

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.302 of 2000

In the matter of Appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree 28.07.2000 and 09.08.2000 respectively passed by the learned Additional District Judge, Jeypore in T.A. No.3 of 1995 setting aside the judgment and decree dated 06.09.1993 and 14.09.1993 respectively passed by the learned Civil Judge, Senior Division, Jeypore, in T.S. No.54 of 1990.

Shri Bali Bhotra

....

Appellant

-versus-

***Sondhar Banua @ Bhotra (Since
Dead) by his LRs & another***

....

Respondents

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

For Appellant - Mr. Manoj Mishra
(Senior Advocate)

For Respondents - Mr. B. Rout
(Advocate)

**CORAM:
JUSTICE D.DASH**

Date of Hearing : 22.09.2022 : Date of Judgment: 25.11.2022

D.Dash, J. The Appellant, in this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree 28.07.2000 and 09.08.2000 respectively passed by the learned Additional District Judge, Jeypore in T.A. No.3 of 1995.

By the same, the Appeal filed by the original Respondent No.1 under section 96 of the Code in challenging the judgment and decree dated 06.09.1993 and 14.09.1993 respectively passed by the learned

Subordinate Judge, Jeypore in T.S No.54 of 1990, has been allowed. The Trial Court, having dismissed the suit filed by the original Respondent No.1, as the Plaintiff and thereby non-suiting him; the First Appellate Court has decreed the suit declaring the right, title, interest of the original Respondent No.1 (Plaintiff) over the suit land and directing the present Appellant and Respondent No.1, the Defendant Nos.1 & 2 respectively before the Trial Court to restore possession of the suit land to the original Respondent No.1 (Plaintiff).

Be it stated here that the original Respondent No.1 (Plaintiff), having died during pendency of the suit, his legal representatives have come on record on being substituted and they are the Respondent Nos.1(a) to 1(b).

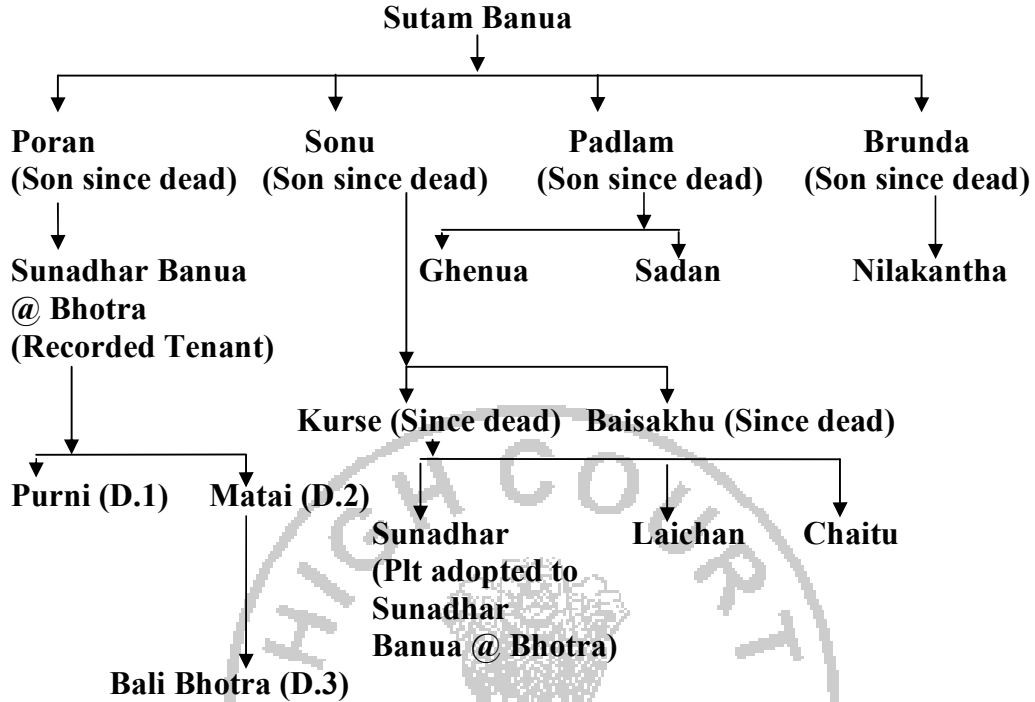
2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. **Plaintiff's Case:-**

The parties are Bhotra by caste and as such, they are the members of the Scheduled Tribe Community. They being Hindus the traditional Hindu Law applies to them and they are governed by Mitaskhara School of Hindu Law. The provisions of Hindu Succession Act and other such enactments are not applicable to them.

4. It is stated that the land in suit exclusively belonged to one Sanadhara Banua @ Bhotra. Said Sanadhara died eleven to twelve years before the institution of the suit in the year 1990. He had only two daughters, namely, Defendant Nos.1 & 2. The Defendant No.3 is the son

of Defendant No.2. The Plaintiff has provided the genealogy showing the relationship amongst the parties and that is given hereunder:-



It is stated that during the life time of Parau, Sanu, Padlama and Brunda, they had partitioned their properties in metes and bounds and possessed their respective shares separately. Since Sanadhara had no male issue and his daughters had grown up, he decided to adopt the Plaintiff. Such a decision of adoption was taken in the year 1949. The Plaintiff then was a boy of 7 to 8 years old. The Plaintiff was adopted by Sanadhara and lived in his house with all the relationship with Sanadhar as father and son. It is further stated that the adoption was with the consent of the adoptive mother and natural parents. The Plaintiff, in course of time, got married and it was performed by that Sanadhar. On 14.04.1949, Sanadhar had executed a deed of acknowledgement of adoption of the Plaintiff. Much prior to the execution of the deed of adoption, late Sanadhara had gifted portions of his landed properties to

his daughters, which had been recorded in their name in the Current Holding Nos.66 & 74. Daughters have been in Cultivating possession of those lands gifted to them. The Defendants have no right, title, interest and possession of the suit land. The Plaintiff, since the attainment of age of discretion, was cultivating the suit land to the exclusion of the Defendants. However, being instigated by some persons in inimical terms with the Plaintiff, the Defendant No.3 created disturbances in peaceful possession of the suit land and initiated a proceeding under section 144 Cr.P.C., which stood numbered as Crl. M.C. No.29 of 1988. The learned Executive Magistrate, in his final order dated 26.05.1990, declared Defendant No.3 to be in possession of the suit land. The Plaintiff thus was compelled to file the suit against that Defendant No.3 arraigning his mother and aunt as other two Defendants.

5. The Defendants, in their written statement, while traversing the plaint averments, have denied the status of the Plaintiff as the son of the recorded owner of the suit land, namely, Sanadhar Banua @ Bhotra. It is stated that there was no such adoption of the Plaintiff by the Plaintiff by Sanadhara at any point of time nor there was any execution of document by Sanadhar acknowledging the factum of adoption. It is also stated that the Plaintiff has never lived in the house of Sanadhar as his adopted son and Sanadhar never got the Plaintiff married as his father. The Plaintiff was never in possession of the suit land either with Sanadhar or after his death on his own exclusively having succeeded to the same as the adopted son of Sanadhar. It is stated that the Plaintiff is the son of Kurse Banua and is known as such and he was never known in their society as the son of Sanadhar Banua. The Defendants are illiterate persons and the Plaintiff, having taken away those documents from the possession of

Sanadhar in a clandestine manner, had obtained loan from the Bank by posing himself to be the son of Sanadhara, which is not the reality. It is asserted that the Plaintiff or his father have no relationship with Sanadhar. The factum of adoption, as projected; the execution of any document in support of the adoption as stated are all imaginary and creations for the purpose of the suit in asserting the right. It is also stated that the Defendant Nos.1 to 3 have all along been in possession of the suit land, which was in his name. Some portions of the suit land had been gifted away by Sanadhar in favour of Defendant Nos.1 & 2 long back. However, on his death, leaving no son, the Defendant Nos.1 & 2 being the daughters claim to have succeeded to the same. It is further pleaded that the Plaintiff as the imposter and since he is living with natural father and then cultivating his share of land of his natural father Kurse Banua, the Defendants state that the Plaintiff has no right, title, interest and possession over the suit land.

6. On the above rival pleading, the Trial Court has framed as many as six issues. On the crucial issue as to adoption of the Plaintiff by Sanadhar, as claimed by him and assertively denied by the Defendants, the Trial Court, upon examination of evidence and their evaluation, has answered against the claim of the Plaintiff as to be the adopted son of Sanadhar in saying that the Plaintiff has failed to prove the same through clear, cogent and acceptable evidence. Essentially, this finding has led the Trial Court to dismiss the suit. The First Appellate Court, having overturned the said finding, upon appreciation of evidence at its level and keeping in view their weightage in law, has decreed the Plaintiff's suit. The Defendant No.3 is thus now before this Court in the Second Appeal. He is the son of Defendant No.2 and thus the grandson of

Sanadhar being his daughter's son. The Defendant No.1 being dead, his two legal representatives are the parties.

7. The present Appeal has been admitted to answer the following substantial questions of law:-

“i. If the adoption of plaintiff is held to be valid, whether the daughters would be entitled to any share after the death of the father?;

ii. The parties to the suit being Scheduled Caste whether the provisions of the Hindu Succession Act as well as Hindu Adoption & Maintenance Act are applicable to them?; and

iii. Whether presumption of Section 90 of the Evidence Act is applicable to the present case.”

8. Mr.M.Mishra, learned Senior Counsel for the Appellant submitted that the appreciation of evidence, as has been done, by the First Appellate Court is not at all just and proper and the outcome of the same is thus unsustainable. He further submitted that the First Appellate Court, without assigning any such good reasons, has overturned the finding of the Trial Court. According to him, in culling out circumstances in disbelieving the adoption, when the Trial Court had rightly answered that issue against the Plaintiff; the First Appellate Court has proceeded in a different direction in overturning the same. He further submitted that the First Appellate Court, having taken the document admitted in evidence in support of adoption to be thirty years old, has gone wrong in attaching presumption as to the correctness of its contents and execution. He further submitted that the document, being not admissible in evidence, it is not permissible to raise a presumption as to its due execution nor the correctness of the contents thereof. He, therefore, submitted that the First Appellate Court has completely erred

in law by drawing the presumption banking upon the provision of section 90 of the Evidence Act. He also submitted that the voter list (Ext.A), which is a public document, has been completely ignored by the First Appellate Court from being taken into consideration in its proper perspective. According to him, the First Appellate Court has fallen in grave error by holding that with the available evidence, the Plaintiff has discharged the burden of proving the factum of adoption, as per the required degree of proof, by leading clear, cogent and acceptable evidence. He further submitted that the burden to prove the factum of adoption being too heavy on the person, who claims the benefit upon the same when the other side denies the same, in the present case, the Plaintiff has failed to discharge the said burden. He submitted that there is no evidence as to the giving and taking ceremony which is most essential in case of adoption and the finding of the First Appellate Court that the Plaintiff is the adopted son of Sanadhara is thus wholly perverse. He lastly submitted that even accepting for a moment that the Plaintiff is the adopted son of Sanadhara, the Defendants could not have been totally deprived of the property.

9. Learned counsel for the Respondents, on the other hand, submitted all in favour of the findings returned by the First Appellate Court holding the Plaintiff to be the adopted son of Sanadhara in saying that the same has been duly proved. He submitted that the mistakes committed by the Trial Court in course of appreciation of evidence to answer that crucial issue of adoption have been duly rectified by the First Appellate Court. According to him, the finding arrived at by the First Appellate Court that the Plaintiff has established his case to be the adopted son of Sandadhara is the result of just and proper appreciation

of evidence on record in the backdrop of the settled principles of law holding the field and thus, in presence of the Plaintiff as the son of Sanadhar, the question of succeeding the property by the daughters not arise.

10. On going through the above three substantial questions of law, it appears that all those relate to the divergent finding of the Courts below on the issue of adoption of the Plaintiff by Sandadhara and, therefore, this Court feels it apposite to proceed to find out the answers to all the substantial questions of law in one go in addressing the rival submissions.

11. For the purpose, I have carefully read the judgments passed by the Courts below. The evidence adduced by the parties both oral and documentary have also been gone through, which would be dealt with in course of discussion to follow.

12. Admitted position here stands that the parties are 'Bothra' by caste and as such, members of Scheduled Tribe Community and that they are governed by Traditional Mitaskhara School of Hindu Law.

The adoption, as claimed by the Plaintiff, had taken place when he was a boy of 7 to 8 years old. The Plaintiff has indicated his age in the plaint to be 55 years in the year 1990. Roughly, the year of adoption then comes to 1947.

A valid adoption has to satisfy the following requirements:-

“a. the person adopting if lawfully capable taking in adoption.;

b. the person giving in adoption is lawfully capable of giving in adoption.;

- c. the person adopted is lawfully capable of being taken in adoption.;
- d. the adoption is completed by an actual giving and taking; and
- e. the ceremony called dutta homa (oblation of fire) has been performed. It is, however, doubtful whether the 'dutta homa' ceremony is essential in all cases to the validity of adoption."

The ceremonies required to be performed for the purpose are as follows:-

- "i. the physical act of giving and receiving, with intention to transfer the boy from one family into another.;
- ii. the dutta homa, that is, oblation of clarified butter to fire; and
- iii. other minor ceremonies, such as Putresti Jag (sacrifice for male issue)."

The above religious ceremonies, however, are not required to be so performed in case of Sudras. The physical act of giving and receiving is, however, absolutely, necessary for a valid adoption in case of Sudras, as so necessity in case of persons of twice born caste. It is well settled that mere expression of consent or the execution of deed of adoption, even though registered, does not dispense with the requirement of proof of actual physical delivery of the child. The exception to the above is there under section 16 of the Hindu Adoption and Maintenance Act, 1956, to the extent that a presumption arises or is attached to a document of adoption as to performance of all these ceremonies as in that case, all the parties to the adoption stand as the executants of the documents, but that is not the case here.

13. The First Appellate Court, in the present case, appears to have made an erroneous approach to the subject by assuming the adoption to be an ancient adoption simply because the adoption has taken place long before. Merely, for that reason, however, it is not permissible to say the adoption to be ancient one so as to receive the relaxation as to proof of factum of adoption through evidence.

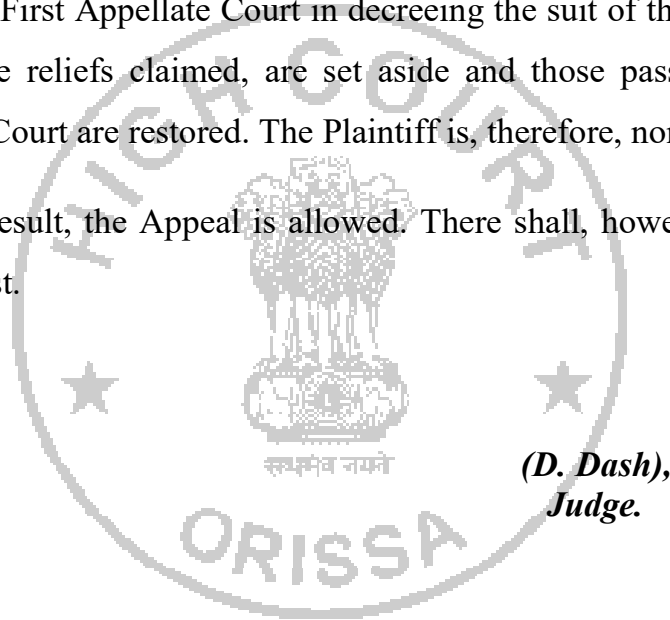
In the given case, the Plaintiff having led direct evidence on the factum of adoption by not only saying himself as if he (P.W.2) had by then the required knowledge and remembrance as to all what had happened but also through another witness (P.W.1). The plaint averments simply state that as Sanadhara had no son and was having no hope of begetting a son, he adopted the Plaintiff as per his caste and custom in the year 1949, which even runs contrary to the averments that at the time of adoption, the Plaintiff was seven to eight years old. It is next stated that the Plaintiff, being adopted by Sandadhara, lived in his house as such and it was with the consent of the adoptive mother. It is not stated that the parents of the Plaintiff had so consented. Having pleaded this, his evidence is very interesting to be taken note of. He has deposed in the Court in the year 1993. He then states that the adoption had taken place 45 years before. He has come forward to depose on the factum of adoption. The tenor of the evidence of this witness-P.W.2 (Plaintiff) is as if he had the remembrance of most of the happenings or events which had taken place on that day of adoption. He even goes to say that it was on a Saturday that Sanadhara adopted him as son but nowhere he says that his natural parents were present nor that Sanadahar's wife too was present. It is his evidence that Sandardhar had asked his natural father to give him in adoption but whether he had consented or

not is again not stated. Other persons, who were present, have been named and it is said that some persons signed on the adoption deed which he has proved as Ext.3. This is an unstamped and unregistered document. The same has been admitted in evidence being paid with the duty penalty. The deed is dated 14.04.1949, which is purported to contain the LTI of Sanadhara wherein the endorsement is also appearing in an unnatural manner that on the left of the LTI, the name of 'Sandadhar' is written whereas on the other side, i.e., right, the surname is written and below that, it is endorsed that the same is the LTI. This document (Ext.3) has been proved through P.W.3, namely, Nilakantha Barua. He says that the adoption had taken place forty years back, i.e., around the year 1953 since the witness has deposed in the year 1993. If his evidence is read as a whole, it reveals as if the document came into existence when the so-called adoption took place. He has stated that Sanadhara requested the natural father of the Plaintiff, namely, Kurse Banua to take Plaintiff on adoption and at the instance of Sanadhara and Kurse, the deed was scribed by Govinda Singh. He is not even stating that Sanadhara or Kurse had given their LTI but it is found that only the purported LTI of Sanadhara finds place. He has stated that after the document was scribed, Kurse made the Plaintiff to sit on the lap of Sanadhara. P.W.1, the witness to the adoption, states that the adoption took place forty years before, i.e., in or around the year 1953. His evidence is also not on the score of giving and taking, which is the essential requirement as per law. When the Plaintiff, who claims himself to be the adopted son of Sanadhara has very interestingly has stated about the document being scribed, which per se is not believable.

In the above state of affairs in the evidence, this Court is unable to accept a finding in favour of the Plaintiff as to have proved the factum of his adoption by Sanadhara with that required degree of proof through evidence in holding him to be the adopted son of Sanadhara.

For the aforesaid discussions and reasons; this Court, without feeling the necessity to proceed any further in the matter; thus, concludes that the answers to the substantial questions of law must run against the case of the Plaintiff. Consequently, the judgment and decree passed by the First Appellate Court in decreeing the suit of the Plaintiff, as laid for the reliefs claimed, are set aside and those passed by the learned Trial Court are restored. The Plaintiff is, therefore, non-suited.

14. In the result, the Appeal is allowed. There shall, however, be no order as to cost.



Basu