

ORISSA HIGH COURT : CUTTACK

**Second Appeal No. 263 OF 2001**

From the judgment dated 30.4.2001 and decree dated 11.5.2001 passed by Shri J.M. Pattnaik, learned Addl. District Judge, Nayagarh in Title Appeal No. 39/43 of 1997 confirming the judgment dated 29.3.1997 and decree dated 11.4.1997 passed by Shri K.N.Panigrahi, learned Civil Judge (Sr. Division), Nayagarh in T.S. No. 70 of 1991.

Mani Das and others ..... Appellants

-Versus-

Bhagirathi Das and others ..... Respondents.

For Appellants : M/s. R.K.Mohanty, D.K.Mohanty,  
P.K. Ratha, A.P. Bose,  
D.Mohapatra and  
P.K. Satapathy.

For Respondents: M/s. S.P.Mishra, S.K.Mishra,  
S.Mishra and S.Dutta  
(for Respondent no.2.)

Decided on 27 .09. 2010.

**P R E S E N T :**

**THE HONOURABLE SHRI JUSTICE M. M. DAS**

***M.M. Das, J.***

This second appeal has been preferred under section 100 of the Code of Civil Procedure by the defendants 1, 3 and 5 in T. S. No. 70 of 1991 against a confirming judgment. The aforesaid suit was filed by the respondents as plaintiffs seeking a decree for partition of the schedule 'A' properties claiming half share therein. By the time, the suit was filed, the defendant no. 2

Bhagirathi Das was a minor aged about 12 years and was represented by his father guardian, defendant no.1. The facts admitted by the parties are that the suit schedule 'A' properties is ancestral properties of the family of the parties.

2. The plaintiffs' case is that as per the genealogy given in the consolidated plaint, Akura was the common ancestor, who had two sons, namely, Panu and Mani. Defendants 2, 3 and 4 are the sons of Mani and defendant no. 5 is his widow. The plaintiffs are three married daughters of Panu. The plaintiffs claimed that the schedule 'A' property measuring Ac.13.23 decimals comprises the joint family ancestral properties left behind by Akura including some properties acquired by Panu and Mani from the joint family nucleus throw into common hotch potch. There has been no partition of the property by metes and bound between Panu and Mani. Panu had a son, who died at a very young age and, therefore, after marriage of the plaintiffs, Panu was living with Mani, who with the intention to grab the entire joint family properties, on the guise of mutating the purchased properties in their names, brought Panu to Khandapara and obtained a registered deed of adoption in favour of his eldest son Kubera – defendant no. 4. The recital of the said document was never read over and explained to Panu and it was not scribed as per his instruction. Kubera – defendant no. 4 left the village in the

year 1972 and his whereabouts were not known for more than seven years for which he met a civil death. Panu lost his mental balance due to old age and taking advantage of the same, Mani wanted to grab the properties of Panu for which the plaintiffs made a publication in the local daily, "The Samaja" on 27.8.1962 regarding the same, cautioning that any one entering into any transaction with Panu relating to their properties, the plaintiffs will not be responsible for the same. Immediately thereafter, Panu was brought by Mani to Khandapara for execution of a registered deed of partition and on 6.10.1982 obtained the signature of Panu on the registered deed of partition without disclosing the recitals to him. In the said deed only Ac. 1.02 decimals of land were allotted to the share of Panu whereas Ac. 7.00 was allotted to Mani. According to the plaintiffs, such unequal distribution of properties manifests perpetration of fraud. On the same day, Mani also obtained a registered deed of adoption-cum-gift in favour of his son Bhagirathi – defendant no.2, though defendant no. 2 was never adopted by Panu nor was there any occasion for Panu to adopt Bhagirathi when the earlier alleged adoption of Kubera – defendant no. 4, by Panu was subsisting. There was no giving and taking ceremony as alleged to have been made on the 'Akhaya Trutiya' day of 1980. On the same day, Mani also obtained a registered deed of cancellation of adoption of Kubera – defendant no.4, by

Panu though there was no occasion for execution of such a cancellation deed, as by that time Kubera had already met civil death and no body had known his whereabouts for more than seven years. Again on 15.5.1991, Mani brought Panu to Khandapara and in the guise of execution of a registered deed of correction of earlier documents obtained a registered sale deed in respect of the remaining property of Panu in favour of Bhagirathi though the same is a homestead land having a two storied residential house where Panu was residing and had no legal necessity to alienate the same. Plaintiffs pleaded that the said sale deed is a sham and void document and there was no passing of consideration. During the settlement operation, Mani managed to record his name in the settlement records. Hence, the suit for partition.

3. The defendant no. 2 is stated to be 12 years old at the time of filing of the suit and as his natural guardian did not appear on his behalf, the court appointed a guardian ad litem, who filed a written statement on his behalf and contested the suit. It was pleaded by defendant no. 2 - Bhagirathi that he was adopted by Panu. But he is not aware of any fraud having been played on Panu by Mani.

Mani was defendant no. 1. Though he filed a written statement describing it to have been filed on behalf of the

defendants 1 and 3, but the defendant no. 3 has neither signed nor verified the written statement as seen from the records. In the said written statement, the plaintiffs' allegations were denied except accepting the fact that the schedule 'A' properties comprises of ancestral joint family properties as well as the properties purchased by Panu and Mani from the joint family nucleus. It was pleaded that the suit for partition was not maintainable in view of the registered deed of partition dated 6.10.1982 executed between Mani and Panu, which is binding on the plaintiffs. It was further pleaded that the adoption of defendant no. 4 - Kubera in the year 1971 and the adoption of Bhagirathi - defendant no.2 in the year 1980 are both valid adoptions. The deed of adoption -cum- gift executed by Panu in favour of Mani was valid and binding and no fraud was practised. Registered sale deed executed by Panu in favour of Bhagirathi in the year 1991 is also valid and consideration passed, coupled with delivery of possession. It was further pleaded that Panu has executed all the documents in sound state of mind which was scribed as per the instructions of Panu. Both, the adoptions of defendant no. 4 and defendant no. 2 were made after observing, giving and taking ceremony in presence of the witnesses and before a Panchayat, plaintiffs have admitted prior partition as well as adoption of Bhagirathi and, hence, they are estopped from challenging the same.

4. The learned trial court framed as many as eight issues and came to the findings that Kubera was validly adopted by Panu, who met a civil death on 25.5.1980. Adoption of defendant no. 2 being made on 'Akhaya Trutiya' day of 1980, i.e., on 17.4.1980, the same is void as by that time, Kubera the adopted son of Panu was alive. Since the gift of properties was made on the basis of adoption of defendant no.2, the gift was invalid and the said adoption-cum-gift deed is void. Since the adoption and gift in favour of defendant no. 2 are invalid, Ext. G, the registered partition deed between Mani and Panu is also not valid and on the basis of Ext. G, it cannot be held that there is a valid prior partition of schedule 'A' properties. The plaintiffs jointly and defendant no. 1 each have half share in schedule 'A' properties and Ext. C, i.e., registered sale deed executed by Panu in favour of defendant no.2 is valid and binding on the plaintiffs. With the above findings, the learned trial court decreed the suit.

5. The defendants 1, 3 and 5 preferred First Appeal against the said judgment of the trial court. The plaintiffs filed a Cross - objection so far as the findings with regard to Ext. C is concerned. The learned lower appellate court in the impugned judgment arrived at the findings that since Kubera, the adopted son of Panu was alive on the date of the alleged adoption of defendant no.2 by Panu, the same is not a valid adoption. Defendant no. 2 is not the

adopted son of Panu. Since the intention of Panu to give the property to Bhagirathi is on the belief that Bhagirathi is his adopted son and adoption of Bhagirathi is invalid, the gift of property in favour of Bhagirathi is also invalid. The property covered under the gift-cum- adoption deed Ext. E is not mentioned in the partition deed Ext. G, though both the documents were executed on the same day which pre-supposes that gift deed was made first and, thereafter the partition deed was made. Hence, without consent of the co-sharers, gift in favour of Bhagirathi is invalid. Ext. G cannot be treated as a valid document of partition and plaintiffs are entitled to the relief of partition as there was no prior partition between Panu and Mani. Since there was no valid partition, the sale of land vide Ext. C by Panu in favour of Bhagirathi is invalid and not binding on the plaintiffs inasmuch as at the time of execution of the sale deed Ext. C, there was neither legal necessity for Panu, nor was there passing of consideration. Therefore, Ext. C is not a valid document. The properties in schedule 'A' are liable for partition and the plaintiffs are entitled to half share. Being aggrieved by the judgment and decree of the lower appellate court, defendants 1, 3 and 5 have preferred this second appeal.

6. Though on 28.8.2001, this Court recorded an order to the effect "Heard. Admit. Issue notice", but no substantial question of law

has been framed by the Court as required under section 100 C.P.C.

7. During the course of hearing, learned counsel for the appellants submitted that substantial questions of law, which arise in this appeal, are as mentioned in grounds of appeal, which are as follows:-

- (a) Whether the suit for partition is maintainable in law in view of the registered partition deed dated 6.10.1982, Ext. 1, particularly, when the said deed being voidable has neither been attempted for being set aside by the plaintiffs' father Panu during his life time nor the plaintiffs have never brought about any action, either in the present suit or otherwise, to set aside the said registered deed in accordance with law upon payment of proper court fee ?
- (b) Whether the learned courts below were correct in disbelieving the adoption-cum-gift deed dated 6.10.1982 executed by Panu in favour of Bhagirathi-defendant no.2 even if adoption is disbelieved when the gift was not dependant on adoption as per the intention of the donor ?
- (c) Whether the learned lower appellate court was correct in allowing the cross-objection of plaintiff-respondents 2 to 4 and setting aside the sale (Schedule - C) property by Panu in favour of Bhagirathi under Ext. C, when the said regd. Sale deed has neither been set aside nor been challenged in the manner prescribed under law upon payment of proper court fee ?

This Court on finding that the Court has not framed the substantial questions of law, while admitting the appeal, examined the facts of the case along with the findings arrived at by the courts below in order to find out as to whether the substantial questions of law as mentioned above do arise in this appeal or not, so that the same can be framed for



hearing the appeal on those questions. The question raised as at (a) cannot be considered to be a substantial question of law as it was only after the written statement was filed by the defendant no. 1 disclosing the existence of a registered deed of partition, the plaintiffs were required to prove that the said deed was executed fraudulently by playing fraud on Panu by Mani and on examining the deposition of the witnesses as well as materials available on record both the fact finding courts below have come to the conclusion that the deed of partition cannot be construed to be a valid deed in view of the fact that the property which was gifted in favour of Bhagirathi on the same day was not included in the deed of partition Ext. G and the said deed of gift –cum-adoption is a void document. The other two questions raised are also questions of fact and cannot be construed to be substantial questions of law as envisaged under section 100 of the Code of Civil Procedure.

8. Therefore, I find that neither any substantial question of law is involved in this appeal nor any such question has been framed at the time of admission of the Second Appeal.

9. In the result, the Second Appeal fails and the same is accordingly dismissed, but in the circumstances without cost.

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**M.M. Das, J.**

**Orissa High Court, Cuttack.**  
**September 27th , 2010/Biswal.**