

**IN THE COURT OF CIVIL JUDGE(SR. DIVN.), BHUBANESWAR**

Present : **Sri Sitikantha Samal**  
Civil Judge(Sr. Divn.)  
Bhubaneswar.

**T.S No.23/1992**

1. Prasanta Kumar Swain, aged about 31 years
  2. Susanta Kumar Swain, aged about 28 years
  3. Hemanta Kumar Swain, aged about 8 years (Dead)
  4. Srimanta Kumar Swain, aged 21 years
- All are sons of late Raghunath Swain  
Village-Chhanaghar, Po-Kusumati,  
P.S-Jatni, Dist-Khurda.

..... Plaintiffs

- Versus -

1. Raghunath Swain, aged about 70 years (Dead)
  2. Harihar Swain, aged about 56 years  
Son of Raghunath Swain
  3. Smt. Kamala Swain, aged about 50 years  
W/o Raghunath Swain
- All are of Village-Chhanaghar, Po-Kusumati,  
P.S-Jatni, Dist-Khurda.

..... Defendants

**COUNSELS APPEARED FOR THE PARTIES:**

For the Plaintiffs : M/s Jahidur Raheman & Associates

For the deft.no.3 : M/s M.Mohapatra & Associates

For the deft.no.2 : M/s Jagannath Das & Associates

DATE OF ARGUMENT : 29.09.2014

DATE OF JUDGMENT : 15.10.2014

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

The plaintiff has filed the suit for partition and other consequential reliefs including cost.

2. The case of the plaintiffs in brief is that they are the sons of the deft.no.1 & 3. The deft.no.2 is the son of deft.no.1 through his first wife. The suit schedule B property

is the ancestral property of the deft.no.1. The Schedule C properties are acquired properties of the deft.no.1 from the income of the ancestral properties and from the rent collected from the ancestral house situated over schedule B property. Except the incomes from the aforesaid sources, the deft.no.1 had no other source of income. Till the year 1989, the plaintiffs and the defendants were residing in joint mess and property, but later the deft.no.2 created disturbance and separated from them. But all were still possessing the suit properties jointly and divided the usufructs among themselves. When the plaintiffs requested the deft.no.1 for partition of the suit properties, the deft.no.1 on plea to partition the same very shortly, delayed the matter. In order to grab the entire properties in Schedule B and C, the deft.no.2 took away his father to his house and thereafter, even though many requests have made by the plaintiffs and the deft.no.3 for partition of the suit properties, the deft.no.1 did not pay any heed to their requests. Hence, finding no other alternative, the plaintiffs constrained to file the present suit for partition.

It is pertinent to mention here that during pendency of the suit, the plaintiff no.3 died.

- 3.** All the defendants appeared and contested the suit by filing their W.S. The deft.no.1 & 3 filed a joint W.S. The deft.no.1 & 3 in their W.S denied all the allegations and assertions made in the plaint. It is the specific case of these defendants that the deft.no.1 married to deft.no.3 as per Hindu Rites and Customs after death of his first wife and the plaintiffs are their sons. It is the further case of these defendants that the deft.no.1 fell ill in the year 1977 and became blind. These defendants admitted the facts of the nature and acquisition of the suit properties as pleaded by the plaintiffs. It is the further case of these defendants that

in the year 1988, the deft.no.2 separated himself from these defendants so also the plaintiffs. But the suit properties were and are being jointly possessed by the parties. It is the specific case of these defendants that the schedule C properties have not been acquired by the funds provided by the deft.no.2. It is the further case of these defendants that the deft.no.2 on the pretext of executing a power of attorney, snatched away RSDs in respect of the suit properties in favour of his wife and son from the deft.no.1 fraudulently. In order to set aside those sale deeds executed in favour of the wife and son of deft.no.2, the deft.no.1 has filed O.S No. 179/1990. But the deft.no.2 with much persuasion kept the deft.no.1 in his house in the year 1991 and ultimately drove out him. These defendants admitted the share of the plaintiffs in the suit properties. With these pleadings, the deft.no.1 & 3 have prayed to dispose of the suit.

It may be stated here that during the pendency of the suit and after filing of the W.S, deft.no.1 died.

The deft.no.2 filed a separate written statement challenging the maintainability of the suit so also the locus standi of the guardian to institute this suit on behalf of the minors. He also denied all the allegations and assertions made in the plaint. It is the specific case of the deft.no.2 that the plaintiffs are the sons of the deft.no.1 through the concubine, the deft.no.3 and since the plaintiffs are not the legitimate sons, they are not entitled to any share in the suit properties so also to bring this suit for partition. It is the specific case of this defendant that the deft.no.3 is also known as Nila @ Kama @ Kamali who had married to one Purna Chandra Rout of village Lindo and had two daughters namely Nima Rout and Pravati Rout through said Purna Chandra Rout. It is the further case of this defendant that

there was no divorce in between the deft.no.3 and her husband Purna Chandra Rout. It is the specific case of this defendant that the deft.no.3 came to the house of the deft.no.1 & 2 in the year 1977 to help in their house hold works and by the way illicit relationship with deft.no.1 with deft.no.3 developed and the plaintiffs were born. It is the further case of the deft.no.2 that the C schedule properties were purchased with the income of this deft.no.2 in the name of the deft.no.1. He further pleaded that the deft.no.1 and 3 have never remained in jointness after 1981. With these pleadings, the deft.no.2 prays to dismiss the suit.

4. On the basis of the aforesaid rival pleadings of the parties, the following issues have been framed for consideration.

#### **ISSUES**

- (i) Is the suit maintainable ?
- (ii) Whether there is any cause of action to file the suit ?
- (iii) Whether the deft.no.3 is the legal married wife of deceased deft.no.1 and the plaintiffs are the legitimate sons of deceased deft.no.1 ?
- (iv) Whether the plaintiffs are entitled for a decree of partition of the suit schedule properties ?
- (v) To what other reliefs, the parties are entitled ?

5. In support of their case, the plaintiffs have examined the plaintiff no.1 who is referred as P.W.1 hereinafter. Besides, the plaintiffs have also examined the evidence of one Chakradhar Swain who is referred to as P.W.2 hereinafter. They have also exhibited certain documents vide Ext.1 to Ext.10. On the other hand, the deft.no.3 has adduced his own evidence who is referred to as D.W.1 hereinafter and the deft.no.2 has also adduced the evidence of himself who is referred to as D.W.2 hereinafter. The deft.no.3 has exhibited one document vide Ext.A. The

deft.no.2 has exhibited various documents vide Ext.A-1 to Ext.A-6. All the oral and documentary evidences adduced on behalf of the parties have been reflected in detail at the foot of this judgment.

### **F I N D I N G S**

6. **Issue No. (iii)**:- Since this issue touches the status of the deft.no.3 so also the legitimacy of the plaintiffs, this issue is taken up first for its consideration. It is the specific case of the plaintiffs that the deceased deft.no.1 Raghunath Swain got married to the deft.no.3 Smt. Kamala Swain in the year 1976 after the death of his first wife and since then not only the plaintiffs are born out of their wedlock but also the deft.no.3 having been recognised as the wife of the deceased deft.no.1 Raghunath Swain continuing as such in the house of the deft.no.1 and even transferred some properties along with deft.no.1. On the other hand, the deft.no.2 who is admittedly the son of the deceased deft.no.1 has denied the aforesaid marriage of the deft.no.3 with deft.no.1 and it is his specific plea that the deft.no.3 came to their house in the year 1977 to help the family of the deft.no.1 & 2 in house hold works and termed her as a concubine. The deceased deft.no.1 and the deft.no.3 in their joint written statement have admitted the pleas of the plaintiffs and their relationship with each other as husband and wife. So when the presence of the deft.no.3 in the house of the deft.no.1 since 1976 or 1977 is admitted by both the parties, the only question remains whether there was any valid marriage in between the deft.no.1 & 3 at any point of time and out of their wedlock, the plaintiffs were born. The P.W.1 who is the plaintiff no.1 in his evidence has categorically stated that her mother, the deft.no.3 got married to the deceased deft.no.1 in the year 1976. Similarly the D.W.1 who is the deft.no.3 has deposed that

she got married to Raghunath Swain, the deceased deft.no.1 in the year 1976 as per Hindu Rites and Customs. The learned counsel for the plaintiffs submitted that when the deft.no.3 herself deposed that she got married to the deceased deft.no.1 in 1976 as per Hindu Rites and Customs and such evidence of the deft.no.3 is supported by the plea taken by the deceased deft.no.1 Raghunath Swain in his W.S that he got married to the deft.no.3 as per Hindu Rites and Customs, it not only proves the marriage in between them but also the subsequent recognition of the deft.no.3 as wife of deft.no.1. The plaintiffs also relied upon a regd. Sale deed dt. 22.08.1980 executed by the deceased deft.no.1 and the deft.no.3 in favour of one Nandakishore Rout of the same village and the certified copy of the said deed is admitted in evidence as Ext.A. The learned counsel for the plaintiffs placed much reliance on such Ext.A as in the said deed the vendors Raghunath Swain admitted the deft.no.3 as his wife and both of them sold a piece of land to one of the co-villagers. According to him this Ext.A not only shows the acceptance of the status of the deft.no.3 by the deft.no.1 as his wife, but also the acceptance of the deft.no.3 as the wife of the deft.no.1 by the villagers. On the other hand, the learned counsel for the deft.no.2 submitted that mere acceptance or recognition as wife by the alleged husband is not a substitute of legal and valid marriage. Law is well settled that where there is no direct evidence as to the marriage, the Court can taken into consideration the acceptance and recognition of the lady as wife and bases his judgment on that. But here in this case, the marriage with the deft.no.3 alleged to have been taken place in the year 1976 with the deft.no.1. No doubt the deft.no.1 not only in his pleading in W.S has accepted the deft.no.3 as legal married wife but also vide Ext.A, he has accepted her as his

wife. But the mere acceptance as such of the deft.no.1 can not make the alleged marriage a valid and legal marriage if such marriage is illegal, invalid or void otherwise. Neither the plaintiffs nor the defendants have pleaded who is the first wife of the deceased deft.no.1 and when she died. On the pleading of the deft.no.1 & 3 and the deft.no.2, it remains admitted that the deft.no.3 had got married to one Purna Chandra Rout of village-Lindo. The deft.no.3 who has been examined as D.W.1 herself admitted in his cross-examination at para-26 that she married to one Purna Chandra Rout of Village-Lindo and out of the said wedlock, two daughters were born. The deft.no.2 has also filed and proved the certified copy of RSD dt. 26.11.1984 executed by the deft.no.3 showing herself as the widow of Purna Chandra Rout which is admitted in evidence as Ext.A-6. The Ext.A-6 not only shows that the deft.no.3 has transferred the land of Purna Chandra Rout but also shows that she is the widow of said Purna Chandra Rout and they have got two daughters namely Mina Rout and Pravati Rout out of their wedlock. This Ext. A-6 is also admitted by the deft.no.3 in her cross-examination at para-26. It is the specific case of the deft.no.2 that by the time of alleged marriage of deft.no.3 with deft.no.1 i.e in the year 1976, the husband of deft.no.3 Sri Purna Chandra Rout was alive and accordingly, there was no valid and legal marriage in between the deft.no.3 & 1. In order to prove that Purna Chandra Rout was alive by the year 1983, he relied upon one information received from the Medical Superintendent, B.M, Swasthanibas, Chandanpur under the RTI Act which reveals that Sri Purna Chandra Rout, S/o Bhikari Rout of Village-Lindo was admitted in the said Swasthanibas on 23.02.1983 and discharged on 23.06.1983 and the said information sheet has been admitted into evidence as Ext.A-5. Even though the original discharge

certificate has not been filed or the original discharge register of said Swasthanibas has not been filed and proved, but the admission of the D.W.1 Kamala Swain in her cross-examination at para 27 that she knew that her husband Purna Chandra Rout was admitted in Basanta Manjari Hospital and he died in the year 1984. Even she admitted in her cross-examination that she attended the cremation of Purna Chandra Rout. This admission of the D.W.1 who is the best witness to say about the death of her husband Purna Chandra Rout clearly establishes the fact that her husband Purna Chandra Rout died in the year 1984. Add to it, the D.W.1 in her cross-examination has also admitted that she was not divorced by Purna Chandra Rout. This admission of the D.W.1 who is none else but the deft.no.3 herself establishes the fact that at the time of the alleged marriage with the deft.no.1 in the year 1976, she was in marriage tie with Purna Chandra Rout of village-Lindo. Accordingly, if at all, from the admission of the deceased deft.no.1 and from Ext.A, it is held that the deft.no.3 got married to the deceased deft.no.1 in the year 1976 or at any point of time prior to 1984 that marriage is a void marriage and hence, the deft.no.3 cannot be treated and held as legal married wife of deceased deft.no.1, as admittedly the parties are Hindus.

The plaintiffs claim that they are the sons of the deft.no.3 through deft.no.1. The deft.no.2 who is contesting this suit tooth and nail in his W.S has categorically admitted that the plaintiffs are the sons of the deft.no.3 through deft.no.1 and called them as illegitimate sons of deceased deft.no.1. Without going through the unnecessary details when the deft.no.2 admitted that the plaintiffs are the sons of deft.no.3 through deft.no.1 and when it has been already held in the above paragraph that there was no valid

marriage in between the deft.no.3 with deft.no.1, it can be safely concluded that the plaintiffs are not born out of the valid wed lock of deft.no.3 with deft.no.1 and are not the legitimate sons of the deceased deft.no.1 Raghunath Swain. Accordingly, this issue is answered.

7. **Issue No.(iv)** :- The next question comes up for determination whether the plaintiffs are entitled to the relief of partition and if so what is their share. From the very outset, the plaintiff has to show that the suit properties either are the ancestral properties or the self acquired properties of the deceased deft.no.1 Raghunath Swain. So far as the schedule of B property is concerned, the certified copy of jamabandi register or the continuous khatian in respect of suit khata no. 767 stands recorded in the name of deft.no.1 Raghunath Swain which is admitted in evidence as Ext.1. Similarly the certified copy of jamabandi register or the continuous khatian in respect of khata no. 768 of schedule B also stands recorded in the name of deceased deft.no.1 Raghunath Swain which is admitted in evidence as Ext.2. So far as the schedule C property is concerned, it remains admitted that the suit plot no. 1587 measuring Ac0.140 decimals under Khata No. 292 has been purchased in the name of the deceased deft.no.1 vide RSD dt. 28.04.1969 which is admitted in evidence as Ext.4, the suit plot no. 242 under khata no. 497 has been purchased in the name of the deceased deft.no.1 by RSD dt. 25.04.1969 which is admitted into evidence as Ext.5. The suit plot no. 380 and 975 under suit khata no. 662 has been purchased in the name of the deceased deft.no.1 on 23.01.1976 which is admitted into evidence as Ext.7. The suit plot no. 1250 under khata no. 226 has been purchased in the name of the deceased deft.no.1 by RSD dt. 23.04.1971 which is admitted into evidence as Ext.8. The suit plot no. 125 under khata no.

1179 has been purchased in the name of the deceased deft.no.1 by RSD dt. 22.11.1971 which is admitted into evidence as Ext.9. So far as the suit plot no. 1711 under suit khata no. 815 is concerned, it is found that it has already been transferred by the deft.no.1 and deft.no.3 to one Nandakishore Routray who is not a party to this suit and accordingly, this suit plot no. 1711 is to be excluded from the purview of this suit. Similarly the certified copy of ROR in respect of suit plot no. 754/3268 measuring Ac0.249 decimals under khata no. 253 shows that the same has been recorded in the name of Raghunath Sethi, Sudarsan Sethi, Udayanath Barik, Raghunath Swain and Natha Bhoi jointly and in respect of said suit plot, the possession of one Raghunath Bhoi in the remarks column has been mentioned and the certified copy of ROR is marked as Ext.10. Neither the plaintiffs nor the defendants have filed any documents in respect of suit plot no. 84 and 92 under suit khata no. 1068 in Mouza-Chhanaghar, it can not be said that those two plots are either the ancestral property or the self acquired property of the deceased deft.no.1. In the aforesaid circumstances, when the aforesaid four suit plots are not the properties of the deceased deft.no.1 and as the owners thereof are not impleaded as parties in this suit, the said plots can not be the subject matter of the present partition.

The specific case of the plaintiffs is that the B schedule property is the ancestral property and the C schedule properties are the joint family properties acquired in the name of deceased deft.no.1 from the nucleus derived from agriculture of the ancestral properties and the rents of the ancestral house which was let out to different persons. On the other hand, it is the case of the deft.no.2 that the schedule C properties are acquired from the funds provided by him and ultimately the deceased deft.no.1 transferred

the same to his wife and son. But the deft.no.2 admitted that the properties described in schedule B are the recorded properties of deceased deft.no.1. Though the plaintiffs have pleaded that the schedule C properties are the joint family properties acquired from the joint family nucleus but there is absolutely no material either in the pleading of the plaintiffs or in the evidence adduced from the side of the plaintiffs that there was surplus joint family nucleus and from that nucleus, the schedule C properties have been acquired. Though the deft.no.3 in her pleading and evidence supports the case of the plaintiffs in respect of the acquisition of schedule C property, but her evidence is also not at all sufficient to establish the same. On the other hand, the registered sale deeds by which the schedule C properties, except the four plots as discussed in the above paragraph show that the properties vide Ext.4,5,7 to 9 have acquired prior to 1976 which is prior to the birth of the plaintiffs and even prior to the alleged marriage of deft.no.3 with the deceased deft.no.1. So the question of purchase of those properties vide Ext.4,5,7 to 9 described in schedule C out of joint family nucleus does not arise. On the other hand, it is the specific plea and evidence of the deft.no.2 that the properties acquired under Ext.4,5,7 to 9 of schedule C and the suit khata no. 767 of schedule B having been transferred by the deceased deft.no.1 to his wife Sarojini Swain and Pradeep Kumar Swain, that properties are no more the properties left by deceased deft.no.1. In course of his evidence, the deft.no.2 proved the RSD dt. 29.09.1977 executed by deceased deft.no.1 in favour of Pradeep Kumar Swain in respect of suit plot no. 1327 and 2155 under suit khata no. 767 of schedule B of the plaint and suit plot no. 242 under khata no. 497, suit plot no. 380 and 975 under khata no. 662 described in Schedule C of the plaint and the

said registered sale deed is admitted into evidence as Ext.A-1. The D.W.2 who is the deft.no.1 also proved the regd. Sale deed dt. 24.06.1980 executed by the deceased deft.no.1 in favour of Sarojini Dei, Wife of deft.no.2 in respect of suit plot no. 125 under Khata No. 1179 described in schedule C of the plaint which is admitted into evidence as Ext. A-2. Similarly the D.W.2 also proved the RSD dt. 13.03.1978 executed by deceased deft.no.1 in favour of Sarojini Dei, Wife of deft.no.2 in respect of suit plot no. 1587 under khata no. 292, suit plot no. 1250 under khata no. 222 of Schedule C land and suit plot no. 1448/3173 and suit plot no. 1449 under khata no. 767 of schedule B which is admitted into evidence as Ext.A-3. The learned counsel for the deft.no.2 submitted that since the properties covered under Ext.A-1, A-2 and A-3 have already been transferred by the deceased deft.no.1, those properties being not the properties of deceased deft.no.1 no more, can not be the subject matter of the suit for partition. Further more, it remains admitted by both the sides that the deceased deft.no.1 had filed a suit against the purchasers of Ext.A-1, A-2 and A-3 i.e Sarojini Swain and Pradeep Kumar Swain including this deft.no.2 bearing O.S No. 179/1990 in the Court of Civil Judge(Sr. Divn.), Bhubaneswar in respect of the properties covered under Ext.A-1, A-2 and A-3 for declaration of those deeds as null and void on the ground of fraud and by the way on death of deceased deft.no.1 who was the plaintiff of that suit, the present deft.no.3 was also substituted as plaintiff in that suit and the said suit was dismissed on contest vide judgment dt. 30.08.2008. The certified copy of the said judgment is admitted in evidence as Ext.A-4 and the certified copy of the decree is admitted into evidence as Ext.B-1. The learned counsel for the deft.no.2 submitted that since the deceased deft.no.1 had already transferred the properties covered under Ext.A-1, A-

2 and A-3 out of the suit lands and even the deceased deft.no.1 & deft.no. 3 have lost the suit in which they challenged the aforesaid transfers, it is to be held that those properties are now the properties of the purchasers of Ext.A-1, A-2 and A-3. In this case, the purchasers of Ext.A-1, A-2 and A-3 namely Sarojini Swain and Pradeep Kumar Swain have not been impleaded as parties and except the suit khata no. 767 of Schedule B, all other properties transferred in their favour vide Ext.A-1, A-2 and A-3 are the properties acquired in the name of the deceased deft.no.1. As discussed and held in the foregoing paragraphs, when the present plaintiffs have been failed to establish that the suit schedule C properties are the joint family acquisition, it can be safely concluded that the transfer made by the deceased deft.no.1 in favour of Sarojini and Pradeep as stated above are valid and they have acquired title and possession on the strength of the aforesaid transfers. So far as the suit plots under suit khata no. 767 described in schedule B of the plaint is concerned, the deceased deft.no.1 being the recorded owner and even the karta of the family, in absence of any material contrary to it, it can be safely concluded that the transfer in respect of the same in favour of Sarojini and Pradeep are also valid and they have acquired title and possession over the same. This finding of this Court strengthened by the judgment and decree passed in O.S No. 179/1990 which is admitted in evidence as Ext.A-4 and B-1 respectively.

After exclusion of the property covered under the Ext.A-1, A-2 and A-3 and the suit plot no. 84 and 92 under suit khata no. 1068 of schedule C for which no document has been filed to show that the property belongs to the family of the deceased deft.no.1 and the suit plot no. 1711 and 754/3268 as discussed in the foregoing paragraphs, the

suit plot nos. 1149 measuring Ac0.400 decimals under suit khata no. 768 only remains for consideration for partition in this suit.

The learned counsel for the deft.no.2 contended that since the plaintiffs are the illegitimate sons, not entitled for any share or partition in respect of the suit plot no. 1149 under suit khta no. 768 which is ancestral in nature. On the other hand, the learned counsel for the plaintiff submitted that the plaintiffs even if found born out of a void marriage as per Section-16(3) of the Hindu Marriage Act have got a right to the property of their parents. It may be stated here that though the Ext.1 and 2 shows that the deceased deft.no.1 belonged to the category 'Sudra' but there is no pleading and evidence to that effect and even there is no material to show to which category, the deft.no.3 belongs to. If at all it is held that the deceased deft.no.1 is belonged to the category 'Sudra' since he died much after the Hindu Succession Act 1956 i.e. during the pendency of the suit, the earlier legal proposition in respect of the right to property of an illegitimate child of a 'Sudra' has got no force at present. Admittedly the suit plot no. 1149 under khate no 768 described in schedule-B stands recorded in the name of deceased deft.no.1. No doubt, the plaintiffs have filed the suit during the life time of their father deceased deft.no.1 for partition of the suit property. Had the father would alive now, the matter would have been otherwise. It remains admitted by both the parties that the deceased deft.no.1 and the deft.no.2 were residing separately at the time of the death of deceased deft.no.1 and they were dealing with their separate landed properties independently. So it can be held that there was unity jointness in mess and status in between the deceased deft.no.1 and the deft.no.2 at the time of the death of deft.no.1. Moreover, the wife and son of

the deft.no.2 have purchased the lands covered under suit khata no. 767 as discussed above and the deft.no.2 has not claimed any share of his own in such property. These transactions coupled with the pleading of the deft.no.2 goes to show that the suit plot no. 1149 under suit khata no. 768 was the exclusive property of deceased deft.no.1. But fortunately the father deceased deft.no.1 died during the pendency of the suit. This suit might not be maintainable during the life time of the deceased deft.no.1. Admittedly, the plaintiffs so also the deft.no.3 are residing in the house of the deceased deft.no.1 and the plaintiffs have no other land except the land of their father, even to reside. Since U/s.16(3) of the Hindu Marriage Act, the children born out of a voidable marriage have got right to the property of their parents, the present plaintiffs being the sons of the deceased deft.no.1 through a void marriage are also entitled to the properties left by their parents i.e. the suit plot no. 1149 measuring Ac0.400 decimals under suit khata no. 768 in Mouza-Chhanaghar along with the deft.no.2 who is also the son of deceased deft.no.1 through his legally married wife. The deft.no.3 being not the legally married wife of the deceased deft.no.1, she is not entitled to any share in the properties left by the deceased deft.no.1 i.e suit plot no. 1149. Accordingly, the plaintiffs together are entitled to 3/4<sup>th</sup> share and the deft.no.2 is entitled to 1/4<sup>th</sup> share in the suit plot no. 1149 of Khata No. 768 measuring an area Ac0.400 decimals. The plaintiffs are not entitled to any share in respect of the other suit plots, since those suit plots were not the properties of deceased deft.no.1 at the time of the institution of this suit. Accordingly, this issue is answered.

8. **Issue No.(i), (ii) & (v)** :- So far as the maintainability of the suit is concerned, the learned counsel for the deft.no.2 urged that this suit being filed by the plaintiffs who were

minor at the time of institution through their maternal uncle guardian is not maintainable specially when their mother was alive and they have got inconsistent right. Admittedly, the suit has been filed by the maternal uncle of the plaintiffs at the time of the institution. Order-32 Rule-1 prescribes that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. If the mother i.e. the deft.no.3 would not be interested to institute this suit, then the plaintiffs have to file the suit by a next friend. After all, after attending the majority when all the plaintiffs accepting the said plaint continued this suit independently, at this stage, it can not be said that the suit is not maintainable as the suit was instituted through their maternal uncle. Since the plaintiffs are entitled to share in the suit property as discussed and held above, this suit is otherwise maintainable and there is cause of action to bring this suit. Since there is no necessity to pass any consequential relief depending upon the partition, no other relief is granted to the plaintiffs. These issues are answered accordingly.

Hence, ordered :

### **ORDER**

The suit be and the same is preliminarily decreed in part on contest against the deft.no.2 & 3, under the above circumstances without any cost. The plaintiffs together are entitled to 3/4<sup>th</sup> share and the deft.no.2 is entitled to 1/4<sup>th</sup> share in suit plot no. 1149, Khata No. 768 measuring an area Ac0.400 decimals in Mouza-Chhanaghar described in schedule B of the plaint. The plaintiffs and the deft.no.2 are directed to amicably partition the aforesaid suit plot within a period of two months from the date of this order failing which each party is at liberty to effect the partition through the process of this Court. So far as the other suit properties

are concerned, the suit is dismissed.

Advocate's fees be assessed at the contested scale.

**Civil Judge(Sr.Divn.)**  
Bhubaneswar.

The judgment is typed to my dictation by the Stenographer 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. the 15<sup>th</sup> day of October, 2014 under my seal and signature below.

**Civil Judge(Sr.Divn.)**  
Bhubaneswar.

**List of witnesses examined for the plaintiffs:**

P.W.1 Prasanta Kumar Swain  
P.W.2 Chakradhar Swain

**List of witnesses examined from the side of defendants:**

D.W.1 Smt. Kamala Swain  
D.W.2 Harihar Swain

**List of documents exhibited on behalf of the plaintiffs:**

Ext.1 Certified copy of ROR of Khata No. 767 of  
Mouza-Chhanaghar  
Ext.2 Certified copy of ROR under Khata No. 768 of  
Mouza-Chhanaghar  
Ext.3 Certified copy of ROR under Khata No. 292 of  
Mouza-Chhanaghar  
Ext.4 Certified copy of RSD No. 4142.  
Ext.5 Certified copy of RSD No. 2925 dt. 05.04.1959  
Ext.6 Certified copy of ROR bearing Khata No. 662 of  
Mouza-Chhanaghar  
Ext.7 Certified copy of RSD No. 139 dt. 23.01.1976

- Ext.8 Certified copy of RSD No. 1189 dt. 30.04.1971  
Ext.9 Certified copy of RSD No. 140 dt. 22.01.1971  
Ext.10 Certified copy of ROR bearing Khata No. 253 of  
Mouza-Chhanaghar.

**List of documents exhibited on behalf of the deft.no.3:**

- Ext.A Certified copy of RSD No. 1437 dt. 22.08.1980.

**List of documents exhibited on behalf of the deft.no.2:**

- Ext.A-1 RSD dt. 29.09.1977  
Ext.A-1/1 Signature of D.W.2 on Ext.A-1  
Ext.A-1/2 Signature of Bijaya Kumar Mohanty on Ext.A-1  
Ext.A-1/3 Signature of Radha Mohanty Mohanty on Ext. A-1.  
Ext.A-2 Registered sale deed no. 1154 dt. 24.06.1980  
Ext.A-2/1 Signature of the father of D.W.2 on Ext.A-2  
Ext.A-2/2 Signature of the wife of D.W.2 on Ext.A-2  
Ext.A-2/3 Signature of Braja Kishore Samantaray on Ext.A-2  
Ext.A-2/4 Signature of Radhamohan Jena on Ext.A-2  
Ext.A-3 Registered sale deed No. 440 dt. 13.03.1978  
Ext.A-3/1 Signature of the father of D.W.2 on Ext.A-3  
Ext.A-3/2 Signature of the wife of D.W.2 on Ext.A-3  
Ext.A-3/3 Signature of Kailash Chandra Kundu on Ext.A-3  
Ext.A-3/4 Signature of Narahari Sahu on Ext.A-3  
Ext.A-4 Certified copy of judgment of O.S No. 179/1990  
Ext.A-5 Information received from the Office of the Medical  
Superintendent, B.M Swartha Nibas under RTI Act.  
Ext.A-6 Certified copy of the RSD bearing no. 6853  
dt. 26/11/1986.  
Ext.B-1 Certified copy of the decree of O.S No. 179/1990.