

**(1951) 03 OHC CK 0003**

**In the Orissa High Court**

**Case No :** First Appeal No. 14 and 22 of 1946

Natabar Parichha and Others

APPELLANT

Vs

Nimai Charan Misra and Others

RESPONDENT

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**Date of Decision :** 09-03-1951

**Acts Referred:**

Evidence Act, 1872 — Section 32, 32(5), 50  
Transfer of Property Act, 1882 — Section 41

**Citation :** AIR 1952 Ori 75

**Hon'ble Judges :** Ray, C.J;Narasimham, J

**Bench :** Division Bench

**Advocate :** P.C. Chatterji, S.N. Sengupta and M.S. Mohanty, in No. 14 of 1946 and B.K. Pal, in No. 22 of 1946, for the Appellant; B. Mohapatra and B.K. Pal, in No. 14 of 1946, B. Mohapatra and P.C. Chatterji, in No. 22 of 1946, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Narasimham, J.—These two connected appeals are by some of the defendants, against the decision of the Subordinate Judge of Sambalpur decreeing the plaintiffs' suit for declaration of title, recovery of possession and damages in respect of certain property situate in Sambalpur District which originally belonged to one Lokanath Parichha. The said Lokanath Parichha died sometime in 1895 leaving three daughters through his first wife and a son named Satyanand through his second wife. The name of the second wife of Lokanath was Haripriya alias Srihari. But the parties differ as regards the name of his first wife, the plaintiffs asserting that she was Satyabhama alias Bhama, whereas the principal defendants urged that she was known as Malli. Satynand succeeded to his father's property but died unmarried sometime in 1902 and then his mother Haripriya succeeded him with the limited interest known as a Hindu Woman's estate. She lived till 1942 and during this long period of nearly 40 years of her possession of the property as a limited owner, the Hindu Law of Inheritance underwent an important change which is mainly responsible for the present

litigation. In 1929 the Legislature enacted the Hindu Law of Inheritance (Amendment) Act giving to a sister and a sister's son a higher place in the order of Mitakshara succession above the agnates. After this amendment, there were conflicting decisions of the High Courts as to whether the expression "sister" in that Act would include a half-sister either consanguine or uterine. But this conflict was set at rest by the Privy Council in AIR 1943 10 (Privy Council) where it was held that half-sisters were also entitled to succeed by virtue of the said amendment. The plaintiffs (who are respondents) claimed to be the step-sisters' sons of the last male-holder Satyanand and as such entitled to succeed to his property in preference to appellants 1, 2, 3 and 4 who are the agnates of Satyanand. Appellant Durgaprasad Misra in P. A. No. 22 of 1946 is a subsequent alienee of a portion of the property from another agnate of Satyanand.

2. The following pedigree will be helpful in appreciating the claims of the parties.

SANKARSAN | ----- | | Balaram Bhubna | |  
 ----- | | | | Baidyanath  
 Raghunath Purushottam Satyabhama-Lokanath Haripriya alias Srihari | | (1st  
 wife) (d.1895) d.1942) (2nd wife) | Anirudha D.7 Sripati D.2  
 ----- | | | ----- Satyanand (d.1903) Natabar D.1  
 Janardan | | | | Ahalya Brunda- Malabati | Devendra D.8. (dead) bati(dead)  
 (dead) ----- | | | | -----  
 Radha- Dolgovind Ramhari | | | | krushna D.4 D.5 D.6 Satyabadi Dasaratha D.8  
 (given Balkuntha Nimai Lakshmi- (dead) in adoption ) P.8 P.1 narayan P.2

Defendants 1, 2, 4, 5 and 6 who are the principal contestants in the litigation do not however accept the pedigree to be fully correct. According to them, the three daughters of Lokanath through his first wife Malli were named Brundabati, Nilabati and Lalita, and the plaintiffs are not the sons of any of those daughters. They set up the following pedigree for the plaintiffs, as the descendants of two other sisters of the said Haripriya.

RAIDYANATH MISRA \_\_\_\_\_ |  
 \_\_\_\_\_ | | | | Haripriya (died Bisseswar Mishra  
 Ahiya--Lakshan Malahati--Mandhta on 6-4-1942) | Pati \_\_\_\_\_ |  
 \_\_\_\_\_ | | Satyanand (died Dayasagar Sushila | | Nimai Lakshmi in 1903)  
 P.W. 3 Dasarathi Baikuntha P.3 P.1 Narayan P.2

Defendant No. 9 (appellant in P. A. No. 22 of 1946) did not however challenge the correctness of the plaintiffs' pedigree but urged that he was a "bona ride" purchaser for value of a portion of the property from the ostensible owner and as such quite indifferent to the question of relationship of the parties to Lokanath and his son Satyanand.

3. The essential question in controversy between the parties is whether the plaintiffs are the first wife's daughters' sons of Lokanath or else whether they are some other persons who have been falsely set up as such daughters' sons. It is admitted that the plaintiffs are the sons of Malabati and Ahalya. It is also

admitted that Lokanath had three daughters through his first wife, one of whom was Brundabati who died issueless. The main point of difference between the parties is firstly as regards the name of the first wife of Lokanath (whether Sabyabhama or Malli) and secondly the names of the two remaining daughters of Lokanath, whether Ahalya and Malabati or Nilabati and Lalita. Both sides have examined some common relations of the parties to prove their respective cases as regards relationship. Before discussing their evidence I would refer to a pedigree (Ext. 1) filed on 5-11-1917 by one Satyabadi in Title Suit No. 31 of 1917 in the Court of the Subordinate Judge of Sam-alpur. That pedigree if taken as correct is the most decisive piece of evidence in favour of the plaintiffs. The circumstances under which that pedigree was filed before the Subordinate Judge in 1917 are as follows: Haripriya had sold a portion of Lokanath's property in favour of one Indumati Pandiani sometime in 1916. Her husband's reversioners, namely, Natabar and Janardan (defendant No. 1 and the father of defendant No. 3) challenged the alienation on the ground of absence of legal necessity. The plaintiffs in that suit (Natabar and Janardan) were admittedly not the nearest reversioners of Lokanath because Purshottom (father of defendant No. 2 Sri Pati) was then alive; but he did not join in that suit and was made a proforma defendant. Several other persons wanted to be made parties in that suit alleging that they had also the same interest as the plaintiffs themselves. But the Sub-Judge by his order dated 2-11-17 (Ex. 1-1) rejected their petition with the following observation. "In a suit like the present it is not necessary that all the reversioners should be made parties." Three days later, on 5-11-17, Satyabadi filed a petition (Ex. 1) on his behalf and on behalf of his brothers claiming to be the daughters' sons of Lokanath through his first wife Satya-bhama and praying to be made parties to the litigation as co-defendants. This petition was rejected on 27-11-17 by the Sub-Judge with the following observation;

"The petition of Satyabadi Pati and others was put up in the presence of the plaintiffs' pleader. He objects to the same. The petition is therefore rejected." The order is extremely cryptic and it does not indicate what was the nature of the objection of the plaintiffs in that suit. But when the order is read along with the previous order of the Sub-Judge dated 2-11-17 it seems clear that the rejection of Satyabadi's prayer was mainly because the Court thought that in a representative suit by a reversioner challenging the alienation made a Hindu female it is not necessary that all the reversioners should be made parties. The suit was eventually decreed in favour of the plaintiffs on the ground that the alienation was not for legal necessity and as such not valid after the life-time of Haripriya. Satyabadi is now admittedly dead. Defendant No. 1 himself admits that the said Satyabadi was one of the brothers of plaintiff Baikuntha though according to him their mother Ahalya was not the daughter of Lokanath. The plaintiffs urged that the pedigree set up by Satyabadi in Ext. 1 was admissible u/s 32(5) of the Evidence Act because he had special means of knowledge as to who his maternal grand-father was and further it was filed at a time when there was no controversy about the existence of daughters' sons through the first wife

of Lokanath. On behalf of the appellants, however, the admissibility and the weight to be given to this document were both challenged.

4. As regards admissibility of Ext. 1 the main contention of Mr. Sengupta, learned Counsel for the appellants, is that it was not made "ante litem motam" and consequently inadmissible. He urged that it was a self-serving document prepared by Satyabadi with a view to claim a share in the property of Lokanath at a time when the question as to who were the reversioners of Lokanath was itself in controversy. In support of his argument he stressed para III of that petition in which Satya-badi challenged Natabar's right to the property of Lokanath. This argument however appears to be without any substance. If the judgment in T. S. No. 31 of 1917 (Ex. c-1) be carefully scrutinised it seems clear that there was absolutely no controversy between the parties as to who were the reversioners of Lokanath. The plaintiffs of that suit were admittedly not the nearest reversioners. But neither the defendants of that suit nor Satyabadi challenged their status as reversioners. The fact that Lokanath had daughters through his first wife and that they were married was fully known to the parties as will be clear from the following passage in the judgment itself.

"The daughters of her husband (referring to Haripriya) were by another wife and were not the full sisters of her son and they were already married."

I have already referred to the fact that the order sheet dated 2-11-17 (Ex. EI-1) indicates that though several other persons wanted to be made parties the Court rejected their prayer on the ground that it was a representative suit which could be prosecuted by some of the reversioners only. There was absolutely no controversy then as to whether Lokanath left daughters' sons through his first wife. The controversy that Satyabadi raised by his petition (Ex. 1) as regards Natabar's right to the property of Lokanath cannot be said to be a controversy either as to Natabar's status as one of the reversioners of Haripriya or as to who all were her reversioners. Consequently the statement of Satyabadi about the names of the daughters' sons of Lokanath cannot be said to be made "post litem motam".

5. The law dealing with the admissibility of declarations of deceased persons on the question of pedigree as embodied in Section 32(5) of the Evidence Act reproduces the following well-known principles of English Law.

"The declaration must have been made "ante litem motam". The mere existence of the situation out of which the dispute subsequently arises does not render a declaration inadmissible; nor on the other hand is actual litigation necessary to exclude it; but so soon as a controversy has actually arisen which would naturally create a bias in the mind of one standing in the relation of the declarant, all subsequent declarations become inadmissible. .... But declarations made before any dispute has arisen, although with the express view of precluding controversy, are not on that account inadmissible... But the previous controversy, to render the declaration inadmissible, must have been on precisely

the same point" (Wills on Evidence, 3rd edition, page 223)

To quote Williams J. in "Shedden v. Patrick" (1860) 164 E R 958 :

"The controversy which is to exclude such evidence must be controversy in respect of the very . point in dispute; it is quite immaterial that there has been controversy, even litigation on kindred matters, if the point itself has not been raised."

These principles have been reiterated in several decisions dealing with section 32(5) of the Evidence Act. In "Kalka Parshad v. Mathura Parshad", 35 Ind App 166 their Lordships of the Privy Council while admitting in evidence a pedigree filed in a previous suit by one Sheo Sahi observed that it was a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent". An objection was raised on the ground that prior to the filing of that suit a dispute had arisen as to the relationship of Sheo Sahai with one Gur Sahai. But their Lordships while negating this contention pointed out:

"But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement inadmissible on this ground the same thing must be in controversy before and after the statement is made."

In "Bahadur Singh v. Mohar Singh", 24 All 94 also their Lordships admitted in evidence the statement of a deceased person as regards his relationship with the previous owner of the property on the ground

"that the claim of kinship now put forward is not a recent invention, but was made nearly fifty years before the commencement of the present suit and was not then seriously controverted, if it was not in terms admitted."

An objection was raised on the ground that the statement was made "post litem motam". Their Lordships observed:

"It does not however appear that the heirship of the then claimant was really in dispute at that time. Such a construction of the Act would practically exclude any attainable evidence in the present case."

Following some English authorities, Varadachariar J. (as he then was), in "Subbiah v. Gopala" AIR 1936 Mad 808 observed:

"the condition of "ante litem motam" involves the idea that the dispute, if any, on the former occasion must not be the same in substance as the dispute in the later suit. The expression used in one of the cases is that the statement now sought to be used will not be excluded if it merely related to some matter foreign or collateral to the matter in controversy on the former occasion."

This has been followed in Bindeshwari Singh and Another Vs. Ramraj Singh and Others, .

6. In the light of the aforesaid authorities great weight should be attached to the statement of Satyabadi in Ex. 1. I have already shown that the question as to whether Lokanath's daughters had any sons was not at all in controversy either in the suit of 1917 or at any time before it. It cannot also be urged as contended by Mr. Sengupta that by filing that petition Satyabadi was himself raising any controversy on the subject because: though his petition was rejected there is nothing to indicate that the rejection was due to the plaintiffs challenging the correctness of the pedigree as put forward by him. The question in controversy in that litigation was whether the impugned alienation was for legal necessity, whereas in the present litigation the question is who are the nearest reversioners of Haripriya. These two questions are not the same either substantially or otherwise.

7. As regards the weight to be attached to Ex. 1 it was urged that as it was a self-serving document by which Satyabadi wanted to establish his claim to Lokanath's property it should not be given any importance. It was further urged that Satyabadi was then a compositor in the Press whose Managing Director was Dharanidhar Misra P. W. 4, father of Indumati Dei, the alienee from Srihari-priya, and that Dharanidhar Misra had set up Satyabadi to put forward such a claim. Apart from mere suggestion there is no evidence to prove that Satyabadi was really employed in the Press of Dharanidhar Misra. But even if this suggestion be taken as true it does not help the defendants' case. In 1917 nobody could anticipate that the Hindu Law of Inheritance would be amended subsequently in consequence of which a sister's son including a step-sister's son would be given a high place in the order of Mitakshara succession. It would therefore be fantastic to say that in 1917 when according to the law as it then stood a sister's son had not preferential claim as against the agnatic reversioners of a Hindu widow, Dharanidhar would set up Satyabadi to claim relationship falsely with Lokanath. The position might have been slightly different if there had been some controversy then as to whether Lokanath's son Satyanand pre-deceased him. Had there been such a controversy, then Satyabadi's claim to be the daughter's son of Lokanath and to be a nearer heir of Lokanath than Lokanath's agnates may be a highly interested statement. But the judgment of that case (Ex. C-I) shows clearly that it was admitted by all the parties that Lokanath predeceased his minor son Satyanand who succeeded to the whole property and it was after Satyanand's death in 1902 or 1903 that his mother Haripriya succeeded to the same. Ex. 4 is a public document of the year 1895 showing the mutation of Satyanand's name in place of his father's in the Revenue Records, thereby establishing beyond doubt that Satyanand survived his father. Consequently succession to the property will depend on the relationship of the claimant to Satyanand and not to Lokanath. No lawyer in 1917 could have ever advised a step-sister's son of the propositus to claim the property in preference to the agnates. The petition was signed not by any lawyer but by a petition-writer. Thus in 1917 there could be no motive for any person to put forward a false pedigree claiming to be the step-sister's son of the propositus.

8. It was next contended that the petition (Ex. 1) though signed by Satyabadi only purports to have been filed on behalf of two other brothers of Satyabadi named Baikuntha and Dasrath and as they are both alive now they ought to have been examined as witnesses in the case. Baikuntha is one of the plaintiffs; but he has not come to the witness-box. Though Ex. 1 purports to have been filed on behalf of the three sons of Ahalya it is signed by Satyabadi only. Even if it be held to be a joint statement of the three brothers, two of whom are now alive its admissibility u/s 32(5) of the Evidence Act cannot be challenged in view of Bindeshwari Singh and Another Vs. Ramraj Singh and Others, . Doubtless in those cases it was held that the weight to be attached to such a joint statement may not be great if the signatory who is still alive is not willing to come forward to the witness-box. But in the present case, as already shown, in view of the Hindu Law as it stood in 1917, it would be fantastic to say that any sane person would put forward a false claim to the property of a propositus as against the agnates solely on the ground of his being the former's step-sister's son. I would, therefore, give the utmost importance to the pedigree as given in Ex. 1 and hold it to be decisively in favour of the plaintiffs' case.

9. (After discussing the oral evidence of plaintiffs' three witnesses, namely, Janaradan Misra (P.W. 2) aged about 62 years, Sushila Misrani (P.W. 3) aged 43 years and Dharanidhar Misra (P.W. 4) aged about 96 years to prove the pedigree his Lordship proceeded:)

10. It was next urged that the evidence of these witnesses on the question of pedigree should not be accepted because there had not been sufficient compliance with section 50 of the Indian Evidence Act. That section says that the opinion of a witness on the question of relationship will be admissible if that witness has special means of knowledge of the subject either as a member of the family or otherwise and if such opinion is expressed by conduct. The scope of this section is more restricted than the corresponding rule of the English law under which evidence of general reputation is admissible to prove relationship. It is not challenged that these three witnesses had special means of knowledge of the family. But it is urged that they have not given sufficient evidence of conduct from which the relationship could be established and that consequently their opinion about the relationship of the plaintiffs with Loka-nath would not be admissible. In support of this argument reliance has been placed on "Secretary of State v. Mariam AIR 1937 Sind 126, "Maung Maung v. Ma Sein Kyi" AIR 1940 Rang 181 Mt. Chunna Kunwar Vs. Lala Mukat Behari Lal and Others . There is no doubt that a mere opinion about relationship based on general repute and not supported by conduct will not be admissible u/s 50 of the Indian Evidence Act. But it does not necessarily follow that in every instance where a witness proves relationship he must also prove exhaustively all the instances of family conduct in support of that relationship. The quantum of evidence of family conduct that is necessary to render admissible evidence on the question of relationship must vary with the facts of each case. For instance if a stranger to the family of "A" says that "A" is the grandson of "B", such statement may not be admissible u/s

50, unless it is supported by ample evidence of conduct. But if a relation or close neighbour of "B" says that "A" is the grandson of "B" and adduces some evidence of conduct, the "admissibility" of his statement cannot be doubted, though the "weight" to be attached to such statement will depend on the facts elicited in cross-examination, and other circumstances such as the age and other factors indicative of his competence to speak about such relationship. The learned counsel for the appellants relied on the observation of the Privy Council in AIR 1937 201 (Privy Council) to the effect that:

"it cannot rightly be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it value or admissibility."

But that decision related to the applicability of Section 32(5) of the Evidence Act, whereas in, this case the evidence of relationship of Janardam (P.W. 2) and Dharnidhar (P.W. 4) is not based on what they heard from deceased persons but on what they personally know by reason of their close association with Lokanath's family and their having seen Lokanath himself. It is true that Sushila never saw Lokanath and her evidence about the names of his three daughters must be based on what she heard from Haripriya and from other relations and its admissibility would depend on Section 32(5) read with section 50 of the Evidence Act. But in view of her living in the house of Haripriya for about thirty years and her having seen Malabati and Brundabati, two of the daughters of Lokanath, her competence to depose on their relationship is beyond question. Nothing has been elicited in the cross-examination of the aforesaid three witnesses to throw doubt on their competence to speak about such relationship. On the other hand the defendants themselves in the cross-examination of these witnesses have proved the relationship of certain other persons for the purpose of supporting their case. For instance, it was elicited in the cross-examination of Dharanidhar (P.W. 4) that Satyabhama's father was one Madhu Behera and that his paternal great-grandson is Gokul Behera, Thus if this witness is competent to speak about the name of the father of Satyabhama and his descendants in the male line, his competence to depose about the name of the three daughters of Satyabhama and their sons, cannot be doubted. If the former evidence is admissible without proof of family conduct, the latter evidence must also be admissible for the same reason. I am, therefore, of the opinion that though there can be no doubt that for proof of relationship u/s 50 of the Indian Evidence Act mere opinion will not suffice unless it is expressed by conduct, the quantum of evidence that is necessary to prove such conduct will depend on the facts of each case, the relationship of the witness with the parties and his special means of knowledge of the family and other circumstances.

11. I would therefore rely on the genealogical tree as given in Ex. I in 1917 and the oral evidence of P.Ws. 2, 3 and 4 as sufficient to prove the plaintiffs' relationship with Lokanath Parichha.

12-17. (After discussing defendants' evidence holding that it was not sufficient to discredit the testimony of plaintiffs' witnesses, his Lordship continued :) I now

take up the case of defendant No. 9. He is a retired Deputy Magistrate living in Sambalpur town. Soon after the death of Haripriya in 1942, defendant No. 1 and defendant No. 2 came into possession of her properties notwithstanding the objections raised by the plaintiffs' family and then executed two deeds of agreement (-Exs. 2 and 2-a) in favour of defendant No. 3. In Ex. 2-a defendant No. 2 Sripati Parichha agreed to convey -/3/- interest in village Bhutia to defendant No. 3 out of gratitude for the financial and physical help that he rendered and was going to render in future in connection with the apprehended litigation from Nimai Charan Misra. In Ex. 2, defendant No. 1 gave his consent to such a deed of gift and also reiterated his apprehension of litigation. Sripati Parichha executed a deed of gift on 20-5-1942 (Ex. C-2). Subsequently defendant No. 3 sold that property to defendant No. 9 by another registered deed (Ex. B-2.) Defendant No. 9, therefore claims to be a "bona fide" purchaser for value of that property and thus claims protection u/s 41 of the Transfer of Property Act. Whatever might have been the defect in title of defendant No. 3 or his donor Sripati Parichha (defendant No. 2) I should note in this connection that soon after the death of Haripriya in 1942 there was a mutation case before the Revenue Officer in which the names of defendants 2 and 3 were mutated in place of Haripriya (Ex. D-2-2) without any objection from other persons. The order of the Revenue Officer in Ex. D-2-2, shows that in ordering mutation in favour of the defendants he was mainly influenced by the decision in T. S. No. 31 of 1917. On behalf of defendant No. 9 it was contended that before making the purchase from defendant No. 3 he took reasonable care by examining the order in the mutation proceeding and also the deed of gift (Ex C-2) and the judgment (Ex. G-I) in Title Suit No. 31 of 1917. The question therefore arises whether defendant No. 9 can claim the benefit of Section 41 of the T. P. Act. This defendant is none else but the own maternal uncle of defendant No. 3 and it was admitted by D.W. 6 that defendant No. 9 used to give him monetary help for prosecuting his studies. There is also clear documentary evidence (Exs. A-2, A-I-2 and A-3-2) to show that in 1941 and 1942 the address of defendant No. 3 was given as care of defendant No. 9. The close relationship between the two and the fact that defendant No. 9 had actually financed him for his education raise some suspicion about the benami nature of the sale-deed. If defendant No. 9 had himself come forward to the witness-box and stated that the sale-deed was genuine and was executed for valid consideration one may be inclined to accept his testimony. But giving out some lame excuse he has discreetly avoided the witness-box and sent his Ammuktar Hariprihar Guru (D.W. 7) and one Haradhan Pujhari (D.W. 8.). Apart from all these considerations I do not think he can claim the protection of Section 41 of the T.P. Act because he has not taken reasonable care to ascertain that the transferor had power to make the transfer. His Ammuktar (D.W. 7) stated that before taking the sale-deed from defendant No. 3, defendant No. 9 himself read the Judgment in T. S. No. 31 of 1917. If he had carefully read that judgment, his attention would have been drawn to the passage (already quoted) in which it is mentioned that Lokanath had daughters through his first wife who were married. That passage should have put defendant No. 9 on guard and he

ought to have made further enquiries to find out who those daughters were and whether they have left any surviving sons. Had he pursued this matter in this manner he would have surely come to know of the existence of the plaintiffs' family. Moreover, the deed of gift (Ex. C-2) which P.W. 7 claims to have read says that after the death of Haripriya defendant No. 3 gave defendant No. 2 help in obtaining possession of her property. Unless there was some obstruction in obtaining possession there can be no question of giving any help. This recital in Ex. C-2, itself must have given defendant No. 9 sufficient warning of the fact that there were other claimants to the property. Had he then pursued the matter further he would have surely come to know of the agreements (Exts. 2 and 2-A) which preceded the deed of gift and then would have noticed therein the apprehension on the part of defendants 1 and 2, that Nimai Charan Misra and others might launch litigation for the property. Therefore if defendant No. 9 had acted with reasonable care he would have easily found out that the transferor's right to make the transfer was itself in question. In *Baidya Nath Dutt Vs. Alef Jan Bibi and Others*, while explaining the principles underlying section 41 of the T. P. Act it was pointed out:

"It was not enough to assert generally that enquiries should be made or that a prudent man would make enquiries : some specific circumstance should be pointed out as the starting point of an enquiry which might be expected to lead to some result."

I have already shown that the recital in the judgment about the existence of married daughters of Lokanath coupled with the clear admission by Sripati Parichha in Ex. C-2 to the effect that defendant No. 3 gave him assistance in obtaining possession of the property after the death of Haripriya are themselves sufficient to put any purchaser on guard and to afford a basis for further enquiry about his vendor's title. It was however urged that the plaintiffs did not object to the mutation of the names of defendants 1, 2 and 3 before the Revenue Officer and defendant No. 9 who is a "bona fide" purchaser could not possibly know that there would be some objection to the title of the defendants. If there was no other paper but the order of the Revenue Officer in the mutation case it may be said that defendant No. 9 was misled. But the other papers which he himself admitted to have seen must have put him on enquiry. Moreover defendant No. 9 being a retired Deputy Magistrate must have known very well that the mutation of the names of defendants 1, 2 and 3 would necessarily follow in view of the decision in T. S. No. 31 of 1917 and that any other claimant to the property has no other alternative but to go to the civil Court. Consequently the mere fact that there was no objection before the mutation officer could not have misled defendant No. 9 into believing that his vendor's title to the property was unchallenged. Further as pointed out in *Shamsher Chand v. Mehr Chand*" AIR 1947 Lah 147 the mere inaction or silence of the plaintiffs during the mutation proceedings would not suffice to show that they either expressly or impliedly allowed the defendants to be ostensible owners. of the property. There must be something more than mere inaction, such as words or conduct on his part which

induced the transferee to believe that the transferor was competent to make the transfer. Here it cannot be said that the plaintiffs were merely inactive. They had objected to the defendants taking possession soon after the death of Haripriya as proved by Sushila (P. W. 3.) But when they found that the defendants were successful in taking possession they immediately contemplated instituting a civil suit and this was well-known to those defendants themselves as proved by the two agreements (Exs. 2 and 2-A.) Then the plaintiffs brought the present suit under appeal in 1944. I am, therefore, of the opinion that there was nothing in the plaintiffs' conduct to induce defendant No. 9 to believe that defendant No. 3 was the real owner of the property and moreover defendant No. 9 did not make reasonable enquiries of his vendor's title as required by Section 41. He is not entitled to the benefit of that section. But I would not saddle him with costs as he might have been misled by defendant No. 3.

18. As regards the damages, Mr. B. Mohapatra, learned Counsel for the respondents, submitted that he would not press for the same. The decree for damages awarded by the lower Court is set aside and P. A. No. 14/46 is dismissed with costs subject to this modification. F.A. No. 22/46 is dismissed without costs.

Ray, C.J.

19. I have considered the judgment proposed by my learned brother Narsimham, J. I am in agreement with the conclusions reached therein. Two questions of law were raised, at the Bar, at the hearing. They relate to admissibility of both oral and documentary media of proof of the disputed pedigree. The problems raised are of general importance and are likely to arise again and again. Mr. Sengupta debated the admissibility of Ex. 1. Mr. M. S. Mahanty addressed very refined arguments invading the admissibility of the oral genealogical evidence adduced by the plaintiffs. In the event of success of either of the arguments, the evidence of the plaintiffs would be too weak to be acted upon as the media of proof of the pedigree in question.

20. In view of the refined nature of the argument and in consideration of the general importance thereof, I wish to add a few words relating to them. Ex. 1, it is said, is not "ante litem motam" and was invented to support a claim to the estate of Lokanath in the Suit of 1917. As already pointed out, by my learned brother, right to inherit the said estate was not in issue in it. The question then at issue, if expanded so as to be one relating to the said estate, was whether the plaintiffs qua reversioners, near or remote, were entitled to challenge the validity of Haripriya's alienation in relation to its capacity to enure beyond her life-time, or in other words, to question its absolute character. The application of Ex. 1, if allowed would not have non-suited the plaintiffs as to their claim of reversionary status but that, the applicants would have been held bound by the result of the suit, either upholding or upsetting the alienation. Haripriya's life-estate, too, was not challenged. The present controversy was not within the scope of the suit. The utmost that can be said about it was that it raised a controversy by itself. Such

controversy is not identical with the "one in dispute" in the present suit. The present question, in dispute, within the meaning of Section 32(5) of the Indian Evidence Act is "Who is entitled to succeed to the estate of Satyananda as his next reversioner?" In this controversy, existence of relationship by blood between the plaintiffs and Satyananda becomes relevant and has to be proved. The statement sought to be proved relates to such an existence. If it raised a controversy, assuming that it does, akin to the one in dispute in the instant case, it does not fall within the mischief of exclusion of the Sub-section.

21. On the other hand, it is the result of natural effusion of conduct, on the part of Satyabadi consisting in his assertion of the family pedigree. Beside the declaration contained in the exhibit, it affords an instance of relevant conduct of one who had the special means of knowledge.

22. Further exception has been taken to its admissibility on the ground that two of the declarants though alive did not examine themselves in support thereof. In my judgment, it is a misnomer to call the statement as theirs. They did not subscribe the document. Satyabadi did so on his own behalf, as well as, on behalf of the two brothers or relations of his. On that ground, the latter may be called parties for whom the application was filed but they are not "the persons making the statement" within the meaning of the Sub-section. They may or may not have such special means of knowledge as Satyabadi had. This objection should, therefore, fail.

23. The next objection was that before the statement could be received in evidence it has to be proved that Satyabadi had the special means of knowledge of the relationship, that is, that Satyabadi was such a relation of the persons, existence of whose relationship is to be proved. True, there is great force in this contention. Otherwise, to admit the statement for both the purposes would amount to begging the question. Law requires that competency of special means of knowledge has to be proved by independent evidence before the declaration as to disputed pedigree is let in. But this preliminary requirement has not been insisted upon in the lower court that recorded evidence. And besides, some form or other of relationship with the family by marriage though not by blood is admitted by the defendants. This would place Satyabadi in the position of one specially competent to acquire or have the requisite knowledge. The argument advanced, as against the admissibility of the oral evidence of witnesses who deposed to prove the existence of disputed relationship puts them to severer test. It is based on section 50 of the Indian Evidence Act. It is urged that the witnesses do not prove the conduct referred to in the section, and their evidence amounting to mere expression of opinion is not admissible. The section reads:

"When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."

The section, it seems, is ambiguously worded. It may tend to mean and refer to the opinion of the witness in the box. In that context, it may be argued that some conduct or other, by which the witness's opinion has been expressed has to be proved, so that his opinion may be let in, as admissible media of proof, for the purpose of formation of Court's own opinion as to the relationship. But I have no hesitation in my mind that such a reading of the section is not permissible. One thing is clear that the conduct must be of "Any person who, as a member of the family or otherwise has special means of knowledge on the subject." If the witness happens to be such a person he shall be in a position to give direct evidence of his knowledge of the relationship. It is not correct to say that evidence of pedigree cannot be direct. Pedigree is nothing but a simultaneous statement of a number of births, deaths and marriages. A birth, a death or marriage, like any other fact, is capable of being proved by direct evidence of one who has seen the acts constituting births, deaths or marriages. But questions of pedigree or relationship by blood, marriage, etc., often arise for proof in enquiries or trials many years after the facts occurred. The strict enforcement of the ordinary rule of evidence in cases of this nature would frequently occasion a grievous failure of justice. Hence, law has devised an exception to the "rule excluding hearsay evidence." Under the exception the parties are allowed to have recourse to traditional evidence -- often the sole species of proof which can be obtained. This rule admits of proof of declarations as to relationships handed down from man to man, that is, hearsay upon hearsay. The necessity principle is here satisfied by the general difficulty of obtaining any other than traditional evidence, in matters of family history. The following passages illustrate the accepted judicial attitude: L.C. Erskine, in "Vowles v. Young" (1806) 13 V J 140:

"Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property regulated, requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence, -- the best the nature of the subject will admit, establishing the descent from the only sources that can be had."

Peckham, J., in "Esenlortd v. Glum" 126 N Y 552

"In many cases it will readily be seen such evidence may under the circumstances be the only evidence which can be obtained..... Traditional declarations become the best evidence sometimes, when those best acquainted with the fact are dead."

This rule of necessity is not without its guarantee of trustworthiness. One of particular significance is the circumstantial probability -- the circumstances may be such that a sincere and accurate statement would naturally be uttered and "no plan" of falsification be formed (hence the rule limiting the admissibility to statements made "ante litem motam") or the conditions may be such that the

statements were made under such publicity that error, if it had occurred, would probably have been detected and corrected. The following illustrate uniform acceptance by eminent Judges of the circumstantial probability as test of their trustworthiness : L. C. Eldon, in "Whitelocke v. Baker" (1807) 13 Ves Jun 511:

"Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Eibles and registry books, all are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

Ash hurst, J. in "R. v. Eriswell" (1790) 3 TR 707

"It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspicious kind; it is generally brought from remote times, when no "question was depending or even thought of, and when no purpose would apparently be answered."

Berkeley Peerage Case: (1811) 4 Camp 402 Lawrence, J.:

"Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject..... we may reasonably suppose that he neither stops short nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family."

To ensure testimonial trustworthiness of the hearsay reproduction of declarations of competent persons since deceased certain rules clustered round the rule of admissibility in common law, such as:

- (1) The declarations must have been made before controversy;
- (2) There should be no interest or motive to decide (this in Indian law will not go to root of admissibility but will affect the weight.)

The existence of a controversy is only one circumstance (though the most common one) likely to produce a bias fatal to the trustworthiness of the declaration. Judicial opinion seems to hold, and properly, that other considerations may under certain circumstances operate to exclude the declarations. In general, they would be excluded where there is any specific and adequate reason to suppose the existence of a motive inconsistent with a fair degree of sincerity. In Lord Eldon's words, they must appear to be the "natural effusions of a party standing in an even position."

- (3) Sufficiency of the declarant's means of knowledge. In application of this rule declarations of non-relatives should not be excluded. It was long doubtful in England whether the declarations of servants, friends and neighbours, might not be received, but the settled rule of admission is now restricted to hearsay proceeding from persons who were "de jure" related by blood or marriage to the family in question and "who consequently may be supposed to have "had the

greatest interest in seeking the best opportunity for obtaining and the. least reason for falsifying, information on the subject." This rule of admission, under the English system is so strict and narrow that even illegitimate relations" declarations or statements are not. considered as admissible media of proof of pedigree). In this respect law obtaining in India codified in the Indian Evidence Act is much wider. It will include neighbour, friends, old servants, or anybody who has the special means of knowledge. I would quote in this connection from Wigmore:

"....." the interest of the person in knowing. the connections of the family" does require the line to be drawn there, excluding "non-relatives." Yet after all, such a narrow test seems too narrow, at least for this country. Even in England, where so much of personal advancement and material prosperity for the individual might depend upon his family rank and his rights of inheritance, it seems too much to say that only those who have this immediate property-interest, in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may in cases, be equally and sufficiently informed, In this country (the United States) at least, the conditions are such, for the mass of the population, that the interest in family rank and inheri-tence cannot require such a narrowing of the test. It is not necessary to maintain that the statements of any friend are always admissible; but it is desirable to disavow any limitation which would exclude the statements of one whose intimacy with the family could leave no doubt as to his sufficient knowledge, equally with the family members, of the facts of the family history."

I would now wind up the discussion and hold, keeping in view the aforesaid principles, that the witnesses examined by the plaintiffs to prove the disputed relationship are competent witnesses.

24. Genealogical evidence may be of two kinds: one, direct, that is of the person who has the knowledge of the facts or acts that constitute the relationship; two, traditional evidence. The latter consists of verbal or written declarations of various kinds mentioned in Sub-sections (5) and (6) of section 32 of the Indian Evidence Act. Ex. 1 is a statement of the kind contemplated in Sub-section (5). To ensure the testimonial trustworthiness of such statements the principle, that they must have been made in circumstances, ensuring freedom from plan, design, motive or self-interest on the part of the declarant, has been followed, in making it a condition precedent to their acceptance, that they must have been made before the question in dispute was raised.

25. Wills in dealing with the subject, traditional evidence, as media of proof of pedigree, re- cognises "conduct" as one of the forms of declarations or statements relating to them by persons deceased, and having had special opportunity or interest to know, or to enquire, and ascertain, and know contemporaneously. I would quote a passage, in this connection, i"rom Wills on Evidence, "Third Edition" by J."D. Pinalaison, Ch. IX p. 225:

"It follows from what has been said that such declarations are equally admissible whether they are brought home to a particular member of the family or are shown to have been recognised and adopted by the family generally. They may moreover be in any form, either oral or by conduct or in writing. Examples of declarations by conduct are where a parent regularly treats a child as legitimate, or as illegitimate, as where he says that he does not regard him as a member of his family and omits all mention of him in his will."

Conduct is the manifestation of psychological state of its author's mind, or in other words, his knowledge, belief or consciousness as to a given fact. Conduct as media of proof is in effect an assertion or expression of opinion.

"For example, on an issue of legitimacy, the parents' conduct, in treating the child as legitimate, is a circumstance from which may easily be inferred their belief in his birth since marriage, and from that belief may be inferred the ultimate fact; yet, this conduct of theirs is also, in another view, equivalent to a declaration of his "legitimacy....."

The same necessity rule of admitting traditional evidence as media of proof of ancient pedigrees will apply to "opinions" expressed by conduct. This rule has been enacted in Section 50 of the Indian Evidence Act. That section makes opinion expressed in conduct admissible. The rule suffers from the disadvantage that the opinion in such cases not having been expressed in words they are not capable of proof by the evidence of one who heard. It must therefore be proved by the particular conduct expressing it. To prove otherwise would amount to proving opinion of one by that of another and Court's opinion based thereon will be of the third degree. To admit the evidence of a witness to prove "the opinion of any person who as a member of the family or otherwise has special means of knowledge "within the meaning of Section 50, the conduct by which the opinion is expressed has to be proved. The rule, however, has no application to the evidence of those witnesses who speak as to relationships from their own knowledge of facts that constitute relationships. Such a witness is Dharanidhar Misra, for the plaintiff. He was at the time of his deposition, 96 years old. He was in various ways, connected with the family. He gives the various relationships that will make up the family tree, in question, from his own knowledge. His evidence cannot be disqualified on the ground urged by Mr. M. S. Mahanty. I am in accord with my learned brother's opinion that he is a reliable witness, notwithstanding all comments made against his statement. I would accept his evidence as true. With regard to the other two witnesses, relied on by the plaintiff: namely that of P.Ws. 2 (Janardan Misra, aged 62) and 3 (Susila Misrani, aged 43), knowledge of relevant facts as to relationships can seldom be attributed to them. Their evidence though true, and otherwise acceptable, must be based upon their having heard the declarations of such members of the family as were their contemporaries or upon the tradition or reputation as family descent handed from generation to generation and recognised and adopted by the family generally. This may partly, if not wholly, be based upon conduct within

the meaning of section 50, such as treating and recognising the mothers of the plaintiffs as Loknath's daughters, and the plaintiffs as his daughters' sons. They, judged from their respective ages, could not be considered to have direct knowledge of the matters in issue. Scanning their evidence closely, I find that they have in no way deposed about such conduct of the members of the family of Lokanath as could be attributed to the knowledge, or belief or consciousness of those who had special means of knowledge of the relationships or that the relationship was recognised and adopted by the family generally. In the circumstances, I entertain some doubt as to the acceptability of their statements in evidence. But, however, I would consider the evidence afforded by Ex. 1 and that of Dharanidhar Misra, P. W. 4 quite sufficient so as to prove the pedigree beyond reasonable doubt as true and genuine. I would, therefore, agree with the order propounded by my learned brother Narasimham, J.