

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**RSA No.585 of 2014**

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned Additional District Judge, Bhubaneswar in R.F.A. No.80/23/55 of 2013/06 setting aside the judgment and decree dated 22.04.2006 and 08.05.2006 respectively passed by the learned Civil Judge, Senior Division, Bhubaneswra in O.S. No.26 of 1985-I.

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***Prakash Chandra Jena***

....

***Appellant***

-versus-

***Anama Jena (Since Dead) through  
his LRs and Others***

....

***Respondents***

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

***For Appellant***

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Mr.S.K. Dash, A.K. Otta,  
Mrs.A. Dhalsamanta,  
Miss.S.Das, P.K. Dasmohapatra  
(Advocates)

***For Respondents***

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Mr.B. Baug, M.R. Baug,  
R.R. Jethi, P.C.P. Das  
(Advocates for Caveator)

Mr.S.Mishra-I, S.K. Mishra  
R.R. Mohanty  
(Advocates for PLRs of R.1)

**CORAM:**

**MR. JUSTICE D.DASH**

**Date of Hearing : 22.04.2022 :: Date of Judgment:20.06.2022**

The Appellant, by filing this Appeal under Section- 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the

judgment and decree passed by the learned Additional District Judge, Bhubaneswar in R.F.A. No.80/23/55 of 2013/06.

By the same, the Appeal filed by the Original Respondent No.1 (since dead) under Section-96 of the Code has been partly allowed and accordingly the judgment and decree passed by the Trial Court in dismissing the suit filed by the Original Respondent No.1 (since dead) being set aside; the same has been preliminarily decreed declaring that the Plaintiff and Defendant No.3(a) are entitled to 1/4<sup>th</sup> share from Schedule-B, 1/8<sup>th</sup> share from Schedule-C, 1/12<sup>th</sup> share from Schedule-D and 1/12<sup>th</sup> share from Schedule-E properties while holding that the branch of Defendants 2 and 6 including the Defendants 2 and 6 are entitled to 3/4<sup>th</sup> share from Schedule-B, 3/8<sup>th</sup> share from Schedule-C, 1/2 share from Schedule-D and 1/2 share from Schedule-E properties, further holding that the branch of Defendant Nos.4 and 5 and the substituted Defendant No.4 are entitled to half share from Schedule-C properties.

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.

It may be stated here that the Original Respondent No.1 (Plaintiff), having died during pendency of this Appeal, his legal representatives have come on record.

3. The Plaintiff's case is that he is the son of one Dhadu Jena. He had been given in adoption to Kandha Jena on the 21<sup>st</sup> day of his birth, i.e., 31.04.1942 through giving and taking ceremony followed by necessary functions as per the Hindu rites and their caste customs. It is stated that since the date of his adoption, he being taken by Kandha

Jena, remained with him as his son. He, therefore, has sought for a partition seeking entitlement of his share as the son of Kandha Jena.

It is stated that one Panu Jena had three sons, namely, Nanda, Kantha and Kandha. Dhadi Jena is the son of Nanda Jena and Indramani (Defendant No.2) is the son of Kantha Jena. Kandha is said to have died leaving behind his widow Hadi Bewa (Defendant No.1) (Since Dead) and this Plaintiff. It is stated that since the time of adoption, not only that he remained with Kandha as his son, but it was known to everyone that he is the son of Kandha, who admitted him in the Ram Krushna Mission School at Bhubaneswar and he also remained in possession of the joint family properties of Kandha as described in Schedule-B to E of the plaint.

Kandha died in the year 1979. The suit land, however, stood recorded in the name of Kandha with Indramani (Defendant No.2), Rajendra, son of Dhadu Jena (since dead), Dhruba son of Nakula and Bala (Defendant No.5). it is further stated that after the death of Kandha, the Defendant No.1, the wife of Kandha being instigated by Defendant No.2., has created trouble in the peaceful possession of the Plaintiff over the suit land. So, he requested Defendant No.2 for partition and allotment of his share from out of the suit land. When they refused, the suit has been filed.

**4.** The Defendants 1, 2 and 6 have come forward to contest the suit by filing written statement when other Defendants did not participate.

In the written statement filed by Defendants 1 and 2, the factum of adoption of the Plaintiff by Kandha has been denied. It is stated that the Plaintiff was not capable of being given or taken in adoption being the only son of Dhadu. The Plaintiff was never adopted by Kandha and there was never any giving and taking ceremony for any such adoption

and Defendant No.1, the wife of Kandha, being alive had not consented to the same. It is, however, stated that the Plaintiff was never treated as the son either by Kandha or Defendant No.1 or was known to them and having any such relationship. It is further stated that the Plaintiff had never been admitted by the Plaintiff in Ram Krushna School at Bhubaneswar and had never stayed with Kandha and his wife (Defendant No.1) at any point of time nor did he possess any property of Kandha in any manner.

It is their case that after the death of Kandha in the year 1979, his widow (Defendant No.1) remained in possession of the properties left by her husband. It is said that the Plaintiff, in order to grab the properties of that helpless illiterate pardanishin lady, has filed the suit by placing an imaginary story. It has been averred that prior to the death of Kandha, he had expressed his desire before his wife (Defendant No.1) to adopt Defendant No.6, who happens to be the son of Defendant No.2 and accordingly, the adoption being made on 18.12.1981, the Defendant No.1 executed a deed to that effect.

5. The Defendant No.6, in his written statement, while denying the factum of adoption, as claimed by the Plaintiff by that Kandha, has asserted himself to be the adopted son of kandha and Hadi (Defendant No.1). He has pleaded that as there was no document to that effect, Hadi executed a deed of acknowledgement of adoption, as instructed by Kandha and that was so executed on 12.12.1981 and then registered. He claims himself to be the adopted son of Kandha.

6. The Trial Court, faced with the above rival pleadings, when Plaintiff claims himself to be the adopted son of Kandha and Defendant No.6 also asserted that very status up-to himself by denying the claimed

status of the Plaintiff, has framed in total seven issues. Out of which, the crucial issues are issue nos.3 and 4.

Issue no.3 deals with the case of the Plaintiff that he is the adopted son of Kandha and Issue no.4 relates to the case of Defendant No.6 to be the adopted son of Kandha whereas other issues are consequential to the finding of the above two.

7. The Trial Court, on examination of the evidence and their analysis, has held that the Plaintiff is not the adopted son of Kandha. Having said so, the issue as to whether Defendant No.6 is the son of Kandha or not has been answered in favour of Defendant No.6 holding him to be the adopted son of Kandha and Defendant No.1.

8. Accordingly, the suit being dismissed, the unsuccessful Plaintiff preferred the First Appeal. While confirming the findings recorded by the Trial Court that the Plaintiff is not the adopted son of Kandha and Defendant No.1, the First Appellate Court has gone to set at naught the finding that Defendant No.6 is the adopted son of Kandha and Defendant No.1. Having held so, taking into account the inter-se relationship of the parties, the First Appellate Court, in disagreeing with the ultimate result of rendered by the Trial Court in dismissing the suit, has passed the order as under:-

“The branch of Plaintiff, i.e., the Plaintiff and Defendant No.3(a) are entitled for  $\frac{1}{4}$  share from Schedule-B,  $\frac{1}{8}$ <sup>th</sup> share from Schedule-C,  $\frac{1}{2}$ <sup>th</sup> share from Schedule-D and  $\frac{1}{2}$ <sup>th</sup> share form Schedule-E properties;

The branch of Defendant Nos.2 and 6 including them are entitled for  $\frac{3}{4}$ <sup>th</sup> share from Schedule-B,  $\frac{3}{8}$ <sup>th</sup> share from Schedule-C,  $\frac{1}{2}$ <sup>th</sup> share from Scheduel-D and  $\frac{1}{2}$ <sup>th</sup> share form Schedule-E; and

The branch of Defendant Nos.4, 4(a) to 4(f) have been held entitled to half share from Schedule-C properties.”

9. It may be stated here that the Plaintiff having been unsuccessful in both the Courts below in not being able to obtain a finding in his favour that he is the adopted son of Kandha and Defendant No.1, has not preferred any Appeal nor has advanced any cross-appeal/cross-objection.

The present Appeal which has been filed by Defendant No.6 in assailing the finding of the First Appellate Court that he is not the adopted son of Kandha and Defendant No.1 and seeking appropriate modification in the preliminary decree with regard to the allotment of shares over the suit lands in Schedule-B & C.

10. The present Appeal has been admitted on 14.07.2015 on the substantial question of law, as indicated in Ground No.4(b) of the Memorandum of Appeal, which reads as under:-

“Whether by applying the abstract doctrine of burden of proof, the lower Appellate Court could have reversed the finding rendered by learned Court below on the score that the appellant is the adopted son of Kandha Jena?”

11. Mr.S.K.Dash, learned Counsel for the Appellant submitted that the Plaintiff, in the suit, has not whispered a word in the plaint about the existence or otherwise registered deed of acknowledgement of adoption on 18.12.1981, which has been admitted in evidence and marked as Ext.B and such pleading has stood all through when the Defendant No.6 advanced his claim over the suit property asserting himself to be the adopted son of Kandha, the Plaintiff has not taken any step for challenging that by way of amendment of the plaint although he has made amendment of his plaint on two such occasions. He further

submitted that the Defendant No.1-Hadi Bewa died pendency of the suit. She, in her written statement, while denying the status of the Plaintiff as their adopted son, has clearly averred that after the death of Kandha, she adopted the Defendant No.6 and had executed a registered deed to that effect on 18.12.1981. He further submitted that when the evidence on record on being well discussed and critically examined from all angles, had been found by the Trial Court as sufficient in establishing the fact that Defendant No.6 is the adopted son of Kandha and Defendant No.1, the First Appellate Court on certain flimsy grounds and unreasonably has negated the same ignoring the settled principles that one well reasoned findings does not call for interference merely because a different view is available to be taken in seisin of an Appeal unless the same is found to be palpably erroneous or perverse.

**12.** None appeared for the Respondents despite service of notice and opportunities being so provided.

**13.** Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement and have perused the evidence both oral and documentary.

**14.** The Plaintiff instituted the suit on 13.02.1982. On being noticed, the Defendants 1 and 2 have filed their written statement on 29.06.1985. Similarly, Defendant No.6 has also filed his first written statement being represented through his natural father as by then Defendant No.1 was dead and subsequently, on attaining majority, he has filed written statement on his own. The Plaintiff, on several occasions, has amended the plaint and that too after the filing of the written statement, but has chosen not to bring/introduce any such averment in the plaint denying or

against the claimed status of the Defendant No.6 as the adopted son of Kandha and Defendant No.1. the Plaintiff being examined as P.W.1, has also not stated that Defendant No.6 is not the adopted son of Kandha. Rather, in his cross-examination, he has deposed to have brought the suit against Indramani, Balakrushna and Dhadu.

From the side of the Defendant No.1, a deed of acknowledgement of adoption dated 18.12.1981, which is a registered one, has been admitted in evidence and marked Ext.B. One witness to the document has proved the said document. The voter identity card, voter list, the records of right in original, being produced from their custody, have been admitted in evidence and marked Ext.J, K, G and H respectively.

**15.** The Defendant No.2 has been examined as D.W.1. While stating that Kandha and Hadi (Defendant No.1) had requested him and his wife to give Defendant No.6 in adoption, he has stated that since they had four sons, they acceded to the request and adoption ceremony was held on the day of Baisakha Purnima in the year 1975. He has stated that in the said ceremony, he and his wife had given their son (Defendant No.6) to Kandha and his wife in presence of five to six relations and there was also performance of necessary ceremonies and pujas etc. D.W.3, being a relation of the D.W.1, has deposed that she was present on that day of adoption ceremony. The Trial court, as it appears, has made an elaborate discussion of the evidence and critically examining them from all possible angles by ignoring certain minor discrepancies, cumulatively viewing with the deed of acknowledgement of adoption (Ext.6) which is the registered one standing admitted by the executants, who is none other the adoptive mother of Defendant No.6 as well as other documents as are available, has found that the factum of adoption of Defendant No.6 by Kandha and his wife Hadi has been established. With all these,

when the Trial Court had answered the issue in holding the Defendant No.6 to be the adopted son of Kandha and his wife (Defendant No.1), the First Appellate Court, finding out certain contradictory statements in the pleading of Defendants 1, 2 and 6 and the evidence of Defendant No.6 and the inability of one of the Defendants' witness to state the age of the Defendant No.6 at the time of adoption, has differed with the finding of the Trial Court. In holding so, it appears that though certain prior version inadvertently made at the movement under certain condition has been clarified by the Defendant No.2 in course of further cross-examination that at the time of adoption of Defendant, Defendant No.6 was one year old, the same being ignored, the said version made at the first blush has been taken to discard the evidence of the witness.

In the present case, when the Plaintiff's case that he is the adopted son of Kandha and his wife (Defendant No.1), has been concurrently answered in the negative in so far as the claim of the Defendant No.6 as the adopted son of Kandha and Defendant No.1 having been so held in favour of the Defendant No.6 by the Trial Court has been over-turned by the First Appellate Court. It is seen that when from the side of the Defendants, they have led the evidence as to the performance of giving and taking ceremony and have proved the documents, even in the absence of any such evidence to counter the same, more importantly, with the averments of the Defendant No.1, the so-called adoptive mother, i.e., widow of Kandha, who too is the executants of the deed of acknowledgement of adoption standing to support the case of the Defendant No.6, the First Appellate Court, in my considered view, ought not to have gone to record a finding to the contrary.

**16.** For all the aforesaid, the substantial question of law stands accordingly answered, which runs to restore the finding of the Trial

Court. Consequent upon the above, it is held that Defendant No.6 is entitled to half share over Schedule-B and C properties and 1/3<sup>rd</sup> share over Schedule-E properties with Schedule-D property in entirety standing as the entitlement of the Defendant No.6. Accordingly, the preliminary decree for partition is hereby passed.

17. In the result, the Appeal stands allowed as aforesaid. There shall, however, be no order as to cost.

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



*Basu*