

**HEADINGS OF DECISION IN CIVIL SUITS****IN THE COURT OF 1ST. ADDL. SENIOR CIVIL JUDGE, BHUBANESWAR  
DISTRICT-KHURDA.*****PRESENT:- Pranab Kumar Routray, LL.M.,  
1st. Addl. Senior Civil Judge,  
Bhubaneswar.*****T.S.355/1999**

1. Raghunath Behera, aged about 52 years,  
S/o. Late Dharamu Behera,  
Vill.Jharapada, P.O./P.S.Laxmisagar,  
Bhubaneswar, Dist.Khurda.
  2. Ali Dei, aged about 65 years,  
W/o. Hari Behera,  
Vill.Giringa Matha Sahi,  
P.O./P.S.Balipatna, Dist. Khurda
- .....Plaintiffs.

-Versus-

1. Nisamani Bewa (dead).
2. Sabitri Behera, aged about 32 years,  
W/o. Late Balaram Behera,
3. Nilu Behera, aged about 20 years,
4. Silu Behera, aged about 18 years,  
Sl. No.3 to 4 are S/o. Late Balaram Behera,

All are of Village/P.O./P.S.Balianta, Dist. Khurda,  
now residing in the house of Kalandi Behera,  
Vill./P.O.Jharapada, Dist.Khurda

5. Dhobani Behera, aged about 44 years,  
W/o. Banamali Behera,  
Vill.Mahukhanda, P.O./P.S.Balipatna,  
Dist. Khurda.
6. Kapila Halli, aged about 47 years,  
S/o. Late Hadibandhu Halli,

7. Suresha Halli, aged about 19 years,  
S/o.Kapila Halli,
8. Biswa Ranjan Halli, aged about 18 years,  
S/o. Kapila Halli,

Sl. No.6 to 8 are resident in Vill.Jharapada,  
P.S./P.O.Laxmisagar, Dist.Khurda.

9. Tuni Behera, aged about 48 years,  
W/o. Late Pitabas Behera,
10. Baidhara Behera, aged about 25 years,  
S/o. Late Pitabasa Behera,
11. Balaram Behera, aged about 20 years,  
S/o. Late Pitabasa Behera,

Sl. No.9 to 11 are residents of Vill. Ramanagar  
Nuapatna, P.O.Telengapentha, P.S.Cuttack Sadar,  
Dist.Cuttack.

12. Nrusingha Behera, aged about 62 years,
13. Hari Behera, aged about 45 years,

Sl. No.12 and 13 are S/o.Radhanath Behera  
of Vill.Jharapada, P.O./P.S.Laxmisagar, Dist. Khurda.

14. Bijaya Behera (now dead)
- 14(a) Bharati Behera, aged about 40 years,  
W/o. Late Bijaya Behera,
- 14(b) Jagabandhu Behera, aged about 20 years,
- 14(c) Minati Behera, aged about 23 years,
- 14(d) Jhuna Behera, aged about 22 years,

Sl. No.14(a) to 14(d) are sons and daughter of  
Late Bijaya Behera of Vill. Jharapada,  
P.O./P.S.Laxmisagar, Dist.Khurda, now residing  
at present Vill.Kateni, P.O. Kantabada,  
Via. Chandaka, Dist. Khurda.

15. Madhusudan Patra, aged about 38 years,  
S/o. Late Gangadhar Patra,  
Vill. Jharapada, P.O./P.S.Laxmisagar,Dist.Khurda.

16. Ajaya Kumar Mohapatra, aged about 30 years,  
S/o. Sarat Kumar Mohapatra,  
Secretary, Lingaraj Housing Co-operative Society Ltd.,  
Vill. Chasakhanda, near Tribeniswar Bazar,  
P.O.Kuanpala, P.S.Salepur, Dist.Cuttack.
17. Lalatendu Nanda, aged about 41 years,  
S/o. Gajendra Nanda,  
Plot No.173, Zone-A, Sector-A,  
Mancheswar Industrial Estate, P.O. Mancheswar,  
Dist. Khurda.
18. Pramod Kumar Rath, aged about 40 years,  
S/o. Bhagirathi Rath,  
Plot No.4507/6, Sasana Padia,  
Old Bhubaneswar, Dist. Khurda.
19. Smt. Lina Sahoo, aged about 26 years,  
W/o. Prasan Kumar Sahoo,  
Vill.Debabhumi, P.S.Aska, Dist. Ganjam,  
at present Quarter No.29/1,  
Type-II, Unit-III, Bhubaneswar, Dist. Khurda.
20. Sarat Chandra Pati, aged about 43 years,
21. Kartika Chandra Pati, aged about 41 years,
22. Basanta Kumar Pati, aged about 29 years,
23. Sasikanta Pati, aged about 33 years,
24. Manas Ranjan Pati, aged about 29 years,

Sl. No.20 to 24 are sons of Sridhara Pati of  
Vill. EA-4, Stage-1, P.O.Laxmisagar,  
Dist.Khurda.

.....Defendants.

**COUNSEL APPEARED**

For the Plaintiffs : Sri R.M. Das & Associates

For Defendants : Sri A.K. Mohanty & Associates

DATE OF ARGUMENT ; 12.12.2013

DATE OF JUDGMENT ; 26.12.2013

## J U D G M E N T

This is a suit for partition and for other reliefs such as declaring the sale deeds executed by the co-sharers inter se and in favour of outsiders such as defendant no.14 to 24 and the sale deeds executed by defendant no.2 to 4 to outsiders during pendency of the suit to be illegal, void, inoperative and not binding on the plaintiffs, for exercising the right of pre-emption in respect of the properties sold away to strangers, for recovery of possession, deletion of the names of defendant nos.2 to 14 from the Record of Right in respect of Plot no.2035 as they are having no share over the said property and for other reliefs.

2. The case of the plaintiffs in brief is that they are Hindus governed under Mitakshyara School of law and the suit property mentioned in the schedules of the plaint are their ancestral undivided joint family properties. According to the plaintiffs, one Kirtan Behera is the common ancestor who died sometimes in the year 1947, so also his widow Suryamani died in the year 1978. Kirtan and Suryamani died leaving behind their three sons namely Dharamu, Kalandi and Arjuna. Dharamu died in the year 1983 and his widow Hara died in 1996. Both died leaving behind Raghunath (Plaintiff No.1) and Ali Dei (Plantiff No.2). Their second son Dhaneswar died during his childhood in the year 1957. Similarly Kalandi died in 1980 leaving behind his widow Nishamani (Original defendant No.1) and two daughters namely Dhobani (Defendant No.5) and Labani who died in the year 1984 leaving

behind her husband Kapila Hali (Defendant No.6), two sons namely Suresh (Defendant no.7) and Biswaranjan (Defendant No.8) and one daughter Jayanti. The third son of the common ancestor namely Arjuna died in 1990 leaving behind his only daughter Tuni (Defendant No.9) as his wife Fula had pre-deceased him in 1953.

So far as the properties described in the schedules of the plaint is concerned, it is the case of the plaintiff that the properties described in Schedule 2, 3 and 4 are joint family properties recorded in the name of Dharamu, Arjuna, Dhobani, Laboni and Nishamani. The properties described in Schedule 3 are illegally transferred among the branches of Kalandi and Arjuna and the properties described in the Schedule 4 of the plaint are sold away to outsiders i.e. to Defendant No.14 to 24. Schedule 5 properties are the properties which have been illegally transferred during pendency of the suit and in excess of the shares of the vendors. It is the further case of the plaintiffs that plaintiff no.1 was adopted by Kalandi during his lifetime and accordingly he was described as the son of Kalandi in all Govt. records including his Service Book. But immediately after death of Kalandi, his widow (Defendant No.1) with malafide intention executed a Registered Deed of adoption-cum-gift on 13.02.1981 in favour of Balaram Behera, the son of her brother Kumar Behera. Subsequently plaintiff No.1 filed O.S.No.46/81(1) in the Court of the Munsif, Bhubaneswar for declaring him as the adopted son of Kalandi and to declare that the adoption-cum-gift deed

executed by Nishamani in favour of Balaram Behera as illegal and void but ultimately the case went up to the Hon'ble High Court in Second appeal. His claim to be the adopted son of Kalandi was denied and the registered adoption deed-cum-gift executed in favour of Balaram was also declared to be void and illegal. The plaintiffs have also pleaded that Arjun during his lifetime filed T.S. No.03/86 in the Court of the Sub-Judge, Bhubaneswar for partition of the properties but his said suit was dismissed for default after filing of written statement. In that suit filed by Arjuna, the survivors of the branch of Dharamu and Kalandi admitted that the properties remained joint. It is alleged by the plaintiffs that Arjuna during his lifetime transferred some joint family properties by self and some properties in collusion with the widow and daughter of Late Kalandi Behera without the knowledge of the plaintiffs. It is further alleged by them that Defendant No.1 to 11 have alienated some of the joint family properties among themselves and to outsiders namely Defendant No.14 to 24 in excess of their respective shares. During such alienations, one Sabitri who is the daughter-in-law of the brother-in-law of Late Kalandi personated herself as the widow of Kalandi and executed some Registered Sale Deeds. Her two children Nilu Behera and Silu Behera identified themselves as the sons of Kalandi Behera during the alleged transactions. It is alleged that since the properties are still joint, the co-sharers have no right to alienate the same in favour of outsiders as the plaintiffs are entitled to purchase the same being co-sharers.

Defendant No.9, Tuni, the daughter of Arjuna and her two sons Baidhara and Balaram have executed Power of Attorney in favour of one Madhusudan Patra (Defendant No.15) so also Dhobani and Tuni have executed two agreements separately in favour of Defendant No.16, Ajay Kumar Mohapatra to transfer the suit properties. Though the plaintiffs approached the defendants not to sell or purchase the suit properties through illegal documents without right, title and interest over the same they did not pay any heed rather asked the plaintiffs to do whatever they liked. Hence, the plaintiffs have come up with the present suit for partition and other reliefs.

3. Defendant No.6 to 8 have filed a joint written statement so also Defendant No.20 to 24 but Defendant No.17 and 19 have filed separate written statements. While denying all the allegations and assertions of the plaintiffs Defendant No.6 to 8 have claimed prior partition of the disputed property.

Defendant No.20 to 24, the purchasers have also denied the facts pleaded in the plaint on the ground that the properties are already partitioned and as such the divided co-sharers alienated the properties which fell to their respective shares in their favour which they have been enjoying peacefully from the date of their purchase. The plaintiffs with malafide intention have filed the suit in order to harass them.

Defendant No.17 and 19 in their respective separate written statements have also challenged the maintainability of the suit filed by the plaintiffs on the ground

that the properties are already partitioned and the separate co-sharers while in exclusive possession and enjoyment of their respective shares alienated the same in their favour and since the date of their purchase they have been enjoying the same as lawful owners in possession thereof. They have also constructed residential houses over their purchased properties to the knowledge of the plaintiffs and are residing thereon peacefully. They have also taken the plea that the suit is under valued and suffers from non-joinder and mis-joinder of necessary parties. The suit is also barred by limitation as alleged by them.

4. With the aforesaid pleadings of the parties the following issues are settled:

#### **ISSUES**

1. Is the suit as laid maintainable ?
2. Have the plaintiffs any cause of action to file the suit ?
3. Whether the suit is barred by law of limitation ?
4. Whether the suit is bad for non-joinder or mis-joinder of necessary parties ?
5. Whether the suit is undervalued ?
6. Whether defendant no.12 to 14 have got any share out of suit plot no.2035 ?
7. Whether the R.S.Ds. Executed by defendant no.2 to 4 during pendency of the suit are legal, valid and binding on the plaintiff ?
8. Whether the suit properties are the ancestral joint properties and are liable for partition ?

9. Whether the inter se transfer of parts of suit properties among the different branches are legal and valid ?
10. Whether the transfers by the co-sharers in favour of defendant nos.14 to 14 are legal and valid ?
11. Whether the plaintiffs are entitled to repurchase the suit properties already alienated in favour of defendant no.14 to 24 ?
12. Whether the plaintiffs are entitled to the relief of recovery of possession of land illegally alienated by the co-sharers out of his share ?
13. To what other relief or relief(s) the plaintiffs are entitled ?

5. During trial of the suit, Defendant No.17 only contested and participated whereas others have been set exparte.

In order to prove their case, plaintiff No.1, Raghunath Behera examined himself as P.W.1 while P.W.2 Krushna Chandra Samantray is the other witness examined from their side. On the other hand, Defendant No.17, Lalatendu Nanda examined himself as D.W.1 while D.W.2, Russa Mohammed is the other witness examined from his side. Besides oral evidence, the plaintiffs have produced and proved documents which have been marked Exts.1 to 35. Similarly the documents admitted from the side of defendant No.17 are marked as Exts.A to F/2 respectively.

## FINDINGS

### 6. Issue No.3

Defendant Nos.17, 19 and 20 to 24 have pleaded in their respective written statements that the suit of the plaintiffs is barred by law of limitation without specifically stating the grounds for the same. No evidence has been led in that regard. However, in course of argument learned counsel for Defendant No.17 invited the attention of the Court to the fact that the plaintiffs being consenting parties to the R.S.D vide Ext.D executed by Tuni Bewa (Defendant No.9), D/o Arjuna Behera in favour of Defendant No.17 in respect of Ac.0.062 decimal of land out of Plot No.2085 under Khata No.363 of Mouza Jharapada admitted regarding execution of the R.S.D by Dhobani Behera, Kapila Hali and Nishamani Behera in favour of Defendant No.17 in the year 1993. Hence, when the plaintiffs were aware of execution of the sale deed in the year 1993 they should have come to the Court within a period of three years for setting aside the said document. In that view of the matter, their present suit of the year 1999 has been filed much after the prescribed period of limitation as such barred under the said statute. There is no material on record to establish that the plaintiffs were aware of the fact of execution of Ext.A in the very same year i.e.1993. It might be that they came to know about the same document prior to Ext.D. Hence, without specific evidence the said plea of the learned counsel is not acceptable. Thus, in absence of convincing evidence it cannot be held that the suit is barred by

law of limitation. Accordingly, this issue is answered in negative and in favour of the plaintiff.

7. **Issue No.5**

The defendants who have filed their W.Ss have taken a plea that the suit is undervalued. Though P.Ws.1 and 2 were cross examined at length on behalf of Defendant No.17, the only contesting defendant during trial but no specific question was suggested to either of them regarding the actual valuation of the suit land so that the Court would have been in a position to ascertain the correct valuation of the suit. This suit being one for partition the plaintiff has paid the fixed Court fee as prescribed. If the plaintiff succeeds in the suit for partition and when any of the parties would come up for final decree he or they has/have to file stamp papers for drawal of the final decree basing on the valuation of the respective shares of the parties. Further, in a suit for partition the valuation is calculated basing on the share of the plaintiffs as claimed. No evidence has been led from the side of the contesting defendant No.17 as to the actual valuation of the suit land. Therefore, considered from all angles there is no material before this Court to accept the plea and to come to a conclusion that the suit is undervalued. Hence, this issue is also answered in negative and in favour of the plaintiff.

8. **Issue No.4**

Defendant No.17 and 19 in their separate W.Ss have taken a plea that the suit suffers for non-joinder of necessary parties though Defendant No.17 has taken an

additional plea of mis-joinder of necessary parties and they have pleaded for dismissal of suit on that count. None of the defendants as aforesaid has elaborately pleaded as to who are the necessary parties to the suit the plaintiff has left out. As per the plaint, Defendant No.1 and 5 to 11 are the persons who are the descendants of the common ancestor Kirtan Behera through his three sons. The plaintiffs have appended the genealogy in Schedule 1 of the plaint. On perusal of the said genealogy it is found that Kalandi Behera had two daughters namely Dhobani (Defendant No.5) and one Laboni who having died is survived by her husband, two sons and a daughter. The plaintiffs have impleaded her husband and two sons as Defendant No.6, 7 and 8 but have left out the daughter Jayanti. As per the plaint, Kalandi died sometimes in the year 1980, and his other daughter Labani died in 1984. So, the husband and children of Labani are entitled to half share out of the  $\frac{1}{3}^{\text{rd}}$  interest of Kalandi Behera. Law is well settled that the persons having interest in the suit properties are necessary parties in a suit for partition and the suit is bound to fail in absence of any of the co-sharers. But in this case the branch of Labani has been sufficiently represented by her husband and two sons. If the Court is inclined to grant the relief of partition as prayed for the share of Labani will go to her legal heirs and successors. In that event her legal heirs and successors may effect a partition among themselves if they so like in future. Under the above circumstances non-joinder of Jayanti is not at

all fatal for the plaintiffs. Hence, the suit cannot fail in absence of Jayanti as the share of Laboni is well represented.

So far as the plea of mis-joinder of parties is concerned, as would be seen from the genealogy appended to the plaint, defendant no.9 Tuni the legal heir and successor of Arjuna is very much alive as such her two sons namely defendant no.10 and 11 have no interest over the suit properties. Hence, they are unnecessarily arrayed as defendants. But law is well settled that no suit shall fail for mis-joinder of parties. Thus, this issue is answered in favour of the plaintiffs and against the defendants.

9. **Issue No.6**

As per the Cause Title of the original plaint, defendant no.12, 13 and deceased defendant no.14, Bijaya Behera are sons of Raghunath Behera. As would be seen from the genealogy of the plaint, the said three brothers are no way connected to the family of common ancestors Pritam Behera. As such are not at all co-sharers in respect of the properties left by the said common ancestors. There is also no evidence on record that the said three brothers have acquired any property of the common ancestors or his legal heirs or successors. On perusal of Ext.3, it reveals to Hal Khata no.413 of Mouza Jharapada, Plot no.2035, Ac.0.055 decimals of land which has been recorded in the name of defendant no.12 to 14 alongwith Dharamu Behera, Arjuna Behera, both sons of Kirtan Behera, Dhobani Behera and Labani Behera both daughters of Kalandi Behera and Nisamani Behera wife of

Kalandi Behera. In this connection Ext.35 which is not final R.O.R in respect of Plot no.2035 is very much material. This document discloses that Hal Plot no.2035 corresponds to Sabik Plot no.1656 and 1657 under Sabik Khata no.252. Ext.34 is the certified copy of Sabik Khata no.252 in the name of Dharamu Behera, Kalandi Behera and Arjuna Behera sons of Kirtan Behera in respect of a total area of Ac.1.953 decimals of land covering several plots including Sabik Plot no.1656 and 1657. Ofcourse one application was filed by plaintiff no.1 before the Settlement Authority in Objection Case no.4817 challenging recording names of defendant no.12 to 14 in respect of Hal Plot no.2035. There is nothing on record to show that as to how defendant nos.12 to 14 acquired any interest over the said plot to justify inclusion of their names alongwith the co-sharers in respect of the said plot. Ofcourse the result of the aforesaid objection case is not known to this Court as no further material has been placed by the plaintiffs. But basing on Ext.34 it can be safely concluded that defendant nos.12 to 14 have no semblance of right, title, interest and possession over any part of the land under Sabik Khata no.252 out of which Hal Plot no.2035 is a part. Therefore, it can be well concluded that defendant no.12 to 14 having no interest in Hal Plot no.2035, inclusion of their names in that respect is totally wrong. On the other hand, the names of the plaintiffs should have been recorded in their place representing the branch of Dharamu as name of Dharamu was recorded in Sabik Khata no.252.

10. On further examination of the documentary evidence adduced from the side of the plaintiffs, it is found that defendant no.13 and 14 alongwith defendant nos.1 and 5 executed a Registered Sale Deed vide Ext.15 in favour of defendant no.18, Pramod Kumar Rath alienating Ac.0.024 decimals of land out of suit plot no.2035 on 06.02.98. Thereafter they executed a registered deed of rectification vide Ext.18 to rectify the mistake i.e. correction of Khata no.'403' and '413'. As already held defendant nos.12 to 14 have got no interest over plot no.2035, hence alienation of land out of the said plot by defendant no.13 and 14 in favour of defendant no.18 is illegal and not binding on the plaintiffs and is liable to be set aside. Accordingly, this issue is answered in the negative and in favour of the plaintiffs.

11. **Issue no.7**

This issue relates to the challenge of the plaintiffs regarding the legality and validity of alienation of land belonging to the joint family by defendant no.2 to 4 on the ground that they are no way related to the joint family. Defendant no.2 is the widow and defendant no.3 and 4 are the sons of late Balaram Behera of village Baliana, Dist. Khordha. As per the plaintiff's case Kalandi Behera had adopted him as his son and accordingly his name was entered in all oblique papers such as school admission registers, service book etc. but after death of Kalandi his widow Nishamani, original defendant no.1 adopted her brother's son Balaram Behera in order to disown adoption of the plaintiff. The said Nishamani

had also executed a deed of adoption-cum-gift in favour of said Balaram Behera alienating part of the joint family property. The plaintiff no.1 had filed O.S. No.46/81 for declaring him as the adopted son of Kalandi Behera and to further declare that Balaram Behera was not the legally adopted son, so also to declare the deed of acknowledgment of adoption-cum-gift executed by Nishamani in favour of Balaram is null and void. The said suit went up to the Hon'ble High Court in Second Appeal No.46/1985 and it was ultimately declared that neither the plaintiff no.1 nor Balaram Behera are the adopted son of Kalandi Behera and the deed of acknowledgment of adoption-cum-gift was not a legal and valid document. Thus, Balaram Behera and after him his legal heirs and successors (defendant no.2 to 4) have no interest over any part of the properties belonging to joint family.

On examination of the documentary evidence from the side of plaintiffs, it is found that during pendency of suit the defendant nos. 2 to 4 have alienated the joint family properties to others and sometimes they alongwith defendant no.5, 6, 7 and 8 have alienated the properties originally belonging to the joint family taking advantage of the deed of acknowledgment of adoption-cum-gift in favour of their predecessor Balaram Behera. Their such alienations are under registered documents marked as Ext.23,26,27,28 and 29 in favour of persons not made parties in this case as lis pendence purchasers. Under Ext.23, they have alienated Ac.0.126 decimals of land out of Ac.0.378 decimals in

Plot no.216 under Khata no.363 of Mouza Jharapada as recorded under Ext.2. Under Ext.26, they have alienated Ac.0.035 decimals of land out of Ac.0.148 decimals in Plot no.1823 under Khata no.363 of Mouza Jharapada as recorded under Ext.2. Similarly under Ext.27, they have alienated Ac.0.035 decimals of land out of Ac.0.134 decimals in Plot no.1822 under Khata no.363 of Mouza Jharapada as recorded under Ext.2. Under Ext.28, they have alienated Ac.0.017 decimals of land out of Ac.0.051 decimals in Plot no.126/2375 under Khata no.363 of Mouza Jharapada as recorded under Ext.2 and under Ext.29, they have alienated Ac.0.005 decimals of land out of Ac.0.035 decimals in Plot no.188 under Khata no.362 of Mouza Jharapada as recorded under Ext.1.

12. Thus, in consideration of the aforesaid material on record defendant no.2 to 4 having no right, title and interest over any part of the properties alienated by them, the documents as executed by them either individually or alongwith others are illegal and void documents without passing of any title in favour of the lis pendence purchasers and those documents are liable to be set aside and those are also not binding on the plaintiffs. Thus, this issue is answered in negative and in favour of the plaintiffs.

13. **Issue no.8, 9, 10 and 11**

These issues are being inter-related are taken up together for the sake of convenience. Though the plaintiffs claim the suit properties to be the undivided ancestral joint

family properties but the contesting defendants who have filed their respective written statement have taken a common plea that the suit properties are already partitioned and the divided co-sharers being the owner in possession of separate specific properties have dealt with the same as they liked. Ofcourse there is neither any document nor any decree showing any partition of the suit properties. Law is well settled that a Hindu family is always presumed to be joint unless and until the contrary is proved. In a suit for partition, the party who takes the plea of prior partition is to prove the same. Both parties have produced and proved several registered sale deeds in this case to show alienation of portions of suit properties at different times. There has been inter se transfers so also transfers to outsiders who are in possession over the same. Under the above circumstances both oral and documentary evidence are to be carefully scrutinised to arrive at a decision regarding the status of the suit properties.

14. Exts.1, 2 and 3 are the original settlement R.O.Rs finally published in the year 1989 which discloses that the properties recorded in the name of the co-sharers. Ofcourse in respect of Ext.3 the name of defendants no.12 to 14 has been recorded which is already held to be illegal under issue no.6. None of the parties contesting the suit have filed rent receipts.

Ext.4 is the certified copy of the plaint in O.S.No.03/1986 of the Court of Sub-Judge, Bhubaneswar filed by Arjuna Behera son of Kirtan for partition of the properties recorded under Khata no.251,252 and 85 of Mouza Jharapada.

The said properties are described as per C.S Record of Right. This plaint of Arjuna Behera atleast shows that till filing of that suit the properties were not partitioned as claimed by him. Ext.4/a is the certified copy of Order no.33 dtd.18.06.1990 and 28.06.1990 which discloses that plaintiff Arjuna Behera died and no step was taken for substitution of his L.Rs and on that ground the suit was dismissed for default. So these documents atleast show that the properties of the joint family were not partitioned. On the other hand, the contesting defendant no.17 (who only contested the suit during trial as the other defendants who filed written statement did not contest the suit during trial) has relied on the certified copies of the registered sale deed filed by the plaintiffs such as Exts.5, 7, 10, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24 and 25 etc. wherein it has been mentioned that there was amicable partition of the properties of the joint family and the separated members of the said family being inclusive, separate and specific possession over their respective allotments had alienated the same not only among themselves but also to outsiders. On perusal of the said documents, it is found that those were executed from the year 1987 onwards even somewhere executed during pendency of the suit. In some of the documents, Arjuna Behera, the plaintiff of O.S.No.03/86 is also one of the executants. Though the documents are admitted into evidence but law is well settled that the contents therein are to be proved. In this case, defendant no.17 being only contesting has not made any attempt to prove the contents of the said documents regarding

prior partition as the burden lies on him to prove the said fact having stepped into the shoes of his vendors. So he has failed to discharge the said burden.

15. In course of argument, learned counsel for the defendant no.17 relied on Ext.21 and vehemently argued that this is a document i.e. the certified copy of the R.S.D executed by the plaintiff no.1 in favour of defendant no.18, Pramod Kumar Rath on 01.01.2000 wherein the plaintiff no.1 has sold away Ac.0.009 decimals of land out of total area of Ac.0.055 decimals in Khata no.413 of Mouza Jharapada (Ext.3). In the said document plaintiff no.1 has also admitted regarding prior partition of the properties belonging to the joint family though recorded jointly. That document was executed during pendency of the suit and this admission of plaintiff no.1 proves the case of defendant no.17 of a prior partition, as such there is no necessity for defendant no.17 to prove the said fact of prior partition which the plaintiff no.1 has already admitted. In reply to the said submission on behalf of defendant no.17, the learned counsel for the plaintiff submitted that the property sold away under Ext.21 has been described in Schedule 5 of the plaint and it is the specific case of the plaintiff that he himself has not executed the said document but the same was done by impersonation. Hence, he has prayed for the relief that the said sale is not binding on him and if that is not available the same should be recovered through the process of Court. The learned counsel for the plaintiffs also invited attention of the Court that the original of Ext.21 being in the possession of

defendant no.18, the purchaser in that document was called upon to produce the original but though he was duly noticed through the process of the Court to produce the original but he failed to do so, as such adverse inference is to be drawn. Had the original being produced by defendant no.18 the same could have been sent to the handwriting expert alongwith the undisputed signature of the plaintiff no.1 for comparison and in that event a clear picture could have been placed before the Court to arrive at a just decision. In this regard, the learned counsel further invited attention of the Court to the order dtd.03.05.2011 and thereafter which show that the plaintiffs took steps for production of the original of Ext.21 by defendant no.18. Under such circumstances, the claims of the plaintiffs that the sale deed (Ext.21) was not executed by him but by impersonation cannot be disbelieved altogether. He has taken all possible steps to establish the said facts as such he has discharged the burden. So without proper evidence from the side of the contesting defendant it cannot be held that there was prior partition of the joint family properties and plaintiff no.1 has admitted such prior partition.

16. The learned counsel for the defendant no.17 also placed reliance on Ext.D which is the R.S.D dtd.11.04.97 i.e. prior to the present suit executed by defendant no.9, daughter of Arjuna Behera in favour of defendant no.17 wherein the plaintiffs are consenting parties. In the said document there has been mention of prior amicable partition and further mention of sale of land to defendant no.17 under

Ext.A. So the plaintiffs were aware of prior partition and prior alienation of land in favour of defendant no.17. As consenting party the plaintiffs might not have objection to transfer of land in favour of defendant no.17 because law is well settled that in jointness a co-sharer can alienate his interest in the joint family property but the alienee cannot possess any specific property without partition. So, at this stage the plaintiffs may be estopped from challenging the alienation in favour of defendant no.17. But in absence of convincing evidence the recital regarding prior partition in Ext.D cannot be binding on the plaintiffs as the fact of prior partition has not been proved by defendant no.17 as discussed earlier. Further, mere recitals in some R.S.Ds executed by the other co-sharers cannot bind the plaintiffs nor the same can be treated as proof of prior partition especially when Arjuna Behera filed O.S. no.03/1986 for partition of the joint family properties. He cannot be allowed to blow hot and cold in the same breath he being one of the executants in some of the sale deeds mentioning prior partition. So it cannot be held that there was prior partition of the suit schedule properties rather the said properties are still joint.

17. So far as the plaintiffs claimed to repurchase the portions of the suit properties already alienated in favour of defendant no.14 to 24 is concerned, the plaintiffs cannot claim the said right in respect of properties sold in favour of defendant no.17 under Ext.A and B. So far as the alienations in favour of defendant no.14 to 24 are concerned, the plaintiffs

should have proved that the co-sharers who alienated the properties to the stranger purchasers had not given him an opportunity to purchase their undivided interest before alienating the same to strangers as per the provision of Section 22 of Hindu Succession Act, 1956. Except filing this suit the plaintiffs never question such alienation effected since the year 1987 and thereafter. This pre-supposes that the plaintiffs have implied consent to such alienation and at this stage he cannot claim such a preferential right. Ofcourse the alienation of the co-sharers to the strangers exceeding their respective shares cannot be held to be valid and binding to the plaintiffs rather their shares within their respective shares will be valid subject to Section 44 of the Transfer of Property Act. So while dismissing the claims of the plaintiffs for the right to repurchase it is held that the properties alienated in favour of defendant no.14 to 24 except defendant no.17 will be legal and valid subject to the respective shares of the alienating co-sharers and as per the provisions of the Section 44 of the T.P. Act. Any alienation by defendant no.2 to 4 exclusively or jointly with other co-sharers will not be valid as they have no interest over the suit properties as already held under issue no.7.

Further there are inter se transfer of properties among the co-sharers. The said transfers cannot be held to be invalid provided those are within the limits of the interest of the respective alienating co-sharers and subject to Section 44 of the T.P. Act. Thus, to sum up the alienation of the

co-sharers either inter se or in favour of strangers are to be within their respective shares and to be governed under section 44 of the T.P. Act otherwise the alienation in excess of share are held to be illegal and invalid without clothing the subsequent transferees with any title.

18. Since it has already been held in the foregoing paragraphs that the suit properties are still joint and the same being liable for partition the respective shares of the co-sharers are to be determined. There is no dispute to the genealogy given in the plaint. As per the same, common ancestor Kirtan Behera died in 1947 leaving behind three sons namely Dharamu, Kalandi and Arjuna each having 1/3rd interest in the properties left by Kirtan. Dharamu died in 1983 leaving behind the plaintiffs and his widow Hara who also died in 1986. So, the 1/3rd share of Dharamu will come to the hands of the plaintiffs. So far as the 1/3rd share of Kalandi, the other son of Kirtan is concerned, he having died in 1980 his said share will be inherited by defendant no.1, 5 and Labani and after the death of Labani in 1984 her share will be inherited by her husband, two sons namely Suresh and Biswaranjan (defendant no.7 and 8 respectively) and her daughter Jayanti.

Thus, out of the 1/3rd share of Kalandi, Nishamani (deceased-defendant no.1) will get 1/3rd, defendant no.5 will get 1/3rd and defendant no.6, 7, 8 & Jayanti will jointly get 1/3rd. In other words, deceased-defendant no.1 will get 1/9th, defendant no.5 will get 1/9th and

defendant no.6,7,8 & Jayanti will jointly get 1/9th out of the entire joint family properties. Ofcourse in case of alienation of properties by any of them will be adjusted out of their respective shares and not beyond that.

Now coming 1/3rd share of Arjuna Behera he died in 1990 leaving behind his daughter Tuni (defendant no.9) as his wife Phula predeceased in 1953. So, the 1/3rd share of Arjuna will come to the hands of defendant no.9. Any alienation either by Arjuna or after his death by defendant no.9 will be valid to the extent said 1/3rd share out of the entire joint family properties. Defendant no.10 and 11, the sons of defendant no.9 are unnecessarily joined as party defendants during the lifetime of defendant no.9. Any alienation by defendant no.10 and 11 exclusively will not be legal and valid, they having no interest as their mother (defendant no.9) is very much alive.

Thus, to sum up, it is held that the suit properties are the ancestral joint family properties and are liable for partition among the co-sharers as per their respective shares as determined above. The transfers by the co-sharers either inter se or to outsiders are held to be legal and valid to the extent of their respective shares and subject to the provisions of Section 44 of T.P. Act. The plaintiff is not entitled to repurchase the properties already alienated in favour of stranger purchasers for reasons as discussed earlier. Thus, issue no.8,9,10 and 11 are answered accordingly.

19. **Issue no.12**

The plaintiff has specifically pleaded that he had not alienated any joint family property in favour of defendant no.18 under Ext.21 as the Court has presupposed under facts and circumstances that the said document has been executed by some other person personating himself to be plaintiff no.1. The property sold away under Ext.21 is liable to come back to the joint family and for partition. If the said property falls to the share of the plaintiffs, they are entitled to recover the same from defendant no.18, if necessary through the process of the Court. Accordingly, this issue is answered.

20. **Issue no.1 and 2**

In view of the discussions in the foregoing paragraphs under issue no.3 to 12 this Court comes to hold that the plaintiffs being the co-sharers in respect of the suit schedule property have every right to claim partition particularly under peculiar circumstances i.e. transfers of portion of suit properties by co-sharers either inter se or to strangers. So, it is held that the plaintiffs have the cause of action to file the suit and the suit so filed for partition is maintainable under fact and law. These two issues are answered in favour of the plaintiffs.

Hence, ordered.

**ORDER**

The suit of the plaintiffs be and the same is decreed preliminary on contest against defendant no.17 and ex parte against other defendants but under the circumstances without any cost. It is hereby declared that defendant nos.2 to 4

and 12 to 14 have no connection with the joint family of the legal heirs and successors of Kirtan Behera and his three sons namely Dharamu, Kalandi and Arjuna. It is further declared that alienation of Ac.0.009 decimals of land out of Ac.0.055 decimals for Khata no.413 in mouza Jharapada in favour of defendant no.18 (under Ext.21) is not a legal and valid document and the same does not clothe the transferee with any title and the said property is liable for partition among the co-sharers. Defendant no.18 is hereby directed to deliver vacant possession of the said property to the joint family forthwith. The suit schedule properties are liable for partition wherein the plaintiffs have jointly got 1/3<sup>rd</sup> share, defendant no.1, 5, 6, 7, 8 and Jayanti have jointly got 1/3<sup>rd</sup> share and defendant no.9 has got 1/3<sup>rd</sup> share. Transfer by any of the co-sharers out of the suit properties will be legal and valid to the extent of his/her share and subject to the provision of Section 44 of the T.P. Act and will be adjusted accordingly at the time of actual partition by metes and bounds. Any alienation by defendant no.2 to 4 is held to be illegal and without conveying any title in favour of the transferees.

The parties are hereby directed to partition the suit properties as per their respective shares as determined above within a period of three months hence failing which any of them is at liberty to approach the Court to make the preliminary decree final through the process of Court.

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

The judgment is typed to my dictation by the Typist attached to this Court directly on my Official Laptop provided under E-Court Project, corrected and pronounced by me in the open Court today i.e. on the day of 26<sup>th</sup> December, 2013 under my seal and signature.

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

**LIST OF WITNESSES EXAMINED FOR THE**

**PLAINTIFFS:**

- P.W. 1 : Raghunath Behera  
P.W. 2 : Krushna Chandra Samantray

**LIST OF WITNESSES EXAMINED FOR THE**

**DEFENDANTS:**

- D.W.1: Lalatendu Nanda  
D.W.2: Russa Mohammed

**LIST OF DOCUMENTS MARKED AS EXHIBITS FOR THE**

**PLAINTIFFS :**

- Ext.1 : Hal R.O.R of Khata no.362 of Mouza Jharapada;  
Ext.2 : Hal R.O.R of Khata no.363 of Mouza Jharapada;  
Ext.3 : Hal R.O.R of Khata no.413 of Jharapada;  
Ext.4 : Certified copy of plaint in O.S.03/86;  
Ext.4/a : Certified copy of order dtd.18.6.90 and 28.6.90  
in O.S.03/86;  
Ext.5: Certified copy of R.S.D no.2512 dtd.11.3.87;

- Ext.6: Certified copy of R.S.D no.4802 dtd.13.5.87;
- Ext.7: Certified copy of R.S.D no.2572 dtd.01.6.93;
- Ext.8: Certified copy of Mutation case no.4359/93;
- Ext.9: Certified copy of Mutation case no.4360/93;
- Ext.10: Certified copy of R.S.D no.396 dtd.24.1.97;
- Ext.11: Certified copy of corrected R.O.R of  
Khata no.928/260;
- Ext.12: Computerised copy of corrected Khata no.363;
- Ext.13: Certified copy of registered agreement for sale  
bearing no.5337 dtd.29.10.97;
- Ext.14: Certified copy of agreement for sale no.523  
dtd.2.2.98;
- Ext.15: Certified copy of R.S.D no.631 dtd.06.2.98;
- Ext.16: Certified copy of registered general power of  
attorney no.459 dtd.06.3.98;
- Ext.17: Certified copy of R.S.D no.1692 dtd.27.3.98;
- Ext.18: Certified copy of corrected R.S.D no.3007  
dtd.03.6.98;
- Ext.19: Certified copy of R.S.D no.3514 dtd.30.6.98;
- Ext.20: Certified copy of R.S.D no.5510 dtd.01.10.99;
- Ext.21: Certified copy of R.S.D no.1 dtd.01.1.2000;
- Ext.22: Certified copy of R.S.D no.3458 dtd.09.5.03;
- Ext.23: Certified copy of R.S.D no.12133 dtd.08.12.04;
- Ext.24: Certified copy of R.S.D no.105996 dtd.14.7.08;
- Ext.25: Certified copy of R.S.D no.13179 dtd.29.8.08;
- Ext.26: Certified copy of R.S.D no.14169 dtd.12.9.08;
- Ext.27: Certified copy of R.S.D no.14170 dtd.12.9.08;

- Ext.28: Certified copy of R.S.D no.11081019734  
dtd.23.8.10;
- Ext.29: Certified copy of R.S.D no.11081019792  
dtd.23.8.10;
- Ext.30: Certified copy of registered GPA no.3482  
dtd.17.2.10;
- Ext.31: Certified copy of order in S.A. no.46 of 1985 of  
Hon'ble High Court, Orissa;
- Ext.32: Certified copy of decree in O.S.46/81 passed by  
Munsif, Bhubaneswar;
- Ext.33: Village map of Mouza-Jharapada;
- Ext.34: Certified copy of R.O.R of Khata no.252 of  
Mouza-Jharapada;
- Ext.35: Parcha no.357 of Plot no.2035;

**LIST OF DOCUMENTS MARKED AS EXHIBIT FOR THE  
DEFENDANTS :**

- Ext.A: R.S.D no.2572 dtd.01.6.93;
- Ext.A/1: Signature of D.W.1 on Ext.A;
- Ext.A/2: Signature of Kapila on Ext.A;
- Ext.B: Mutation R.O.R of Khata no.928/297;
- Ext.C: Certified copy of R.O.R of Khata no.928/297  
(conversion);
- Ext.D: R.S.D dtd.11.4.97;
- Ext.D/1: Signature of D.W.1 on Ext.D;
- Ext.D/2: Signature of Raghunath Behera on Ext.D;
- Ext.D/3: Signature of D.W.2 on Ext.D;

- Ext.E: Mutation R.O.R of Khata no.928/642;  
Ext.F: Agreement dtd.16.3.97;  
Ext.F/1: Signature of plaintiff on Ext.F;  
Ext.F/2: Signature of D.W.2 on Ext.F;

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