entire contents it is found that Ext.C is not a deed of adoption but a deed acknowledging adoption with defective drafting.

22. It is further argued from the side of defendant nos.1 and 2 that Ext.C be considered as a deed acknowledging adoption and it is being a registered document relating to adoption, as per Section 16 of the Hindu Adoptions and Maintenance Act, 1956, the Court shall presume that adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

23. Section 16 of Hindu Adoptions and Maintenance Act speaks thus " *Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved* ".

24. The meaning of the term ' shall presume ' is found in Section 4 of the Indian Evidence Act. It has been provided that " wherever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved and until it is disproved ". Under Section 3 of the Evidence Act " A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist ". In the decision reported in XXXVII CLT 587 cited supra which is relied on by the learned counsel for

the defendants, it is also said that the rule in Section 16 of the Act is not one of a mere statutory presumption which can be rebutted in the ordinary manner of rebuttal but the presumption has to be dislodged by disprove of the fact.

25. Now it is to be seen as to how the plaintiff has tried to disprove the fact of adoption. It is the pleadings as well as the evidence from the side of plaintiff that there was no adoption of defendant no.2 by defendant no.1. It is the further stand of the plaintiff that no giving and taking ceremony has been proved by the defendants. It is the pleadings and also the evidence of the plaintiff that defendant no.2 is her relation who had come to Bhubaneswar after passing Matriculation in 1981-82 from Makidia High School and stayed with her family for prosecuting higher study but he developed illicit relationship with defendant no.7 (sister of the plaintiff) which was opposed by her mother. This evidence gets strength from the evidence of defendant no.1 as D.W.1 who has admitted in his cross-examination in para 28 that he had no discussion with his wife regarding adoption of a son before her death. When it is claimed that adoption was taken place in the year 1973 and it is a fact that the wife of defendant no.1 died in the year 1994 then as to how the wife of defendant no.1 was unaware about such adoption. This shows that the wife of defendant no.1 had no consent for such adoption or no such adoption had taken place in 1973.

26. The plaintiff has further endeavoured to disprove the fact of adoption through Ext.6 which is information given by Board of Secondary Education to Banamali Bai, husband of the plaintiff. This document shows that defendant no.1 passed

Matriculation from Olmara High School in 1982 wherein his father's name is shown as Suresh Ch. Das. So question arises, if defendant no.2 was given in adoption to defendant no.1 in the year 1973 when he was aged about 7 years then how the name of his natural father appears as his father's name in the High School Examination Certificate. In the decision reported in L. Devi Prasad (Died) by LR.s.-Vs.- Smt. Triveni Devi / Manu / S.C. / 0354/ 1970 it has been observed by the Hon'ble Apex Court that " entry in School Admission Register is a very important piece of evidence and it has considerable value because in most of the cases it is in contemporaneous to the date on which adoption is claimed." Considering Ext.6 this Court is at a loss to understand if defendant no.2 was given in adoption in 1973 then how the name of his natural father appears in the High School Certificate as his father. Besides this, there is no dispute that defendant no.1 has been staying with his family at Bhubaneswar since 1960. If he has taken in adoption to defendant no.2 in 1973 then why defendant no.2 was prosecuting his study by residing at his native place in the district of Balasore till completion of High School.

27. The plaintiff has also endeavoured to disprove the fact of adoption by bringing some documents into evidence. Ext.3 is the Voter list prepared in the year 1995 in respect of Jaleswar Assembly Constituency for village Makidia i.e. the native place of plaintiff and defendants. This document reveals that the name of defendant no.2 as Nihar Ranjan Das appears against Sl. no.159, House no.49 wherein his father's name is mentioned as Suresh Das. Similarly Ext.7 is the Voter list of the year 1995 prepared for Bhubaneswar Constituency for Village Bapuji Nagar

and it reveals that name of defendant no.2 appears against Sl. No. 183 as Nihar Ranjan Das son of Suresh Das. It is contended that if defendant no.1 has been adopted in the year 1973, then how in the Voter list prepared in the year 1995 his title was not changed and Suresh Das, his natural father has been shown as his father. On this context it can be safely said that so far as Voter's list is concerned, Electoral Roll being a public document is admissible in evidence and it is not necessary to prove source of information on the basis of which facts stated in the Roll were recorded nor is it necessary that the person who prepared Electoral Roll has to be examined. This apart, the defendants are not disputing the entry in the said voter lists. So, question arises if defendant no.2 was taken in adoption by defendant no.1 in 1973 then under what circumstances in the voter list prepared in the year 1995 the name of defendant no.1 does not appear as the father's name of defendant no.2.

28. The further attempt of the plaintiff to disprove the adoption is the marriage taken place between defendant no.2 with defendant no.7. It is not disputed that defendant no.2, the adopted son of defendant no.1 has got married to defendant no.7, the natural daughter of defendant no.1. It is claimed by the plaintiff that there was disturbance in the family relating to the illicit love affair between defendant no.2 and defendant no.7. The plaintiff has filed the letter written by the brother of defendant no.2 to defendant no.1 in the year 1991 vide Ext.1 and contends that contents of the letter reveals about such relationship. It is also claimed that how can an adopted son of a person can marry to the said person's natural daughter and hence defendant no.2 is not the

adopted son of defendant no.1 rather his son in law. It is contended on behalf of the defendants that defendant no.2 is the adopted son and not son in law of defendant no.1 because he got married to defendant no.7 after defendant no.7 being adopted to one Nilakantha Pati. The plaintiff has challenged the validity of adoption of defendant no.7. Further discussion on this point is not necessary as it is not the subject matter of dispute. Be that as it may, it is gathered from the materials on record that defendant no.2 has married defendant no.7.

29. From the aforesaid discussion it is well found that the plaintiff could be able to disprove the fact of adoption of defendant no.2 made in 1973. This apart, when it is available in evidence on record that the natural father of defendant no.2 is alive then he should have been examined from the side of defendants to prove the fact of adoption. Other persons present at that time should also have been examined. There is absolutely no evidence on record about giving and taking ceremony. In absence of such evidence and considering the aforesaid evidence laid by the plaintiff in disproving the adoption, irresistible conclusion is drawn that defendant no.2 is not the adopted son of defendant no.1 but as he married to defendant no.7, hence, he is son-in-law of defendant no.1.

Hence, issue no.8 is answered accordingly.

Issue no.6 :

30. So far as execution of deed acknowledging adoption vide Ext.C under fraud and undue influence is concerned, it is the claim of the defendant no.1 that he executed the deed in fit state of mental condition. In order to prove his fit state of mental

condition he has produced and proved two books written by him vide Exts.K and L. Ext.K is a short story book written by defendant no.1. Ext.L is a book on Homeopathy practice published in the year 2013-14 written by defendant no.1. It is also admitted by the plaintiff in her evidence in para 26 that her father (defendant no.1) used to write which means he is a writer and admits the fact that her father has written one book by the name " Galpa Kumuda " vide Ext.K and also admitted about Ext.L and publication of both the books. Hence, from the materials available on record inference is drawn that defendant no.1 was in fit state of mind till the year 2013. So, the plea taken by the plaintiff that defendant no.1 was not in fit state of mind and taking advantage of this, defendant no.2 could get executed Ext.C is not sustainable. This apart, fraud is to be specifically pleaded and proved. There is no specific pleading of the plaintiff nor evidence from her side that as to how defendant no.2 practised fraud on defendant no.1 for execution of Ext.C. Hence, it is held that Ext.C has not been executed by practicing fraud and undue influence by defendant no.2. But this finding will in no way prove the fact of adoption of defendant no.2. by defendant no.1 as already held under Issue no.8.

Hence, this issue is answered accordingly.

Issue nos.5 and 9 :

31. This issue relates to the gift of suit property. It is the claim of the plaintiff that the gift executed by her father defendant no.1 in favour of defendant no.2 is not valid on the ground that the property is a joint family property and defendant no.1 has no right to alienate the same. Further,

defendant no.2 is not adopted son of defendant no.1 rather defendant no.2 in connivance with defendant no.7 managed to get executed the gift deed in his favour by practicing fraud and undue influence. On the other hand it is the stand of defendant nos.1 and 2 that the suit property is the leasehold property of defendant no.1 and Govt. has accorded permission for transfer of the same by gift in favour of defendant no.2 and accordingly the case property being the self acquired property of defendant no.1 has been validly alienated by gift in favour of defendant no.2.

32. There is no dispute that the suit land is a leasehold property allotted in favour of defendant no.1. It has already been held under issue no.7 that it is the self acquired property of defendant no.1. It is also held that defendant no.2 is not the adopted son of defendant no.1. There is no dispute that Govt. has accorded permission to defendant no.1 to alienate the suit property in favour of defendant no.2 inspite of objection by plaintiff and defendant nos3 to 8 and accordingly a tripartite agreement has been executed between defendant nos.1, 2 and Govt. and gift deed has been executed on dtd.28-12-1998. Defendant no.1 examining himself as D.W.1 has deposed in para 10 that he has executed a gift deed in favour of defendant no.2 after fully understanding the contents thereof and that he was quite capable and in fit state of physical and mental health at the time of execution of gift deed. Hence, the evidence of the donor itself reveals that there was no undue influence for execution of the gift deed. This apart, the allegation of plaintiff that gift deed has been executed by exercising fraud has not been specifically pleaded nor plaintiff has laid specific evidence to prove the same. So the

plaintiff is unsuccessful in proving that the gift deed has been executed in exercising fraud and undue influence. Now question comes, whether the gift in favour of defendant no.2 is in consonance with his adoption. If so, certainly the gift deed is invalid because adoption of defendant no.2 by defendant no.1 has already been declared invalid.

33. It is argued on behalf of defendant nos.1 and 2 that the gift deed has no connection with adoption deed and the application given by defendant no.1 to the Govt. for according necessary permission does not disclose that the suit property will be gifted to his adopted son. It is further argued that Govt. being a necessary party has not been impleaded as a party and therefore in absence of Govt. in the suit the gift deed cannot be nullified. At this juncture the case reported in Panchksharamma-Vs.-Chinnabbayi AIR 1967 SC 207 will be helpful to arrive at a just conclusion. It is held in the said decision that "*Where a gift or bequest is made to a person who is described as an adopted son, but such person was not adopted at all, or if he was adopted, his adoption is held to be invalid, the validity of the gift or bequest depends on the intention of the donor or testator to be gathered from the language of the deed of gift or Will and from the surrounding circumstances."*

34. Plaintiff has obtained copy of the entire file of Govt. relating to alienation of the suit property by defendant no.1 in favour of defendant no.2 and the same has been marked as Ext.17. The said file reveals that defendant no.1 has applied for transfer of the suit property in favour of his son Ashis Baran Chand. This shows that defendant no.1 had intention to transfer the suit land in favour of his adopted son. After several note sheets

finally Govt. accorded permission for transfer of the said land. The gift deed vide Ext.D does not reveal intention of the donor. The first party-transferer is defendant no.1 whereas second party-transferee is Ashis Baran Chand Son of Narayan Prasad Chand i.e. defendant no.2. Hence, this shows that the gift was executed by defendant no.1 in favour of none other than his adopted son defendant no.2. The original name of defendant no.2 is Nihar Ranjan Das but through an affidavit he has changed his name to Ashis Baran Chand which is published in the Gazette vide Ext.E dtd.10-11-1995. It has already been observed that if he was taken in adoption in the year 1973 then as to why his surname was not changed till 1995. Hence, the surrounding circumstances speaks that after execution of the Deed acknowledging adoption vide Ext.C defendant no.1 has applied to Govt. to accord permission for alienation of the suit property in favour of his adopted son. Hence, in view of the ratio of the aforesaid case and considering the surrounding circumstances, execution of gift deed by defendant no.1 in favour of his adopted son defendant no.2 is not a valid one. This apart, when defendant no.1 examined himself prior to evidence of plaintiff he should have brought clinching evidence. Onus is also on defendant no.2 to prove that the gift deed is a valid one. Gift deed not being a public document, no explanation has been made under what circumstances its certified copy has been produced instead of the original. No attesting witness have been examined. Had any attesting witness examined he could have thrown some light about the intention of the donor. Taking into consideration all these aspects the gift deed is not a valid one. The other question as regards to impleadment of Govt. as a party, it is

said that law is well settled that leasehold property is heritable and transferable and when Govt. has accorded permission there is no role of Govt. being a party in this suit. When it is already held that the gift deed in favour of defendant no.2 in respect of the suit property is not a valid one then certainly the Mutation R.O.R prepared during pendency of the suit basing on the gift deed is certainly not a valid one. Hence, issue nos.5 and 9 are answered accordingly.

Issue no. 4:

35. This issue relates to the valuation of the suit. The suit is valued at Rs.2,90,500/- for the land, for building Rs.2,90,100/ and for declaration of the deed of adoption is invalid. The suit is valued at Rs.200/-. The suit is filed in the year 1999. Considering the valuation of the suit which is filed about 15 years back, it is held that the suit is properly valued. Hence, this issue is answered accordingly.

Issue nos.1, 2, 3 and 11:

36. The plaintiff is claiming the suit property as joint family property and challenging the adoption deed and gift deed executed by defendant no.1 in favour of defendant no.2 on the ground of exercising fraud and undue influence by defendant no.2. The other children of defendant no.1 have been impleaded as parties. When Govt. has accorded permission for alienation of the suit property which is a leasehold property and when the said alienation by gift is challenged on the ground of invalid adoption and also on fraud and undue influence by defendant no.2, Govt. is not a necessary party in the suit. Accordingly, the suit is not bad for non-joinder or mis-joinder of parties. Considering the facts pleaded

by the plaintiff, there is cause of action to file the suit and in view of the aforesaid findings the suit so filed is maintainable. The plaintiff is not entitled for any other relief. Hence, these issues are answered accordingly.

Hence, it is ordered.

O R D E R

The suit be and the same is decreed on contest against defendant nos.1, 2, 3, 4, 5 and 8 and ex parte against defendant nos.6 and 7 but under the circumstances without cost. It is hereby declared that defendant no.2 is not the adopted son of defendant no.1 and the Gift Deed no.6769/6770 dtd.30-12-1998 executed by defendant no.1 in favour of defendant no.2 is invalid.

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, corrected and pronounced by me in the open Court today i.e. on the 28th day of August, 2014 under my seal and signature.

1st. Addl. Senior Civil Judge,
Bhubaneswar

List of Witnesses examined for the Plaintiff:

P.W.1 : Smt. Anuradha Chand

P.W.2: Banamali Bai

P.W.3: Jamuna Chand

P.W.4: Jogamaya Chand

P.W.5: Swarupananda Chand

P.W.6: Debendranath Dey

List of Witnesses examined for the Defendants :

D.W.1: Narayan Prasad Chand

List of Documents marked as Exhibits for the Plaintiff:

Ext.1: Letter of one Radharanjan to Defendant no.1 to Narayan Prasad Chand on dtd.23-10-91 ;

Ext.2: Information obtained from Orissa State Bar Council;

Ext.3: Ext.3 is the voter list of 1995 in respect of Village Makidia Dist.Balasore ;

Ext.4: R.O.R of Khata no.484 of the year 1988 of Mouza Karanjagouri ;

Ext.5: Govt. Girls' High School letter dtd.17-05-2010 ;

Ext.6: Letter No.3243 dtd.07-05-2010 from P.I.O. / Asst. Secretary, Board of Secondary Education, Orissa, Cuttack.

Ext.7: Voter list of Unit-1, Bhubaneswar in 1995 ;

Ext.8: Letter of Radharanjan to Anuradha ;

Ext.9: Letter of Radharanjan to Anuradha ;

Ext.10: Letter of Defendant no.2 to Defendant no.7 ;

Ext.11: Sale Deed no.16/1935 dtd.02-04-35 ;

Ext.12: Sale Deed no.807/1994 of Narayan Prasad Chand ;

Ext.13: Sale Deed of Suryananda Chand and 2 brothers bearing no.3653 of 1977 dtd.30-05-77 ;

Ext.14: Sale Deed of Suryananda bearing no.3654 dd.30-05-77 ;

Ext.15: Sale Deed of 1977 of two brothers bearing No.3655 dtd.30-05-1977 ;

Ext.16: Register of self acquittance of plaintiff ;

Ext.17: R.T.I 162/10/11437,General Administration Bhubaneswar ;

Ext.18: Deed of adoption of defendant no.2.

List of Documents marked as Exhibits for the Defendants :

Ext.A: Evidence affidavit of D.W.1 ;

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

Ext.B : Certified copy of lease deed dtd.20-01-67 in respect of the suit land ;

Ext.C: Certified copy of Deed of adoption dtd.17-04-95 ;

Ext.D: Certified copy of Gift deed executed in favour of defendant no.2 in respect of the suit land ;

Ext.E: Gazette Notification dtd.10-11-95 showing change of name of defendant no.2 ;

Ext.F : Letter of G.A. Department furnishing information on the petition filed by Sailabala Dey and others ;

Ext.G: Sanction order of house building advance granted by Finance Department in favour of defendant no.1 ;

Ext.H: Letter of Finance Department requesting Accountant General to issue Authority slip.

Ext.J: Building plan approval letter of N.A.C., Bhubaneswar ;

Ext.K: A short story book written by defendant no.1 ;

Ext.L: A book on homeopathy written by defendant no.1 ;

Ext.M: Certified copy of adoption deed no.1854 dtd.03-09-99 in respect of adoption of Anusuya Chand (defendant no.7).

1st. Addl. Senior Civil Judge,
Bhubaneswar