ARUNA SURESH, J.

S.A. NO.271 OF 1994 (Decided on 20.05.2011)

JYOTIRMAY PANI …….. Appellant.

.Vrs.

STATE OF ORISSA & ORS. ……Respondents.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.68.

For Appellant - Mr. B.Mishra, Sr. Advocate
For Respondents – Mr. D.N.Mohanty
Additional Standing Counsel

ARUNA SURESH, J. Appellant has preferred this appeal against the judgment dated 9.8.1994 and decree dated 23.8.1994 passed in T.A. No.4/93 by the First Appellate Court thereby confirming the judgment dated 6.11.1992 and decree dated 11.11.1992 of the Second Subordinate Judge, Cuttack.

2. Plaintiff (appellant herein) filed a suit through his natural mother, Jyostsnamayee Mohapatra against the State (respondents herein) i.e. defendant No.1 to 3 and his adoptive father Jogendranath Pani (defendant no.4) since deceased seeking following reliefs:

(a) that let it be declared that the deed of gift dated 18.2.1981 executed by defendant no.4 in favour of defendant no.2 in respect of schedule "A" of the property is fraudulent and illegal, null and void and to be set aside.

(b) that the possession of the suit property described in schedule "A" of the plaint be delivered to the plaintiff through the process of the Court.

(c) that let the cost of the suit be decreed against the defendants.

(d) that any other relief or reliefs which is deemed and proper be granted in favour of the plaintiff against the defendants.

3. Case of the plaintiff in brief is that he is the natural born son of Biranchi Narayan Mohapatra and Jyotsnamayee Mohapatra. Jyotsnamayee Mohapatra is the natural born daughter of Jogendranath Pani (defendant no.4). He was adopted by Jogendranath Pani. His adoptive father owned ancestral property No.132 Sabik Plot No.129 A0.14 decimal, Plot No.130 A0.07 decimal which was the residential house at District-Cuttack, P.S.-Mahanga, Mouza Jankoti, corresponding to Consolidation Khata No.412, Consolidation Plot No.129, A0.14 decimal; Plot No.130, A0.07 decimal. Plaintiff is legally entitled to get half share in the said properties as the family is ruled under the Mitakhyara Principle of Hindu Law.

4. In the garb of lease deed, a gift deed was executed on behest of Ashalata Das, sister-in-law of Jagannath Pani in favour of defendant no.1 to 3 for running a Homeopathic dispensary. Natural mother of the plaintiff later on came to know of the fact that instead of lease deed, a gift deed dated 18.2.1981 was executed by defendant no.4 when, she obtained a certified copy of the said document. Alleging that the gift deed dated 18.2.1981 is a sham and fraudulent document, the suit was filed.

5. Defendants no.1 to 3 contested the suit of the plaintiff and filed joint written statement. Defendants disputed adoption of the plaintiff by Jogendranath Pani. As per their averment, the gift deed was executed by Jogendranath Pani voluntarily and he put his signatures on the same after knowing its contents and the deed was got registered and was acted upon. It is also averred that Jogendranath Pani had permitted the defendants to run a Homeopathic dispensary in the suit property with effect from 1.1.1981 and the gift deed was executed by him subsequently after the permission was granted by the Government to receive donations for running a Homeopathic dispensary. Jogendranath Pani had none else in the family and therefore, he voluntarily gifted the suit property to the Government for public charitable purpose i.e. for running a Homeopathic dispensary. It was also averred that the suit was barred by period of limitation and the plaintiff had no cause of action to file the suit and also that the suit, as filed was not maintainable.

6. The donor (defendant no.4) was duly served with summons for settlement of issues but he did not care to appear and contest the suit. Hence, he was proceed ex parte by the trial court vide order dated 17.11.1986. He died on 11.5.1989 during the pendency of the suit and his name was deleted from the record vide order dated 19.11.1990.

7. Trial Court held that plaintiff had failed to prove himself to be the adopted son of defendant no.4 at the relevant point of time when the gift deed was executed and the suit was barred by law of limitation because existence of the gift deed was known to the plaintiff as Jyotsnamayee Mohapatra, mother guardian of the plaintiff had filed objection case No.2224/82 under the Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972 before the Consolidation Officer, claiming right, title and interest over the suit property, which was dismissed on 16.10.1982 and the present suit was filed on 29.9.1986 i.e. after expiry of 3 years of the dismissal of the said case. The trial court dismissed the suit of the plaintiff on merit as well, holding that plaintiff had not been able to prove any fraud, misrepresentation or any undue influence exercised by Ashalata on Jogendranath Pani to execute the gift deed (Ex.3). While dismissing the appeal, findings of the trial court were confirmed by the First Appellate Court.

8. Vide order dated 9.2.1995 grounds No.2, 3 and 4 of the appeal were considered as substantial question of law. They are:

> (i) Whether the court below acted illegally in not admitting the certified copy of the judgment passed in T.S. No.77/83 by way of additional evidence u/o.41 Rule 27 C.P.C. particularly when the decree of the said suit has been marked as Ext.1?

(ii) Whether the gift deed dated 18.2.81 marked Ext.3 is valid since the entire homestead has been gifted away by the father without the consent of the plaintiff?

(iii) Whether the suit is barred by limitation?

9. Subsequently, on an application filed by the appellant following additional substantial question of law was formulated on 27.8.2008.

"As to whether on account of non-examination of attesting witness, the deed of gift can be used as evidence and basing upon the same the question of title can be decided.**"**

10. Mr. B. Mishra, learned senior counsel appearing for the plaintiff has submitted that the First Appellate Court committed an error in dismissing the application of the appellant filed under Order 41, Rule 27 of the Code of Civil Procedure (hereinafter referred as 'CPC') for permission to lead additional evidence as appellant wanted to file certified copy of the judgment delivered in T.S. no.27 of 1983 whereby plaintiff was declared to be the legally adopted son of Jogendranath Pani and the decree sheet pertaining to the said case (Ext.1) had been already proved in evidence before the trial Court.

11. Mr. D.N. Mohanty, Addl. Standing Counsel for the defendants has submitted that the First Appellate Court was right in dismissing the application as plaintiff, who was in the knowledge and possession of the document, withheld the same for the best reasons known to him and he could not be allowed to fill in the lacuna in the appeal by filing certified copy of the judgment passed in the adoption case.

12. Order 41, Rule 27 CPC postulates that a party who, for the reasons mentioned in the application, was unable to produce the evidence in the trial Court, should be enabled to produce the same in the appellate Court. However, it lays down the conditions to be fulfilled for entertaining an application for production of additional evidence in the appeal. They are :-

1. the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

2. the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed; or

3. the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. The appellate Court may allow such evidence or document to be produced, or witness to be examined.

13. Thus, it is clear that it is but proper for the Court that before entertaining those documents, the party or parties must satisfy that they could not place those documents

at the appropriate stage, namely, before the trial Court and there must be a bonafide effort in not filing those documents before the trial Court. It is settled law that unless there is acceptable reason for not placing the required documents at the appropriate stage, the parties cannot be permitted to place the documents as the additional evidence at the appellate stage.

14. It is not the case of the plaintiff that the trial Court refused to admit evidence which ought to have been admitted. The appellate Court did not require any document to be produced or witness to be examined to enable it to pronounce the judgment. Therefore, plaintiff was required to fulfill the requirement of Rule 27 (1) (aa) of the CPC. Plaintiff was required to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree, appealed against was passed. The appellate Court dismissed the application of the plaintiff with following observations:

> 11. "A party can not adduce additional evidence as a matter of right. The scope of Order 41, Rule 27 C.P.C. is limited according to the Orissa amendment. A document can be admitted, if the lower court has refused to admit, which it ought to have been admitted. The other ground is that the party seeking additional evidence has to satisfy the appellate court that even applying its due diligence, the existence of the document was not within his knowledge. Thirdly, when the appellate court requires a documents to be produced or any witness to be examined to enable it to pronounce a judgment additional evidence should be accepted. In the present case, the document filed is the certified copy of the Judgment of Second Munsif, Cuttack in T.S. No.77/83. This certified copy was received by the Plaintiff on 28.3.84, which is much prior to the filing of the suit, as the suit was filed on 29.9.86. So it can not be said that the document was not in existence and appellant could not procure it in spite of his best effort. Therefore, the petition Under Order-41, Rule-27 C.P.C. is hereby rejected."

15. The document sought to be filed is the certified copy of the judgment dated 21.12.1983 of Second Munsif, Cuttack passed in T.S. No.77 of 1983. Plaintiff had filed the present suit being T.S. No.150 of 1986 on 29.9.1986. Plaintiff had filed certified copy of the decree sheet (Ext.1) of the said suit which was obtained on 18.2.1984. The document sought to be produced was applied for by the plaintiff on 27.1.1984. The certified copy of the judgment was ready for deliver on 18.2.1984 i.e. the date when the certified copy of the decree sheet was obtained. However, plaintiff did not collect the copy of the judgment till 28.3.1984, though he collected the certified copy of the decree sheet. Thus, it is clear that at the time when the suit was filed, plaintiff was in possession of the document sought to be filed as additional evidence. Plaintiff continued to retain possession of the document and did not file the same in the trial Court for the best reasons known to him till the judgment was delivered on 6.11.1992. In other words, plaintiff was having knowledge and possession of the document for eight years and waited for the suit to be decided.

16. Things did not end here. Appeal was filed before the First Appellate Court on 7.1.1993. Proceedings in the said appeal continued for over a period of one and half

years before application under Order 41 Rule 27 CPC was filed by the plaintiff before the First Appellate Court on 5.8.1994. It is pertinent that on 5.8.1994, the appellate Court had heard final arguments on the appeal when the application was presented. The Court reserved the case for pronouncement of judgment and listed it for 9.8.1994. Objections to the application were filed by the defendants on 8.8.1994 i.e. a day before pronouncement of the judgment. The document sought to be produced in additional evidence was annexed to the application. Plaintiff having full knowledge and possession of the document chose not to file the document in the trial Court to support his case. Additional evidence could not have been permitted to enable the plaintiff to make out a fresh case or fill in the lacuna. The appellate Court, therefore, rightly did not admit the document nor allowed production of additional evidence. Plaintiff had ample opportunity to give evidence in the lower court but, elected not to do so and based his case on the evidence as it stood, could not have been allowed to give evidence which he could have given below. The application was nothing but an after-thought. It is pertinent that plaintiff did not file the application simultaneously with, or immediately after the filing of the appeal. He filed this application only on the date when final arguments were heard by the appellate Court and the matter was reserved for judgment. Plaintiff failed to give any satisfactory explanation as to why he did not file the document at the relevant stage. He failed to show that despite exercise of due diligence, he could not produce the document at the time when the decree appealed against was passed.

17. To conclude, the appellate Court rightly appreciated the law governing under Order 41, Rule 27 CPC while dismissing the application of the plaintiff. I find no illegality in the observations of the appellate Court which may warrant any interference by this Court.

18. Learned senior counsel for the plaintiff has submitted that suit of the plaintiff is within the period of limitation as his mother guardian acquired the knowledge of the gift deed (Ext.3) only after three years of its execution, on enquiry made from the Registrar and obtained certified copy of the said gift deed and the suit was filed within three years of the said knowledge.

19. I find no force in the aforesaid submissions. The trial Court while concluding that the suit was barred by period of limitation had considered admission of the plaintiff's natural mother guardian, P.W.1 that she had filed an objection case no.2224 of 1982 under the Orissa Consolidation of Holdings and Prevention of Fragmentation of land Act, 1972 before the Consolidation Officer Camp at Srikrishnapur claiming right, title and interest over the suit property. The said objection petition was dismissed vide order dated 16.10.1982 holding that her claim for right, title and interest in the suit property was not maintainable. Therefore, she had knowledge of the impugned gift deed when she filed the objection case in the year 1982. Since she filed the present suit in 1986 i.e. after the expiry of period of four years of the dismissal of the objection petition, the First Appellate Court rightly concurred with the finding of the trial Court that the suit was barred by period of limitation. It being fact finding, no interference is called for nor this Court is competent to interfere in the fact findings of the Courts below based on an earlier litigation, for construing the date of knowledge of the plaintiff about the existence of the gift deed. Period of limitation has to be calculated from the dates available on the record. As plaintiff had the knowledge of existence of the gift deed since after its

execution or since before the filing of the objection petition in the year 1982, the suit of the plaintiff is patently barred by period of limitation.

20. In the appeal, validity of the gift deed is also challenged on the grounds that donor could not have gifted entire homestead vide impugned gift deed without the consent of the plaintiff. This issue has not been specifically pressed during the course of arguments. Plaintiff has challenged the legality and the validity of the gift deed (Ext.3) alleging that he is the adopted son of Jogendranath Pani and has half share in the impugned property which is ancestral in nature. The trial Court as well as appellate Court, on analysis of oral as well as documentary evidence placed on record by the parties, did not find the plaintiff to be the adopted son of defendant no.4. Rather, a doubt has been specifically expressed by the Courts below, if the alleged adoption had taken place after the execution of the gift deed or prior to that, as the date of adoption was not disclosed by the plaintiff or her natural guardian, who happened to be the daughter of the donor, neither in evidence nor in the plaint. Therefore, since plaintiff had failed to establish his claim in the suit property as an adopted son, his suit attacking the execution of the impugned gift deed was found not maintainable. The fact remains, T.S. No.77 of 1983 was instituted on 29.6.1983 i.e. after the execution of the gift deed and the present suit was filed after obtaining the decree (Ext.1) passed in the said suit.

21. I find no reason to interfere in the fact findings of the Court below. The certified copy of the decree passed in T.S. no.73 of 1983 (Ext.1) does not find mentioned the date of adoption. Even in the plaint, plaintiff did not disclose the date of his adoption. None of the plaintiff's witnesses including his natural mother disclosed the date of adoption by deceased Jogendranath Pani. When plaintiff had claimed half share in the ancestral property as an adopted son of defendant no.4, it was for him to prove that he was adopted by Jogendranath Pani before the execution of the gift deed and had acquired right of half share in the impugned property being ancestral in nature. In the absence of any evidence, the Courts below rightly held that the gift deed (Ext.3) was valid. Since plaintiff failed to prove his right in the suit property before it was gifted, consent of the plaintiff for transfer of the entire homestead by way of a gift deed was not required.

22. Learned senior counsel appearing for the appellant has submitted that the right, title and interest in the suit property flowed from the respondents from the gift deed (Ext.3) dated 18.2.1981. Defendants have failed to examine an attesting witness to prove the gift deed. He has argued that Section 123 of the Transfer of Property Act (hereinafter referred to as 'T.P.Act') clearly postulates that for the purpose of making a Gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two attesting witnesses. He has referred to Section 68 of the Indian Evidence Act (hereinafter referred to as 'The Act') to argue that it is mandatory requirement of law that a document which requires attestation cannot be used in evidence, unless, at least one attesting witness has been examined for the purpose of proving its execution/attestation, if an attesting witness is alive and capable of giving evidence. However, no evidence has been produced by the defendants to show that both or any of the attesting witnesses to the gift deed were either dead or beyond the process of Court or were not capable of giving evidence. He has emphasized that no attempt was made by the defendants to call any of the attesting

witnesses to prove the execution of the gift deed and therefore, in the absence of proof of its execution, it cannot be used in evidence against the plaintiff. He has referred to AIR 2003 Orissa 123 to support to his submissions.

23. The second limb of arguments advanced by the senior counsel for the appellant is that defendants cannot take protection of provisory to Section 68 of the Indian Evidence Act as the execution of the will has been specifically denied by the plaintiff being son and successor of Jogendranath Pani.

24. Mr D.K. Mohanty, Additional Standing Counsel for the respondents while refuting the submissions made by the learned senior counsel for the appellant has argued that certified copy of the gift deed was produced by the plaintiff himself in evidence and there was no denial to the execution of the document by the donor and therefore deed being an admitted document and duly registered did not need to be proved by the defendants by examining one of the attesting witnesses. The court below, therefore, rightly held that gift deed was voluntarily executed by Jogendranath Pani. It was registered and was acted upon as required Section 122 and 123 of the T.P. Act.

25. On analysis of evidence of the parties, the Courts below observed that plaintiff had failed to prove that gift deed was got executed by Ashalata (sister-in-law of the donor) by exercising undue influence and misrepresentation upon Jogendranath Pani and that execution of the gift by Jogendranath Pani in favour of the defendants is not in dispute and also that it was acted upon. It is pertinent that an officer of defendant no.2 had also signed the gift deed in token of having accepted it. Homeopathic Dispensary was being run in the suit premises since 1.1.1981 and the gift deed (Ext.3)was executed by Jogendranath Pani on 27.1.1981. Therefore, defendants were already in possession of the suit property before it was gifted to them by defendant no.4.

26. During the course of arguments, counsel for the appellant only questioned on the prove of the gift deed (Ex.3) in the absence of examination of attesting witnesses. Section 68 of the Indian Evidence Act reads:

> **"S.68.** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of given evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.**"**

27. This section lays down that the documents required by law to be attested shall not be used as evidence until one attesting witness at least has been called for proving its execution provided an attesting witness is alive, capable of giving evidence and subject to the process of the Court. By virtue of provisions contained in Section 123 of the T.P. Act, a gift of immovable property is required to be attested by at least two witnesses and the transfer can be made only by a registered instrument. True that,

defendants have not examined any attesting witness to the gift deed to prove its execution to meet the requirements of Section 68 of the Indian Evidence Act.

28. However, there is a proviso to the Section. According to it, in the case of a document which is not testamentary in nature, it shall not be necessary to call an attesting witness to prove its execution, if it has been registered under the provisions of the Registration Act, unless its execution by the person by whom it purports to have been executed is specifically denied. So, the position is that, if any document other than a Will is registered, generally it is not necessary to call an attesting witness. However, even if it is registered, if the alleged executant denies its execution, then it would become necessary to comply with the main provision by examining at least one attesting witness. This section applies only where the execution of a document has to be proved. Where, however, the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that attesting witnesses had not witnessed the execution of the document. The necessity of examining an attesting witness would arise only when the document, which is required by law to be attested is sought to be produced in evidence and the execution thereof is questioned. If the attestation is not specifically denied it is not necessary to call any attesting witness.

29. The word “specifically denied” appearing in the proviso means specific denial by the party against whom it is sought to be used and not only by the executant. Attacking a document as a sham and nominal transaction would not amount to a specific denial of execution. A plea that the plaintiff was not aware of the execution of a document does not amount to specific denial. The law requires not a mere denial but a specific denial. In other words not only that the denial must be in express terms but it should be definite and unambiguous what has to be specifically denied is the execution of the document. Other contentions not distinctly referring to the execution of the document by the alleged executant are not covered by the expression denial in the proviso. When execution of a gift deed is specifically denied attesting witness has to be called for proof but, not where the donor specifically admitted its execution. If it is not denied in the pleadings there is no necessity to call the attesting witness. Where the execution is not specifically denied, attestation can be proved by any other method without taking recourse to the provisions of Section 68 which would come into operation only when the execution is specifically denied.

30. In view of the proviso to Section 68 of the Evidence Act, only when the execution of the gift deed was specifically denied, the document was required to be proved by examining an attesting witness. Such a denial could not be made by any person unless he had a right to succeed or any other right in the property.

31. Coming to the facts of the case, execution of the gift deed is an admitted fact. Rather, certified copy of the document was placed on record by the plaintiff himself. Jogendranath Pani, the executant of the document was arrayed as defendant no.4. He chose to absent himself from the Court proceedings after due service of summons on him. He remained ex parte throughout the proceedings till his death i.e. for about three years. He did not specifically deny the execution of the document by him. Therefore, by virtue of Proviso to Section 68 of the Act, it was not required for the defendants to prove the execution of the gift deed by examining at least one of the attesting witnesses. The plaintiff has claimed his right in the suit property on the plea that he was taken in

adoption by Jogendranath Pani and therefore, was his adopted son. Even in the plaint, he has not challenged the execution of the deed. According to him, the deed was not voluntarily executed by Jogendranath Pani but was executed under the undue influence of Ashalata. It was for the plaintiff to prove that the said deed was not voluntarily executed by defendant no.4 but, was executed under pressure or undue influence exercised by Ashalata or misrepresentation by her. Plaintiff had utterly failed to prove that the said deed was executed by Jogendranath Pani under undue influence of, or mis-representation by Ashalata. Both the Courts below have given a concurrent finding that plaintiff had failed to prove that the deed was not voluntarily executed by defendant no.4 and that it was a sham document. The findings of the Court below that the impugned gift deed was voluntarily executed by Jogendranath Pani thereby gifting the suit property in favour of the defendants no.1 to 3 for running homeopathic dispensary are findings of fact and cannot be interfered with by this Court in the Second Appeal. Besides, aforesaid findings have not been challenged by the plaintiff in this appeal.

32. Since execution of the gift deed was never in question and in fact, the certified copy of the document was placed on record by the plaintiff himself, Proviso to Section 68 of the Act came to the rescue of the defendants. Hence, no attesting witness was required to be examined to prove the execution of the gift deed by defendant no.4. Denial made by the plaintiff is not to the execution of the document but to its nature. Plaintiff could have recourse to Section 68 to argue that defendants did not examine any attesting witness to prove the execution of the gift, if the execution was specifically denied. Section 68 regulates proof of execution of the deed and not its nature or contents. It was not sufficient to prove merely a relationship wherein one person was in a position to dominate the Will of the other, it must also be proved that the transaction was unconscionable. **In Nishamani Singh Vs. Nishamani Dibya and others,** (supra) as relied upon by the counsel for the appellant, it was the donor who had specifically denied the execution of the gift deed by him and pleaded that donee had taken her signatures on the deed after giving her understanding that it was merely a power of attorney for managing her properties. Under the facts and circumstances of that case, it was held that execution of the gift deed was not conscious. It was also noted that valid execution was not proved by examining of an attesting witnesses and therefore, donee could not drive any interest in the property on the basis of the said document. Proposition of law as laid down in the said case is not in dispute. However, in the present case, as discussed above, neither the donor nor the plaintiff has specifically denied the execution of the gift deed. What is disputed is the voluntary nature of its execution. Therefore, this case is of no help to the plaintiff.

33. Plaintiff has also failed to prove his locus standi to challenge the execution of the gift deed. He claimed a right to succeed or ownership right in the impugned property, as an adopted son of Jogendranath Pani but, has failed to prove that he was legally adopted by Jogendranath Pani before the execution of the gift deed. Under the facts and circumstances of the case, the trial Court and the First Appellate Court adopted correct approach in accepting the gift deed in evidence, in the absence of examination of an attesting witness as examination of the attesting witnesses was not required by virtue of Proviso to Section 68 of the Act, while deciding the claim of the plaintiff in the suit property.

34. Hence, in the light of my discussion as above, I find no merits in the appeal and the same is accordingly dismissed. Parties are left to bear their own cost. The trial Court record as well as Appellate Court record be sent back forthwith along with an attested copy of this judgment.

Appeal dismissed.