

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.101 OF 2005

In the matter of an appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned Additional District Judge, Jagatsinghpur, in RFA No. 07 of 2003 by setting aside the judgment and decree passed by the learned Civil Judge (Senior Division), Jagatsinghpur in Title Suit No.74 of 1994.

Smt. Nirupama Dei

:::

Appellant

-versus-

Harekrushna Mohapatra & Others

:::

Respondents

**(Appeared in this case by Hybrid Arrangement
(Virtual/Physical) Mode):**

For Appellant

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M/s.R.K. Mohanty,
Sr. Advocates.
Mrs. S. Mohanty, Advocate.

For Respondents

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P.K. Kar, D.K. Ratha,
A.K. Sethy, M.K. Panda,
Advocate.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:: 22.07.2022, DATE OF JUDGMENT:: 08.08.2022

The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and preliminarily decree passed by the learned Additional District Judge, Jagatsinghpur, in RFA No. 07 of 2003.

By the same, the judgment and preliminarily decree passed by the learned Civil Judge (Senior Division), Jagatsinghpur in Title suit No.74 of 1994 have been set aside.

This Appellant with her mother, Ranga Bewa had filed the suit for partition claiming half share over the suit property, declaration that Hemanta, present Respondent No.3 (arraigned as Defendant No.3 in the suit) is the son of Harekrushna not the adopted son of Maheswar and Ranga and declaration that the gift deed dated 24/25.02.1975 executed by Chanda in favour of Defendant Nos.2 and 3 as illegal, void and not binding.

The suit stood preliminarily decreed declaring half share to the present Appellant (Plaintiff) in respect to the suit schedule property in Schedule-A & B; declaring that the Plaintiff is the daughter of Maheswar; declaring that the present Respondent No.3 (Defendant No.3) is the son of Hemanta was not adopted by Maheswar and Ranga; declaring that the gift deed dated 24/25.02.1979 is sham, fraudulent, illegal and void and not binding. The present Respondent Nos. 1 to 3 (Defendant No.1 to 3) in the suit having filed the Appeal under Section-96 of the Code, said judgment and preliminary decree passed by the Trial Court have been set aside and the present Appellant (Plaintiff) has been non-suited. It may be stated here that during pendency of the suit,

the co-Plaintiff who happens to be the mother of the present Appellant (Plaintiff) having died, the suit was pursued by the present Appellant (Plaintiff) alone and she too contested the First Appeal.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. Plaintiff's Case:-

The Parties are governed by Mitakshara School of Hindu Law. One Hansa Moharana is the common ancestor of the parties and Chanda is his wife. Maheswar and Harekrushna are the two sons of Hansa. The Plaintiff is the daughter of Maheswar and Ranga. Maheswar died sometime in the year, 1958 leaving behind his widow Ranga and the present Plaintiff, Nirupama as her heirs. Hrusikesh and Hemanta are the sons of Harekrushna, Pratima, Surama and Jhunu are three daughters of Harekrushna. As even after the 15 years of marriage, Hansa and Chanda did not beget any child; they are said to have adopted Ananta before birth of Maheswar and Harekrishna. In order to avoid future complication regarding distribution of the family property at the issuance of Hansa; Ananta before the death of Hansa persuaded others for a partition deed which was executed on 22.10.1948 in respect of ancestral joint family property of Hansa, Ananta, Maheswar and

Harekrushna as described in Schedule-A of the plaint. It is further stated that inspite of the execution of said partition deed, the joint family status continued and there was no severance in that status. So, it is said that A Schedule property was jointly enjoyed and Hansa, Chanda, Ananta, Maheswar and Harekrushna continued to live in joint mess and estate and as such the partition was never acted upon in the field.

After the death of Puni and her husband Ananta; Hansa, his wife Chanda, their son Maheswar and Harekrushna continued to live in joint mess and estate. The joint family status also continued after the death of Hansa. Maheswar died in the year, 1958; and after the death of Maheswar, his wife Ranga and daughter Nirupama (Plaintiff) along with Defendant No.1 i.e. Harekrushna and Chanda possessed 'A' schedule property jointly. Ranga, the mother of Nirupama died during pendency of the suit on 09.09.1994 (during the suit), Nirupama after the death of Maheswar, is said to have been brought up by her mother Ranga. She was only three years old at the time of death of her father Maheswar. She is performing the Sudhi ceremony of her parents through her son. After the death of Maheswar, Harekrushna, the Defendant No.1 became the Karta of the joint family consisting of Ranga and Nirupama (Plaintiff) and Chanda. Harekrushna was only male member and was looking after joint family property.

Hansa and his wife Chanda had purchased Ac.1.39 decimals of landed property by registered sale-deed dated 20.11.1942. The property is said to have been purchased from out of the joint family income but the registered documents to that effect was in being the name of Chanda. It is stated that Chanda was illiterate and rustic pardanasin lady having no knowledge about the property affairs and documentation. So Chanda only possessed the purchased property separately and the entire joint family property was being managed by Hansa. The purchased property is described in Schedule-B. It is stated that both items of property have never been partitioned., In the year, 1975, when Chanda was alive and the Defendant No.1, Harekrushna was managing the joint family affairs; taking advantage of old age of Chanda, he prevailed upon her and got registered deed of power of attorney in his favour for looking after the joint family affairs. Chanda has no other option at the relevant time and surrendering to the pressure of Harekrushna, the Defendant No.1, a deed came into being on 26.02.1975. It is stated that Chanda had no knowledge about the nature of the document and its consequences and having acted under the pressure and direction of Defendant No.1, she did everything as desired by Defendant No.1 in the said deed without the knowledge of Chanda. She is said to have gifted away the property in favour of Defendant Nos. 2 and 3 which she did

not know nor even told. In that very document, the Defendant No.1 in shrewd manner has got Hemanta (Defendant No.3) described as the son of deceased Maheswar. It is stated that the document is completely invalid and that was never acted upon. During the move for amicable partition, the Defendant No.1 refused to give any share out of Schedule-B property to the Plaintiff in saying that Chanda had gifted away the property to Defendant Nos. 2 and 3 and their names have been recorded in the Record of Right. The Plaintiffs were taken aback by such disclosure and then they could discover the fraudulent transactions made at the instance of the Defendant No.1. It is further stated that during the year, 1974-1975, Chanda was alive and due to her old age, she was physically and mentally not in fit state. So, Defendant No.1 being in-charge of the management of the joint family property and as he was looking after the settlement affairs, he is said to have manipulated all these things in their favour. During illness of Chanda, the Plaintiff No.1 (Ranga-since dead) suggested for sale of some joint family property to meet the family expenses especially the expenses incurred in the treatment of Chanda, who was then found to be suffering from Cancer. The Defendant No.1 turned down the suggestion. The plaintiff has then requested for amicable partition of the properties which too was ignored.

So, it is stated that the Plaintiff No.1 has 1/4th share over the suit schedule property which now after her death has come to the hands of Plaintiff No.2 (sole Plaintiff) in addition to her own 1/4th share. Her entitlement is thus said to be ½ share.

4. The Defendants in their written statement while traversing the plaint averments have stated that Nirupama has been wrongly described by the Plaintiff as the daughter of Maheswar. It is claimed that Nirupama is the daughter of Defendant No.1 himself. It is also stated that Hemanta, the Defendant No.3 is the adopted son of Maheswar and Ranga and he had been son adopted, when he was two years old on the Sri Gundicha day by performance of required adoption ceremony and Hemanta (Defendant No.3) was brought up by Ranga, the Plaintiff No.1 (since dead).

It is the further case of the Defendants that Plaintiff No.2 is the eldest daughter of Defendant No.1 and was brought up by Ranga, the wife of Maheswar as after the birth of Plaintiff No. 2, the wife of Defendant No.1 fell ill. It is further asserted that it was severance of status of the joint family on the strength of registered partition deed dated 22.10.1984. The Defendants refuted that the said deed of partition is not a nominal one. It is stated that Maheswar died in the year, 1966 leaving behind his wife, Ranga and mother Chanda. It is said that

Chanda purchased Ac.1.29 decimals of landed property out of her own money. Then denying the plaint averments, they say that Chanda out of free will and volition had gifted away Schedule-B property to Defendant Nos. 2 and 3 on 26.02.1975. It is their case based upon that deed of gift, the property has come to be recorded in the name of Defendant Nos. 2 and 3 and during the settlement in the entry Hemanta (Defendant No.3) has been rightly shown to be son of Maheswar. They assert that the deed of gift of the year 1975 is genuine one and the said title over the suit property therein has come to be conferred upon Defendant Nos. 2 and 3. They state that there being partition, the Plaintiffs is not entitled to any share when Harekrushna, the Defendant No.1, who is the father of Plaintiff No.2 is alive. It is further stated that the property under dispute was Badhei Jagir land and after death of Hansa, Ananta and Maheswar having died, the Defendant No.1 is continuing to serve the villagers following the foot prints of his forefathers. The land under dispute having been settled under the provision of Orissa Estate Abolition Act, he is possessing suit property exclusively. It is also stated that the land under Khata No.809 appertaining to plot No.1684 covering the area of Ac.0.26 decimals is the self-acquired property of Defendant Nos. 2 and 3 and as such these properties and the Schedule-B property are to be executed from partition.

In the subsequent Additional written statement, the Defendants have stated that it is not correct that Defendant No.1 had only three daughters namely, Pratima, Surama and Jhumu. It is stated that Plaintiff No.2 is another daughter of Defendant No.1. They also denied Ranga to be the mother of Plaintiff No.2. It is stated that Maheswar died in the year 1965.

5. On the above rival pleadings, the Trial Court in total framed eight issues.

Coming to answer issue nos.3 and 5 with regard to the correctness of the genealogy showing inter se relationship between the parties in his plaint and the status of Defendant No.3 as to if he is the son of Harekrushna, the Defendant No.1 or the adopted son of Maheswar and Ranga; upon examination of evidence both oral and documentary and their detail discussions at its level from all possible angle, the finding have been rendered that Plaintiff No.2 is the natural born daughter of Maheswar and Ranga. It has also been held that the Defendant No.3 is not adopted son of Maheswar and Ranga.

Having said as above, the Trial Court has proceeded to answer the other issues in saying that the deed of partition dated 22.10.1948 was never acted upon and therefore, the partition has to take place.

Lastly, coming to the sustainability of the document i.e. deed of gift as it said; the finding has been that said deed of gift purported to have been executed by Chanda in favour of Defendant Nos. 2 and 3 is not genuine and valid document. And thus, the Defendant Nos. 2 and 3 have not been conferred with the title in respect of the all those properties covered under the said deed of gift. In saying so, it has been observed that this was not the exclusive property of Chanda and she was jointly possessed by the parties. So, it is stated that even Schedule-B is also to be partitioned.

Answering the question as to the settlement of the suit land in favour of Defendant No.1 under the provision of Orissa Estate Abolition Act; relying upon the settlement entries as also the that such position, it has been said that such possession is to enure to the benefit of all the co-owners. The objection raised by Defendant No.1 as to partition has been turned down.

5. The Defendant Nos. 1 to 3 being aggrieved by the above, having carried First Appeal have been successful in getting all such important findings annulled.

6. The First appellate Court on analysis of evidence on re-appreciation of evidence at its level has held that Hemanta is the

adopted son of Maheswar and Ranga. Relating to the deed of gift, the First Appellate Court's finding is that said property is the property of Chanda and she having duly and consciously executed the deed of gift in respect of Schedule-B property in favour of Defendant No.2 and 3; the same is genuine and as such valid as that has been accepted by the Defendant Nos. 2 and 3. It has also been said by the First Appellate Court that there being a deed of partition dated 22.10.1948 in respect of Schedule-A property; the subsequent partition is not permissible. In saying so, the First Appellate Court has held that the said properties are not no more having the character of joint family properties for being available for the partition. With all these findings, the First Appellate Court has non-suited the same.

7. The present Appeal has been admitted to answer the substantial questions of law as stated in A(i), A(ii), A(iii) and C & E of the Memorandum of Appeal which read as under:-

- (i) Whether the learned Lower Appellate Court was correct in reversing the finding that Hemanta is not the adopted son of Ranga?
- (ii) Whether adoption could not have been approved through documents, far less through assumption, in the absence of concrete proof of giving and taking?

- (iii) Whether the mandatory requirements to plead the giving and taking and the year and date of adoption are conspicuously absent?
- (iv) Whether the finding that the gift deed Ext.D is invalid has been correctly reversed when the gift deed has been proved not to have been acted upon as mandatorily required U/s. 122 of T.P. Act?
- (v) Whether, in any view of the matter, the learned lower Appellate Court was justified in refusing partition of Chanda's interest only on the ground of non-joinder of daughters when there was substantial representation of her estate?

8. Learned Counsel for the Appellant submitted that the First Appellate Court has unjustifiedly set aside the findings of the Trial Court on all those factual aspects by simply taking a view on its own without saying as to whether the view taken by the Trial Court is either contrary to the evidence on record or perverse or have been rendered on the base of an erroneous view point of law. It was submitted that the Appellate Court mainly relying on the entries in the record of right, Ext.9 and Ext.13 and being totally oblivious of the position that in the written statement, there is no pleading as to the date of adoption has erroneously concluded that the evidence on record justify a finding that Hemanta, the Defendant No.3 is the adopted son of Maheswar and Ranga. She further submitted that the First Appellate Court has

misdirected itself by holding that Schedule-B property is separate and exclusive property of Chanda when admittedly Chanda was illiterate and having no source of income, more so, when the settlement entries of such land show joint recording and the evidence on record reveal that the Defendant No.1 being the Karta was looking after all these family properties. In that view of the matter, when the evidence on record according to her does not establish that the gift has been duly accepted as required under the provision of section-122 of the Transfer of Property Act, 1882; the First Appellate Court is not right in holding the said deed of gift, Ext.D as valid in the eye of law for holding the field. She also submitted that even though there was a registered deed of partition in the year 1948, on the face of the overwhelming evidence on record that the same has not at all been acted upon for such long length of time, the finding of the First Appellate Court that the suit for partition even in respect of 'A' Schedule property is not maintainable cannot be sustained. According to her, such partition having not been acted upon ought not to have been held to be a partition in metes and bounds to defeat the suit for partition.

9. Learned Counsel for the Respondents submitted all in favour of the findings returned by the First Appellate Court. According to him, the First Appellate Court upon an in-depth analysis of evidence on record

has rightly arrived at the finding that the Defendant No.3 is the adopted son of Maheswar and Ranga and the flimsy ground assigned by the Trial Court in culling out certain deficiencies in the written statement has been rightly ignored and held as untenable not to record finding on adoption. He submitted that the finding of the First Appellate Court on the issue of the status of the Defendant No.3 as the adopted son of Maheswar and Ranga is based on just and proper appreciation of evidence both oral and documentary and therefore, the same is not liable to be interfered with. He next submitted that the properties standing purchased long-long back in the name of Chanda and during the lifetime of her husband, Hansa, merely because the property was possessed with other joint family properties, the same should not have been taken to have lost its character that it is not the exclusive property of Chanda and it is too late to contend that it is the joint family property and had just been purchased in the name of Chanda, but to benefit the whole family. He submitted that the deed of gift executed by Chanda being a registered one and on the basis of evidence of record, the First Appellate Court did commit no mistake in holding that it is genuine and valid.

10. Proceeding to answer the first two substantial questions of law, which are inter-linked by addressing the rival contention, this Court is now called upon to judge the sustainability of the finding of the Courts

below on issue no.5. In taking up this exercise, it is noteworthy to say that here when the Plaintiff Nirupama and her mother, the Co-Plaintiff, Ranga have placed their case in the plaint that Plaintiff Nirupama is the daughter of Maheswar and Plaintiff No.1, Ranga; the Defendant No.1 i.e. Harekrushna and other Defendants stated in the written statement that said Nirupama, Plaintiff No.2 is the natural born daughter of Defendant No.1. The Trial Court has negated the Defendant's case in saying that Plaintiff No.2, Nirupama is the daughter of Harekrushna, Defendant No.1. The First Appellate Court has also affirmed the said finding of the Trial Court on independent assessment and analysis of voluminous evidence both oral and documentary at its level. This finding is not challenged by the Defendants. So the falsity of the Defendant's case that in denying the status of the Plaintiff No.2 as the natural born daughter of Maheswar and Ranga is established. Thus, the move of the Defendants Nos. 1 & 2 to non-suit the Plaintiff No.2 by claiming that she is the daughter of Defendant No.1 and not the daughter of Maheswar and Ranga has failed. In my view, this has definite bearing in the matter of judging the sustainability of the finding of the First Appellate court on the issue of adoption of Defendant No.3 as claimed by the Defendants by Ranga, wife of Maheswar who has been conclusively held to be the mother of Plaintiff No.2. Ranga who is

said to be have adopted Defendant No.3 was thus not issueless at the time of adoption as asserted by the Defendant Nos. 1 & 2.

11. It is settled position of law by long catena of decisions that since adoption changes the natural course of succession, the heavy burden of proof lies on the person who claims adoption. The burden of proving the fact that there is valid adoption which deflect the ordinary course of succession lies upon him who sets up the case of adoption.

In our given case therefore, the burden lies upon the Defendants in proving that Defendant No.3 had been validly adopted by Ranga, the wife of Maheswar and that too when Ranga was having her daughter, the Plaintiff No.2 as has been finally held. So, by such adoption, Ranga is said to have introduced another successor to the property of her husband and herself in reducing her right as well as that of her own daughter. It is stated that Hemanta, the Defendant No.3 was only two years old; when he was taken on adoption by Ranga in the year 1968 on the Sri Gundicha day. The witness, D.W.1 has been examined in support of the case of adoption. He has failed to withstand the cross-examination in establishing the veracity of his version having said that the age difference of Harekrushna, Nirupama and Hemanta is only two years which is unbelievable. Maheswar and Harekrushna are the sons of

maternal uncles of D.W.2. He has failed to say the age of the Ranaga and Maheswar in the year 1955 and has contradicted his own version by saying that Maheswar adopted Hemanta during his lifetime which is not the case of the Defendant Nos. 1 & 2. On detail discussion of evidence, the Trial Court has observed that D.W.2 does not have any idea about the property and relationship between the parties. This Court finds all the justification to accept the same which appears to have been overlooked by the First Appellate Court. D.W.3's evidence has been discarded as he has said that 25 years before the death of Ranga on Sri Gundicha day, Ranga adopted the Defendant No.3 which is utter falsehood. Having marked the other answers given by that witness during the cross-examination, the Trial Court is found to have rightly held that his evidence is not to be relied upon for the purpose and does not come to the aid of Defendants on this score. The First Appellate Court has not at all touched upon these facets. The Trial Court has examined documents Exts. 20 and 21 properly in saying that those negate the claim of Defendant No.3 to be the adopted son of Ranga. Similarly, the evidence of D.W.-4 on elaborate discussion has been disbelieved and so also the evidence of other witnesses examined from the side of the Defendants with which this Court concurs.

The First Appellate Court does not appear to have touched upon all these affairs in evidence as have been viewed and pointed out by the Trial Court in saying that the oral evidence on the score of adoption of Defendant No.3 by Ranga are wholly unsatisfactory. On the other hand, the First Appellate Court appears to have given much of importance to the documents, Exts. C, D, E, J & K with the mention of father's name of Defendants No.3 as Maheswar and mother's name as Ranga. In a sale-deed Ext.C without indicating as to how such mention as to status of Hemanta would be binding upon the Plaintiff, the First Appellate Court is found to have been taken that as an important circumstance in support of said claimed adoption. One important aspect which appears here, which has been completely lost sight of by the Appellate Court of which judicial notice can be taken is that in the year 1971, there was no need for stating name of mother in a document of sale which now too is also not the need or requirement. Therefore, this description in these documents in my view which have come into being within three years of so called adoption is just too build up the case in that light so as to be projected as evidence in future. The other document, Ext.D under challenge is the deed of gift and there the mention of name of father of Defendant No.3 as Maheswar has been taken note of. Fact however remains that there is no evidence on the score that whether such specific

description has been made under the instruction of Chanda. Other documents which have been pointed out by the First Appellate Court, in my view are not of that significance. Even if it is taken for a moment that there was a declaration of Chanda that Defendant No.3 is the adopted son of Maheswar, it cannot support the claim of adoption by standing as a strong circumstance. Without the oral evidence with regard to the performance of the giving and taking ceremony and acceptance of Defendant No.3 all along by Ranga and Plaintiff No.2 as such which too is wholly wanting; these documents which are self-serving are not of any worth more so when it is not pleaded to be an ancient adoption nor any evidence in that direction are being so placed. Thus it is clear that the finding of the Trial Court that the Defendant No.3 is not the adopted son of Ranga and Maheswar is based on proper appreciation of evidence on record and that ought not to have been annulled by the First Appellate Court in holding to the contrary. Therefore, the answers to above two substantial questions of law are hereby returned to set aside the finding of the First Appellate Court on that issue of adoption of Defendant No.3 by Ranga as has been set up by the Defendants in the written statement and that in turn goes to affirm the finding of the Trial Court answering against the said adoption of Defendant No.3 as claimed.

12. This now takes us to undertake the exercise of finding out the answer to the 3rd substantial questions of law. The deed of gift under Ext.E has been admitted in evidence and marked Ext.D. It is stated that on 24.09.1974, it was executed by Chanda Dei, the widow of Hansa. In that the property involved stood purchased by Chanda way back on 20.11.1942 under a registered sale-deed. The Plaintiffs claim that it was with the funds of the joint family. Be that as it may, it is not stated by the Plaintiffs as to what was the extent of the joint family property then at that time in the hands of the Hansa coming from his ancestors. Now even if for a moment, it is accepted that Chanda had no income of her own and therefore Hansa had purchased the property in Schedule-B in favour of his wife Chanda, that itself is not enough to assume that the nature of property so purchased in the name of Chanda to be the joint family property in unsetting the normal presumption that the property is that of Chanda who is a female member of the family as it was so purchased. There being no evidence on record that such purchased property in the name of Chanda was not to benefit her alone, when the ordinary presumption stands that it was for the benefit of the vendee, the finding of the Trial Court that Chanda was having no absolute right over the said property has no leg to stand and pass through judicial

scrutiny. The First Appellate Court having reversed the said conclusion of the Trial Court, although for different reasons, the same thus stands.

This deed of gift, Ext.D is attacked by the Plaintiff as to have been obtained from Chanda by Defendant No.1 on misrepresentation that she was required to execute a power of attorney. It is also stated that the document has been obtained fraudulently. Through it is seen that Chanda was an illiterate lady, the evidence of D.W.6 who is a witness to the deed of gift reveal that Chanda had executed said deed of gift and he was present at the relevant time, when the contents of the deed were read over and explained to Chanda, the doner. He has further stated that Chanda having understood the contents to have been correctly written under her instruction had finally placed her LTI on the document. He has also named the other witnesses to the said deed of gift and the role played by that witness as like him. The Plaintiffs here do not say that Chanda had not executed any such deed. They only say that she had executed the said deed which was registered believing it to be a power of attorney which she has going to execute in favour of Defendant No.1 as requested for. When the property in question are the purchased property of Chanda and the execution of said document has been proved through D.W.6; in the absence of any evidence as to existence of doubting circumstances surrounding the document, the First Appellate

Court is not found to have committed any mistake in reversing the finding of the Trial Court on that issue in saying that Ext.D is valid and genuine. Furthermore, here the evidence on the score of acceptance of the gift is quite satisfactory with the land record standing in the name of the donees giving rise to a presumption in favour of the donees (Defendant Nos. 2 and 3) to be in possession of the same.

13. Although no such substantial question of law has been framed touching upon the sustainability of the finding of the First Appellate Court on the maintainability of the suit which it has held against the Plaintiff, the same is required to be dealt with for being answered.

14. The First Appellate Court at paragraph-11 of its judgment has discussed that on the suggestion of Hansa, this registered deed of partition had come into being on 22.10.1948 (Ext.F). The Plaintiffs state that it was merely with an aim to avoid future complication. The deed being of the year, 1948, the Trial Court appears to have made a detail discussion of evidence on record in concluding that said deed was never given effect to in the field and the parties have not acted upon the same as such at any given point of time. The fact remains that the record of right was continuing to remain a joint except with little variation, that some properties have been separately recorded. This aspect is not being

explained by the Defendants. Accepting for a moment that such was the decision in the year 1948 when the properties had gone for partition, the fact however stands that even with that, the parties have not possessed their respective allotted lands in accordance with the partition and they too have not got their Record of Right prepared separately in terms of that partition. In the meantime, much water have flown in the Ganges and the survey numbers have undergone changes; there might have been change in the area of the plots too. Here as shown by conduct and treatment meted out to the properties by the members of the family, said partition as made under the deed was not in real field carried into action. Thus now after lapse of four and half decades till the suit to say that no such suit for partition is maintainable in my view would not be the right approach which the First Appellate Court has said. More particularly, when at present in the partition, the exact entitlement and possession of the properties by the parties as far as possible and practicable can very well be given respect to. Furthermore, merely on the basis of that partition deed when the First Appellate Court has not arrived at a finding that the possession of the properties by the respective parties are not in great variance to their legally entitled shares; the denial of the claim of partition as advanced by the Plaintiff and as has been ordered by the First Appellate Court cannot be allowed to stand.

The decision in case of '*Anil Kumar Mitra and others Vrs. Sanendra Nath Mitra & Others*; AIR 1977 SC 3767' cited by the learned Counsel for the Respondent has been rendered on completely different factual settings. In that case, there was a preliminary decree in the earlier suit and in that backdrop; it has been held that in the absence of pleading of reunion by blending, the joint family cannot be held to be continuing.

For all the aforesaid discussion and reasons, the suit of the Plaintiff is preliminarily decreed declaring her half share over Schedule-A property only. The parties are directed to make amicable partition of the Schedule-A property within a period of three months hence failing which the final decree proceeding would stand initiated for further follow up actions in finally disposing the suit as per law.

15. In the result, the Appeal to the extent as indicated above is allowed in part and as so held hereinabove. However, there shall be no order as to cost.

**(D. Dash),
Judge.**