B.P.DAS, J.

FIRST APPEAL NO.54 OF 1982 (Decided on 21.05.2010)

NAYAN SUNDARI BEWA (DEAD) BY L.Rs. ……. Appellants.

.Vrs.

SUBASH CHANDRA BEHERA & ORS. ……. Respondents.

(A) **CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – SEC.96**.

(B) HINDU LAW

(C) LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – ARTICLE 95.

For Appellant - M/s. Bidyadhar Mishra, P.K.Rout, P.C.Panda,
G.K.Agrawal, M.Mishra & B.C.Panda.
M/s. Tapan Mishra & G.K.Agarwalla.
For Respondent –M/s.B.M.Patnaik, B.D.Mohanty, J.K.Mishra,
P.Mohanty, S.Mantry & A.K.Sharma.
M/s.N.C.Das, S.R.Das & A.K.Das.M/s. N.P.Pattnaik.

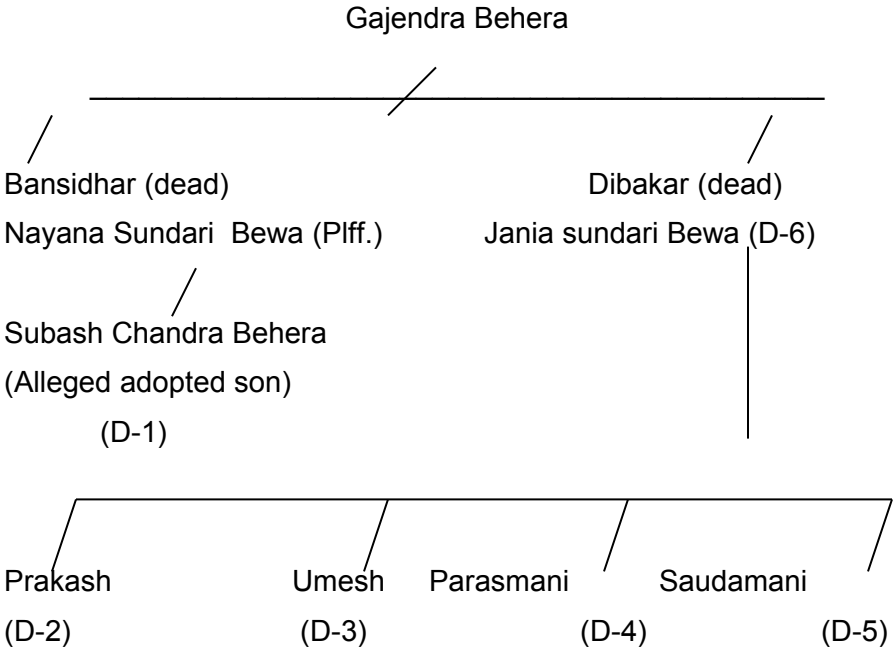
B.P.DAS, J. This First Appeal arises out of the judgment and decree dated 3.10.1981 and 5.11.1981 respectively passed by the Additional Subordinate Judge, Cuttack in Title Suit No.142 of 1972.

2. The plaintiff appellant-Nayana Sundari Bewa having died during pendency of the appeal has been substituted by her legal heirs, who are appellant nos.A.1/a to A.1/g. Defendant-respondent no.1 having died during pendency of this appeal, has been substituted by his legal heirs, i.e., R.1/a to R.1/i. Respondent nos.6 and 7 were expunged respectively by order no.36 dated 1.12.1989 and order no.53 dated 2.3.1989. The names of respondent nos.8 and 9 were deleted by order no.67 dated 13.1.1992. This appeal stood dismissed as against respondent no.9 vide order no.61 dated 8.4.1990.

3. The present appellants 1/a to 1/g are all sons and daughters of plaintiff-Nayana Sundari Bewa, who filed the aforesaid suit bearing T.S.No.142/1972 for a declaration that D-1-Subash Chandra Behera, is not the adopted son of the plaintiff's husband, late Bansidhar Behera, and as such, he is not entitled to the status and benefit of a son by virtue of the deed dated 29.2.1960, which is a void document ; and for a declaration that the preliminary decree passed by the Sub-Judge, Cuttack in Title Suit No.74/1962 and further proceedings based thereon are null and void and the said Subash Chandra Behera is not entitled to any share thereunder and further to direct Subash Chandra Behera to render accounts of the management of the estate of the plaintiff during his agency and a Pleader Commission be appointed to take proper accounts to be submitted by Subash Chandra Behera and for a

permanent injunction restraining Subash Chandra Behera from interfering with the estate of the plaintiff's husband, which was vested on her.

For the sake of convenience, the genealogy given in the plaint is extracted herein below :-



4. The case of the plaintiff as pleaded in the plaint is that late Gajendra Behera had two sons, Bansidhar and Dibakar. Plaintiff is the widow of Bansidhar and defendant no.6-Janaka Sundari is the widow of Dibakar. While Bansidhar and Dibakar were living in a joint Hindu family, Banshidhar, the husband of plaintiff-Nayana Sundari Bewa, died on 29.12.1955 in a state of jointness with his brother-Dibakar, who died in 1963 leaving behind his widow, sons and daughters, who were defendant nos.2 to 6 in the suit.

4(a). The joint family of Bansidhar and Dibakar was a well-to-do family in Cuttack town having vast landed property and considerable estate. After the death of her husband, the plaintiff inherited the properties left by her husband. Shortly after the death of Bansidhar Behera, dissension started in the family and both the branches were separated in mess and residence. Dibakar picked up quarrel with the plaintiff and filed T.S. No.5 of 1956 in the Court of the Sub-Judge, Cuttack against the plaintiff for partition of the joint family moveables. The plaintiff being a Pardanashin illiterate lady was unable to look after her estate, for which she had to take the assistance of her brother-Naba Behera, and her son-in-law Madhusudan Behera. Naba Behera was a neighbour of the plaintiff at Bada Jobra, Cuttack. The suit filed by Dibakar ended in compromise. The plaintiff obtained succession certificate in respect of the estate of her deceased husband from the court of the District Judge, Cuttack, in Misc. Case No.8 of 1956.

4(b). The plaintiff's brother having frequently found fault with her son-in-law in managing the estate, the son-in-law of the plaintiff expressed his inability to continue to manage her estate any further and therefore, the plaintiff had no other alternative than to depend upon her brother for management of her estate in view of the hostility of Dibakar and his family members with the plaintiff. Some time thereafter, plaintiff's brother wanted the estate to be looked after by his son-Subash Chandra Behera-Defendant no.1 and Defendant no.1 continued to live with the plaintiff at her house since 1958 and managed the estate of the plaintiff. Thus the plaintiff had to trust Defendant no.1 and his father who were successfully protecting her interest against the red eyes of Dibakar Behera and his family members. Taking advantage of the trust reposed by the plaintiff, her brother advised the plaintiff to adopt defendant no.1, as her son so that defendant no.1 would develop an attachment towards the plaintiff and would be sincere to look after her estate. The plaintiff had to accept the proposal. Defendant no.1 pressed upon the plaintiff to give her final consent to the adoption and the plaintiff agreed that she would execute a deed of adoption in favour of defendant no.1 as a token of evidence of adoption and the power of attorney executed in favour of her son-in-law would be cancelled and a fresh power of attorney would be executed in favour of defendant no.1 to facilitate him in managing the plaintiff's estate. Subsequently, the plaintiff's brother took her to the house of defendant no.1's father-in-law at Dargha Bazar, Cuttack and asked her to put her L.T.Is. on some papers which she was told to be deed of adoption and the power of attorney. The said documents were written and scribed by a scribe arranged by defendant no.1's father-in-law and were attested by the supporters of defendant no.1's father-in-law, who was a shrewd and influential litigant of the locality. The scribe, attesting witnesses and the identifier to those documents were strangers to the plaintiff and believing defendant no.1 and their representation, his father-in-law in good faith that it was a deed of adoption the plaintiff, subscribed her L.T.I. on the said documents. The contents of the documents were never read over nor explained to the plaintiff. The Sub-Registrar was requisitioned to the house of defendant no.1's father-in-law and the plaintiff had no occasion to know the contents of the documents. On the same day, defendant no.1 and his father-in-law also obtained a deed of cancellation of the power-of-attorney in his favour the same way without the contents of that document being read over or explained to her.

4(c). Defendant no.1 having induced Sidha Behera, a tenant under her son-in-law to refuse the tenancy in respect of some properties gifted by the plaintiff and her husband to her son-in-law the latter instituted T.S. No.167 of 1962 in the Court of the Munsiff, Second Court, Cuttack, against the tenant in which the plaintiff and defendant no.1 were pro forma defendants. In the said suit, defendant no.1 having influenced the son-in-law of the plaintiff to admit him (defendant no.1) as the adopted son of the plaintiff, the said suit was compromised. The deed of compromise was never read over or explained to the plaintiff. Defendant no.1 engaged a lawyer of his choice and asked the plaintiff to subscribe her L.T.Is. on some papers and at times the plaintiff also put her L.T.Is. on same blank papers which, according to defendant no.1, were necessary to be filed in different litigations.

4(d). Thereafter Dibakar Behera instituted O.S.74 of 1962 in the Court of Sub-Judge, Cuttack, against the plaintiff for partition of the joint family immovable properties and defendant no.1 was also impleaded as a co-defendant along with the

plaintiff in the said suit. At the intervention of the well-wishers of the family, the said suit was compromised and it was settled that the plaintiff would get seven annas interest in the suit properties since Dibakar Behera had expired during the pendency of that suit. It was also decided that a compromise petition would be filed in the suit and defendant no.1 was looking after the said suit on behalf of the plaintiff. He wanted a deed of partition to be also executed and registered before filing of the compromise petition. Accordingly, the plaintiff put her L.T.I. on the deed of partition that was prepared by the scribe and the attesting witnesses arranged by defendant no.1 without apprising the plaintiff of the contents of the said document. The compromise petition was also written and without the contents of the same being read over or explained to the plaintiff, she was asked to put her L.T.Is. on it. The suit was preliminarily decreed in terms of compromise and during the final decree proceeding which was started on the petition of defendant nos.2 to 6 for the first time, defendant no.6, the widow of late Dibakar Behera, having passed a taunting remark that defendant no.1 whom she had trusted would deprive her of the properties and turn to the streets, suspicion arose in the mind of the plaintiff and she engaged Sri N.P.Choudhury, Advocate, to look after the final decree proceeding. To her utter surprise, the plaintiff was informed by Sri N.P.Choudhury, Advocate, that the plaintiff along with defendant no.1 has been declared jointly entitled to 9 annas interest in the suit properties in the compromise decree. The plaintiff came to know this in August, 1969 and thereafter, obtained the certified copy of the preliminary decree to confirm her suspicion of fraud practised on her. The plaintiff having enquired it from defendant no1., the latter gave an impression to the plaintiff that the same would be corrected as a mistake had crept in, the plaintiff would be entitled to 9 annas interest and is not along with defendant no.1.

4(e). Since defendant no.1 did not take any step for correction of compromise decree, the plaintiff filed a petition during the final decree proceeding which was disallowed by order dated 11.2.1970 against which the plaintiff preferred Civil Revision No.181 of 1970 before this Court. During pendency of the Civil Revision, the plaintiff was advised that the same could be rectified by filing a suit and therefore, she had to withdraw C.R. No.181/70 and filed T.S. No.152/71 in the Court of the Sub-Judge, Cuttack. In the said suit the plaintiff also filed a petition under Order 39 Rule-1 C.P.C., which was numbered as Misc. Case No.348 of 1971, for temporary injunction for restraining defendant no.1 from proceeding with the final decree in the previous suit. For the first time, defendant no.1 produced a document purporting to be an acknowledgement of previous adoption dated 29.2.1960 and on perusal of this document, the plaintiff came to know for the first time that defendant no.1 had fraudulently obtained the said document by false recitals that he was the adopted son of Basidhar Behera, the deceased husband of the plaintiff. Since the fact of adoption was not challenged in T.S. No.152 of 1971, the plaintiff had to withdraw the suit and filed the present suit for redress. According to the plaintiff, her husband had never adopted defendant no.1 at any time nor the plaintiff and the recitals contained in the document dated 29.2.1960 are all false and imaginary.

4(f). Defendant no.1 taking advantage of his fiduciary relationship with the plaintiff and taking advantage of being an agent of the plaintiff having created confidence on

her has got a document executed in his favour evidencing his adoption by the plaintiff's husband without the contents thereof being read over or explained to her and keeping the plaintiff in darkness of the contents of the document, the petitions and decree were obtained in his favour. The compromise decree passed in T.S. No.74 of 1962 did not clothe defendant no.1 with any right or interest in the properties of the plaintiff's husband and the same not having been acted upon was void and thereby did not clothe the defendant no.1 with any right, title and interest. Although defendant no.1 was removed from the agency of the plaintiff since March 1971, he had not rendered any accounts for the period of his management. After withdrawal of Civil Revision No.181 of 1970, defendant no.1 was emboldened to interfere with the plaintiff's possession and so the document dated 29.2.1960 and the compromise decree having thrown a cloud on the title of the plaintiff, she was obliged to come to Court and hence filed the present suit.

5. Defendant no.1 in his written statement denied all the allegations made in the plaint. According to him, it was false to say that shortly after death of the plaintiff's husband, dissension cropped up in the family and there was separation in mess and properties between the branches which resulted in the institution of T.S. No.5 of 1956 by Dibakar Behera, that the plaintiff was a Paradanashin illiterate lady, that she was unable to look after the affairs, that she took the help of her brother and son-in-law, that there was estrangement between the plaintiff and her son-in-law, that the plaintiff had to depend solely on her brother for the management of the estate left by Banshidhar Behera, that the estate of the plaintiff's husband was protected with the assistance of this defendant and his father, that they were the protectors and beneficiaries of the estate of the plaintiff, that this defendant pressed upon the plaintiff for his adoption, that the plaintiff's brother advised her to execute a deed of adoption and a deed of cancellation of power of attorney in favour of her son-in-law and to execute a power of attorney in favour of this defendant; that the plaintiff was taken to the house of the father-in-law of this defendant by her brother; that she subscribed her L.T.Is. to the deed of adoption and power of attorney without the contents being read over and explained to her; that the said documents were scribed with the own scribe and the witnesses and the identifiers of this defendant and his father-in-law; that the scribe and the witnesses and the identifiers were strangers to the plaintiff; that misrepresentation was made to her without the contents of the document being read over and explained to her; that this defendant put pressure on the son-in-law of the plaintiff to admit him as the adopted son of Bansidhar Behera in the compromise petition filed in T.S. No.167 of 1962; that the contents of the said compromise petition were not read over and explained to her; that T.S. No.74/62 was filed by late Dibakar Behera without the knowledge of the plaintiff and that it was decided in the said suit that the plaintiff would alone be entitled to 9 annas share and the heirs of Dibakar to 7 annas share in the family properties. It was equally false to say that the plaintiff had to throw all the responsibility on this defendant; that this defendant persuaded the plaintiff to remain silent as he would get the mistakes in the compromise decree rectified; that the plaintiff came to know of the previous adoption of this defendant only during the pendency of Misc. Case No.348 of 1971 in the Court of the Sub-Judge, Cuttack.

5(a). According to this defendant, in spite of long marital life when the plaintiff had no male except a daughter and after taking medical advice when late Bansidhar

Behera and the plaintiff were convinced that no son would be begotten, late Bansidhar Behera in order to perpetuate his line along with the plaintiff proposed to adopt the son and in their said desire proposed to the natural parents of this defendant that in case a son is born to them, he would be adopted by late Bansidhar Behera and the plaintiff.

5(b). Sometime thereafter late Bansidhar Behera having got information that the natural parents of this defendant were blessed with a child, the plaintiff on the direction of Bansidhar came to the house of the natural parents of this defendant and wanted to take this defendant as adopted son. In her eagerness and to satisfy her desire, the plaintiff took this defendant to her house from his mother on the third day of his birth though the giving and taking was performed on the 21st day of his birth, when at the request of Bansidhar Behera and the plaintiff, the natural father and mother of this defendant handed over this defendant to the adoptive father and the defendant was named as Subash from that day. Subsequently, this defendant was being called as Suno by way of affection. This defendant was born on 5.5.1939. After defendant no.1 left her mother's breast, he was brought to the house of Bansidhar permanently where he was nursed and was looked after by the plaintiff. Late Bansidhar Behera educated him and the plaintiff performed the marriage ceremony of defendant no. 1. This defendant continued as a member of the plaintiff's family and got the properties left by Bansidhar by survivorship along with the plaintiff who was a post-Act widow. Bansidhar Behera, the adoptive father expired during the minority of this defendant and Dibakar Behera with the plaintiff and her son-in-law-Madhusudan Behera in order to deprive this defendant with his legitimate share in the properties left by Bansidhar Behera created some documents and tried to misappropriate huge amount that were lying in different banks and Government offices in the name of Bansidhar Behera. When this defendant came to know about such foul game played by Madhusudan Behera and Dibakar Behera, the plaintiff was surprised to know about the same and the plaintiff was eager to fulfil the desire of her husband and, accordingly, executed a deed of adoption on 29.2.1960 acknowledging the adoption of this defendant by her husband and also executed and registered a power of attorney in favour of the defendant to look after the litigation and the properties. She also cancelled the power of attorney executed in favour of her son-in-law. Thereafter several purchases have been made by this plaintiff and defendant along with defendant no.6 and they have also transferred some of their family properties. The plaintiff entered into a compromise in T.S. No.167 of 1962 wherein she had also acknowledged the adoption of the defendant by her husband. The contents of the documents were all read over and explained to the plaintiff who was a shrewd lady of Cuttack town, and this defendant having lost all his interest in the family of his natural father had severed all connection with the said family.

5(c). The plaintiff having acknowledged the adoption of this defendant in several documents, she is now estopped from challenging the adoption and being under the ill-advice of her son-in-law, Madhusudan Behera, who, in order to get a lion's share in the properties left by Bansidhar Behera, after the death of the plaintiff has got this false suit filed in order to deprive the defendant of his legitimate right. This defendant has performed the sudhi ceremony of late Bansidhar Behera and is offering annual Pinda to the knowledge of the plaintiff. He has been recorded in respect of the family

properties in the present settlement record of right and is paying all the public dues. He being a member of the family having legitimate share in the properties, the question of his rendering accounts does not arise.

5(d). Therefore, according to defendant no.1, the suit is not maintainable in law; the plaintiff has got no cause of action to bring the suit, the suit is barred by law of limitation and hit by estoppel and acquiescence, the suit properties have been grossly undervalued and proper court-fees have not been paid, the suit is bad for misjoinder of parties and also for non-joinder of necessary parties and also for multifariousness. Therefore, the defendant prayed for dismissal of the suit with costs.

6. Defendant nos.2 to 6 in a separate written statement have almost admitted the averments made in the plaint and denied their knowledge about the fraud and misrepresentation played on the plaintiff by virtue of the documents referred to in the plaint. They have specifically stated that defendant no.1 was never adopted either by the plaintiff or by her husband.

7. Defendant no.7 filed a separate written statement stating that the suit was not maintainable in law and no relief having been claimed against him by the plaintiff, the suit was bad for misjoinder of parties and was liable to be dismissed so far as this defendant is concerned. Defendant no.7 supported the case of defendant no.1 and stated that defendant no.1 was adopted by Bansidhar Behera during his life time. He further stated that the properties described in the schedule of the written statement were acquired by late Bansidhar Behera, the plaintiff's husband, who while in possession gifted it to this defendant who is an ascetic and hermit in 1948 over which this defendant started a Math and accepted the gift made by the plaintiff's husband. He constructed a pucca house and is in possession of the same. The said gift has been confirmed by way of registered gift deed executed by the plaintiff and defendant no.1 on 11.6.1960 rectifying the earlier gift. This defendant has mutated his name in Tahasil Office and it was assessed to Municipal Taxes. This fact has been admitted by the plaintiff in the compromise entered into in T.S. No.7/1962 and therefore, according to this defendant, the challenge to the gift made on 11.6.1960 in the present suit is barred by law of limitation. The suit is hit by estoppel and acquiescence and the suit properties have been grossly undervalued. Therefore, this defendant prayed for dismissal of the suit with costs.

8. Defendant no.9 in a separate written statement also denied the allegations made in the plaint and supported the case of defendant no.1. According to her, she obtained a permanent lease in respect of Ac.2.725 decs. of land appertaining to plot no.1258 in khata no.206 of Mouza-Sikharpur from the plaintiff under the registered deed of lease dated 21.8.1961 and is in possession thereof. She has been recorded as such in the settlement record of right. The plaintiff and defendant no.1 also jointly sold Ac.0.160 decs. of land out of plot no.354 in khata no.25 of Mouza-Badajobra to defendant no.8 by registered deed of sale executed on the same day, i.e., 21.8.1961 and defendant no.8 is in possession of the said properties as owner thereof. According to her, the suit is not maintainable in law and barred by law of limitation. It is bad for non-joinder and miss-joinder of parties and the plaintiff has got no cause of action to bring the suit and there being no allegation against her in the plaint and

no relief having been sought for against her, the suit is bad for miss-joinder of parties. Defendant no.8 by a separate written statement adopted the written statement filed by defendant no.9.

9. Defendant no.10 did not contest the suit and so he was set ex parte.

10. The Court below, on the pleadings of the parties, framed the following issues :-

a) Is the suit as laid maintainable ?

b) Has the plaintiff any cause of action to file this suit ?

c) Is the suit barred by law of limitation, estoppel and acquiescence ?

d) Has the suit been properly valued and proper court fees have been paid on the plaint ?

e) Is the suit band for multifariousness ?

f) Is the suit bad for miss-joinder and non-joinder of parties ?

g) Is defendant no.1 adopted son of Bansidhar Behera ?

h) Has the deed of acknowledgement of adoption dated 29.2.1960 been executed by the plaintiff ?

i) Has the compromise petition on which preliminary decree passed in T.S. No.74 of 1962 in the court of the 3rd Addl. Sub-Judge, been executed by the plaintiff and it is vitiated by fraud, misrepresentation and undue influence and is not binding against the plaintiff ?

j) Was defendant no.1 an agnate of the plaintiff at any time and he accountable to the plaintiff ?

k) To what other relief the plaintiff is entitled ?

11. During course of hearing three witnesses were examined on the side of the plaintiff, one witness was examined on behalf of defendant no.7 and 17 witnesses were examined on behalf of defendant no.1. Altogether 15 documents were exhibited on behalf of the plaintiff, 49 documents were exhibited on behalf of defendant no.1 and two documents were exhibited on behalf of defendant no.7.

12. The court below has decided issue nos. 8 and 9 together. So far as issue no.8 is concerned, the court below relying upon the evidence of p.w.1, who stated that Nayana Sundari was willing to adopt defendant no.1 as her son on the suggestion made by Naba Behera, her brother. Accordingly, she had gone to the house of Chintamani Behera for execution of the documents. The court below came to a finding that admittedly the plaintiff had given her consent to execute the documents. Admittedly, the service of the Sub-Registrar was requisitioned to the house of

Chintamani Behera at Dargha Bazar. The plaintiff has admitted in her cross-examination that Subash is also known as Suno. He was living in the house of Bansidhar Behera from his childhood. She negotiated the marriage of Subash with the daughter of Chintamani when Subash was only 19 years' old. The trial court further found that it is a fact that defendant no.1 with his wife and children was residing at he r house and the maternal mother of defendant no.1 is dead since his childhood. His father is also dead. The document shows that the age of Subash on 29.2.1960 when Ext.9 was executed was only 21 years whereas the age of this lady was 50 years. This lady belongs to a rich family of Cuttack town who is able to collect rent by herself as well as usufructs from her paddy land. The Sub-Registrar also endorsed that the lady admitted execution of the document before him.

The trial court also relied upon an independent witness who was examined as D.W.15 who came forward to state that the contents of the documents were read over and explained to Nayana Sundari, P.W.1 and the said document was scribed by Paramananda Mohanty at the instruction of said Nayana Sundari. He had also further relied upon the statement of the said witness made in cross-examination that no other lady was present with p.w.1 at that time, that he was present when p.w.1 put her L.T.I. and p.w.1 had seen the attesting witness putting their signatures. The other attesting witness, Bata Sahu was also dead. Chintamani Behera was also dead. Therefore, the trial court came to hold that the plaintiff executed Ext.9 after understanding the contents thereof.

13. Issue nos. 4, 5 and 6 were not pressed. So far as issue no.3 is concerned, the plaintiff prayed for a declaration that the preliminary decree of compromise obtained in T.S. No.74 of 1962 was tainted with fraud and undue influence. In this issue the question of limitation was also raised by defendant no.1. According to her, the suit was filed three years after the decree in T.S. No.74 of 1962 was passed and it was barred by limitation. The plea taken by the plaintiff that she could know about the fraud perpetuated by defendant no.1 from Sri N.P.Choudhury, Advocate, in August, 1969. The finding of the trial court in this regard was that so far as execution of Exts.9 & Q is concerned, the plaintiff has stated that after Sri N.P.Choudhury read the compromise petition and explained the contents thereof, she put her L.T.I. for filing it in Court in T.S. No.74 of 1962. According to the trial court, the plaintiff had the knowledge of the contents of the compromise petition on the date of its execution. As such, when on 3.11.1965 the plaintiff had the knowledge of the compromise, the present suit was filed on 16.8.1972 after lapse of the period of limitation. Ext.9 was executed on 29.2.1960 and as the trial court has already discussed, it was executed by the plaintiff with the full knowledge.

The suit out of which this appeal arises was filed on 16.8.1972, i.e., more than 12 years after execution of Ext.9 and more than 8 years after execution of Ext.Q. The claim was also barred under Section 57 of the Indian Limitation Act. The trial court in this regard placed reliance on the decision of this Court in **Girish Chandra Pradhan vrs. Amrit Bewa & another,** I.L.R. 1980 Cuttack 423.

14. So far as Issue nos.1 and 2 are concerned, the Trial Court in view of the above finding held that the suit was not maintainable and the plaintiff had no cause of action to file the suit.

15. Against the aforesaid judgment and decree passed by the trial court, the plaintiff filed this appeal taking several grounds. The main grounds are set forth herein below :-

A. Learned Additional Subordinate Judge wrongly decided Issue nos. 8 and 9 against the plaintiff. As it is admitted that the plaintiff was a Pardanashin and illiterate lady, the principles of law as laid down in **Mst. Kharbuja Kuer vrs. Jangbahadur Rai & Others,** A.I.R. 1963 S.C. 1203 are applicable to the facts of the case. But the trial court misreading the said decision wrongly put onus on the plaintiff while deciding issue nos. 8 and 9 and therefore, the impugned judgment is palpably wrong and grossly illegal and is liable to be set aside.

B. Ext.5, the preliminary decree passed in T.S. No.74 of 1962 should have been held as null and void and the same was not binding on the plaintiff since the said compromise decree was obtained fraudulently without explaining the contents of the compromise petition, if any, to the plaintiff. The learned Additional Subordinate Judge should have also held that the plaintiff is not bound by the said compromise decree.

C. The leaned trial court should have also declared Ext.9 the alleged deed of acknowledgement of adoption dated 29.2.1960, purported to have been obtained by defendant no.1 from the plaintiff as null and void, since the same was obtained fraudulently from the plaintiff without explaining to her the contents of the document.

D. The plea of adoption, which was intended to displace the natural line of succession, was to be established by cogent and satisfactory evidence of the party who alleged the same and in the instant case, defendant no.1 having failed to establish that he is the adopted son of Bansidhar, the trial court has committed gross illegality and error of law by holding that defendant no.1 is the adopted son of Bansidhar, the late husband of the plaintiff.

E. Instead of placing the onus of proof of adoption on defendant no.1, the trial court rather proceeded on the basis that the plaintiff was to prove that defendant no.1 was not the adopted son. Such a course adopted by the trial court is contrary to law and the judgment passed by it has been grossly vitiated both in law and fact and is, therefore, liable to be set aside.

F From the admitted facts of the case, it is established that Bansidhar Behera, husband of the plaintiff, died in the year 1955 and he was aged 47 years at the time of his death. Defendant no.1 was born in 1939 by which date Bansidhar was only aged 31 years and already had a daughter. Therefore, it was improbable that at such a tender age of 31 years, Bansidhar would ever like to adopt a child when he was also blessed with a daughter and there was also no loss of hope for having a son in future and such a fact has not at all been considered by the learned Additional Subordinate Jude and if this fact is taken into consideration, no Court will come to the conclusion that defendant no.1 was ever adopted by Bansidhar as alleged by him.

G. Defendant no.1 (D.W.17) in his evidence and written statement has admitted that he was adopted on the 3rd day of his birth and there was giving and taking ceremony of adoption, which was observed on the 21st day. But there is absolutely no evidence to prove the factum of giving and taking ceremony which is an essential condition before believing a case of adoption.

H. From the facts of the case, it also emerges that at the time of adoption, defendant no.1 was the first child of their parents and it is also against the human conduct and probabilities to believe that he was ever given in adoption by his parents nor such a proposal was ever offered by the plaintiff and her late husband. This fact has also not been considered by the trial court while deciding the plea of adoption.

I. Admittedly there was no documentary evidence on adoption and the trail court proceeded on the basis of accepting the evidence of various witnesses while coming to the conclusion on adoption. But the evidence of such witnesses is not established under the principle as laid down in Section 50 of the Evidence Act and therefore, their evidence should have been thrown out of consideration.

J. Assuming but not admitting that the deed of acknowledgment of adoption (Ext.9) is valid, yet the same cannot be accepted in law to be an adoption made by the husband of the plaintiff to himself and the same can be at best said to be an adoption by the plaintiff herself, since there is no evidence that the plaintiff had adopted with the consent of her husband. K. Ext.F series, the letters alleged to have been written by Bansidhar, also did not make out a case of adoption and the trial court has, therefore, committed gross illegality by accepting the position that Ext.F series made out a case of adoption.

L. The trial court wrongly accepted the evidence of the defendants' witnesses in support of the plea of adoption and failed to properly consider the case of the plaintiff from the same angle that defendant no.1 was not the adopted son of Bansidhar. The impugned judgment, therefore, is grossly prejudicial to the interest of the appellant and is liable to be set aside.

M. The finding of the trial court that Ext.9 was executed by the plaintiff after understanding the contents thereof, is not supported by any evidence and defendant no.1 has failed to prove such a fact in the light of the observation and principle of law as laid down in A.I.R. 1963 S.C. 1203 (supra).

N. From the evidence on record, it is established that the contents of the compromise petition were also not at all read out and explained to the plaintiff before the same was made a decree of the Court and the trial court has, therefore, committed gross illegality by accepting the position that the compromise petition was valued and binding on the plaintiff since the plaintiff was aware of the contents thereof, and his finding is, therefore, grossly illegal and liable to be quashed.

O. It is also not probable to believe that while the plaintiff had 4 to 5 children of her own daughter, as to why she or her husband should at all adopt defendant no.1, who is a distant relation of the plaintiff being her brother's son. This aspect has not

been considered by the learned Additional Subordinate Judge properly and his finding on the plea of adoption is, therefore, not correct.

P. Exts. 1, 2, 3, 4, 7, 8, 11 and 12 clearly proved that defendant no.1 was never the adopted son of late Bansidhar Behera and these documents have not been properly considered by the learned Additional Subordinate Judge.

Q. After the death of Bansidhar, the plaintiff obtained a succession certificate (Ext.4) in which she was stated to be the only heir of her deceased husband, Bansidhar Behera. If at all defendant no.1 was the adopted son, then he must have been described as a legal heir in the succession certificate. This document thoroughly mitigates the case of defendant no.1 that he is the adopted son of Bansidhar. R. Ext.U, a School Admission Register and Ext.W, a Transfer Certificate issued by Ranihat High School, filed by defendant no.1 were not duly proved and they should not have been taken into consideration by the trial court since they were inadmissible in evidence.

S. The trial court committed error of law by relying on the principles decided in 1967 C.L.T. page 222, 1973 C.L.T. 635 and A.I.R. 1970 S.C. 1286 although the facts of those cases did not at all apply to the facts of the present case. The judgment is, therefore, liable to be set aside on this ground.

T. That the evidence of D.W.4 is that the fact of adoption of defendant no.1 by Bansidhar was recoded in a khata, which was kept in the Thakura Ghara in the custody of a caste headman. This khata, if produced, could be the best evidence in support of the plea of adoption and the same having been withheld, the trial court should have drawn adverse inference and held that there was no adoption at all. The principles of law as laid down in A.I.R. 1967 S.C. 756 are not applicable to the facts of this case, but the trial court relying on the said decision held that no adverse inference is to be drawn. His observations are, therefore, not correct to follow.

U. The widow of Dibakar Behera and the widow of Barju would have been the best witnesses in the present case and they having not been examined by defendant no.1 in support of his plea of adoption, the trail court should have drawn adverse inference and decided the issues in favour of the plaintiff.

V. The trial court decided issue no.10 wrongly against the plaintiff. The position of law is clear that even the Karta of a joint family is accountable to the other members of the family. His finding that defendant no.1 was the adopted son of late Bansidhar Behera and he being a member of the family is not accountable to the plaintiff is grossly illegal and liable to be set aside.

W. The trial court wrongly decided issue no.3 against the plaintiff. The plaintiff having filed the suit within three years from the date of her knowledge, the suit was filed within the period of limitation.

16. According to the learned counsel for the appellant, out of eleven issues framed by the learned trial court, the most important issue is issue no.8, i.e., “Is defendant no.1 (Subash) the adopted son of late Bansidhar Behera ? Learned

counsel for the appellant drew my attention to the pleadings of the parties regarding adoption of defendant no.1.

17. The case of the plaintiff-appellant is that defendant no.1's father counselled her to adopt defendant no.1. Ultimately the plaintiff gave her final consent to adopt defendant no.1 and thereupon the plaintiff's brother counseled her to execute a deed of adoption to evidence the adoption of defendant no.1. In para-8 of the plaint, it is indicated that the plaintiff's brother took her to the house of defendant no.1's father-in-law at Daraghabazar and asked her to sub-scribe her L.T.I. to some deeds which she was told to be a deed of adoption and a power of attorney. The plaintiff's husband had not adopted defendant no.1 at any time. Therefore, the deed dated 29.2.1960 is fictitious and imaginary. In para-25 of the plaint, it is stated that defendant no.1 not having been adopted by the plaintiff's husband, has not acquired any right, title or interest in the estate of her husband, which was absolutely vested in her.

18. Defendant no.1, who was the main contesting defendant, in his written statement stated that in spite of long marital life, when the plaintiff except giving birth to a daughter, did not conceive, on the medical advice, late Basidhar Behera was convinced that he would not get a son through the plaintiff, to perpetuate his line of succession, both husband and wife decided to adopt a son and accordingly, when defendant no.1 was in womb, they proposed to the natural parents of defendant no.1 that in case a son would be born to them, they would adopt him. Thereafter on getting information that the natural parents of defendant no.1 were blessed with a son, the plaintiff on the direction of Bansidhar Behera went to the house of the natural parents of defendant no.1 and wanted to take defendant no.1 on adoption. In her eagerness and to satisfy her desire the plaintiff took defendant no.1 from his mother on the third day of his birth but the adoption ceremony was performed on the 21st day of the birth of defendant no.1, which on the request of Bansidhar Behera and the plaintiff, the natural father of defendant no.1, Upendra @ Naba Behera gave this defendant in adoption to Bansidhar, who gave the name of this defendant in the said ceremony of adoption as Subash. But, subsequently, Bansidhar used to call defendant no.1 as 'Suna' by way of affection. Defendant no.1, who was born on 5.5.1939, was nourished and looked after by the plaintiff and educated by Bansidhar and subsequently given in marriage by the plaintiff and this defendant continued as a member of the plaintiff's family and got the properties of Bansidhar by survivorship along with the plaintiff, a post-Act widow, as statutory heir. The defendant was a minor when his adoptive father died and the plaintiff was under the influence of her son-in-law, Madhusudan Behera, and her husband's younger brother, Dibakar Behera, who combined together and created some documents to deprive defendant no.1 of his legitimate share in the properties left by Bansidhar and tried to misappropriate huge amounts, which were lying in the name of Bansidhar in different banks and with different authorities. When defendant no.1 came of age, he could see the foul game played by Madhusudan and Dibakar and the plaintiff on being apprised of such foul action, she expressed her desire to fulfil the wishes of her husband and executed the deed dated 29.2.1960 acknowledging adoption of defendant no.1 by her husband and also registered a power of attorney in favour of defendant no.1 to look after the litigations and the properties and also cancelled the power of attorney executed in favour of her son-in-law, Madhusudan Behera.

According to the defendant no.1, he and the plaintiff made several purchases and also registered several sale deeds as vendors along with Janak Sudari Dei, widow of Dibakar Behera, while transferring some of the family properties. The plaintiff also entered into a compromise with the heirs of her daughter, who attempted to undo the adoption of this defendant in .T.S No.167 of 1962 and acknowledged the adoption of this defendant by Bansidhar Behera.

19. According to the learned counsel for the appellants, relying upon the decisions in **Sugri Khamari vrs. Mangulu Khamari & Others** (1967 CLT 222), **Nidhi Swain & Others vrs. Khati Dibya & Others,** (1973 CLT 646) and **L.Debi Prasad (dead) by L.Rs. vrs. Smt.Tribeni Devi & Others** (AIR 1970 SC 1286) cited by learned counsel for respondent no.1/defendant no.1 in support of his case the trial court found that in a case of ancient adoption when the witnesses to actual giving and taking are not alive and available, the cumulative effect of the circumstances are to be taken into consideration. The trial court came to the further finding that admittedly defendant no.1 is the plaintiff's brother's son, admittedly defendant no.1 resided in the house of Bansidhar from his childhood, P.W.1 admitted that she negotiated the marriage of defendant no.1 with the daughter of Chintamani Behera, the marriage ceremony was solemnized in her house after the death of Bansidhar Behera and defendant no.1 was continuing in the house of Bansidhar Behera with his wife and children even after marriage. It is further admitted by the plaintiff that she adopted defendant no.1.

The only question is whether defendant no.1 has been adopted by Bansidhar Behera, her husband. All the witnesses i.e. D.Ws.4, 5, 6, 7, 13 and 15, who were the neighbors, specifically stated that Bansidhar Behera was treating defendant no.1 as his son. Defendant no.1, as stated, is the son of Bansidhar. The trial court has found that the fact that his father Bansidhar was dead. It is also derived, and relied upon by the trial court, from the evidence of D.W.4 that the adoption took place during the time of his father and it is recorded in a khata maintained by him. All the khatas are kept in the Thakur Ghar and the caste headman is the custodian. Further the trial court relied upon the evidence of D.W.5, who has stated that defendant no.1 was the adopted son of Bansidhar Behera. D.W.5, who is aged 74 years, deposed before the trial court that he had seen Subash-defendant no.1 on the lap of Bansidhar, who told him that he had adopted defendant no.1. D.W.7, who is aged 65 years, has also corroborated the aforesaid fact. All the witnesses are neighbors of Bansidhar at Jobra. D.W.9 has got special means of knowledge to know about the existence of the relationship between the parties. He had joint business with Bansi Babu from 1942 to 1950. He had visiting terms with the house of Bansi Babu and he stated that Bansi Babu told him that he had adopted Subash affectionately called "Suno", as his son.

20. The trial court has also relied upon certain documents that Exts.F/1, F/2, F/3, F/4 and F/6, i.e., the letters written by Bansibabu. The plaintiff has admitted that defendant no.1 was called as Suno. P.W.2 has come forward to state that his son was being called as Suno. The trial court taking the aid of Section 32 of the Indian Evidence Act found that the letters were admissible and further the son-in-law of Bansibabu, i.e., P.W.2 after the death of the plaintiff has admitted that defendant no.1 is the adopted son of Bansibabu in Ext.B/1. Further the trial court has taken into

consideration the voter list, Ext.Z, in which Subash has been described as son of Bansidhar Behera. Ext.W, i.e., Transfer Certificate issued by Ranihat High School, Cuttack, in which he was described as son of Bansidhar Behera. The School Admission Register (Ext.U) indicates that it is Bansidhar Behera.

21. According to the learned counsel for the plaintiff, the trial court has fallen into an error by considering this case as a case of ancient adoption. According to him, the following aspects were the certain conditions required to term an adoption as ancient-adoption.

A) There was a long lapse of years between adoption and questioning the same.

B) It is not possible to procure witnesses for oral evidence as to giving and taking. (AIR 1963 Orissa Page-45)

C) All persons who could have known about adoption have died. (AIR 1970 SC Page-1286, Page-1289, Para-7)

D) The natural father, the adoptive father, the boy adopted and his brother are all dead. No eyewitnesses are available to speak about actual giving and taking.

Learned counsel for the appellant relying upon the decision in **Harihar Rajguru Mohapatra & another vrs. Nabakishore Rajaguru Mohapatra & Others,** AIR 1963 Orissa 45 submitted that there were varieties of transactions of open life and conduct on the footing that adoption is a valid act, from the date of the adoption and between the period when it is challenged. According to the learned counsel for the appellant, neither defendant no.1, i.e., respondent no.1 in the present Appeal does satisfy any of the tests of the requirement of law. Hence, the adoption of Subash cannot come within the category of ancient-adoption. Learned counsel for the appellant relied upon a decision of this Court reported in **Sitaram Nai vrs. Puranmal Sonar,** AIR 1985 Orissa page-171**.** The relevant portion in paragraph-173 of the said decision is as follows :-

> "……There is no specific rule as to number of years necessary for the purpose to hold the adoption as an 'Old adoption'. By judicial pronouncements, however, the Courts in India have more or less considered adoption of 50 years or more to be an ancient adoption. In our opinion, no definite formula can be applied as to the number of years to find out whether the adoption is an old adoption or not. But according to us, where on account of lapse of time, it is not possible to give evidence of persons proving the ceremony of giving and taking, then a party can take recourse to the theory of ancient adoption, provided of course, there has been a sufficient lapse of time between the date of alleged adoption and the date on which the same is challenged. But if the evidence discloses that the persons who attended the adoption ceremony are available to give evidence, then in such a case one can not discharge his burden of proving the factum of giving and taking merely by taking recourse to the fact that the adoption had taken place 25 or 30 years before the same is challenged……"

It is submitted by the learned counsel for the appellant that according to law, a person who claims 'adoption', is under a legal obligation to disclose the exact/particular date on which he was adopted. Here in the case at hand, no definite date has been given in the pleading. No evidence has been given on which date the actual giving and taking ceremony took place. In this regard, learned counsel for the appellant referred to Ext.9, i.e., document dated 29.2.1960. According to the recital of this document, the date of adoption was 8.5.1939, whereas according to the pleading of defendant no.1, adoption ceremony was performed on the 21st day when as requested by late Banshidhar Behera, the natural father of the defendant-Upendra @ Naba Behera gave this defendant in adoption to Banshidhar. According to him, if the date of birth was 5.5.1939, the 21st day was to fall on 25.5.1939. So there is a clear discrepancy and wide gap between the alleged date of adoption as pleaded in the written statement and as mentioned in Ext.9 and it creates grave doubt and suspicion on the claim of defendant no.1 that he was adopted by Banshidhar during his lifetime in the year 1939. More peculiarly, according to the learned counsel for the appellant, no witness of the defendant speaks about the date of adoption.

22. According to the learned counsel for the appellant, the documentary evidence that was relied upon by the applicant from 1939-1955, i.e., Ex.Z/1, Ext.Z/2, Ext.U, Ext.U/1 and Ext.U/2 in order to prove the adoption is not worth acceptable because of the reason that Ext.Z/1 dated 21.6.1946 said to have been written by Bansidhar Behera to admit his son Subash Chandra Behera in Class-IV of Ranihat High School. Ext.Z/2 dated 25.6.1946 is the endorsement and signature of Ananta Babu. Ext.U relates to an entry in School Admission Register, in which Subash has been mentioned as the son of Banshidhar Behera and Ext.U/1 contains the signature of B.N.Satapathy of the said High School.

During the course of trial, the trial court called upon the original application containing the signature of late Banshidhar Behera of Jobra, copy of which was granted under Ext.Z/1. Ext.U/2 was filed by the then Headmaster, Arjun Senapati, who is a relation of Haricharan Behera and then working as a teacher and son of defendant no.9-Rambha and defendant no.1. Ext.Z/1 is the copy of the alleged application said to be containing the signature of late Banshidhar Behera in its original describing Subash Chandra Behera as his son for admission into Class-IV of Ranihat High School. This copy was prepared by Haricharan, son of defendant no.9, and husband of defendant no.8 and co-power-of-attorney holder along with defendant no.1. When the trial court called upon for the original application of Ext.Z/1, a memo was filed by the then Headmaster, Arjun Ch. Senapati that the original could not be filed on the plea that the same had been eaten away by white ants. According to the learned counsel for the appellant, the original application containing the signature of late Banshidhar Behera was a primary document. If that was produced and proved to have contained the signature of late Banshidhar then the claim of the defendant would have gained some strength.

Learned counsel for the appellant drew my attention to the deposition of D.W.1, in which he has stated that he has got a copy of the application submitted by Banshidhar Behera at Ranihat High School through Haricharan Behera from the original application. During course of cross-examination, he submitted that Hari Charan Behera was Assistant Teacher in Ranihat High School. He was not summoned to depose in his favour in respect of the document he got in the year 1973. At the direction of the Headmaster, the document was prepared but it does not bear the School seal. He has also admitted that Haricharan Behera is the nephew of Banshidhar and cousin of P.W.1. P.W.1 had executed a power of attorney in the year 1960 in his favour and in favour of defendant no.1 after canceling the power of attorney in favour of P.W.2. Learned counsel for the appellant submitted that the above evidence clearly established that Ext.Z/1 is a fabricated document and if the original of Ext.Z/1 was in existence for a long period, i.e., 27 years from 1946-73. The plea was taken by the appellant that it was eaten by white ant in 1981. In other words, according to the learned counsel for the defendants, Haricharan Behera copied Ext.Z/1 from its original which is alleged to have contained the signature and writing of Banshidhar. Haricharan was a close relation of late Banshidhar and co-power-of-attorney holder and a relation of defendant no.1 also. He was alive and no strained relation was complained against defendant no.1. He was the best witness but he was withheld from the box.

Drawing my attention to all the details further it is submitted that there is improbable adoption of defendant no.1 by Banshidhar in 1939 because the case of the defendant that on medical advice, late Banshidhar Behera was convinced that he would not beget a son through the plaintiff to perpetuate his line of succession, for which he adopted Subash but no evidence was adduced in that regard, either oral or documentary. The specific case of defendant no.1 is that during long marital life the plaintiff did not conceive further except giving birth to a daughter. According to the learned counsel for the appellant, the plea taken in the written statement of defendant no.1 stands belied and disproved in view of the oral testimony of P.W.1-Nayana, who stated that she came to her father-in-law's house at the age of 15 years and when she was 16 years of age, her first girl child was born and she later on married to Madhusudan Behera. About 4 years of birth of the first daughter, second child was born. About 4 years thereafter, a son was born and they died at the age of 8. The above evidence of Nayana remained unshaken in cross-examination. There was no explanation that Nayana had not given birth to a son, according to the learned counsel for the appellant.

Learned counsel for the appellant further submitted that arithmetically it is apparent that Nayana came to her in-law's house in 1926 at the age of 15. The first female child was born at the age of 16 in 1927 and the second female child was born 4 years after, i.e., in 1931. Four years thereafter a son was born means the son was born in the year 1935. Both the child died at their age of 8 means the second female child died in 1939 and the son died in 1943. There is no reason as to how and why these simple facts of life borne out on evidence could not be appreciated by the learned trial court and if this is believed, then a natural son was living in 1939. There is no reason as to why defendant no.1 was taken adoption in the year 1939.

The most important aspect of this case to which learned counsel for the appellant drew my attention is that non-examination of material witnesses, who are

still alive, improbabilises the alleged adoption. Defendant no.1 while examined as D.W.17 has stated that Baraju Behera is the brother of Naba Behera and both are sons of same father and Baraju would now be 60 years. According to the learned counsel for the appellant, Baraju Behera is a material witness. He being the brother of the natural father of defendant no.1 is the best witness, who could have spoken about the actual giving and taking and adoption of Subash. He is alive but has been deliberately withheld from the box. In course of evidence, D.W.17 has stated that Chandramani Das, Jai Das, Gopal Dalei, Banamali Behera and Sanathan Behera are alive. Their houses are 8 to 10 apart from the house of Banshi Babu. They are the most competent witnesses and could have spoken whether in fact Banshi Babu adopted Subas or not. In this aforesaid premises, learned counsel for the appellant submitted that it is not a case of innocent adoption where witnesses are not available.

23. Learned counsel for the respondents, Mr. B.Pattnaik, submitted that the finding of the trial court is correct and the adoption being held in the year 1939 and the evidence recorded in the year 1981, i.e., 42 years after. It is a case of ancient adoption and strict proof of performance of ceremony is not necessary in case of an old ancient adoption, which is 25 years or more. (**AIR 1996 SC 1253) Sri Lakhi Baruah and others vrs. Sri Padma Kanta Kalita and others.** Learned counsel for the respondents submitted that the documents are 30 years' old and the presumption is available under Section 90 of the Evidence Act. **Section 90 of the Evidence Act- Presumption as to documents of thirty years' old.**

Learned counsel for the respondents in this regard relied upon paragraphs-8 & 9 of the decision in **Sitaram Nai vrs. Purnamal Sonar and others**, AIR 1985 Orissa 171, relevant portions of which are extracted hereunder :-

> "8…….There is no particular form prescribed for giving and taking but what the law requires is that there should be some overt act to signify the delivery of the boy from one family to another. The natural parents should hand over the adoptive boy and the adoptive parents should receive him. In case of an old adoption, however, strict proof of the performance of the ceremonies may not be available. An adoption acquiesced in and recognized for a number of years by the person making the adoption and a long course of recognition on the part of the persons who would be expected to know of the fact and who were best acquainted with the circumstances, can give rise to the inference that the conditions relating to the adoption were fulfilled. (See, Mulla's Hindu Law, Section 489). There is no specific rule as to number of years necessary for the purpose to dub the adoption as an 'old adoption'. By judicial pronouncements, however, the Courts in India have more or less considered adoption, of 25 years and more to be an ancient adoption. In our opinion, no definite formula can be applied as to the number of years to find out whether the adoption is an old adoption or not. But according to us, where on account of lapse of time, it is not possible to give evidence of persons proving the ceremony of giving and taking, then a party can take recourse to the theory of ancient adoption, provided of course, there has been a sufficient lapse of time between the date of alleged adoption and the date on which the same is challenged. But if the evidence discloses that the persons who attended the adoption ceremony are available to

> give evidence, then in such a case one cannot discharge his burden of proving the factum of giving and taking merely by taking recourse to the fact that the adoption had taken place 25 or 30 years before the same is challenged. In our opinion, it depends upon the facts and circumstances of each case."
>
> 9…….In the case of Harihar Rajguru Mohapatra vrs. Nabakishore Rajaguru Mohapatra AIR 1963 Orissa 45, a Bench of this Court was considering the applicability of sections 101 to 104 of the Evidence Act and in that connection it was held (Para 12) :-
>
> ……..The law is well settled that the evidence in support of adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging adoption. It is equally well settled that when there is a long lapse of years between the adoption and its being questioned, every allowance for the absence of such evidence to prove such fact must be favourably entertained, the reason being that after very long term of years it is difficult to procure evidence. …."

Relying upon the said decision, learned counsel for the respondents submitted that if the adoption took place many years ago, direct evidence of much value could hardly be look for. Further it is submitted that the method of appreciation of evidence regarding old adoption is not that strict as in the case of recent adoption as direct evidence as to giving and taking would not be available due to long lapse of time and the burden would shift on the person who challenges adoption to disprove the same.

24. Learned counsel for the respondents drew our attention to Exts.B/1 and B/2, i.e., a portion marked in original decree in Ext.B and certified copy of order sheet in T.S. No.167 of 1962 respectively filed by Madhusudan claiming to be the owner of the said property, in which both Nayana and Subash had filed their joint written statement stating that Subash was the adopted son. According to the respondents, Nayana may be a Pardhanasini and illiterate, but it is not correct that she herself has stated in her deposition that after the death of her husband, she herself used to collect rent. So she was capable of managing her own affair, which showed that she was intelligent enough to deal with her assets. So the adoption deed cannot be said to have been made either under coercion or without knowledge of Nayana. Further learned counsel for the respondents drew our attention to Ext.A/1, which is a registered sale deed executed by Nayana and Subash describing Subash as son of Banshidhar.

Learned counsel for the appellant submitted that several letters were referred to by the learned trial court, which show that while Banshidhar was under treatment for his ailment at Calcutta in 1955, he had written certain letters to P.W.2 son-in-law, who was in the house of the management of his business, wherein he was referred as Suno. According to him, the nick name of Subash as Suno. In her cross-examination, Nayana has stated that Subash and Suno are the same persons and again has stated that they are not the same persons.

The trial court has referred the aforesaid letters of Banshidhar in paragraph-12 of the judgment, which shows that Banshidhar in his lifetime was keen about the

education of defendant no.1-Subash, who was in his house since his childhood after adoption. Ext.U, i.e., School Admission Register describes him as son of Banshidhar. Ext.C is the plaint in T.S. No.152/71 filed for declaration that Subash is not the adopted son. But ultimately, it ended in compromise and in the compromise petition, it is indicated that Subash was treated as the adopted son of Bashidhar. Ext.B/2 is the order-sheet recording compromise. This petition was read over to the parties, who admitted and executed it. So according to the learned counsel for the appellant, it operates as estoppel by judgment. A dispute was raised as to the status of defendant no.1 in that suit. Status quo has already come to an end and it cannot be re-opened or decided in the suit. A compromise decree creates an estoppel by judgment.

According to the learned counsel for the respondents, the argument advanced by P.W.1 that she was taken to Daragha Bazar and Ext.9 was procured cannot be sustained as claimed above that Nayana was illiterate but intelligent. There is no material to show that fraud or misrepresentation was perpetrated on P.W.1 while executing the document in Ext.9. On the aforesaid judgment and evidence on record, learned counsel for the respondents submitted that the judgment and decree passed by the trial court suffer from no infirmity either in fact or law to be interfered with.

25. In view of the aforesaid circumstances, let us state whether there is an estoppel by judgment as there is a compromise decree in T.S. No.167/1962 instituted by P.W.2-Madhusudan Behera, in which Nayana admitted that Subash was the adopted son of Nayana. But at the same time, D.W.12, J.Mitra, Advocate, who drafted the compromise petition, stated in his evidence at page-100 of paper book that " I cannot tell if adoption was an issue in that suit. Parties did not put signature or L.T.I. in my presence on the compromise petition. I cannot tell if contents of compromise petition were read over and explained to the parties". But fact remains, the compromise decree was passed in T.S. No.74/62 on the basis of Ext.Q dated 3.11.65 and registered deed of Ascertainment of Share, i.e., Ext.N dated 14.3.1966. Nayana came to know the exact contents of the compromise petition in Ext.Q and Ascertainment of Share in Ext.N and filed her objection challenging the correctness of contents in Exts.Q & N and to the compromise decree Ext.5 dated 15.4.1966 on the ground of fraud and misrepresentation. The Court below rejected Nayana's objection on the ground that when she was allotted 9 Annas share, which is obviously more, there was no question of fraud without appreciating Nayana's objection to the inclusion of name of Subash along with her and the false recitals in Exts.Q and N. Regarding adoption of Subash from his childhood and that she was unaware that defendant no.2 was a party to the said suit along with her. Ultimately, T.S. No.142/72, out of which this First Appeal arises, was filed by Nayana. Bare perusal of Ext.9, i.e., deed dated 29.2.1960, Ext.Q, i.e., compromise petition and Ext.N, i.e., deed of Ascertainment of Share, raises a grave doubt that if Subash was adopted by the husband of Nayana. In my considered opinion, this is misrepresentation. From the evidence of defendant no.2-J.Mitra, Adocate, who drafted the compromise petition, it is clear that adoption was not an issue in the suit and for the first time, the branch of Dibakar, after the death of Dibakar, accepted defendant no.1-Subash as the adopted son of late Bansidhar and Nayana. The suit was

executed by Dibakar against Nayana and others for partition of his joint family property and at the intervention of their well-wishers, it was settled. In

the very nature of the things the fraudulent design adopted by the defendant was secret in its origin or inception and in the means adopted for its success each circumstance by itself may not mean much taking all of together, they clearly reveal a fraudulent and dishonest plan.

26. As held in **AIR 1959 SC 504**- Kishori Lal vrs. Mt.Chaltibai, the question of onus loses its efficacy because it was never objected to in the court below and evidence having been led by the parties, at this stage, the court has to adjudicate on the material before it. And admissions are not conclusive, and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or were untrue.

This aspect was lost sight of by the trial court, which was influenced by Exts.N, 5 and Q passed in T.S. No.74/1962. The issue of Subash, the adoptive son of Bansidhar, was never before this Court. So there is no question of estoppel in raising the aforesaid issue. The trial court has fallen in error by not deciding the aforesaid issue on the basis of evidence on record.

27. So far as adoption of Subash is concerned, I have already referred to the arguments advanced by both sides on adoption. My attention was drawn to the findings recorded by the trial court on this aspect and the relevant portion of the oral and documentary evidence was also relied on by both sides.

28. The apex Court in the case of **Rahasa Pandiari (Dead) by LRs and others vrs. Gokulananda Panda and others,** (1987) 2 S.C.C. 338 held that “An adoption would divert the normal and natural course of succession. Therefore, the court has to be extremely alert and vigilant to guard against being ensnared by shemers who indulge in unscrupulous practice out of their lust for property. If these are only suspicious circumstances, just as the propounding of the will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt.

The apex Court in the case of **Kishori Lal vrs Mt. Chaltibai** AIR 1959 (S.C.) 504 held as under :-

> “As an adoption results in changing the course of succession depriving wives and daughters of their rights and transferring properties to comparative stranger or more remote relations, it is necessary that evidence to support it should be such that, it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth.”

29. This Court in the cases of **Prafulla Kumar Biswal vrs. Sashi Beura and others**, OLR 1989(I) 425, **Sulei Bewa & others vrs. Gurubari Rana,** AIR 1971 (Orissa) 299 and **Arjun Banchhar vrs. Bacchi Banchhar,** AIR 1999 (Orissa) 32 has also observed that

"As an adoption displaces natural succession, the burden to establish the adoption is squarely on the person who propounds and that burden is heavy."

30. In **R.Lakshman Singh Kothari vrs. Smt. Rup Kanwar,** AIR 1961 (S.C.), 1378 it has been held by the Hon'ble apex Court that

"Under the Hindu Law whether among the regenerate caste or among sudras, these cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption in adoption is to secure publicity. To achieve this object, it is essential to have a formal ceremony. No particular form is prescribed for the ceremony but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine delegation and therefore, the parents after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy and receiving him as the case may be to a third party.

In the case of **L. Debi Prasad (dead) by L.Rs. vrs. Smt. Tribeni Devi and others**, AIR 1970 SC 1286, it has been held that giving and receiving are absolutely necessary to the validity of an adoption and they are the operative part of the ceremony being that part of it which transfers the boy from one family to another.

31. So the ceremony of giving and taking is very essential for the validity of an adoption and in the present case, Defendant-1, Subash has to prove it and it should be free from suspicion or fraud and should be consistent and probable as to leave no occasion for doubting its truth.

32. In proving of such giving and taking ceremony, there is also distinction between ancient adoption and recent adoption, as held in the case of **Sitaram Nai vrs. Puranmal Sonal and others** reported in AIR 1985 (Orissa) 171 (supra).

33. In the case of **Kangali Swain vrs. Dinabandhu Rout**, 37 CLT 217, the principle of ancient adoption when can be availed has also been discussed: In the above case, it has been held by this Court that

"When the actual evidence is available and the party claiming adoption does not seek to the proof of ancient adoption and consequent loss of evidence, no allowance is available to be made on the plea that evidence might have been lost. The evidence of actual giving and taking as occurred has to be scrutinized in the same way as when evidence is offered to establish any fact, keeping in mind rigorous burden that lies on the party supporting adoption to establish the fact".

34. Here in this case, contemporaneous evidence being there inasmuch as the persons in whose presence the alleged adoption could have been made being available to testify about the same, the very contention taken by the respondents that since the adoption is ancient one, the burden is on the plaintiff who challenges such adoption, which has also been accepted by the trial court, cannot be sustained. In such

circumstances, the ratio in the case of **Gouranga Sahu and others vrs. Bhaga Sahu and another,** 1976 Orissa 43 that though the normal rule is that one who seeks to deflect the natural line of succession to property by alleging adoption must discharge that burden, in cases of ancient adoption every allowance for the absence of evidence to prove such fact must be favourably entertained and where there is long lapse of 36 years between the adoption and the time of its being questioned and during that period of interregnum a variety of transactions of open life and conduct on the footing that the adoption was a valid act have taken place, the initial burden necessarily shifts to the person who challenges its validity, is of no assistance to the respondents.

35. In the instance case, the alleged adoption is on 8.5.1939. The pleadings of Defendant-1 show that he was adopted on the 3rd day of his birth but the adoption ceremony was performed on the 21st day of his birth. But no specific custom is pleaded and it is not even pleaded that both the parents perform the physical act of handing over and receiving him. As per the pleading, Defendant-1 its only both the father and not the parents who did such act. The venue of the ceremony was also not given in the written statement. The written statement also is shortage of details which is essential for proving the adoption. Defendant-1 placed into service the evidence of D.Ws.4,5,6,7,8,9,10,11, 13 & 15 to prove such adoption ceremony. But none of them stated about the ceremony. D.W.13 even stated that he was not present at the time of alleged giving and taking ceremony. Further the family members and relatives who were alive and who were supposed to attend the adoption ceremony have not been examined. On the other hand, the plaintiff who examined herself as P.W.1 and the witnesses examined on her behalf clearly denied about such adoption and giving and taking ceremony. None of the witnesses examined on behalf of Defendant-1 have deposed the date of alleged adoption and the ceremony although most of them were adult by then and are also neighbours and relatives and business associates of the natural father and alleged adoptive father of Defendant-1. The witnesses have deposed in a parrot like manner stating that Subash is the adopted son of Bansidhar but none has stated about the transfer of adoptive boy by ceremony of giving and taking which is essential condition of a valid adoption.

36. Some witnesses examined on behalf of Defendant-1 stated about the performance obsequies of Bansidhar by Subash and performance of marriage of Subash by the plaintiff.

In the case of **Kishori Lal vrs. Mt. Chaltibai**, AIR (1959) S.C. 504 it has been held that “The performance of funeral rites will not sustain an adoption unless it clearly appears that adoption itself was performed under circumstances as would render it perfectly valid.”

In the said case it has also been held that the performance of marriage of the son alleged to have been taken in adoption itself does not prove adoption, which is otherwise disproved.

37. Ext.9 is the alleged deed of acknowledgement of adoption. It is stated to have been executed by the plaintiff on 29.2.1960 that is much after the death of Bansidhar, the husband of the plaintiff. The plaintiff alleged that the above document is the result of misrepresentation, undue influence and fraud. Admittedly, the plaintiff was an illiterate

and paradahnasin widow even if it will be considered that she was not paradahnasin lady, law is well settled that principles which govern the proof of execution of document taken from paradahnasin woman are equally applicable to documents taken from illiterate woman (see **Brundaban Misra vrs. Iswar Swain and others** AIR 1983 (Orissa) 172. Further in a case of execution of document by an illiterate or paradahnasin woman burden is heavy on the person getting advantage under the document to establish that the contents were read over and explained to her, she understood them, she had taken advice at the relevant time and the execution of the document was not only a physical act but also a mental act (See **Khalli Panda and another vrs. Rahas Patra & others 66(1988) CLT 495**). The principles of law as laid down by the apex Court in the case of **Mst. Kharbuja Kuer vrs. Jangbahadur Rai and others** reported in AIR 1963 (SC) 1203 are also applicable to the facts of the case. In the instant case while the plaintiff categorically denied about execution of Ext.9, Defendant-1 examined only D.W.15, Dhadi Sahu to prove the execution of Ext.9. D.W.15 stated that P.W.1 only requested the scribe to prepare a deed of adoption and nothing more. There is clear shortage of evidence of other materials required under the law in respect of a document executed by an illiterate lady as noted earlier to prove the execution of the document. Some peculiar features also appear from the evidence on record. The document vide Ext.9 was neither prepared, executed and registered in the Sub-Registrar's Office nor in the house of the plaintiff, Nayana Sundari. But the entire exercise was done in the father-in-law's house of Defendant-1 at Jobra. No explanation has also been offered by Defendant-1, who intends to take advantages out of the above document as to why the document was executed in such a secluded place. He has also failed to explain the suspicious situation and the background in creation of such a document. Hence, it can not be contended that this is a proof of adoption.

38. Exts.J,K,L,M,P,R, A-1 are the certified copies of some Registered Sale Deeds and Gift Deeds in which Defendant-1 Subash has been described as the son of Bansidhar Behera. In Ext.Z, Subash has also been described as the son of Bansihdar. But it is the settled principle of law that even though such type of documents are available than the ceremony of giving and taking are absolutely necessary in all cases of adoption (1973(1)C.W.R. 68).

In a case reported in **Somanath Bhataria vrs. Punananda Bhataria,** 1991(I) O.L.R. 445, it has also been observed that validity of adoption depends upon the proof of various facts. Hundred of documents should not substitute the proof of formalities by which adoption is established.

In a case reported in **Krupasindhu Mallik vrs. State,** 1978 C.L.T. 261, the Court held that creation of document is not substituted for the fact of giving and taking. Hence those documents cannot be considered as proof of adoption.

39. Ext.U is the entry made in the School Admission Register in which Subash has been described as the son of Bansidhar. D.W.16 who proved the above entry has deposed the effect that the guardian or father of Subash has not signed in the place meant for father or guardian. D.W.16 has also stated that the admission application of Subash Benehra is not available in the Office to prove that Bansidhar has signed the same as father of Subash. D.W.16 also stated that he joined in the above School in the year 1977 and he had no direct knowledge as to the entries made Ext.U. In a case

reported in **Thimmakkul and others vrs. Bandlu Rangappa & others,** AIR 1977 (Karnataka)115, it has been observed that entries of parentage made in the Birth Register or School Admission Register are of no evidentiary value unless they are proved by evidence of a person who had special means of knowledge as to the relationship or the source of knowledge. In the absence of such evidence, the entries or recitals therein cannot themselves be treated as substantive evidence. Entries relating to the relationship or paternity are extraneous to what is strictly enjoined to be recorded in those registers. So it cannot be contended that there is a proof of adoption.

40. Ext.5 is the certified copy of compromise decree passed in T.S. No.74/1962 by the Addl. Sub-Judge, Cuttack. In the above document, it has been averred that Subash is the son of Bansidhar. The plaintiff alleged that the so-called consent decree vide Ext.5 is the result of misrepresentation and fraud.

In the case of **Rama Chandra Singh vrs. Sabitri Dei**, 2004 S.A.R. (Civil) 1 it has been held by the apex Court as under.

> "Fraud and Justice never dwells together. It is also well settled that misrepresentation itself amounts to fraud. Indeed innocent misrepresentation may also give reason to claim against fraud. An act of fraud on court is viewed seriously. In the case of **State of A.P. vrs. T. Surya Chandra Rao,** A.I.R. 2005(SC) 3110, it has also been held by the Hon'ble apex Court that
>
> Fraud is a conduct either by letter or words which includes the other person or authority to take a definite determinative stand as a response to the conduct of the forms either by words or letters. It is also well settled that misrepresentation itself amounts to fraud. Fraud and collusion vitiate even the most solemn proceedings in every civilized system of jurisprudence."

The evidence of D.W.12, J.Mitra, the Advocate who drafted the compromise petition, vide Ext.Q is relevant for the purpose. He could not say whether adoption was a issue in the above suit or not. He stated that the parties did not put their signature or L.T.I. in his presence on the compromise petition. He could not even say whether the contents of the compromise petition was read over and explained to the parties. He would not even say what happened to the petition after it was drafted. He also admitted that the compromise petition does not bear the signature of Advocate P.C. Mishra.

D.W.2, who is an Advocate's Clerk has stated that the compromise petition was written by him at the instruction of D.W.-1 Subash, plaintiff, Nayana and one Janiya. He could not say who was the Advocates for the parties. The execution of the document vide Ext.N by the plaintiff Nayana Sundari who is admittedly an illiterate and paradahnasin lady has also not been proved by the Defendadnt-1.

It is well settled by various judicial pronouncements that consent decree cannot be passed in contravention of the law (**Nagin Das Ram Das vrs. Dal Patram Ichharam alias Brijivanu and others** AIR 1974 S.C. 471, **State of Punjab (now Haryana) and others vrs. Amar Singh and another,** AIR 1974 (SC) 994). Similarly 3rd party's right cannot be set at naught by a consent order (Rama Chandra singh vrs. Savitri Dei (2003) 8 SCC 319). So from the decree so passed vide Ext.5 on the basis of Exts.Q & N which

are alleged to be the result of fraud and misrepresentation and which also effects the right of the other legal heirs of the plaintiff, who are not parties to such suit and documents it cannot be said that Subash is the adoptive son of Bansidhar and the plaintiff is estopped from challenging such adoption.

41. I, therefore, hold that the alleged adoption is not true and valid and the alleged adopted son Subash has no right in the property of late Bansidhar. Once the adoption of defendant no.2 fails, the sale deed executed by him in favour of the intervenors does not convey any title.

42. So far as issue no.3 is concerned, the trial court has dealt with the issue whether the suit of the plaintiff was barred by limitation. It was held by the trial court that the suit was barred by law of limitation.

In this regard, in my opinion, the prayer in the plaint was to declare defendant no.1 as not adopted by the plaintiff's husband and as such he was not entitled to the status and benefit of a son and that to declare the deed dated 29.2.1960 purporting to acknowledge such adoption as null and void.

The primary question before the trial court is whether Bansidhar adopted Subash in 1939 or Subash was adopted by Nayana on 29.2.1960 under Ext.9 and whether Ext.9, i.e., deed dated 29.2.1960 is a deed of adoption or acknowledgement of deed of adoption. Plaintiff's specific case is that on 16.3.1972, defendant no.1 produced in Court the deed dated 29.2.1960 and came out with a case that he had been adopted by the plaintiff's husband in the year 1939, which was acknowledged in the year 1960 and it was known to the plaintiff on 16.3.1972. So a cause of action arose on 16.3.1972 for filing of the suit. The principle laid down in the case of **Ningawwa vrs. Byrapppa Shiddappa Hireknrabar & Others** reported in AIR 1968 SC 956, Article 95 is that- Starting Point of Limitation- It is not date of execution of gift deed but time when fraud becomes known to the party wronged. Article-95 prescribes a period of limitation of three years from the time when the fraud becomes known to the party wronged. In the present case the appellant should come to know regarding the fraud perpetrated to her on 16.3.1972 when Subash produced the deed dated 29.2.1960 before the Court that he had been adopted by the plaintiff's husband. Hence, the trial court should not draw the suit within the process of adjudication merely on the plea that it is barred by limitation.

43. So for the foregoing reasons, this Fist Appeal of the plaintiff stands allowed. The impugned judgment and decree passed by the trial court are set aside. Consequentially, the suit of the plaintiff stands decreed in favour of the plaintiff.

During course of hearing of the First Appeal, as I have allowed Misc. Case No.270/2004 on 11.8.2004 to implead the third party purchaser as respondent during lis pendens, I have also heard him. I find that despite order dated 17.11.1987 passed in Misc. Case Nos.851 & 561 of 1987 injuncting both the parties not to dispose of any part of the suit property, which was confirmed by order of this Court dated 17.2.1988 and order dated 5.5.1995, the parties were directed to maintain status quo till hearing of the Appeal regarding the properties described in Schedule "B" to the disputed deed of partition dated 14.12.71, for which the lis pendens purchasers were impleaded as parties and the respondents have deposited a sum of Rs.4,51,500/- before this Court and the same is lying in deposit. The aforesaid

amount be released in favour of the appellant. As it is stated by the learned counsel for the intervenors that the land has been utilized for public purpose, the appellants shall settle the same in favour of the intervenors by executing sale deed.

Appeal allowed.