

IN THE HIGH COURT OF JHARKHAND AT RANCHI

S. A. No. 88 of 1984(R)

1. Bhakti Mahto, son of Ganesh Mahto, deceased by caste Kurmi Mahto by occupation cultivators, residents of Village Taratand, P.S. Nawadih, District-Giridih **(Dead and substituted vide order dated 07.10.2025).**
- 1(a) Mohan Mahto, aged about 63 years, son of Late Bhakti Mahto
- 1(b) Rameshwar Mahto, aged about 50 years, son of Late Bhakti Mahto
- 1(c) Ghanshyam Mahto, aged about 47 years, son of Late Bhakti Mahto
- All resident of village Taratand, tola Hussodih, P.O. and P.S. Nawadih, District Bokaro.
- 1(d) Bisni Devi, aged about 67 years, W/o Kaleshwar Mahto, D/o Late Bhakti Mahto, resident of Chirudih, P.O. Chirudih, P.S. Nawadih, District Bokaro.
- 1(e) Sukari Devi, aged about 65 years, W/o Sankar Mahto, D/o Late Bhakti Mahto, resident of Mahuari, P.O. Mahuari, P.S. Bagodar, District-Giridih.
- 1(f) Koshilya Devi, aged about 57 years, W/o Churamani Mahto, D/o Late Bhakti Mahto, resident of Bhalmara tola Rakhwa, P.O. Bhalmara, P.S. Nawadih, District Bokaro.
- 1(g) Jailal Mahto, aged about 42 years, son of Rameshwar Mahto, maternal grand son of Late Bhakti Mahto.
- 1(h) Bina Devi, aged about 45 years, D/o Rameshwar Mahto, maternal grand daughter of Late Bhakti Mahto
- Both resident of Palamu, P.O. Palamu, P.S. Peank, Narayanpur, District-Bokaro

... .. **Plaintiffs/Respondents/Appellants**
Versus

1. Mangar Mahto, son of Uttim Mahto, deceased, by caste Kurmi Mahton, by occupation agricultural labourers, resident of village Tingra, P.S. Dukri, at present resident of village Taratand, P.S. Nawadih, District Giridih **(Died and substituted vide order dated 29.02.1996).**
- 1(a) Namia Devi, wife of Fulchand Mahto, D/o Late Mangar Mahto, resident of village- Ratari, P.O. and P.S. Dugda, District Giridih (Now Bokaro). **(Abated vide order dated 06.11.2025)**
- 1(b) Khokia Devi, daughter of Late Mangar Mahto and wife of Kali Mahto, resident of village-Junodih, P.O. and P.S. Nawadih, District Giridih (Now Bokaro) **(Abated vide order dated 06.11.2025)**
2. Lakhan Lal, son of Jageshwar Lal, resident of Village Nawadih, P.O. and P.S. Nawadih, District Giridih (Now Bokaro).**(Substituted vide order dated 30.01.2026)**
- 2(a) Shankar Pansari, S/o: Late Lakhan Lal
- 2(b) Hira Pansari, S/o Late Lakhan Lal

- 2(c) Om Pansari, son of Late Lakhanlal (**deleted vide order dated 30.01.2026**)
3. Bukan Mian, son of Wahadali Mian, resident of village Nawadih, P.O. and P.S. Nawadih, District Giridih (Now Bokaro) (**Substituted vide order dated 30.01.2026**)
- 3(a) Rahman Mian, S/o Bukan Mian
- 3(b) Muslim Mian, S/o Bukan Mian
- 3(c) Kamrul Mian, S/o Bukan Mian
- 3(d) Inues Ansari, S/o: Late Samsuddin Mian, Grandson of Late Bukan Mian
- 3(e) Ikram Ansari, S/o: Late Samsuddin Mian, Grandson of Late Bukan Mian
- 3(f) Hakik Mian, S/o: Late Bukan Mian
- All resident of village-Nawadih, P.O. and P.S. Nawadih, District-Bokaro
- 3(g) Basiram Bibi, D/o Late Bukan Mian, W/o: Gulam Ansari, R/o: Mairchaitand, P.O.-Telo, P.S.: Chandrapura, District: Bokaro.
4. Abdul Karim, son of Fajo Mian, resident of village Nawadih, P.O. and P.S. Nawadih, District Giridih (Now Bokaro). (**Abated vide order dated 06.11.2025**)
5. Mahabir Mahto (**Substituted vide order dated 30.01.2026**)
- 5(a) Kisto Mahto, S/o Late Mahabir Mahto
- 5(b) Thakur Mahto, son of Late Mahabir Mahto (**deleted vide order dated 30.01.2026**)
- 5(c) Dinu Mahto, S/o Late Mahabir Mahto
- R/o Jainamore, P.O. Jainamore, P.S. Jaridih, District-Bokaro
6. Aghnu Mahto (**Substituted vide order dated 30.01.2026**)
- 6(a) Suresh Mahto, S/o Late Aghnu Mahto
- 6(b) Naresh Mahto, S/o Late Aghnu Mahto
- Both R/o Jainamore, P.O. Jainamore, P.S. Jaridih, District-Bokaro
7. Chhotu Mahto (**Deleted vide order dated 17.11.2025**)
8. Falguneshwar Mahto son of Panchu Mahto, resident of Maraphari P.O. and P.S. Maraphari, District Dhanbad at present resident of Taratand, P.O. and P.S. Nawadih, District- Giridih (now Bokaro) (dismissed on account of non-compliance of order dated 13.07.1998).

... .. **Defendants no. 2 to 9/Appellants/Respondents**

CORAM :HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Appellant	: Mr. Saibal Mitra, Advocate
	: Mr. Mahesh Kumar Mahto, Advocate
	: Mr. Laxman Kumar, Advocate
For Resp. Nos. 3(a) to 3(g)	: Mr. Ayush Aditya, Advocate
	: Mr. Avnish Prakhar, Advocate

C.A.V. On 05.02.2026

Pronounced on 03.06.2026

1. This appeal has been filed against the judgment dated 25.04.1984 (decree signed on 28.04.1984) passed by learned Additional Sub-Judge, Giridih in Title Appeal No. 20 of 1982/ 18 of 1983 whereby the judgment dated 15th June, 1982 (decree signed on 19.06.1982) passed in Title Suit No. 19 of 1980 by learned Munsif, Bermo at Tenughat, Giridih has been set-aside.

2. The title suit was decreed in favour of the plaintiffs and the judgment was set aside by the learned 1st appellate court. Consequently, the plaintiffs are the appellants before this Court.

3. The records of the case reveal that the defendant no.1 in the trial court was Budhan Mahton son of Uttim Mahton, but on account of his death, his name was expunged during trial vide order dated 12.05.1982 and accordingly the defendant nos. 2 to 9 of the suit became respondent nos.1 to 8 before this court.

4. It is important to note that it has been recorded in order dated 07.10.2025 in paragraph 14 that the trial court's judgment reveals that the spelling of title Mahton was written as Mahto but in the decree the spelling was written as Mahton. The 1st appellate court's judgement has used the spelling as Mahto and consequently, before this court also the spelling has been used as Mahto.

5. The suit was filed for the following reliefs:-

(a) *It be declared that the sale deeds dated 21.02.1973 and 07.05.1976 executed by defendant No.1 and 2 in favour of defendant No. 3 are illegal and void and not binding on the plaintiff and the same have not affected the title of the plaintiff to the suit lands which is subsisting.*

(b) *Possession of the plaintiff over the suit land be confirmed and in the event of dis-possession during the pendency of the suit, khas possession be recovered to the plaintiffs be evicting the defendant No.3 therefrom.*

(c) *a decree for the cost of the suit.*

(d) *any other relief or reliefs to which the plaintiff be found entitled in law and equity be also awarded to him against the defendants.*

6. The schedule of the property is as below:-

All that 1.23 acres of land situated in village Taratand, P.S. Nawadih, District-Giridih recorded under Khata No. 11 details of which are as under:-

Khata No.	Plot No.	Area
11	977	11 dec.
	976	16 dec.
	1468	6 dec.
	1482	13 dec.
	1365	3 dec.
	1367	5 ½ dec.
	1489	8 dec.
	1456	2 dec.
	1572	7 ½ dec.
	1866	14 ½ dec.
	1569	2 dec.
	1573	3 dec.
	1579	2 dec.
	1575	10 ½ dec.
	1583	13 dec.
	1582	6 dec.
		Total 1.23 acres

7. This appeal was admitted for final hearing by giving the entire background of the case vide order dated 08.07.1996. The background of the case and the substantial questions of law as recorded in order dated 08.07.1996 is as under:

“

This suit was filed by the plaintiff appellant for declaration of two sale deeds executed by the defendant respondent in favour of defendant no.3 having no title in those properties and such declaration as claimed from the side of the plaintiff have been challenged by defendant by filing joint written statement.

The plaintiff's case is that one Ganesh Mahato was the original owner of the suit land and he married with one Nirsi Devi, who had two sons, namely, defendant nos. 1 and 2 by her previous husband and those sons were brought to the house of Ganesh Mahato while marrying with Nirsi Devi. After the

death of Ganesh Mahato, one son, the plaintiff and his sister remained alongwith Nirsi to inherit the property of Ganesh Mahato, but Nirsi Devi out of her affection for her sons, which she had got by her previous husband, made a deed of Batwaranama in the year 1946 giving half share to the defendant nos. 1 and 2. According to the plaintiff, he was not in the knowledge of such Batwaranama or in possession from the side of the defendant nos. 1 and 2 as when he became major in the year 1950, he saw defendant no. 1 and 2 living separately. He came to know of such Batwaranama only in some criminal proceedings filed by defendant no.3 against the plaintiff. The title of the plaintiff was clouded when he came to know that defendant nos. 1 and 2 had parted the properties in favour of defendant no.3 and hence declaration was sought for. Original Court decreed the suit in favour of the plaintiff, but on appeal being filed, the decree was reversed holding that the suit in the present form is not maintainable as the possession although adverse remained in favour of defendant nos. 1 and 2. Hence, the suit was dismissed after allowing the appeal.

This second appeal is admitted on the following substantial questions of law: -

- i. Whether the suit in the present form for declaration is having any question related to the adverse possession as claimed from the side of defendant nos. 1 and 2?
- ii. Whether the plaintiff's suit would suffer due to his non-filing of declaration against the defendant nos. 1 and 2 challenging the Batwaranama of 1946 on attainment of his majority within three years after 1950?

8. 3rd substantial question of law was framed vide order dated 07.10.2025, which is as under:

“(iii) Whether any relief can be granted to the appellants when the appeal has abated against respondent nos. 4 and 8?”

9. Learned counsel for the parties have jointly submitted that so far as the deceased persons involved in this case are concerned, the same shall not have any impact in the present case and therefore, the appeal is not abated.

10. Arguments of the appellants

- I. The learned counsel for the appellants has submitted that the suit was filed by sole plaintiff and the appellants are the legal heirs of the sole plaintiff. The suit was decreed. The learned 1st appellate court has reversed the decree and consequently the second appeal has been filed by the appellants.
- II. The learned counsel for the appellants has submitted that it is not in dispute that Ganesh Mahto married with Nirsi Devi, who had two sons, that is, defendant nos. 1 and 2 from her previous husband. The plaintiff, namely, Bhakti Mahto, was born out of wedlock of Ganesh Mahto and Nirsi Devi. The learned counsel submits that the defendant nos. 1 and 2 executed two sale deeds in favour of defendant no. 3, although they did not have any title over the property belonging to Ganesh Mahto.
- III. He has referred to the provisions of Section 3(e) of the Hindu Succession Act, 1956 and submits that the plaintiff and the defendant nos. 1 and 2 were related by 'Uterine Blood' and then he has referred to Section 8 of the aforesaid Act dealing with succession of property belonging to male. He has then referred to the Schedule to the Act and submits that the Schedule specifically excludes reference to brother or sister who are related by 'Uterine Blood'.
- IV. The learned counsel submits that the consequence is that the property of Ganesh Mahto would devolve exclusively upon the plaintiff and not in favour of the defendant nos. 1 and 2 and consequently, the defendant nos. 1 and 2 had no right over the property to convey through sale deed. He submits that the sale deeds executed by defendant nos. 1 and 2 in

favour of defendant no. 3 were under challenge before the learned trial court.

V. With respect to **1st substantial question of law**, the learned counsel for the appellants has submitted that on the face of the written statement, the foundational pleadings in connection with adverse possession is totally missing. He submits that mere mention of adverse possession in the written statement is not sufficient and the foundational pleadings should contain the date of possession and also acceptance of the title of the true owner. He submits that these aspects were missing and the learned 1st appellate court could not have given the finding in favour of the respondents, so far as the adverse possession is concerned.

VI. The learned counsel has submitted that the suit was filed for a declaration that the sale deeds executed by defendant nos. 1 and 2 in favour of defendant no. 3 was not binding and it was void and illegal and also for confirmation of possession.

VII. The learned counsel for the appellants has relied upon the following judgments on the point of adverse possession: -

- (i) (1995) 2 SCC 543 (*Annasaheb Bapusaheb Patil & Others vs. Balwant @ Balasaheb Babusaheb Patil*)
- (ii) (2004) 10 SCC 779 (*Karnataka Board of Wakf vs. Government of India & Others*)
- (iii) (2006) 7 SCC 570 (*T. Anjanappa & Others vs. Somalingapa & Anr.*)

VIII. With respect to **2nd substantial question of law**, the learned counsel for the appellants has submitted that a deed of partition is not a document of transfer, but it only distributes property amongst the title holders. He submits that in a case where the property of a minor is alienated, then only the question of challenging the same within three years of attaining majority applies. He submits that since partition is not transfer, the partition deed dealing with the property

which did not belong to the defendant nos. 1 and 2 is of no consequence and the same was not required to be challenged at all. He has referred to Article 60 of the Limitation Act.

IX. Learned counsel for the appellants has further submitted that the partition deed involved in the present case is Exhibit-H dated 29.01.1946 in which two uterine brothers of the plaintiff and their mother are the signatories. He submits that admittedly on the date of execution of partition deed, the plaintiff was a minor and he attained majority in the year 1950. It is not in dispute that the parties are governed by Mitakshara School of Hindu Law and the father of the plaintiff expired in 1942 and that the property was recorded in the name of the father. The learned counsel submit that the mother had no right to the property to allocate the same to the uterine brothers of the plaintiff who are otherwise not entitled to succeed to the property of the father of the plaintiff. He has submitted that in effect, the property of the plaintiff has been transferred to his uterine brothers through partition deed and such modus of transfer is void *ab-initio* and therefore, there was no need for the plaintiff to challenge the deed of partition. In such circumstances, the limitation prescribed under Article 60 of the Limitation Act has no applicability.

X. The learned counsel has submitted that after death of the mother, the plaintiff was the sole successor of the property and the entire property of his father would have devolved upon him and his uterine brothers had no right to the property.

XI. He submits that in such circumstances, the transfer of property made by his uterine brothers vide registered sale deeds of the year 1973 and 1976 were void *ab-initio* and consequently, it was not binding upon the plaintiff. He submits that the learned trial court has held that the challenge

to the sale deeds and the connected relief was governed by Article 65 of the Limitation Act, as the plaintiff was seeking confirmation/recovery of possession with respect to the property which was subject matter of sale deeds of the year 1973 and 1976. Learned counsel submits that this finding of the learned trial court has been reversed by the learned 1st appellate court who has held that the declaration sought for with respect to the two sale deeds would be governed by Article 58 of the Limitation Act and has held that the relief in connection with the two sale deeds is barred by limitation. He has submitted that though no substantial question of law has been framed on the point of limitation, but still the court can decide it.

XII. On the point of limitation, the learned counsel has referred to the judgment passed by Hon'ble Supreme Court reported in **2025 SCC Online SC 1961 [Shanti Devi (Since Deceased) through Lrs. Goran vs. Jagan Devi and Others]** and has referred to paragraph 5, 29, 30, 38 and 39.

11. Arguments of the respondents.

A. On the **1st substantial question of law**, the learned counsel for the respondents representing defendant no. 4 and 5 does not dispute that the foundational plea in connection with adverse possession is totally absent in the written statement. The learned counsel representing the defendant nos. 4 and 5 had on earlier occasion submitted that he had filed *Vakalatnama* on behalf of legal heirs of defendant nos. 3, but they have taken 'No Objection' from him and no fresh *Vakalatnama* has been filed in the present case on behalf of the legal heirs of the defendant no. 3.

B. The learned counsel for the respondents has opposed the prayer and has submitted that the husband having expired in the year 1942, the property would certainly devolve upon his widow and son as by that time the Hindu Woman's Right to Property Act,

1937 had already come into force and they had equal share on the property.

- C.**The learned counsel has submitted that under such circumstances, at best the plaintiff had $\frac{1}{2}$ share with respect to the property of his father and the $\frac{1}{2}$ share was with the mother. He submits that in the partition, $\frac{1}{2}$ share was allocated to the plaintiff and $\frac{1}{2}$ share was allocated to his two uterine brothers. The learned counsel submits that there can be no doubt that the uterine brothers of the plaintiff formed a part of the joint family consisting of widow and her three sons, one through her 2nd husband and two others through her previous husband.
- D.**The learned counsel submits that if the plaintiff had any grievance in connection with the allocation of share to the extent of 50% to his uterine brothers, he ought to have challenged the same within three years of attaining majority. Learned counsel has further submitted that the registered deed of partition dated 29.01.1946 was also duly acted upon by the parties, inasmuch as, the plaintiff and his uterine brothers had jointly sold the property which was also subject matter of the partition and therefore, the plaintiff had acknowledged the right of his uterine brothers in connection with the property.
- E.**He has further submitted that the sale deeds of the year 1973 and 1976 were executed by referring to the deed of partition. The learned counsel has submitted that since no substantial question of law has been framed in connection with applicability of Article 59 of the Limitation Act, with respect to two sale deeds as decided by the learned 1st appellate court, there is no scope for this Court to enter into this dispute as the 2nd appeal has to be decided strictly on the substantial question of law framed by the court.
- F.**He has also submitted that otherwise also the learned 1st appellate court has rightly held that the prayer seeking declaration that two sale deeds of 1973 and 1976 were not binding upon the plaintiff

was barred by limitation by referring to Article 58 of the Limitation Act.

G. The learned counsel has also submitted that the suit property involved in this case was only relating to the property covered by the two sale deeds i.e. 1973 and 1976 and further the partition deed dated 29.01.1946 was not specifically under challenge in the suit as no relief was prayed for in connection with the partition deed. He submits that the present suit will have a bearing only with respect to the suit property i.e. property covered under two sale deeds of 1973 and 1976 and he is representing the purchasers of the property covered by the two sale deeds.

H. Learned counsel submits that the defendant No.4 and 5 are the persons who had purchased the property from defendant No. 1 and 2 by other sale deeds which is not under challenge in the present case, but at the same time those properties are also involved in the partition deed dated 29.01.1946.

I. Learned counsel for the respondents has relied upon the judgment reported in *2019 (20) SCC 633[Murugan and Others v. Kesava Gounder (Dead) Thr. LRs. And Others]* (paragraph 28 and 29) to submit that the plaintiff, if aggrieved by the partition deed dated 29.01.1946, ought to have challenged the same within the period of three years from the date of attaining majority which he admittedly attained in the year 1950.

12. Rejoinder argument of the appellants.

I. Learned counsel for the appellants, in response, has submitted that the learned 1st appellate court has recorded the finding in favour of the defendant Nos. 1, 2 and 3 with respect to the suit property on the point of adverse possession and since no foundational plea was taken in connection with the adverse possession therefore, the finding recorded by learned 1st appellate court on the point of adverse possession is certainly fit to be set aside.

- II.** Learned counsel has also submitted that the defendant Nos.1 and 2 could not have simultaneously taken the plea of title based on partition deed dated 29.01.1946 and adverse possession. However, it is not in dispute that the foundational plea in connection with claiming adverse possession was not taken by the defendants in their written statement.
- III.** The learned counsel has also submitted that the learned trial court has given a finding that defendant Nos. 1 to 3 have no title over the suit property and this finding has not been reversed by the learned 1st appellate court.

Findings of this Court

13. Case of the Plaintiffs:-

- A. Raiyati lands measuring in all 11.04 acres was recorded in the name of Ganesh Mahton, son of Piarchand Kurmi and he was the absolute owner thereof in continuous possession.
- B. One Nirsi Devi was married to Uttim Mahton and had two sons Budhan Mahto (original defendant no. 1) and Mangar Mahto (original defendant no.2). Uttim Mahton died leaving his widow and aforesaid two children.
- C. Thereafter, Nirsi Devi married Ganesh Mahton in or about the **year 1928** and brought her two children, original defendant no. 1 and 2, with the consent of Ganesh Mahton and brought them up. In course of time, Nirsi Devi begot one son and a daughter through Ganesh Mahton, namely, the plaintiff and Kumari Bhulia. Kumari Bhulia in course of time was married to Lalu Mahton and she was still living with her husband and children.
- D. Ganesh Mahton died sometimes in the **year 1942** leaving behind his widow Mt. Nirsi and a daughter Bhulia and his son Bhagti Mahton (the plaintiff) who succeeded to the lands of Khata No. 11 of village Taratand.
- E. After death of Ganesh Mahton, Nirsi Devi began to be pressurized by defendant Nos.1 and 2 to give them some lands for their maintenance lest they feared that plaintiff, after he

comes to age, may not allow them to share an inch of land out of Khata No.11. It is the case of the plaintiff that Nirsi Devi , without any right or authority in law to do so, executed a deed of so-called partition amongst the plaintiff and defendant No.1 and 2 on 29.01.1946 acting as guardian of the then minor plaintiff in spite of knowing fully well that defendant Nos.1 and 2 neither had any right or title in the lands of Khata No. 11 nor could they have demanded partition. Nirsi Devi purportedly allotted 8/- annas share, jointly to defendant No.1 and 2, and 8/- annas share, to the plaintiff by making a false recital that such an arrangement had been made by her 2nd husband, Ganesh Mahton himself, during his life time. It is the case of the plaintiff that though the document dated 09.01.1946 was with nomenclature ‘deed of partition’ but it did not partake the nature of partition. It simply purported to define the share of plaintiff and defendant Nos.1 and 2. However, this was a mere paper transaction which did not become operative nor could bind the plaintiff, who was a minor at that time, and had no knowledge or idea about such a document which was kept a close secret. The defendants No.1 and 2 also did never disclosed this fact to any known relative nor to any person in the village until they claimed a right in the lands of khata No. 11 in the year 1973.

- F. The plaintiff attained majority in the year 1950 before which Nirsi Devi had died in the year 1949.
- G. The plaintiff, after attaining majority, found the defendants No.1 and 2 living in a separate house. The plaintiff could come to know later from the villagers about the parentage of defendant Nos.1 and 2. However, after attaining majority, the plaintiff entered into khas cultivating possession of all the lands of khata No.11 measuring 11.04 acres. After the date of vesting, the plaintiff’s father’s name was entered and continued in the tenant’s ledger prepared and opened by the State of Bihar. The plaintiff on receiving demand notice started paying rent for the

entire 11.04 acres of land of Khata No.11 and continued to pay rent till 1964. The plaintiff also remained in khas cultivating possession of 11.04 acres of khata No. 11.

- H. In 1966 the plaintiff negotiated to sell some lands of khata No. 11 to defendant No.4 and 5 and 6 to 9 on various occasions, but on all occasions, they insisted that defendant No. 1 and 2 should also be joined as executants in order to obviate future litigation. The plaintiff while selling lands to defendant No.6 to 9, under pressure and insistence of the aforesaid defendants, had to formally join defendant No.1 and 2 as executants although they had no right, title, interest or possession over any bit of the lands of khata No.11. In the sale deeds the defendant no. 1 and 2 fraudulently, in collusion with the scribe, got their father's name falsely written as Ganesh Mahton, without the knowledge of the plaintiff and the purchasers. These defendants Nos. 6 to 9 got their names mutated and thereafter the plaintiff continued paying rent alone for the remaining area of lands till 1972 and also continued in possession of the remaining area of lands of khata No.11 of village Taratand for which he was paying and paid rent till 1972.
- I. The plaintiff had been in peaceful continuous possession of the lands of Khata No. 11 aforesaid, when surprisingly defendant No.3 falsely instituted a criminal case against the plaintiff alleging theft of crops from plot No. 976 and 977 of khata No.11. The plaintiff in course of the said case came to know that defendant No.3, who is a veteran litigant and land grabber, fraudulently, falsely and by setting up defendant no.1 and 2, who had no right or title to the lands of khata No. 11, obtained a sale-deed in respect of 0.46 acres of land within plot No. 976, 977, 1482 and 1462 on 21.02.1973 without paying them a single farthing on the consideration of fighting out a litigation for them and for establishing their right. The plaintiff however fought the same case which ended in his clean acquittal. The

learned Magistrate held on the evidence that the complainant Lakhan Lal had instituted that case in order to secure possession of the disputed lands. In that very case, the plaintiff also learnt about the fraudulent and collusive deed of partition executed by Nirsi Devi.

- J. Thereafter, defendant Nos. 1 to 3 remained quiet, but in 1976 the defendant No.3 again succeeded in setting up defendant No.1 and 2 by giving them false assurances of securing their right in the lands of khata No. 11 and thereby obtained a false deed of sale dated 07.05.1976 in respect of 0.77 acres of land within plot No. 1365, 1367, 1489, 1456, 1572, 1856, 1569, 1573 and 1582 of Khata No. 11 without paying a single farthing to defendant No.1 and 2 as consideration.
- K. Thereafter as usual, when the crops grown by the plaintiff had grown ripe for harvest, the defendant No.3, on the strength of brute force, succeeded this time in illegally committing theft of crops from some of the lands for which the plaintiff filed a case u/s 379 of Indian Penal Code against defendant No.3 which ended in acquittal of the defendant No.3. However, the plaintiff continued in possession of entire plot numbers covered by the sale deeds dated 21.02.1973 and 07.05.1976 standing in the name of the defendant No.3.
- L. Thereafter the defendant No.3 finding no way out to take possession got a proceeding under section 144 Cr.P.C. initiated in respect of 1.23 acres of unspecified lands out of the plots covered by the sale deeds dated 21.02.1973 and 07.05.1976. The said case was ultimately converted into a proceeding under section 145 Cr.P.C. The defendant No. 3 in his show cause made out a false case that defendant No.1 and 2 are the sons of Ganesh Mahton and that after purchase he got his name mutated. It has been submitted that the mutation order, if any, might have been obtained by defendant No.3 fraudulently in collusion with the Anchal staff by surpassing all processes. It is

learnt that one Durga Prasad Burnwal, a veteran Karmchari, got it done by exerting his own influence. But the said mutation order long after the dispute has arisen can neither bind the plaintiff nor can be the evidence of possession since the plaintiff was still in possession of the lands covered by the proceeding under Section 145 Cr.P.C. which are the lands in suit described in the schedule to the plaint.

M. Since the date the plaintiff attained majority in 1950, he has been in undisturbed possession of the lands of khata No. 11 to the exclusion of defendant No.1 and 2 to their knowledge and to the knowledge of the whole world without any claim by the defendant No. 1 and 2 till 1972.

N. The cause of action for this suit arose on 21.02.1973 and on 07.05.1976, the dates of the execution of the sale deeds.

14. Case of Defendants

- a) ***Defendant Nos. 1 to 3*** have filed written statement and asserted that the instant suit as framed was not maintainable. The plaintiff has failed in series of litigations.
- b) The defendant Nos.1 and 2 are none but are also the sons of the recorded tenant Ganesh Mahto being begotten from a common mother Nirsi Devi which also stands admitted in several documents and papers by the plaintiff Bhakti Mahto.
- c) The suit is barred under the law of limitation, estoppel, res-judicata, waiver and acquiescence, and also under Specific Relief Act.
- d) Suit is further barred by the law of adverse possession since the suit land was firstly in cultivating possession of the defendant Nos.1 and 2 and then it came in physical possession of the defendant No.3 in the year 1973 and since then it has been coming in his continuous physical possession.
- e) From the relief portion of the plaint, it would appear that whatever relief or reliefs the plaintiff has sought by filing the instant suit, are deemed to have been sought only against the

defendant Nos. 1 to 3 and since no relief has been sought against the defendant Nos. 4 to 9, the suit being bad for mis-joinder of the parties, is fit to be dismissed.

- f) The two sons of Nirsi Devi, namely, defendant no. 1 and 2, begotten from her previous and deceased husband Uttim Mahto were brought to the house of her 2nd husband Ganesh Mahto and were also adopted by him as of his two sons.
- g) Ganesh Mahto had died in or about the year 1942 but it was not a fact that he had died leaving behind his widow Nirsi Devi and a daughter Bhulia and the plaintiff who succeeded to the lands of khata No. 11. On the contrary, Ganesh Mahto was also survived by his two adopted sons, namely, defendant Nos. 1 and 2 and after his death all his three sons, namely, plaintiff and defendant no. 1 and 2 jointly succeeded the lands of khata No. 11 and continued till their common mother Nirsi Devi partitioned the land amongst them at the ratio of half and half, joint half share to the defendant nos. 1 and 2 and half share to the plaintiff .
- h) It was denied that after the death of Ganesh Mahto, Nirsi Devi began to be pressurized by the defendants Nos.1 and 2 to give them some lands for their maintenance lest they feared that plaintiff, after he comes of age, may not allow them to share an inch of land out of Khata No.11.
- i) It was false to allege that Nirsi Devi ,without any right and authority in law, had executed a deed of so-called partition amongst the plaintiff and defendant Nos. 1 and 2 on 29.01.1946 acting as guardian of the then minor plaintiff and in that attempt knowing fully well that the defendant Nos.1 and 2 neither had any right, or title in the lands of khata No.11 nor could they have demanded partition.
- j) Nirsi Devi allotted 8 annas share jointly to defendant Nos.1 and 2 and 8 annas share to the plaintiff and such an arrangement had

been made by Ganesh Mahto himself during his life-time and this was his last will.

- k) The allegation of the plaintiff that, though the document dated 29.01.1946 was manufactured as a deed of partition, it did not partake of the nature of Partition but simply purported to define the share of the plaintiff and of defendant Nos. 1 and 2, is a mere allegation and is not a fact. In this connection it was reiterated that the document dated 29.01.1946 was not manufactured as a deed of partition but was really a deed of partition and that cannot be deemed to be a mere arrangement and allotment of share amongst the defendants 1 and 2 and the plaintiff.
- l) All the three sons of the recorded tenant Ganesh Mahto shall be getting equal share in the land in accordance with law of inheritance and succession.
- m) The allegation of the plaintiff that the document being mere a paper transaction did not bind the plaintiff as he was a minor at that time has also no leg to stand. The document of partition is not a mere paper-transaction as alleged by the plaintiff but is a document which has the force of law and is equally binding upon the defendant Nos. 1 and 2 as well as upon the plaintiff. The fact of the execution of the deed of partition by Nirsi Devi was within the knowledge of the plaintiff and as such the plea taken by the plaintiff that he being minor was not aware of the same is not sustainable nor acceptable as being minor had got sufficient understanding and knowledge at that time. Since deed of partition was within the knowledge of the plaintiff and since he was fully aware of the contents of the same, there was no necessity to these defendant Nos. 1 and 2 to make him known about the same. Here the plaintiff, instead of stating the real fact, has made a futile attempt to make a completely false statement that he was not aware of the contents of the partition

deed as he was minor and he has done so with a malafide intention to reap some illegal gain to suit his own case.

- n) It is false to allege that the plaintiff had attained majority in the year 1950 but he had attained majority on earlier date and much before the year 1950 and he had attained his majority in the life time of Nirsi Devi. The statement that Nirsi Devi died in the 1949 is far from truth. Nirsi Devi did not die in the year 1949 but she died much after the year 1949.
- o) The further averment made by the plaintiff to the effect that the plaintiff, after attaining majority found the defendant Nos. 1 and 2 living in a separate house, was also claimed to be self-serving statement and the same was denied in toto. In this connection, it was stated that the defendants were never living in a separate house as stated by the plaintiff but were living in the same house where the plaintiff had been living. The statement that the plaintiff could come to know later from the villagers about the parentage of defendant Nos. 1 and 2 was denied. In this connection it was re-iterated that the plaintiff had been knowing the parentage of the defendant Nos. 1 and 2 and his relation with them since his infancy and childhood. Similarly, the averment that the plaintiff, however, after attaining majority entered into khas possession of all the lands of khata No.11 measuring 11.04 Acres is also a twisted and completely false statement and denied. In this connection it has been asserted that the plaintiff was never in possession what to say of khas or symbolical of the entire land of khata No.11. The real position was that he was in possession of only half of the land while the other half of the land was in possession of the defendant Nos. 1 and 2. The averment that after the date of vesting, the plaintiff's father's name was entered and continued in the tenant's ledger by the State of Bihar was admitted with the modification that name of Ganesh Mahto, being the common father of defendants 1 and 2 and of the plaintiff, was entered and continued in the

tenant's ledger prepared and opened by the State of Bihar. The further averment that the plaintiff on receiving demand notice started paying rent for the entire 11.04 Acres of land of Khata No.11 and continued to pay rent till 1964, has been denied. In this connection it has been stated that no such occasion had ever arisen and these defendants are not aware whether any demand notice was ever received by the plaintiff as alleged by him. Here it has been denied that the plaintiff had continued to pay rent till 1964. It has been denied that the plaintiff also remained in khas cultivating possession of 11.04 Acres of land of khata No.11.

- p) These defendants were not aware whether the plaintiff being in need of money had negotiated to sell some land of khata No.11 with the defendant Nos. 4 and 5 and 6 to 9 on various occasions and on all occasions, they insisted that defendants No. 1 and 2 should also join as executors in order to obviate future litigation. But it has been admitted that some pieces of land were sold to defendant Nos. 4 and 5 and 6 to 9 jointly by defendant Nos. 1 and 2 *and* by the plaintiff. In this connection, it has been stated that the defendant Nos. 1 and 2 had joined their hands with the hands of the plaintiff in disposing off the land of khata No.11 with the defendant Nos. 4 and 5 and 6 to 9 not because the purchasers insisted to do so, but because they had got equal share in the land of Khata No.11 being the adopted sons of the recorded tenant Ganesh Mahto and being begotten from a common mother Nirsi Devi. In reply to the averment that the defendant Nos. 1 and 2, in collusion with the scribe, got their father's name falsely written as Ganesh Mahto in the sale-deeds, it has been submitted that the allegation to the effect is a completely false and concocted and denied. Writing of the father's name of the defendant Nos. 1 and 2 as Ganesh Mahto in the sale-deeds was within the knowledge of the plaintiff as well as of the purchasers and was written in his presence. So far the fact of the mutation of the names of the

defendant Nos. 4, 5 and 6 to 9 is concerned, it stood admitted by these defendants but it was denied that the plaintiff kept on paying rent alone for the remaining area of lands of khata No.11 till 1972 and also continued in possession of the same. Whatever rent was given for the remaining area, was given jointly by the defendant Nos. 1 and 2 and by the plaintiff, and the land remained in their joint possession.

- q) Khata No.11 had not been in exclusive possession of the plaintiff but had been in joint possession of the plaintiff and defendant Nos. 1 and 2. The plaintiff had instituted case u/s 379 of Indian Penal Code against the defendant No.3 not once but twice and both the cases ended in clean acquittal of the defendant No.3. It is false to allege that the plaintiff, in course of the said case, came to know that the defendant No.3 had purchased land of khata No.11 but on the contrary he was knowing the same much before the institution of the case by him, rather, the sale of the land by the defendant Nos. 1 and 2 in favour of the defendant No.3 was within the knowledge of the plaintiff. Thus, it was completely false to allege that the defendant No.3 being a veteran litigant and land grabber had fraudulently and falsely set the defendant Nos. 1 and 2 up and got the sale-deeds executed.
- r) The sale-deeds by defendant Nos. 1 and 2 in favour of the defendant No.3 were with full consideration and it was false to allege that no consideration money was ever paid by the defendant No. 3 to defendant Nos. 1 and 2. Whatever criminal cases were brought, they were brought by the plaintiff and in all the cases so brought by the plaintiff, the Magistrate held that the complainant, being plaintiff in the instant suit, had been trying to secure the possession of the land.
- s) Sale of the land of plot Nos. 1365, 1367, 1489, 1456, 1572, 1856, 1569, 1573 and 1582 of khata No.11 by the defendant Nos. 1 and 2 in favour of defendant No.3 was a voluntary sale

by the defendant Nos. 1 and 2 and for a valuable consideration and it is false to allege that any false assurance of security to their right in the lands of khata No.11 was ever made by the defendant No. 3 by setting up defendant Nos. 1 and 2.

- t) It is also false to allege that even after the acquittal of the defendant No.3, the plaintiff continued in possession of the land covered by the sale deeds dated 21.02.1973 and 07.05.1976 standing in the name of defendant No.3. The land was never in possession of the plaintiff and the same was in possession of the defendant No. 3 and has been coming in his possession.
- u) It is false to allege that the defendant No.3 finding no way out to take possession got a proceeding u/s 144 Cr.P.C. initiated in respect of 1.23 Acres of unspecified lands out of the plots covered by the sale deeds dated 21.2.1973 and 07.05.1976. On the contrary, the fact is otherwise. The plaintiff Bhakti Mahto, after having been defeated in cases u/s 379 I.P.C. had, in order to take forcible possession, got a proceeding u/s 144 Cr.P.C. drawn up with respect to the lands covered by the sale deeds dated 21.2.1973 and 07.05.1976 arraying himself therein as the 1st Party and defendant No.3 as the 2nd Party and it is a fact that the said proceeding u/s 144 Cr.P.C. was converted into a proceeding u/s 145 Cr.P.C. But it is false to allege that the defendant No.3 in his show cause had made out a false case that the defendant No.1 and 2 are the sons of Ganesh Mahto and that after purchase he got his name mutated. In this connection it was re-iterated that whatever statement with respect to the defendant Nos. 1 and 2 of being sons of Ganesh Mahto was made in the show cause is a correct statement and there is no falsity in it. The allegation of obtaining mutation order by the defendant No.3 fraudulently in collusion with the Anchal staff surpassing all processes is mere surmises and conjectures of the plaintiff and has purposely been levelled to give undue strength to his false case. The said mutation order is not a fraudulent one

but the same was done after observing all formalities and after exhausting all due processes of law and in obtaining the said mutation order, no collusion was ever made with any of the Anchal staff. So far the allegation of getting the mutation order done by one Durga Prasad Barnwal being the Karmchari of the Anchal is concerned, it was submitted that it is completely false to allege that the same was done by Durga Prasad Barnwal. Besides so far these defendants are concerned, they do not know any Durga Prasad Barnwal. Thus, the said mutation order, which was passed after observing all formalities and process of law, is binding to the plaintiff as well as is also evidence of possession of defendant No.3 over the land. The plaintiff was never in possession of the lands covered by the proceeding u/s 145 Cr.P.C. In this connection, it has been submitted that the said Proceeding u/s 145 Cr.P.C. was ended in favour of the defendant No.3 after holding the continuous possession of the defendant No.3 over the land involved in the proceeding and that order is binding to the plaintiff as well as to anybody on the earth and that is strong evidence of possession of the defendant No.3.

15. *Written Statement filed by Defendant Nos. 4 to 9* are on similar lines. These defendants have further stated that the plaintiff has sought reliefs only against the defendant Nos. 1 to 3 and since no relief has been sought against the defendant Nos. 4 to 9, the suit is bad for mis-joinder of the parties and is fit to be dismissed. It has been stated that so far lands detailed in the schedule of the plaint is concerned, these defendants have got neither any interest nor any concern with the same. In this connection, it has been stated that the suit land is now in peaceful physical possession of the defendant No.3 as he had purchased the same from the defendant Nos. 1 and 2 on payment of valuable consideration. The defendant Nos. 1 and 2 being the adopted sons of the recorded tenant Ganesh Mahto and being begotten from a common mother Nirsi Devi had sold the suit lands to

the defendant No.3 in two parts, firstly being in the year 1973 and secondly, being in the year 1976. The plaintiff was never in possession what to say of khas or symbolical of the entire land of khata No.11. The real position was that the plaintiff was in possession of only half of the land while the other half of the land was in possession of the defendant Nos. 1 and 2.

16. Learned trial court framed the following issues for consideration:-

- 1. *Is the suit maintainable in its present form?*
- 2. *Has the plaintiff got valid cause of action?*
- 3. *Is this suit barred by the law of limitation and adverse possession?*
- 4. *Has the suit been properly valued?*
- 5. *Are the sale deeds dated 21.02.1973 and 07.05.1976 genuine and valid documents and binding upon the plaintiff?*
- 6. *Has the title of the plaintiff over the suit lands been affected by these sale deeds?*
- 7. *To what relief of reliefs, if any, the plaintiff is entitled?*

17. Both the parties had produced oral and documentary evidences which are as follows:-

Oral evidence on behalf of plaintiff:-	
<i>P.W-1</i>	<i>Bhakti Mahto</i>
<i>P.W-2</i>	<i>Darbari Mahto</i>
<i>P.W-3</i>	<i>Babu Jaan Mian</i>
<i>P.W-4</i>	<i>Arjun Mahto</i>

Documentary evidence on behalf of the plaintiff:-	
<i>Exhibit-1</i>	<i>Certified copy of judgment dated 05.06.1976</i>
<i>Exhibit-2</i>	<i>Khatian in the name of Ganesh Mahto</i>

Oral Evidence on behalf of the defendants:-	
<i>D.W-1</i>	<i>Lakhan Lal</i>
<i>D.W-2</i>	<i>Jailal Mahto</i>
<i>D.W-3</i>	<i>Ugan Mahto</i>
<i>D.W-4</i>	<i>Gyanchand Sao</i>
<i>D.W-5</i>	<i>Fagu Mian</i>
<i>D.W-6</i>	<i>Budhan Mahto</i>
<i>D.W-7</i>	<i>Bukan Mian</i>

D.W-8	Hemlal Mahto
D.W-9	Mangar Mahto

Documentary evidence on behalf of the defendants:-	
Exhibit-A	Sale deed dated 04.01.1966
Exhibit-B	Sale deed dated 04.01.1966
Exhibit-C	Sale deed dated 07.05.1976
Exhibit-C/1	Sale deed dated 21.02.1973
Exhibit-D to D/8	Rent receipts
Exhibit-E	Voter List
Exhibit-F	Sale deed dated 04.01.1966
Exhibit-G to G/2	Rent receipts
Exhibit-H	Partition deed
Exhibit-I	Certified copy of judgment dated 23.07.1979
Exhibit-I/1	Certified copy of judgment dated 17.02.1979
Exhibit-J	Certified copy of the proceeding
Exhibit—K	Certified copy of the deposition of the plaintiff dated 25.07.1977

18. Findings of the learned trial court is as under:-

“Issue No.:-4

This issue on the point of valuation has already been decided and disposed of vide this court’s order dated 23.11.1981.

Issue No. 5 and 6

..... On the basis of the discussion above, I find that the sale deed dated 21.02.1973 Exhibit-c/1 and sale deed dated 7.05.1976 Exhbit-C executed by Budhan Mahto and Mangar Mahto defendant Nos. 1 and 2 in favour of Lakhan Lal defendant No.3 are not valid and not binding upon the plaintiff. Budhan and Mangar Mahto can not be treated as legally and validly adopted sons of Ganesh Mahto. They have not derived any right and interest through the partition deed dated 29.01.1946 and as such they had no power to transfer by sale the lands through the sale deed dated 07.05.1976 and 21.02.1973. I find that the plaintiff has never consented expressly or impliedly for such sale. Nowhere in his evidence, D.W. 3 has stated that before the purchase, he used due diligence and took reasonable care to ascertain that Budhan Mahto and Mangar Mahto had got power to sale the lands in

khata No. 11. If he had enquired about the adoption or the partition from the plaintiff or from the villagers or from some one else, he would have easily discovered that whether Budhan and Mangar Mahto had got power to sell the lands or not. Rather scrupulously using his brain initiated a criminal case (Exhibit-1) against some Arjun Mahto and tried to establish his possession over the suit lands by twisting the provisions of law and to defraud the plaintiff by keeping him in total darkness. I find that these sale deeds exhibits C and C/1 have in no way affected the title of the plaintiff over the lands covered by these sale deeds. These issues therefore are disposed of in favour of the plaintiff.

Issue No. 3:-

“The defendants have hotly contested the case in the point of limitation and adverse possession. It has been contended by the defendants that the suit itself is barred by Art. 59 of the Limitation Act which provides 3 years limitation for cancellation or setting aside an instrument.

The relief prayed by the plaintiff in this suit is that the sale-deeds dt. 21.2.73 and 7.5.76 executed by defendants 1 & 2 in favour of def. no. 3 is illegal and void, not binding upon him and has not affected his title nor the lands covered by these sale-deeds. He has also prayed for the confirmation of the possession, and if found dispossessed pending the suit, he has prayed for Khas possession by evicting deft. No. 3.

In this case the plaintiff Bhakti Mahto is not a party in any of the sale-deeds dated 21.2.73 and 7.5.76. These instruments therefore cannot be cancelled or set aside by the plaintiff. In *Unni Vs. Kunchi Amma* (1890) 14 Mad., their Lordships have quoted, that,

“If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist.”

The plaintiff Bhakti Mahto may, if these instruments are likely to cast cloud upon his title, get a declaration under sec. 34 of the Specific Relief Act. He is not bound to sue for such a declaration and his failure to do so will not affect the enforcement of his rights.

In this suit the plaintiff has prayed that the sale-deeds be declared void and that his title over the suit lands has not been affected by the sale deeds. He has also prayed for

confirmation of possession and Khas possession by dispossessing deft. No. 3.

Apparently, the primary relief sought by the plaintiff is possession over the suit lands by dispossessing deft. No. 3. The plaintiff who is not a party to these instruments is not bound to sue to set aside or declare void these instruments. But as the plaintiff has prayed to declare these void, it may be treated as an ancillary prayer. As per Straight J. reported in (1882) 5 All. 76 (79), where in a suit for possession, cancelling or setting aside an instrument is purely incidental in granting the relief for possession through suit in its essence and substance is one for the recovery of immovable property and Art. 144 (Art. 65 of the new Act) and not Art. 91 (Art. 59 of the new Act) applies. In this suit the primary relief seeking khas possession of the plaintiff over the suit lands by dispossessing deft. No. 3 with a declaration that the said sale deeds are void being an ancillary relief and that these have not affected the title of the plaintiff over the suit lands is a suit for possession of immovable property based on title and the suit will be governed by Art. 65 of the Limitation Act with a limitation period of 12 years. The sale deeds have been executed on 21.2.73 and 7.5.76. This suit filed on 17.6.80 has been filed well within the limitation period of 12 years.

The claim of the defendants that they have acquired adverse possession by virtue of the said sale deeds Exhibit-C and C/1 is therefore, not tenable.

The defendants have filed certain rent receipts- Exhibit D to D/8 and Exhibit G to Exhibit G/. Deft. No.3 has filed D/7 and D/8 rents paid from 75 to 79 for the lands in suit. For this I would like to quote the observation of their lordships is Smt. Purni Devi vs Shibu Mahton reported in AIR 1971 Pat 249-

“Entries in Khatian as to occupation of particular person raises a presumption as to continuity of possession of that person and that presumption is not materialized by payment of rent by someone else”.

Exhibit-2, the Khatian shows that the name of Ganesh Mahato the father of the plaintiff as recorded tenant. No better, legal, or credible documents have been produced by the defendants to rebut this presumptive evidence to show their adverse possession over the suit lands.

This issue therefore is disposed in favour of the plaintiff.

Issue No. 1, 2 and 7:-

On the basis of the discussion above, evidences produced by both the parties and facts and circumstances of the case, I find

that the plaintiff has got valid cause of action and the suit is maintainable in its present form.”

19. Thus, the learned trial court held that -

- a. Defendant nos. 1 and 2 cannot be treated as legally and validly adopted sons of Ganesh Mahto.*
- b. Defendant no. 1 and 2 have not derived any right and interest through the partition deed dated 29.01.1946 and as such they had no power to transfer by sale the lands through the sale deeds dated 07.05.1976 and 21.02.1973. The plaintiff has never consented expressly or impliedly for such sale.*
- c. The sale deed dated 21.02.1973 (Exhibit-C/1) and sale deed dated 7.05.1976 (Exhibit-C) executed by defendant Nos. 1 and 2 in favour of defendant No.3 are not valid and not binding upon the plaintiff. sale deeds (exhibit C and C/1) have in no way affected the title of the plaintiff over the lands covered by these sale deeds.*
- d. Nowhere in his evidence, D.W. 3 has stated that before the purchase, he used due diligence and took reasonable care to ascertain that Budhan Mahto and Mangar Mahto had got power to sell the lands in khata No. 11.*
- e. The defendants have hotly contested the case in the point of limitation and adverse possession. It has been contended by the defendants that the suit itself is barred by Art. 59 of the Limitation Act which provides 3 years limitation for cancellation or setting aside an instrument.*
- f. The relief prayed by the plaintiff in this suit is that the sale deeds dated 21.02.1973 and 07.05.1976 executed by defendant nos. 1 & 2 in favour of defendant no. 3 are illegal and void, not binding upon him and have not affected his title over the lands covered by these sale-deeds. He has also prayed for the confirmation of the possession, and if found dispossessed pending the suit, he has prayed for Khas possession by evicting defendant No. 3.*
- g. In this case, the plaintiff Bhakti Mahto is not a party in any of the sale-deeds dated 21.02.1973 and 07.05.1976. These instruments therefore cannot be cancelled or set aside by the plaintiff.*
- h. The plaintiff Bhakti Mahto may, if these instruments are likely to cast cloud upon his title, get a declaration under section 34 of the Specific Relief Act. He is not bound to sue for such a declaration and his failure to do so will not affect the enforcement of his rights.*

- i. Apparently, the primary relief sought by the plaintiff is possession over the suit lands by dispossessing defendant No. 3. The plaintiff who is not a party to these instruments is not bound to sue to set aside or declare void these instruments. But as the plaintiff has prayed to declare these void, it may be treated as an ancillary prayer.
- j. Where in a suit for possession, cancelling or setting aside an instrument is purely incidental in granting the relief for possession through suit in its essence and substance is one for the recovery of immovable property and Art. 144 (Art. 65 of the new Act) and not Art. 91 (Art. 59 of the new Act) applies.
- k. In this suit the primary relief is seeking khas possession of the plaintiff over the suit lands by dispossessing deft. No. 3 with a declaration that the said sale deeds are void being an ancillary relief and that these have not affected the title of the plaintiff over the suit lands. The suit is for possession of immovable property based on title and the suit will be governed by Article 65 of the Limitation Act with a limitation period of 12 years.
- l. The sale deeds have been executed on 21.02.1973 and 07.05.1976. This suit filed on 17.06.1980 has been filed well within the limitation period of 12 years.
- m. The claim of the defendants that they have acquired adverse possession by virtue of the said sale deeds Exhibit-C and C/1 is therefore, not tenable.
- n. The court also considered the rent receipts filed by the defendants. The defendants have filed certain rent receipts- Exhibit D to D/8 and Exhibit G to Exhibit G/2. Defendant No.3 has filed Exhibits D/7 and D/8 which are the rent receipts for the rents paid from 1975 to 1979 for the lands in suit.

On the basis of an earlier judgement, the court observed that entries in Khatian as to occupation of particular person raises a presumption as to continuity of possession of that person and that presumption is not materialized by payment of rent by someone else.

The court recorded that Exhibit-2, the Khatian shows that the name of Ganesh Mahto, the father of the plaintiff, has been shown as the recorded tenant and the defendants have not produced any better legal, or credible documents to rebut this presumptive evidence to show their adverse possession over the suit lands.

Thus, the court discarded the plea of possession raised by the defendants on the basis of the rent receipts as the khatiyani was running in the name of Ganesh Mahto, the father of the plaintiff.

20. The learned trial court decreed the suit by holding that the defendant no. 1 and 2 did not derive any right out of the deed of partition of the year 1946 as they had no right over the property of 2nd husband of their mother and hence the sale deeds executed by them in favour of the defendant no. 3 were void and not binding upon the plaintiff who was the biological son of Ganesh Mahto; the story of adoption of defendant no. 1 and 2 by Ganesh Mahto was rejected; the suit seeking recovery of possession was to be governed by Article 65 of the Limitation Act and the period of limitation would be 12 years and the plea of the defendants that they were in possession on the strength of rent receipts was rejected by observing that the Khatiyani was still running in the name of Ganesh Mahto, father of the plaintiff and mere payment of rent by the defendants had no bearing in the matter.

21. The learned 1st appellate court recorded that in appeal the finding of the learned court was challenged on the ground that suit was barred by limitation as it was filed after 3 years of the execution of alleged two sale deeds Exhibits C and C/1, and also on the ground that the defendant nos. 1 and 2 and defendant no. 3, purchaser from defendant no. 1 and 2, have also acquired right by adverse possession on the basis of the alleged illegal document of partition of the year 1946 which is Exhibit- H and since defendant no. 1 and 2 continued to be in possession for more than 12 years adversely to the title of the plaintiff, hence, defendant nos. 1 and 2 acquired indefensible right and the purchaser also acquired that right by purchase.

22. ***The learned 1st appellate court*** has recorded its findings from paragraph 7 to paragraph 13 and, *inter alia*, held as follows: -

7. So far as point of limitation is concerned, the learned court below has held that Article 59 of the limitation Act is not applicable in this case and the suit would be governed by

Article 65 of the Limitation Act. So far as the applicability of Article-59 is concerned, I agree with the learned court below that this Article 59 is not applicable in the present case because that Article prescribes limitations of 3 years for cancellation or setting aside an instrument or decree or for recession of a contract. From the perusal of the relief in the plaint, I find no such prayer for cancellation of the sale deed dated 22.02.73 and 7.05.76. But there is a clear prayer for declaration that the two sale deeds are illegal and void. And for mere declaration regarding document, in my opinion, Article 58 of the new limitation Act will apply in which period of 3 years limitation has been prescribed from the time when the right to sue first accrues. Therefore, the right to get such declaration arose immediately after the execution of the two sale deeds Exhibit-C and C-1 of the year 1973 and 1976. Thus, so far as the declaration of the two sale deeds are concerned, in my opinion, the claim of the plaintiff is time barred and hit by law of limitation as the suit has been filed after three years of the execution of the deed. No doubt, Article 65 will apply so far as demand for recovery of possession or confirmation of possession is concerned and for that 12 years limitation is prescribed. But in the present case, I would like to discuss the case of the defendant that the suit is barred by law of limitation on account of the adverse possession of the defendants.

8. The learned advocate on behalf of the respondent has given a short written submission and alleged in paragraph 1 that the defendant-appellant have not pleaded adverse possession. But I find that in paragraph 5 of the written statement it is clearly stated that the suit is barred by law of adverse possession as the suit land was firstly in cultivating possession of defendant No. 1 and 2 and since the year 1973, it came in cultivating possession of defendant No.3. It is to be borne in mind that in para 6 of the plaint it is written that the plaintiff attained majority in the year 1950 after death of Nirsi and after attaining majority the plaintiff entered into khas cultivating possession of all the lands of khata No.11. It clearly shows that before attaining majority in the year 1950 plaintiff was not in khas possession of the suit land or any land. There is no dispute that Ganesh Mahto had died in the year 1942 and in the year 1946 Exhibit-H a registered 'Batwarnama' deed was executed by Most Nirsi, the mother of the plaintiff and admittedly, at that time the plaintiff was a minor and in that registered partition deed schedule of lands allotted in favour of Budhan Mahto and Mangar Mahto have been shown and

schedule of lands falling in share of plaintiff has also been given and the rents has been also shown. This partition deed in a way purported to create a title in favour of defendant No. 1 and 2 who were born to Most. Nirsi from her first husband Uttim Mahto. In my opinion, the Article 60 of new Limitation Act will also apply in the present case, because the guardian of the minor plaintiff is transferring or alienating the interest of the plaintiff to the extent of 8 annas in favour of her sons from previous husband. So, this registered partition deed which appears to me to be a really a transfer deed had to be challenged after 3 years of 1950 when the plaintiff had admittedly attained majority. It not only purported to have for 8 anna interest but also put defendant No.1 and 2 in possession of suit land.

9. The learned advocate on behalf of the appellant has argued that even on the basis of a wrong and illegal document if the party came in possession, adverse possession against the real owner will start running. I find force in this contention. The admitted case of the plaintiff is that Nirsi died in the year 1949 and plaintiff attained majority in the year 1950 and then he came in possession. So it is clear that after death of the father Ganesh Mahto these defendants had been in possession of the suit property along with mother and after the death of Nirsi in the year 1949, and prior to the attainment of majority of the plaintiff, in the year 1950 these defendants remained in exclusive possession of the suit property, if they are treated to be stranger to that family of the plaintiff. So in any case the adverse possession of the defendant No. 1 and 2 started running from year 1950 to the knowledge of the plaintiff. It is to be noted that Exhibit-E and I are the judgment of the two criminal cases u/s 379 IPC in which Bhakti Mahto plaintiff was complainant and Budhan Mahto and others as well as defendant No.3 and purchaser were accused and the allegation was regarding removal of paddy from the land of complainant and the accused were acquitted. Admittedly, the proceeding under Section 145 Cr.P.C. was decided in favour of the defendants and it would be too much for this court to hold that even after acquittal of the accused in theft case and their success in 145 Cr.P.C. proceeding the plaintiff continued in possession of the suit lands. Exhibit-A and B are the two Bajidawa deeds of the year 1966 in which Budhan Mahto is party as executant along with Bhakti Mahto plaintiff and there is recital that after death of Ganesh Mahto, the executants are coming in possession. That would be too much for the plaintiff to say that Budhan Mahto and Mangar Mahto were not in

possession of the suit property. It is also significant to mention that they have also separately executed another Bajidawa in form of the sale deed, which is Exhibit-F and in that also, their father's name have been mentioned to be Ganesh Mahto and the voter list Exhibit-E also shows that Budhan Mahto and Mangar Mahto has been described to be sons of Ganesh Mahto. It has been argued on behalf of the plaintiff respondent that admittedly, Budhan Mahto and Mangar Mahto were sons of Uttim Mahto but borne of Nirsi hence, the wrong entry of father's name in those papers will not create any title in favour of Budhan and Mangar. True it is, but the mention of the names of Budhan and Mangar in several registered deeds in which the plaintiff is himself a party will go to show that the defendants were also in possession of the suit property. And from his own conduct the plaintiff would be estopped from challenging the possession of defendant No. 1 and 2. This would be a case of estoppel by conduct.

10. The learned advocate on behalf of the appellant has submitted that he learned court below has rejected the adoption story as it was not according to the Hindu Law and he is not very much eager to press the point of adoption of defendant No.1 and 2 by their adoptive father Ganesh Mahto, but however, the fact that these two defendants were brought in the family of the plaintiff at the time of marriage of Nirsi with Ganesh Mahto cannot be treated lightly or ignored. Therefore, the recital in the partition deed Exhibit-H that partition is being effected by the mother guardian only to fulfill the last wishes of the deceased father cannot at all be ignored and rejected. AIR 1936 Privy Council page 264 is lays down that father can make partition without the consent of sons and partition is binding on sons. Had this lady any foul intention and soft corner for the sons of her previous husband she could have divided the properties in 3 equal shares for their sons because at that time plaintiff was minor and there was no one to object to the action of the lady guardian of minor and therefore, I am not inclined to impute any foul or bad intention in the mind of that lady Most. Nirsi in the year 1946. Further, I will like to refer to the evidence of P.W. 4 Arjun Mahto in this respect. He is aged 80 years and is resident of village-Taratand. In para 7 of his evidence he has said that he had participated in the marriage of Ganesh Mahto and had attended the Barat which was organized with full pomp and grandeur. Ganesh Mahto had brought two sons from that place; one was 14 or 15 years old and another was 10 to 12 years old and Bhakti Mahto was born 4 years or 5

years after that marriage. So if the sons also came with mother and remained in the family of the adoptive father, the desire of the father for giving half lands to the two sons of his newly married wife from the previous husband, can not be deemed to be fantastic and imaginary story and as defendant No.1 and 2 were inducted in their new step father's family, hence, every where in the documents the father of defendant No.1 and 2 has been described to be Ganesh Mahto. Therefore, I am of opinion, that the defendant No.1 and 2 came in possession of the suit property in the year 1946 even adversely to the interest of the plaintiff and they remained in possession for more than 12 years and acquired valid title.

11. There is yet another circumstance to be considered in this case. P.W. 1 Bhakti Mahto has admitted in paragraph 1 of his evidence that after marriage with Ganesh Mahto Nirsi had brought her two sons from previous husband Uttim Mahto with her and Ganesh Mahto told her to keep them together or jointly, and thereafter, this witness as well as his sister was born from Nirsi Devi. So it clearly indicates that Mangar and Budhan were kept in the family of the plaintiff with consent and previous permission of his father Ganesh Mahto. Further in paragraph 5 of his evidence this witness has stated that Nirsi Devi had sympathy with Budhan and Mangar. Therefore, she created document of share in favour of the defendant No.1 and 2 with respect to the land of khata No.11. He clearly refers to Exhibit-H the 'Batwaranama' paper and he himself calls this document as instrument creating share in favour of Budhan and Mangar. He has further stated in paragraph 6 that this Nirsi Devi had no right to create a share in favour of Budhan and Mangar in the lands of Khata No.11 and Budhan and Mangar could not get any share or title on the basis of that document. Therefore, he clearly admits, this fact of illegal transfer of half of the property of Khata No.11 by the mother guardian and as such in my opinion, as I have earlier referred, Article 60 of the new Limitation Act will apply in this case, but that document Exhibit-H was not challenged after eight years of attaining his majority in the year 1950.

12. Further in his evidence he has admitted that on the basis of that paper creating share in favour of defendant they (defendants) did not claim the land. It also goes to show that they claimed and are claiming title in the land at present also on the ground of adverse possession as well and their possession had already started in the year 1946 adversely on the basis of the alleged illegal partition deed Exhibit-H. It is to be also considered that in para 10 of his evidence, P.W.1 has

stated that after attaining 'Hosh' in the year 1950 he is in exclusive possession of the lands of Khata No.11. But not a single rent receipt has been produced to prove this fact. It has been argued on behalf of the plaintiff-respondent that rent was paid in the name of Ganesh Mahto upto 1964, which fact has been admitted by the defendant in written statement, hence no adverse inference should be drawn for non-production of rent receipts. But in my opinion, the production of receipt would have shown as to who actually was paying rent in the name of Ganesh Mahto. This would be a circumstance to show physical possession of the parties concerned. In page 6 of his evidence before the commencement of para 53 it has been said by this witness that he always got the receipt issued. But from the non-production of receipt by him adverse inference must be drawn against the actual physical possession over the entire land. In para 48 of his evidence in page 5 he has denied the suggestion that his statement regarding payment of rent by him alone is false. This falsify of his evidence stands proved by the three rent receipts Exhibit-G, G-1, and G-2 filed on behalf of the defendants. These rent receipts are in the name of Budhan Mahto with respect to 5.41 acres of land of Khata No. 11/4 of mauja. Taratand. Exhibit-G-2 the rent receipt was issued in the year 1969. With respect to the rent of one year 68-69. By receipt Exhibit-G the rent was paid by Budhan Mahto for the year 1969-70 and 70-71 and by the rent Exhibit-G-1 of the year 1975 rent upto 1975 was paid by Budhan Mahto and receipt was issued in his name. Exhibit D series the rent receipts appears to have been issued in the name of purchaser and Exhibit-D/6 the rent receipt in the name of Lakhan Lal there is mentioned of mutation case No. 60 /61 of the year 1966-67. Therefore, in view of these rent receipts in the name of Budhan and purchaser and in absence of any rent receipt produced on behalf of the plaintiff I am not at all prepared to accept that the plaintiff Bhakti Mahto is in possession of the suit land and continued in possession from the year 1950 onwards and even after the decision of proceeding under Section 145 Cr.P.C. the plaintiff continued to be in possession is unworthy of acceptance to me.

13.In para 29 of his evidence the plaintiff has admitted that after marriage with Ganesh Mahto, Nirsi his mother willingly kept Mangar and Budhan but he has denied the suggestion that she was brought up by Ganesh willingly and he was adopted as a son according to village customs. P.W. 4 Arjun Mahto who was present in the marriage of Ganesh has also not the courage to deny the fact that Ganesh Mahto had stated

at the time of his death to his wife to give 1/2 land to them and keep them as son. Therefore, there is enough material before this court to come to the conclusion that by continued possession of the Budhan and Mangar from 1946 onward till 1973 and of the purchaser defendant No. 3 thereafter adversely to the title of the plaintiff, the defendant No.1 to 3 acquired indefeasible right over the suit property and as such the transfer made by defendant No.1 and 2 and in favour of defendant No.3 who purchased it for valuable consideration cannot be said to be illegal and void. Therefore, this point is being decided in favour of the defendant-appellant. Accordingly, I set aside the judgment and decree of the learned court below and allow the appeal and dismiss the case of the plaintiff with cost at the minimum contested scale.”

23. The learned 1st appellate court has recorded its findings from paragraph 7 to paragraph 13 and, *inter alia*, held as follows: -

- a. On the point of limitation, the learned 1st appellate court agreed with the finding of the learned trial court that Article 59 of the Limitation Act is not applicable in this case and the suit would be governed by Article 65 of the Limitation Act since no prayer for cancellation or setting aside of the sale deeds dated 22.02.1973 and 7.05.1976 was made in the suit but there is a clear prayer for declaration that the two sale deeds are illegal and void.
- b. The appellate court was of the view that Article 58 of the Limitation Act will apply in which period of 3 years limitation has been prescribed from the time when the right to sue first accrues which in the instant case accrued immediately after the execution of the two sale deeds Exhibit-C and C-1 of the year 1973 and 1976. The 1st appellate court held that so far as the prayer for declaration of the two sale deeds as illegal and void is concerned, the claim of the plaintiff is time barred as the suit has been filed after three years of the execution of the deeds.
- c. With respect to the relief of recovery of possession, the learned 1st appellate court held that Article 65 of the Limitation Act will apply for which 12 years limitation has been prescribed. But the

court discussed the case of the defendants that the suit was barred by law of limitation on account of the adverse possession of the defendants.

- d. The 1st appellate court recorded the submissions of the plaintiff that the defendants had not pleaded adverse possession, but found that in paragraph 5 of the written statement it was clearly stated that the suit was barred by law of adverse possession as the suit land was firstly in cultivating possession of defendant No. 1 and 2 and since the year 1973, it came in cultivating possession of defendant No.3.
- e. The court also recorded that in paragraph 6 of the plaint it is written that the plaintiff attained majority in the year 1950 after death of Nirsi Devi and after attaining majority the plaintiff entered into khas cultivating possession of all the lands of khata No.11 and this clearly showed that before attaining majority in the year 1950, plaintiff was not in khas possession of the suit land or any land.
- f. The learned 1st appellate court noted that there is no dispute that Ganesh Mahto had died in the year 1942 and in the year 1946 Exhibit-H, a registered Batwarnama deed, was executed by Most. Nirsi, the mother of the plaintiff. Admittedly, at that time the plaintiff was a minor and in that registered partition deed, schedule of lands allotted in favour of defendant no. 1 and 2 have been shown and schedule of lands falling in share of plaintiff has also been given and the rents have been also shown.
- g. The court observed that this partition deed in a way purported to create a title in favour of defendant Nos. 1 and 2 who were born to Most. Nirsi from her first husband Uttim Mahto and in the opinion of the court, the Article 60 of the Limitation Act will also apply, because the guardian of the minor plaintiff transferred or alienated the interest of the plaintiff to the extent of 8 annas in favour of her two sons from previous husband.

- h. The learned court was of the view that this registered partition deed, which appeared to be really a transfer deed, was required to be challenged within 3 years of 1950 when the plaintiff had admittedly attained majority. The registered partition deed not only purported to have transferred 8 anna interest but also had put defendant No.1 and 2 in possession of suit land.
- i. The 1st appellate court agreed with the submission of the defendants that even on the basis of a wrong and illegal document if the party came in possession, adverse possession against the real owner will start running. The admitted case of the plaintiff is that Nirsi Devi died in the year 1949 and plaintiff attained majority in the year 1950 and then he came in possession. So, it is clear that after death of the father Ganesh Mahto, defendant nos. 1 and 2 had been in possession of the suit property along with one another and after the death of Nirsi in the year 1949, and prior to the attainment of majority of the plaintiff, in the year 1950 these defendants remained in exclusive possession of the suit property, if they are treated to be stranger to the family of the plaintiff.
- j. The 1st appellate court held that in any case the adverse possession of the defendant No. 1 and 2 started running from year 1950 to the knowledge of the plaintiff.
- k. The court referred to Exhibit-E which were the judgments of the two criminal cases under Section 379 Indian Penal Code in which Bhakti Mahto (plaintiff) was complainant and defendants were accused and the allegation was regarding removal of paddy from the land of complainant and the accused were acquitted. The court observed that admittedly, the proceeding under Section 145 Cr.P.C. was decided in favour of the defendants and it would be too much for the court to hold that even after acquittal of the accused in theft case and their success in section 145 Cr.P.C. proceeding, the plaintiff continued in possession of the suit lands.

- l. The court also referred to Exhibit-A and B, the two Bajidawa deeds of the year 1966, in which Budhan Mahto (defendant no.1) is party along with the plaintiff and there is recital that after death of Ganesh Mahto, the executants were in possession. That would be too much for the plaintiff to say that defendant no. 1 and 2 were not in possession of the suit property. The defendants have also separately executed another Bajidawa in form of the sale deed, which is Exhibit-F and in that also, their father's name have been mentioned as Ganesh Mahto and the voter list Exhibit-E also shows that defendant no. 1 and 2 have been shown as sons of Ganesh Mahto. The court held that the mention of the names of defendant no. 1 and 2 in several registered deeds, in which the plaintiff is himself a party, will go to show that the defendants were also in possession of the suit property and from his own conduct, the plaintiff would be stopped from challenging the possession of defendant No. 1 and 2. This would be a case of estoppel by conduct.
- m. The 1st appellate court recorded a finding that the defendant Nos.1 and 2 came in possession of the suit property in the year 1946 even adversely to the interest of the plaintiff and they remained in possession for more than 12 years and acquired valid title.
- n. P.W. 1 Bhakti Mahto has admitted that defendant nos. 1 and 2 were kept in the family of the plaintiff with consent and previous permission of his father Ganesh Mahto. P.W-1 also stated that the mother, Nirsi Devi, had sympathy with defendant nos.1 and 2 and therefore, she created document of share in favour of the defendant Nos. 1 and 2 over the land of khata No.11. The learned 1st appellate court has recorded that the P.W-1 has clearly referred to Exhibit-H the '*Batwaranama*' paper and he himself stated that this document was instrument creating share in favour of defendant no. 1 and 2. P.W-1 has further stated that Nirsi Devi had no right to create a share in favour of defendant no. 1 and 2 and defendant no.1 and 2 could

not get any share or title on the basis of that document. The 1st appellate court recorded that therefore, the plaintiff clearly admitted the fact of illegal transfer of half of the property of Khata No.11 by the mother guardian and as such was of the opinion, that Article 60 of the Limitation Act will apply in this case, but the document by which ½ portion was given to the defendant no. 1 and 2, Exhibit-H, was not challenged by the plaintiff even after eight years of attaining his majority in the year 1950.

- o. The learned 1st appellate court recorded that plaintiff has admitted that on the basis of the paper creating share in favour of defendants, they (defendants) did not claim the land. On this basis the learned 1st appellate court recorded that this also goes to show that defendants claimed and are claiming title in the land also on the ground of adverse possession and their possession had already started in the year 1946 and adversely on the basis of the alleged illegal partition deed Exhibit-H.
- p. The 1st appellate court discussed the oral evidences and also the various rent receipts placed on record and recorded a finding that in view of these rent receipts in the name of Budhan and purchaser and in absence of any rent receipt produced on behalf of the plaintiff, the court was not at all prepared to accept that the plaintiff Bhakti Mahto was in possession of the suit land and continued in possession from the year 1950 onwards and even after the decision of proceeding under Section 145 Cr.P.C. which was decided against the plaintiff, the plaintiff continued to be in possession was unworthy of acceptance.
- q. The learned court also observed that there was enough material before the court to come to the conclusion that by continued possession of Budhan and Mangar from 1946 onwards till 1973 and of the purchaser defendant No. 3 thereafter adversely to the title of the plaintiff, the defendant Nos.1 to 3 acquired indefeasible right over the suit property and as such the transfer

made by defendant No.1 and 2 in favour of defendant No.3 who purchased it for valuable consideration could not be said to be illegal and void.

- r. The learned 1st appellate court set aside the judgment and decree of the learned trial court and allowed the appeal and dismissed the case of the plaintiff.

Substantial question of law no.(iii) – Whether any relief can be granted to the appellants when the appeal has abated as against respondent nos. 4 and 8?

24. The suit was essentially filed seeking a declaration that sale-deeds dated 21.02.1973 and 07.05.1976 executed by defendant nos. 1 and 2 in favour of defendant no. 3 are void and do not affect the title of the plaintiff, which is subsisting. Defendant nos. 1 and 2 were the sons of Nirsi Devi through her 1st husband and the plaintiff was the son of Nirsi Devi through her 2nd husband. The property belonged to the 2nd husband of Nirsi Devi and hence the plaintiff claimed exclusive title and to the exclusion of his uterine brothers, defendant nos. 1 and 2.

25. The property belonged to the 2nd husband of Nirsi Devi, who in total had 11.04 acres of land in khata no. 11 and the suit property was only a portion of the same having total area 1.23 acres covered by the aforesaid two sale-deeds dated 21.02.1973 and 07.05.1976 which was subject matter of the suit and both the sale-deeds were executed by defendant nos. 1 and 2 in favour of defendant no. 3.

26. The defendant nos. 4 to 9 had filed separate written statement, though in line with the written statement of defendant nos. 1 to 3, but had additionally raised a plea that there was mis-joinder of necessary parties so far as defendant nos. 4 to 9 are concerned, as no relief was prayed for against defendant nos. 4 to 9.

27. The respondent no. 4 in the present case is Abdul Karim who was defendant no. 5 in the suit. Further, the respondent no. 8 in the present case is Falguneshwar Mahto who was defendant no. 9 in the suit. Since no relief was prayed as against defendant no. 5 (respondent

no. 4) and defendant no. 9 (respondent no. 8) in the suit itself, therefore, the appeal having been abated as against them, has no bearing in the matter.

28. It is also important to note that the suit stood dismissed as against respondent no. 8 on account of non-compliance of order passed by this Court which was passed way back in the year 1998 and the application seeking restoration of 2nd appeal with respect to respondent no. 8 was dismissed on account of limitation and the order refusing to restore the 2nd appeal as against the respondent no.8 attained finality up-till the Hon'ble Supreme Court.

Accordingly, the substantial question of law no. (iii) is hereby answered by holding that in spite of the fact that the 2nd appeal as against respondent nos. 4 and 8 has abated, there is no impediment in granting relief to the appellants in this 2nd appeal on account of appeal having been abated against respondent no. 4 and 8.

29. It is also important to note that defendant no. 1, son of Nirsi Devi through her 1st husband had expired during the pendency of the suit and his name was expunged vide order dated 12.05.1982. The defendant no. 2 namely, Mangar Mahto is also the son of Nirsi Devi through her 1st husband and admittedly, the two sale-deeds involved in the present case were executed jointly by defendant nos. 1 and 2 in favour of defendant no. 3.

30. Defendant no. 2, who was arrayed as respondent no. 1 in the present case, also died during the pendency of this 2nd appeal and was substituted vide order dated 29.02.1996 by respondent nos. 1(a) and 1(b). However, the records of the case reveal that the appeal stood abated as against deceased respondent nos. 1(a) and 1(b) vide order dated 06.11.2025. It is important to note that on account of abatement in connection with the respondent nos. 1(a) and 1(b), the estate/interest of defendant nos. 1 and 2 is completely unrepresented and the impugned judgment had attained finality qua the defendant no. 2. It is important to note that the name of defendant no. 1 was struck off from the cause-title at the stage of the suit on account of his death

and the defendant no. 2 being full brother of defendant no.1 and also co-executant of the two sale-deeds involved in the present case and both of them having filed common written statement, the estate of the vendor with respect to the sale-deeds was duly represented before the court. As of now, neither the defendant nos. 1 and 2 nor their legal heirs are on record and the judgment and decree has become final so far as defendant nos. 1 and 2/their legal heirs are concerned.

31. The core dispute involved in this case is as to whether the defendant nos. 1 and 2 had a valid title over the suit property and accordingly whether they were entitled to execute the sale-deeds in favour of the defendant no. 3. The learned 1st appellate court has held that challenge to the two sale-deeds involved in this case executed by defendant nos. 1 and 2 in favour of the defendant no. 3 was barred by limitation. The 1st appellate court also held that the plaintiff remained dispossessed from the suit property even after the plaintiff gained majority in the 1950 by virtue of alienation (1/2 share of the property of Ganesh Mahto) by the mother, Nirsi Devi vide registered *Batwaranama* of the year 1946 in favour of the defendant no. 1 and 2 and the plaintiff did not take any steps to challenge the registered *Batwaranama* of the year 1946 and his suit for recovery of possession was barred by limitation under Article 65 of the Limitation Act. This finding in favour of defendant no. 2 (name of the defendant no.1 was already struck off) having attained finality as defendant no.2 has not been substituted, if any contrary view is taken by this Court, that would give rise to a conflicting decree which is not permissible under law. None of the other defendants can be said to be representing the estate/interest of defendant nos. 1 and 2 in the present case.

32. *In the aforesaid circumstances, while deciding this 2nd appeal, aforesaid aspect of the matter cannot be lost sight of and accordingly, it is held that the entire appeal has abated on account of non-substitution of defendant no.2 and technically no relief can be granted to the appellants representing the plaintiff before this Court.*

Substantial question of law no. (i)

Whether the suit in the present form for declaration is having any question related to the adverse possession as claimed from the side of defendant nos. 1 and 2?

33. In paragraphs 14 and 15 of the judgment reported in **(1995) 2 SCC 543 (Supra)**, it has been held that under Article 65 of the schedule to the Limitation Act, 1963, it prescribes the limitation for possession of immovable property or any interest therein based on title and the limitation of 12 years begins to run from the date the defendant's interest becomes adverse to the plaintiff. It has also been held that adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of title of the true owner. It has also been held that where the possession can be referred to a lawful title, it will not be considered to be adverse and the reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. Paragraphs 14 and 15 of the aforesaid judgment are quoted as under:

“14. Article 65 of the Schedule to the Limitation Act, 1963 prescribes that for possession of immovable property or any interest therein based on title, the limitation of 12 years begins to run from the date the defendant's interest becomes adverse to the plaintiff. Adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of title of the true owner. Under Article 65, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere

denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."

34. Further, in the same judgment, it has been held in paragraph 16 that in case of Hindu joint family, there is community of interest and unity of possession amongst all the members of the joint family and mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members and thus, the possession of one is the possession of all. It has been held that the burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that, such adverse possession had continued for the statutory period of 12 years. Paragraph 16 of the aforesaid judgment is quoted as under:

16. In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. The right of the plaintiff to file suit for partition had arisen after the Act has come into force and re-grant was made by the Collector under sub-section (1) of Section 5. The defendant, therefore, must plead and prove that after the re-grant, he asserted his own

exclusive right, title and interest to the plaint schedule property to the knowledge of the plaintiff and the latter acquiesced to such a hostile exercise of the right and allowed the defendant to remain in continuous possession and enjoyment of the property in assertion of that hostile title during the entire statutory period of 12 years without any let and hindrance and the plaintiff stood thereby.

35. In the judgment passed by the Hon'ble Supreme Court reported in **(2004) 10 SCC 779 (Supra)**, the appellants averred that the plea of the respondent based on title of the suit property and the plea of adverse possession were mutually exclusive and the finding of the High Court in the said case that the Government of India had title over the suit property by way of adverse possession, was assailed. The Hon'ble Supreme Court held that adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner and held that plea of adverse possession is not a pure question of law, but a blended one of fact and law and a person, who claims adverse possession, should demonstrate the basic ingredients for claiming adverse possession and whenever a plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property. It has been held that the plea of title and adverse possession are mutually inconsistent and adverse possession does not begin to operate until the plea of title is renounced. The paragraphs 11 and 12 of the aforesaid judgment are quoted as under:

“11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are

the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma [(1996) 8 SCC 128].

12. *A plaintiff filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P. Periasami v. P. Periathambi [(1995) 6 SCC 523] this Court ruled that:*

“Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.”

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. ...”

36. In the judgment reported in **(2006) 7 SCC 570 (Supra)**, it has been held that concept of adverse possession contemplates a hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the others’ right but denies them. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed.

37. In the present case, both the parties were claiming title over the suit property. The plaintiff was in complete denial of the title of the defendant nos. 1 and 2 and hence title of the defendant no.3 and the defendant nos. 1 and 2 claimed exclusive title on the basis of registered *Batwarnama* of 1946. The registered *Batwarnama* of 1946 was not specifically challenged in the prayer of the suit but in the body of the plaint it was asserted that through the registered *Batwarnama* of

1946, the mother, Nirsi Devi, had alienated the property of the minor plaintiff to his uterine brothers, defendant no. 1 and 2 by illegally terming it a partition and such alienation was not binding on the plaintiff. The defendant nos. 1 and 2 were claiming title upon themselves along with the plaintiff by stating that they were adopted by their step father, Ganesh Mahto and hence they were entitled to inherit his property along with the plaintiff. The defendant nos. 1 and 2 further claimed exclusive title and possession over $\frac{1}{2}$ share of the property of Ganesh Mahto, to the exclusion of the plaintiff, on the basis of registered *Batwarnama* of 1946. The defendant no. 1 and 2 also claimed possession on the basis of registered *Batwarnama* of 1946 and claimed adverse possession as the plaintiff was seeking recovery of possession of the suit property from the defendant no. 3 who had purchased the property from the defendant no. 1 and 2. Since the plaintiff himself claimed that his property was wrongfully alienated by his mother through registered *Batwarnama* of 1946 when he was a minor and claimed recovery of possession, it was certainly open to the defendant no. 1 to 3 to assert that the relief seeking recovery of possession was barred by limitation under Article 65 of the Limitation Act and thus claim adverse possession. The claim of title by the defendant no. 1 and 2 was based on their alleged adoption by their step father Ganesh Mahto and the plea of adverse possession was based on possession and exclusive title acquired through registered *Batwarnama* of 1946. In such circumstances, it cannot be said that the plea of title and adverse possession, as claimed by the defendant nos. 1 to 3, were conflicting to each other. The parties acknowledged the true owner of the property as Ganesh Mahto and the question was as to whether alienation/ partition through registered *Batwarnama* of 1946 conferred any valid and exclusive title upon the defendant nos. 1 and 2 and whether the prayer of the plaintiff seeking recovery of possession of the property was barred by limitation. This court also finds that the issue on the point of limitation and adverse possession was framed at

the stage of trial and the point of limitation and adverse possession was the bone of contention at the 1st appellate stage also.

38. The suit was for declaration that the two sale-deeds of the year 1973 and 1976 executed by defendant nos. 1 and 2 in favour of defendant no. 3 were void and the plaintiff also prayed for confirmation of possession and if found dispossessed, for recovery of possession based on his title. In the body of the plaint the plaintiff also challenged the registered *Batwarnama* of 1946 executed by his mother being his guardian as the plaintiff was minor at that point of time and it is alleged that his mother made false recitals to alienate the ½ share of the property to his two uterine brothers (defendant no. 1 and 2) and the plaintiff asserted that registered *Batwarnama* of 1946 was void and not binding upon him.

39. This Court finds that the case of the plaintiff was that the plaintiff being the biological son of Nirsi Devi and Ganesh Mahto (2nd husband of Nirsi Devi) and the property admittedly belonging to Ganesh Mahto, has completely denied the title of the defendant nos. 1 and 2 through succession upon death of Ganesh Mahto on account of the fact that the defendant nos. 1 and 2 were the sons of Nirsi Devi through her 1st husband. Thus, the plaintiff on the one hand and defendant nos. 1 and 2 on the other hand, were uterine brothers and the plaintiff claimed that the property of his biological father could not have devolved upon his uterine brothers as they did not belong to the common male ancestor. The specific case was that property of the father of the plaintiff could not have been allocated to his uterine brothers, defendant nos. 1 and 2 through the alleged registered *Batwarnama* of 1946 and hence the defendant no.1 and 2 had no title over the suit property to pass to the defendant no.3 while executing the two sale-deeds involved in the present case.

40. On the other hand, the defendant nos. 1 and 2 claimed that they were duly adopted by their step father and therefore, they also had equal rights as that of the plaintiff and they have rightly executed the sale-deeds and they also claimed that challenge to the sale-deeds was

barred by limitation. The defendant no. 1 and 2 claimed exclusive title and possession over the $\frac{1}{2}$ share of the property, which included the suit property, on the basis of registered *Batwarnama* of 1946 whereby $\frac{1}{2}$ share of the property belonging to the biological father of the plaintiff was allocated to the defendant nos. 1 and 2 by the mother, Nirsi Devi. The defendant nos. 1 to 3 in their written statement took a stand that the defendant no. 3 was in adverse possession of the suit land as he has been cultivating the land since 1973 – the date of execution of the 1st sale-deed by defendant nos. 1 and 2 in his favour and prior to this the defendant no. 1 and 2 were in exclusive possession by virtue of registered *Batwarnama* of 1946. It was their specific case that defendant nos. 1 and 2 were adopted as sons by Ganesh Mahto – the biological father of the plaintiff. It was their further case that after death of Ganesh Mahto, the plaintiff along with defendant nos. 1 and 2 jointly succeeded to the property of Ganesh Mahato and continued in possession till their mother Nirsi Devi partitioned the land amongst them by registered *Batwarnama* of 1946 in the ratio of half-and-half between the plaintiff on the one hand and defendant nos. 1 and 2 on the other.

41. Thus, the defendant no. 1 and 2 and hence defendant no.3 also claimed adverse possession as the plaintiff had remained dispossessed from the suit property and also on account of certain conduct of the plaintiff while selling the properties other than the suit property. The suit property was only a portion of the $\frac{1}{2}$ share of the property of Ganesh Mahato allocated to defendant no. 1 and 2 through registered *Batwaranama* of the year 1946.

42. This court finds that the plaintiff had completely denied title of the defendant no. 1 and 2 and took a stand that no property could have been allocated to defendant nos. 1 and 2 through registered *Batwaranama* of the year 1946 by the mother of plaintiff and the defendant no. 1 and 2. The plaintiff had also challenged the transfer through registered *Batwaranama* of the year 1946 as null and void in the body of the plaint by asserting that the mother of the plaintiff made

false recitals in the registered *Batwarnama* of 1946 and the plaintiff also claimed recovery of possession of the suit property based on his title from defendant no.3 as the same was sold to defendant no. 3 by the defendant no. 1 and 2 by virtue of registered sale deeds of the year 1973 and 1976, alleging that same were null and void.

43. *The learned trial court* rejected the story of adoption put forth by the defendant nos. 1 and 2 and held that the defendant nos. 1 and 2 had not derived any title and as such had no power to transfer the property to defendant no. 3 through sale-deeds dated 07.05.1976 and 21.02.1973 and the sale-deeds were not binding upon the plaintiff. It was also observed by the learned trial court that the plaintiff was not a party to the sale-deeds and therefore, it could not be cancelled by the plaintiff, but he could get a declaration that it is not binding on him being void.

44. The trial court also observed that the suit in essence and substance was one for recovery of possession of immovable property based on title and Article 65 of the Limitation Act would apply and not Article 59. The trial court held that the suit for recovery of possession of immovable property based on title will be governed by Article 65 of the Limitation Act which prescribes a period of 12 years. The learned Court further observed that the suit was filed within 12 years from the execution of the sale-deeds dated 21.02.1973 and 07.05.1976 as it was filed on 17.06.1980 and held that the suit was not barred by limitation. The learned trial court also discarded the claim of the defendants that they were in possession and therefore, held that the defendants did not produce any credible documents to show their adverse possession over the suit land.

45. *So far as the learned 1st appellate court is concerned,* the learned 1st appellate court agreed with the learned trial court that Article 59 of the Limitation Act would not apply and the suit will be governed by Article 65 of the Limitation Act. Further, the court was of the view that since the plaintiff was seeking a declaration that the two sale-deeds dated 21.02.1973 and 07.05.1976 were void, therefore,

Article 58 of the Limitation Act would apply and held that the suit having been filed beyond three years from the date of execution of sale-deeds, the suit seeking declaration that the two sale-deeds were void, was barred by limitation.

46. However, the learned 1st appellate court proceeded further with regard to applicability of Article 65 of Limitation Act and observed that for recovery of possession based on title, 12 years limitation was prescribed and, in that light, discussed the case of the defendants that the suit was barred by law of limitation on account of adverse possession of the defendants. The 1st appellate Court, after considering the materials on record, held that the registered partition deed of 1946 was clearly a transfer deed which was required to be challenged within three years from 1950 when the minor attained majority and referred to Article 60 of the Limitation Act to hold that the suit was barred under Article 60 of the Limitation Act. The Court also recorded that the defendant nos. 1 and 2 were put in possession of ½ share of the property of Ganesh Mahto by virtue of registered *Batwarnama* of 1946 and while doing so, the court also took into consideration the conduct of the parties. The court recorded a clear finding that the defendant nos. 1 and 2 came in possession of the suit property in the year 1946 by virtue of the registered *Batwarnama* of 1946 even adversely to the interest of the plaintiff and they remained in possession for more than 12 years and acquired valid title. Consequently, the point of limitation/adverse possession was ultimately decided in favour of the defendants and the judgment and decree of the learned trial court was set-aside.

47. This Court finds that the suit in the present form seeking declaration and also recovery of possession on the basis of title had questions related to adverse possession, as claimed from the side of the defendant nos. 1 and 2, and these questions were decided by the learned trial court as well as by the learned 1st appellate court. The learned 1st appellate court, while reversing the finding of the learned trial court, clearly held that the plaintiff was dispossessed from the suit

property [which was part of ½ share of the property of Ganesh Mahto] way back in the year 1946 by virtue of *registered Batwaranama of the year 1946* and that the defendant nos. 1 and 2 and hence defendant no.3 acquired title through adverse possession.

48. *This court is of the considered view that the suit in the present form seeking declaration that the sale deeds of the year 1973 and 1976 were null and void and seeking recovery of possession based on title was certainly having a question related to adverse possession as claimed from the side of defendant nos. 1 and 2 as the plaintiff himself claimed that the ½ share of the property of his biological father Ganesh Mahto was illegally alienated by his mother by making false recitals through registered Batwaranama of the year 1946 in favour of the defendant no. 1 and 2. The 1st substantial question of law is accordingly decided against the appellants(plaintiff) and in favour of the respondents (defendant no. 1 to 3) .*

Substantial question of law no. (ii)

Whether the plaintiff's suit would suffer due to his non-filing of declaration against the defendant nos. 1 and 2 challenging the Batwaranama of 1946 on attainment of his majority within three years after 1950?

49. The Hon'ble Supreme Court in the case of ***Prem Singh v. Birbal, (2006) 5 SCC 353***, discussed the position of law as to when Article 59 of the Limitation Act, 1963 would apply and also if a deed was *executed* by the plaintiff when he was a minor *and it was thereby void* then the minor had two options to file a suit to get the property conveyed thereunder i.e., he could either file the suit within 12 years of the deed or within 3 years of attaining majority. The observation with regards to rights of a minor and the time stipulated is certainly referable to Articles 60 and 65 of the Limitation Act.

50. Article 59, 60 and 65 of the Limitation Act are quoted as under:

Article 59 and 60

Part IV- Suits Relating to Decrees and Instruments

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.
60. To set aside a transfer of property made by the guardian of a ward-		
(a) by the ward who has attained majority	Three years	When the ward attains majority.
(b) by the ward's legal representative-		
(i) when the ward dies within three years from the date of attaining majority,	Three years	When the ward attains majority.
(ii) when the ward dies before attaining majority.	Three years	When the ward dies.

Article 65

Part V- Suits Relating to Immovable Property

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
65. For possession of immovable property or any interest therein based on title. Explanation.—For the purposes of this article— (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

(c)where the suit is by a purchaser at a sale in execution of a decree when the judgment debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		
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51. The judgement passed by the Hon’ble Supreme Court in the case of **Prem Singh v. Birbal, (2006) 5 SCC 353** has been summarized, quoted and considered in the recent judgement of the Hon’ble Supreme Court reported in 2025 **SCC On Line 1961 (supra)** in the following manner: -

“29. This court in **Prem Singh v. Birbal, (2006) 5 SCC 353**, discussed the position of law as to when Article 59 of the Limitation Act, 1963 would apply and opined as follows: -

- i. **First**, that Article 59 of the Limitation Act, 1963 would only encompass within its fold fraudulent transactions which are ‘voidable’ transactions and not those that are ‘void’. In other words, Article 59 would apply only where an instrument is prima facie valid and not to those instruments which are presumptively invalid.
- ii. **Secondly**, that when the document in question is void ab initio/or void, a decree for setting aside the same would not be necessary since such a transaction would be non-est in the eyes of law, owing to it being a nullity.
- iii. **Thirdly**, a fine distinction was drawn between fraudulent misrepresentation as regards the ‘character of the document’ and fraudulent misrepresentation as regards the ‘contents of a document’. It is only in the former situation that the instrument would be void and, in the latter, it would remain voidable. To put it simply, Article 59 would not govern the period of limitation in respect of a void transaction.
- iv. **Lastly**, that if a deed was executed by the plaintiff when he was a minor and it was thereby void, he had two options to file a suit to get the property conveyed thereunder i.e., he could either file the suit within 12 years of the deed or within 3 years of attaining majority.

The relevant observations are reproduced as under:

“13. Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions.

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16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity.

17. Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary article would be.

18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid. (See *Unni v. Kunchi Amma* [ILR (1891) 14 Mad 26] and *Sheo Shankar Gir v. Ram Shewak Chowdhri* [ILR (1897) 24 Cal 77].)

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21. Respondent 1 has not alleged that fraudulent misrepresentation was made to him as regards the character of the document. According to him, there had been a fraudulent misrepresentation as regards its contents.

22. In *Ningawwa v. Byrappa* [(1968) 2 SCR 797 : AIR 1968 SC 956] this Court held that the fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating:

“The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable.”

In that case, a fraud was found to have been played and it was held that as the suit was instituted within a few days after the appellant therein came to know of the fraud practised on her, the same was void. It was, however, held:

“Article 91 of the Limitation Act provides that a suit to set aside an instrument not otherwise provided for (and no other provision of the Act applies to the circumstances of the case) shall be subject to a three years' limitation which begins to run when the facts entitling the plaintiff to have the instrument cancelled or set aside are known to him. In the present case, the trial court has found, upon examination of the evidence, that at the very time of the execution of the gift deed, Ext. 45 the appellant knew that her husband prevailed upon her to convey Surveys Plots Nos. 407/1 and 409/1 of Tadavalga village to him by undue influence. The finding of the trial court is based upon the admission of the appellant herself in the course of her evidence. In view of this finding of the trial court it is manifest that the suit of the appellant is barred under Article 91 of the Limitation Act so far as Plots Nos. 407/1 and 409/1 of Tadavalga village are concerned.”

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28. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly

conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court."

52. The Hon'ble Supreme Court in **2025 SCC On Line 1961 (supra)** referred to the earlier decision in the case of **Hussain Ahmed Choudhury v. Habibur Rahman, 2025 SCC OnLine SC 892** and observed as follows: -

"30. In the decision of this Court in Hussain Ahmed Choudhury v. Habibur Rahman, 2025 SCC OnLine SC 892, where one of us, J.B. Pardiwala J., was a member of the Bench, it was reiterated that a person who is not a party to an instrument would not be obliged in law to seek its cancellation. The reason being that such an instrument would neither be likely to affect his title nor be binding on him. However, such a plaintiff must at least seek a declaration that the said instrument is not binding on him or that is invalid insofar as he is concerned. The relevant observations are reproduced hereinbelow:

"30. As observed aforesaid, a plaintiff who is not a party to a decree or a document, is not obligated to sue for its cancellation. This is because such an instrument would neither be likely to affect the title of the plaintiff nor be binding on him. We have to our advantage two very old erudite judgments of the Madras High Court and one of the Privy Council on the subject.

31. In *Unni v. Kunchi Amma, 1890 SCC OnLine Mad 5*, the legal position has been thus explained:

"If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside for it cannot be used against them. They may treat it as nonexistent and sue for their right as if it did not exist."

32. The same principle has been distinctly laid down by the Privy Council in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi, 1907 SCC OnLine PC 1*, where the jural basis underlying such transactions was pointed out. In that case, the reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and also for khas possession. It was objected that the omission to set aside the lease by a suit instituted within the time limit prescribed by Article 91 of the Indian Limitation Act, 1877 was fatal to the suit. The following observations which are equally applicable to the case at hand, are apposite:

"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court

either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint for a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the ijara of any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs.”

33. In fact, it is logically impossible for a person who is not a party to a document or to a decree to ask for its cancellation. This is clearly explained by Wadsworth, J., in the decision rendered in Vellayya Konar (Died) v. Ramaswami Konar, 1939 SCC OnLine Mad 149, thus:

“When, the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void ‘in toto’, and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled ‘in toto’. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed.”

34. Therefore, filing a suit for cancellation of a sale deed and seeking a declaration that a particular document is inoperative as against the plaintiff are two distinct, separate suits. The plaintiff in the present case, not being the executant of the sale deed dated 05.05.1997 executed in favour of the respondent no. 1 (original defendant no. 14), was therefore, not obligated to sue for its cancellation under Section 31 of the Act, 1963.”

53. The Hon’ble Supreme Court in **2025 SCC On Line 1961 (supra)** with respect to the facts of the case at hand applied the law laid down in the case of **Prem Singh v. Birbal, (2006) 5 SCC 353** and held that since the sale deed in the said case was not executed by the plaintiff as it was proved to be not her thumb impression on the sale deed, the deed was held to be void / void ab initio and therefore the plaintiff was not required to challenge the same and Article 59 of the Limitation Act, 1963 was found to have no applicability to the case. It was also observed in the facts of the said case that the sale deed was void on account of the fact that the consideration was not paid and the

plaintiff would not be required to seek its cancellation and therefore, Article 59 of the Limitation Act, 1963 could not be said to be applicable to the facts of the case. It has been held that in the aforesaid circumstances the plaintiff could indeed have maintained an action to obtain possession of the property on the basis of her title and file the same within the period of 12 years from the date of knowledge that the possession of the defendant was adverse to that of the plaintiff. The court further observed that even if the date of execution of the sale deed, i.e., 14.06.1973 was considered, the suit having been filed on 28.02.1984, i.e., almost 11 years later, could be said to be well within limitation as stipulated under Article 65 of the Limitation Act, 1963. The paragraphs/ portions of the paragraphs relevant for the purposes of the present case are quoted as under: -

31. As per the dictum in Prem Singh (supra), this Court, in order to ascertain whether Article 65 of the Limitation Act, 1963 would apply to the present factual scenario, has to first determine whether the fraud was alleged as regards the contents of the sale deed dated 14.06.1973 or the character of such sale deed. Both the First Appellate Court as well as the High Court have arrived at the finding that the plaintiff had never executed the said sale deed in the first place as it was proved that it was not her thumb impression that was affixed therein. Therefore, this finding goes to the character of the sale deed and thereby, renders it void/void ab initio. Hence, as per this decision, there remained no reason for the plaintiff to seek for its cancellation. The original sale deed also was not produced before the Trial Court by the defendants in order to rebut the doubt cast upon the veracity of the said sale deed. Consequently, Article 59 of the Limitation Act, 1963 would find no application to the case in hand.

32. In Hussain Ahmed Choudhury (supra), it was clearly opined that a plaintiff who is not a party to the instrument in question need not seek its cancellation. We are not oblivious to the fact that in a situation where the plaintiff was not a party to the instrument, the said decision laid down a requirement that a declaration must be sought to the effect that the said instrument was not binding on the plaintiff. However, the said decision clarified that whether the plaintiff has sought such a declaration or not could be culled out from a holistic reading of the plaint along with the relief(s) sought. In cases where the character of the sale deed is assailed as being fraudulent, this requirement is implicitly satisfied since the very averment that the sale deed was fraudulent or a sham and bogus transaction by itself indicates that the plaintiff did not intend to be bound by it. Therefore, this requirement too, could be said to have been satisfied by the plaintiff in the present case.

33. Further, as per *State of Maharashtra (supra)*, it would be of no consequence even the plaintiff in one of his prayers, seeks a declaration that the sale deed is a nullity or invalid insofar as he is concerned, since such an instrument would anyway be void owing to it being fraudulent. Therefore, the period of limitation for a suit for possession based on title would continue to be governed by Article 65. In other words, the addition of such a prayer would not influence the period of limitation within which such a suit must be filed.

38. Therefore, the averment of the plaintiff in the plaint, that she had not received the sale consideration, had not been otherwise proven as false. In such circumstances as well, i.e., in the absence of the sale consideration being tendered, the sale deed would be void and the plaintiff would not be required to seek its cancellation. Therefore, Article 59 of the Limitation Act, 1963 could not be said to be applicable to the present facts.

39. The First Appellate Court had rightly observed that the plaintiff had claimed the relief of joint possession. It had also arrived at the finding that the transaction in question was void. To put it simply, in the eyes of the law, the plaintiff could not be said to have executed the sale deed. Therefore, the plaintiff could indeed have maintained an action to obtain possession of the property on the basis of her title and filed the same within the period of 12 years from the date of knowledge that the possession of the defendant was adverse to that of the plaintiff. Even if the date of execution of the sale deed, i.e., 14.06.1973 is considered, the suit having been filed on 28.02.1984, i.e., almost 11 years later, could be said to be well within limitation as stipulated under Article 65.”

54. It is also relevant to refer to the earlier judgement of the Hon’ble Supreme Court passed in *Murugan v. Kesava Gounder*, (2019) 20 SCC 633: 2019 SCC OnLine SC 270, paragraph 28 and 29, where it has been held that the Limitation Act contemplates suit to set aside a transfer of property made by the guardian of a ward for which limitation is contemplated as three years. Article 60 of the Limitation Act although provides for a limitation of a suit but also clearly indicates that to set aside a transfer of property made by the guardian of a ward a suit is contemplated. Paragraph 28 and 29 of the aforesaid judgement is quoted as under: -

“28. This Court time and again held that setting aside of a sale which is voidable under Section 8(3) is necessary for avoiding a registered sale deed. We may, however, not to be understood that we are holding that in all cases where minor has to avoid disposal of immovable property, it is necessary to bring a suit. There may be creation of charge or lease of immovable property which may not

be by registered document. It may depend on facts of each case as to whether it is necessary to bring a suit for avoiding disposal of the immovable property or it can be done in any other manner. We, in the present case, are concerned with disposal of immovable property by natural guardian of minor by a registered sale deed, hence, we are confining our consideration and discussion only with respect to transfer of immovable property by a registered deed by a natural guardian of minor.

29. The Limitation Act, 1963 has been enacted by Parliament after the enactment of the Hindu Minority and Guardianship Act, 1956. Article 60 of the Limitation Act, 1963 provides for limitation of “suits relating to decrees and instruments”. The Limitation Act contemplates suit to set aside a transfer of property made by the guardian of a ward for which limitation is contemplated as three years. Article 60 of the Limitation Act although provides for a limitation of a suit but also clearly indicates that to set aside a transfer of property made by the guardian of a ward a suit is contemplated.”

55. It was the specific case of the plaintiff that after death of Ganesh Mahto, Nirsi Devi began to be pressurized by defendant Nos.1 and 2 to give them some lands for their maintenance lest they feared that plaintiff, after he comes to age, may not allow them to share an inch of land out of Khata No.11. It was the case of the plaintiff that Nirsi Devi, without any right or authority in law to do so, executed a deed of so-called partition amongst the plaintiff and defendant No.1 and 2 on 29.01.1946 acting as guardian of the then minor plaintiff in spite of knowing fully well that defendant Nos.1 and 2 neither had any right nor had any title in the lands of Khata No. 11 nor could they have demanded partition. It is alleged that Nirsi Devi purportedly allotted 8/- annas share, jointly to defendant No.1 and 2, and 8/- annas share to the plaintiff by making a false recital that such an arrangement had been made by her 2nd husband, Ganesh Mahto himself, during his life time. It was the case of the plaintiff that though the document dated 09.01.1946 was with nomenclature ‘deed of partition’ but it did not partake the nature of partition. It simply purported to define the share of plaintiff and defendant Nos.1 and 2. It has been alleged that this was a mere paper transaction which did not become operative nor could bind the plaintiff, who was a minor at that time and had no knowledge or idea about such a document which was

kept a close secret. It was also his case that the defendants No.1 and 2 also never disclosed this fact to any known relative or to any person in the village until they claimed a right in the lands of khata No. 11 in the year 1973. It was the case of the plaintiff that he remained in possession of the property right from 1950 when he became major. However, the plaintiff claimed confirmation of possession of the property and also prayed for recovery of possession of the suit property from defendant no.3 if the plaintiff was found dispossessed as the defendant no. 1 and 2 sold the suit property to defendant no. 3 vide two registered sale deeds of the year 1973 and 1976 and a prayer was made seeking declaration of the two sale deeds as void on the ground that the defendant no. 1 and 2 had no title to pass to the defendant no.3.

56. The reading of the plaint revealed that the plaintiff did not pray in the prayer portion that the registered *Batwarnama* of 1946 was null and void but in the body of the plaint the plaintiff had challenged the registered *Batwarnama* of 1946 by stating that that the mother, Nirsi Devi , made false recitals in the registered *Batwarnama* of 1946 (exhibit-H) in order to alienate the property of the minor plaintiff which devolved upon him on death of his father, to his two uterine brothers in the name of partition deed but the deed was not a partition deed, rather in effect it was a transfer. The registered *Batwarnama* of 1946 was not specifically challenged in the prayer but was challenged in the body of the plaint and asserting that it was a void transaction by making false recitals as the uterine brothers were not the coparceners of the plaintiff in the matter of inheritance and the property of the biological father of the plaintiff could not have been subject matter of partition through registered *Batwarnama* of 1946 as defendant no. 1 and 2 had not inherited the property. The plaintiff had challenged the correctness of the recitals made by the mother of the plaintiff in the registered *Batwarnama* of 1946.

57. The law is well settled, as held by the Hon'ble Supreme Court, that the legal position will be different if there is a fraudulent

misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. **[(1968) 2 SCR 797 : AIR 1968 SC 956 also referred in 2025 SCC On Line 1961 (supra)]**

58. In the present case, the allegation of the plaintiff with respect to registered *Batwarnama* of 1946 is of misrepresentation not only as to the contents of the document but also as to its character. It has been alleged that the mother of the plaintiff being the guardian of the plaintiff had made false statement in the registered *Batwarnama* of 1946 to partition the property between the plaintiff on one hand and defendant no. 1 and 2 on the other hand and in fact had alienated /transferred the $\frac{1}{2}$ share of the property to the defendant no. 1 and 2 in the name of partition.

59. Considering the nature of allegation made with respect to registered *Batwarnama* of 1946 which relates to misrepresentation with respect to the content and also the character of the document, the registered *Batwarnama* of 1946 was voidable and not void *ab initio* document and accordingly the same could not be avoided without challenging the same in accordance with law and within the period of limitation.

60. As per the case of the plaintiff, he attained majority in the year 1950 and there is finding of the learned 1st appellate court that the plaintiff was dispossessed from the property in the year 1946 by virtue of registered *Batwarnama* of 1946 executed by his mother in the capacity of his natural guardian, and since the document was voidable as held above, the plaintiff ought to have challenged the registered *Batwarnama* of 1946 [by which $\frac{1}{2}$ of his property was alleged to have been alienated by his mother in the capacity of the guardian of the plaintiff in favour of defendant no. 1 and 2] within 3 years of attaining majority. The learned 1st appellate court has

recorded a finding of fact that the plaintiff was dispossessed and the defendant no.1 and 2 came in possession of the ½ share of property of Ganesh Mahto by virtue of registered *Batwaranama* of 1946 and this findings of fact has attained finality. ***Having failed to challenge registered Batwaranama of 1946 within 3 years of attaining majority in the year 1950 the plaintiff's suit would suffer due to his non-filing of suit seeking declaration against the defendant nos. 1 and 2 challenging the registered Batwaranama of 1946. Mere challenging the registered Batwaranama of 1946 in the body of the plaint as void and not binding upon the plaintiff was not sufficient as the registered Batwaranama of 1946 was a voidable document and not void document. The substantial question of law no. (ii) is accordingly answered against the plaintiff (appellants) and in favour of the defendant no. 1 to 3(respondents).***

61. In view of the answers to the substantial question of law nos. (i) and (ii) against the plaintiff (appellants) and in favour of the defendant no. 1 to 3 (respondents), this 2nd appeal is dismissed.

62. Pending interlocutory application, if any, are dismissed as not pressed.

63. Let the records received from the learned court concerned be sent back forthwith.

64. Let this order be communicated to the learned court concerned through 'FAX/email'.

(Anubha Rawat Choudhary, J.)

*Date of Judgment: 03.06.2026
Pankaj/Rakesh/-
Date of Uploading: 04.06.2026*