

(2004) 04 RAJ CK 0011
In the Rajasthan High Court
Case No : Civil First Appeal No. 62 of 1992

Virendra Singh and Others

APPELLANT

Vs

Kashiram (deceased by L.Rs.)

RESPONDENT

Date of Decision : 06-04-2004

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 10
Limitation Act, 1963 — Article 57, 59
Transfer of Property Act, 1882 — Section 122

Citation : AIR 2004 Raj 196 : (2004) 3 CivCC 584 : (2006) 1 CTLJ 378 : (2004) 3 RLW 1979 : (2004) 3 WLC 711

Hon'ble Judges : A.C. Goyal, J

Bench : Single Bench

Advocate : R.K. Mathur, for the Appellant; R.K. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Goyal, J.—This is first appeal by the defendants challenging the judgment and decree dated 28-2-1992 whereby learned Additional District Judge, Kishangarhbas decreed the plaintiffs suit. The parties in this appeal shall be referred as arrayed in the plaint.

2. The plaintiff Sh. Kashiram (since deceased) filed a suit on 26-2-1986 for cancellation of a gift deed dated 20-6-1977 and for declaration that the defendant No. 1 Sh. Virendra Singh is not the adopted son of the plaintiff with the averments that agricultural land measuring 15 beeghas 5 biswas as mentioned in para 1 of the plaint and agricultural land measuring 16 and half beeghas as mentioned in para 2 of the plaint is in Khatedari and in possession of the plaintiff. The plaintiff is having three daughters -- all married and his wife. The defendants Virendra Singh and his father Deen Dayal are also residents of village Bheekhawas. The defendant No. 2 Sh. Deen Dayal is an advocate and on account of his contacts with the plaintiff, the plaintiff developed his confidence in defendant No. 2. Both the defendants in conspiracy approached the plaintiff and

stated that the plaintiff is having about 32 beeghas of land and in case half of this land is transferred by way of Will, the plaintiff's land would be saved from ceiling and after some time the Will would get cancelled. Thus, taking the plaintiff in confidence the defendant No. 2 got his thumb impressions on a number of papers at Mundawar on 20-6-1977 by playing fraud upon the plaintiff. Thereafter, the defendant No. 1 filed the revenue suit against the plaintiff for declaration and permanent injunction in the Court of Assistant Collector, Kishangarhbas in August, 1985 and thereafter, the plaintiff came to know that the defendant got his thumb impressions on a gift deed said to be executed on 20-6-1977 in the guise of Will executed on the same day and the fact that the defendant No. 1 has claimed himself to be the adopted son of the plaintiff and also got mutation in the revenue records on the basis of this alleged gift deed. According to the plaintiff, he never took the defendant No. 1 in adoption and he never executed any gift deed and thus the gift deed should be cancelled on the grounds stated in para 15 of the plaint and it should also be declared that the defendant No. 1 is not the adopted son of the plaintiff.

3. The defendants in their Joint written statement while denying all the allegations of the plaint pleaded that the plaintiff executed a Will as well as a gift deed in favour of the defendant No. 1 respectively for the agricultural lands as mentioned in paras 2 and 1 of the plaint and since then the defendant No. 2 is in possession of the entire agricultural land. It was also pleaded that the defendant No. 1 was adopted by the plaintiff and his wife on 28-8-1977 by performing all the rituals as mentioned in para 9 of the written statement and thus the defendant No. 1 is the adopted son of the plaintiff. An objection with regard to limitation was also taken.

4. On the basis of the pleadings of the parties following issues were framed on 14-4-1988.

(Vernacular matter omitted)

5. On the basis of the amended pleadings following additional issue was framed on 5-4-1991:--

(Vernacular matter omitted)

6. The trial Court recorded the evidence of both the parties and vide impugned judgment decreed the plaintiff's suit.

7. During pendency of this appeal the defendant No. 2 Deen Dayal and the plaintiff Kashiram have expired. Their legal heirs have been brought on record.

8. I have heard learned counsel for the parties. On the basis of the submissions made before this Court following points arise for consideration:--

(i) Whether the case should be remanded to the trial Court on account of no decision by trial Court on additional issue framed on 5-4-1991?

(ii) Whether the decision of the trial Court on issue Nos. 1 and 2 relating to gift

deed, issue No. 3 with regard to valid adoption of the defendant No. 1 and issue No. 4 with regard to limitation is not sustainable ?

9. First Point:-- According to learned counsel for the appellants this additional issue was framed on the basis of amended plaint but the trial Court neither provided any opportunity to the defendants to lead the evidence on this issue, nor decided this issue, hence the case should be remanded back to the trial Court. He placed reliance upon Chhinga Ram and Another Vs. Nihalsingh and Others, and Lakshmamma Vs. Kamalamma and Others, According to learned counsel for the plaintiff this additional issue stands covered by the issue Nos. 1 and 2. It was also contended that on account of amended plea of undue influence this additional issue was framed and no additional evidence on this additional issue was produced on behalf of the plaintiff, hence there was no occasion for the defendants also to lead any additional evidence on this issue.

10. I have considered the rival submissions. It is evident that this additional issue was recorded in the order-sheet dated 5-4-1991. A perusal of the entire judgment goes to show that this additional issue escaped the notice of the Court and counsel appearing for the parties. A careful reading of issue Nos. 1, 2 and this additional issue makes it clear that this additional issue practically stands covered by both the issue Nos. 1 and 2. The term "undue influence" is defined u/s 16 of the Indian Contract Act, 1872 (in short the Act) while the term "fraud" is defined u/s 17 of the Act. The provisions of both the sections are as under:--

16. "Undue influence" defined. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the Will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the Will of another--

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the Will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the Will of the other.

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872 (1 of 1872),

17. "Fraud" defined.-- "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

11. The trial Court allowed some time to the plaintiff to produce additional evidence on this additional issue but the plaintiff did not produce any additional evidence. Although, there is no order-sheet recorded by the trial Court to show that any opportunity was given to the defendants to lead additional evidence on this additional issue, but in absence of any additional evidence by the plaintiff, there was no occasion for the Court to allow opportunity to the defendants for their additional evidence. Apart from this fact, no prayer was made on behalf of the defendants to allow them to lead additional evidence. Hence, on this count, prayer for remand of the case is not allowed. Further on account of no decision on this additional issue also this case should not be remanded for a fresh decision mainly on two grounds. The first is that this additional issue is practically covered by the issues Nos. 1 and 2 and secondly evidence on this additional issue is available on the record, hence this Court may decide this additional issue along with issue Nos. 1 and 2. The judgments relied upon by learned counsel for the defendants on this point are not applicable as the point in issue before this Court as well as Karnataka High Court was as to whether decision on preliminary issue without decision on all the issues is justified and the answer was in negative.

12. Second Point:-- According to the provisions of Section 10 of the Act, all the agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void. The term "free consent" has been defined by Section 14 of the Act. Consent is said to be free when it is not caused by--

(1) coercion, as defined in Section 15, or

- (2) undue influence, as defined in Section 16, or
- (3) fraud, as defined in Section 17, or
- (4) misrepresentation, as defined in Section 18, or
- (5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

13. According to Sub-section (3) of Section 16 of the Act where a person who is in a position to dominate the Will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the Will of the other,

14. It is not in dispute that the plaintiff and both the defendants are residents of the same village Bheekhawas, Tehsil Mundawar and are of the same caste. It is also not in dispute that two documents Ex. A-2 Will and Ex. A-3 gift deed were executed on 20-6-1977. Ex. A-3 gift deed was got registered at about 3:30 p.m. while Ex. A-2 Will was got registered at about 3:45 p.m. D.W. 6 Sh. Ramanand is the scribe of Ex. A-3 gift deed while his grandfather late Sh. Parsadi Lal was the scribe of the Will Ex. A-2. Ex. A-3 relates to 15 beeghas 5 biswas agricultural land while Ex. A-2 Will relates to remaining 16 beeghas and 10 biswas agricultural land. It is also not in dispute that on 20-6-1977 when these two documents were executed the plaintiff had got two daughters married, one daughter unmarried and his wife. It is also not in dispute that no other agricultural land except the agricultural lands mentioned in paras 1 and 2 of the plaint was left out with the plaintiff. It was the case of the plaintiff that the defend-ant No. 2 was an advocate at that time and he developed his contacts with the plaintiff and conveyed him that in case half of the agricultural land is transferred by way of Will, the plaintiffs entire agricultural land would be saved from the ceiling and thus got his thumb impressions on a document representing the same to be the document of Will but later on he came to know that his thumb impressions were obtained on a gift deed. In para 15 of the plaint it has been pleaded that the plaintiff never executed any gift deed; that the plaintiff never intended to execute any gift deed; that the plaintiff had no relations with the defendants and thus there was no reason for such a gift; that in the guise of execution of the Will his thumb impressions were obtained on a gift deed by playing fraud: that the defendants never served the plaintiff and in the garb of service fraud was played upon him and he never transferred the possession of the land under the gift deed. Vide written statement, all these grounds were denied and it was pleaded that all the three daughters of the plaintiff are now married and all of them are residing with their husbands and not with the plaintiff and since the plaintiff had no son he took the defendant No. 1 in adoption and prior to that he executed these two documents in favour of the

defendant No. 1 with free mind and without any pressure or fraud or undue influence and the defendant No. 1 is in possession of the entire agricultural land. It is significant to observe here that the specific grounds of cancellation of gift deed as pleaded in para 15 of the plaint were not specifically denied in the written statement. It is also not in dispute between the parties that Ex. A-2 Will has already been cancelled by the plaintiff. According to learned counsel for the defendants, the plaintiff has admitted his thumb impressions on Ex. A-3 gift deed, hence burden was upon him to prove that this document was executed under undue influence and fraud which he failed to prove. According to learned counsel for the defendants, the plaintiff failed to prove all the grounds pleaded in the plaint for cancellation of the gift deed and since the gift deed is registered one, presumption of its genuineness arises in favour of the defendants. It was also contended that the trial Court wrongly did not rely upon this gift deed on account of absence of any consideration as there can be no gift with consideration. He placed reliance upon *Km. Sonia Bhatia Vs. State of U.P. and Others*, wherein it was held that absence of consideration in a gift is an essential element. In *Afsar Sheikh and Another Vs. Soleman Bibi and Others*, it was held that plea of undue influence can-riot be made out from the general allegations in the plaint if not specifically pleaded. In *Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others*, it was held that no presumption of undue influence can arise merely because parties were nearly related to each other or merely because donor was an old or of weak character. The Court must consider that relations between the donor and the donee are such that the donee is in a position to dominate the Will of the donor and donee used that position to obtain an unfair advantage over the donor.

15. Per contra, learned counsel for the plaintiff contended that the entire evidence including the statement of the defendant No. 2 Sh. Deen Dayal clearly goes to prove that the defendant No. 2 was in a position to dominate the plaintiff's Will and the plaintiff was not related to the defendants and in view of the fact that the plaintiff at that time was having three daughters and out of them one was unmarried and was also having his wife, there was no reason to execute any gift deed in favour of the defendant No. 1 and particularly there was no reason to transfer the entire land by way of the Will as well as the gift. He placed reliance upon some of the judgments to be referred hereinafter. Section 122 of the Transfer of Property Act, 1882 (in short the Act, 1882) defines "Gift". Gift is the transfer of certain existing move-able or Immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Section 123 of the Act, 1882 provides that for the purpose of making a gift of Immovable property, the transfer must be affected by a registered instrument signed by or on behalf of donor and attested by at least two witnesses. The term "attested" has been defined u/s 3 of the Act, 1882. The term "attested" in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the

instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary. According to the definition of the term "gift" the most important point is as to whether the plaintiff executed the gift deed voluntarily ? In Smt. Takri Devi Vs. Smt. Rama Dogra and Others, it was held that to prove undue influence the plaintiff has to prove that the relations subsisting between the parties are such that the defendant was in a position to dominate the Will of the plaintiff and the defendant used that position to obtain an unfair advantage from the plaintiff. In view of these facts that the value of gifted property was about Rs. 2 lacs and the plaintiff was an old, illiterate lady and the plaintiff had civil and criminal litigations and the plaintiff had engaged the defendant as her counsel it was held that though the gift deed is a registered document the defendant being in a position to dominate the Will of the plaintiff got the gift deed executed and thus the statement of the plaintiff that she did not know about the contents of the gift deed cannot be brushed aside lightly. Similar view was taken by this Court in Smt. Soni v. Madan Lal 1993 (2) WLC (Raj) 581 . In Thangachi Nachial and Another Vs. Ahmed Hussain Malumiar and Others, it was held that in the very nature of things, fraud is secret limits origin and inception and the means adoption for its success and fraudulent motive or design cannot be proved to the very hilt and it should be inferred from the circumstances placed before the Court. Each circumstance by itself may not mean much but taking all of them together, they may reveal a fraudulent or dishonest plan. In Indernath Modi Vs. Nandram and Others, it was held that the presumption u/s 60(2) of the Registration Act is raised when evidence to prove execution in the manner provided in Section 67 of the Evidence Act is not available due to the executant or the marginal witnesses being dead or for some other reason. The presumption of Section 60 cannot take the place of proof as required by Section 67 of the Evidence Act when witnesses are available to prove the document in the manner provided by the Evidence Act. Similar view was taken in Premraj v. Mishrimal RLW 1959 265.

16. I have gone through the evidence of the parties. According to the statement of P.W. 1 Kashiram he was in no way related to the defendants and the defendants used to come to him and they asked him to execute the Will on the grounds that he has got agricultural land in excess and they will serve him and thus he put his thumb impressions treating the document to be the Will and not the gift deed. He was cross-examined in detail but nothing adverse came out. He denied that the defendant No. 1 ever stayed with him. It was also stated that this gift deed was not read over to him by the Registrar or anybody else. P.W. 2 Sh. Ganeshi is the father of son-in-law of the plaintiff and is one of the attesting witnesses of the gift deed. According to him, the facts relating to execution of

the Will were disclosed to them and there was no conversation with regard to execution of any gift deed. In cross-examination, it was admitted by him that stamps were purchased by the plaintiff but this document was not read over to them. D.W. 1 Sh. Deen Dayal stated that in the year 1977 he was serving in Panchayat Samiti, Bansur and he started his practice as an advocate only in the year 1981 and thus he was not advocate at that time, It was also stated by him that the plaintiff had no son and the plaintiff asked him to give his son Virendra in adoption. He further stated that initially he declined but later on agreed and thus the plaintiff executed two documents Will and the gift deed on 20-6-1977 and got them registered and he executed both the documents with free consent. In cross-examination he pleaded ignorance about his relations with the plaintiff but admitted this fact that the plaintiff used to treat him as his own near man and the plaintiff used to consult him in each and every matter. D.W. 2 Sh. Virendra Singh is the defendant No. 1 who tried to support his father's statement.

17. On a careful consideration of the entire evidence, the plaintiff though failed to prove that the defendant No. 2 Deen Dayal was an advocate at that time when these two documents were executed. But from the various circumstances the trial Court rightly came to this conclusion that the plaintiff did not execute any gift deed with free consent. At the cost of the repetition, it is stated that both the documents Ex. A-2 Will and Ex. A-3 gift deed were executed and registered on the same day. Ex. A-2 was executed at about 3:45 p.m. while Ex. A-3 was executed at about 3:30 p.m. just after a gap of 15 minutes only. No reason has been assigned as to why these two documents of different nature were executed on the same day by the plaintiff in case the plaintiff intended to transfer his entire land to the defendant No. 1 and further he was going to adopt him as his son. The reasons of executing the Will as well as the gift deed as stated in both the documents are very significant and the reasons are that Sh. Virendra Singh (defendant No. 1) is serving the plaintiff and the plaintiff has a hope that he will serve him in future also. Neither it is pleaded by the defendants that the defendant Virendra Singh ever served the plaintiff nor there is any such evidence given by both the defendants, Both the defendants did not state in their statements that the defendant Virendra Singh ever served the plaintiff before or after execution of the gift deed and thus the very basis of the execution of gift deed in favour of the defendant No. 1 did not exist. Apart from the above facts, there are various important circumstances to show that the plaintiff did not execute the gift deed with free mind and the said gift deed on the face of it as well as on the evidence adduced appears to be unconscionable and thus the burden of proving that this gift deed was not executed under the undue influence or by fraud is upon the defendants who have misreably failed to prove as such. The various circumstances are that the plaintiff is an illiterate person and he was about 60 years of age at that time, that the plaintiff had got three daughters and his wife and one daughter was unmarried at that time; that the plaintiff was not related to the defendants and no reason has been pleaded and proved by the

defendants as to why the plaintiff executed the Will as well as the gift deed transferring his entire agricultural land in favour of the defendant No. 1 ; that none of the attesting witnesses has proved due execution of gift deed as required by law as out of two attesting witnesses one P.W. 2 Ganeshi has been examined by the plaintiff and he did not support the gift deed and the other attesting witness has not been examined by the defendants; that there is a recital of a consideration of Rs. 30,000/- in the gift deed and this recital of Rs. 30,000/- to be paid by Virendra Singh to the plaintiff in the gift deed has not been explained by the defendants; that two documents of different nature were executed on the same day and the fact that mutation register showing the consent of the plaintiff as pleaded by the defendants has also not been produced. All these circumstances clearly show that the gift deed Ex. 43 is the result of undue influence and fraud exercised by the donee i.e. the defendants upon the plaintiff as defendant No. 2 was in a position to dominate the Will of the plaintiff as has been admitted by D.W. 1 Deen Dayal himself in his statement. In view of the entire discussion made hereinabove, the trial Court rightly cancelled the gift deed.

18. Now comes the question of adoption. The trial Court observed that the age of the defendant No. 1 at the time of adoption was 22 years, hence there was no valid adoption and further that the evidence with regard to adoption of the defendant No. 1 by the plaintiff is unbelievable. It is the case of the plaintiff that he never adopted the defendant No. 1 and no ceremony of adoption was performed. It is the case of the defendants that the defendant No. 1 is the adopted son of the plaintiff as the plaintiff took the defendant No. 1 in adoption on 28-8-1977 in the presence of people of their community as well as responsible persons of the society of the village Bheekhawas and certain ceremonies were also performed and both the plaintiff and his wife accepted the defendant No. 1 as their adopted son and since then the defendant No. 1 is residing with the plaintiff. It was also pleaded that the defendant No. 1 was married on 10-3-1978 to Smt. Dhanani alias Kamla and the plaintiff performed all the ceremonies as father of the defendant No. 1. Section 10 of the Hindu Adoptions and Maintenance Act, 1956 (in short the Act, 1956) is as under :--

Section 10. "Persons who may be adopted. -- No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely,--

- (i) he or she is Hindu;
- (ii) he or she has not already been adopted;
- (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
- (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

19. Thus, according to Sub-clause (iv) a person who has not completed the age

of fifteen years may be taken in adoption. In case there is custom or usage applicable to the parties which permits persons who have completed the age of fifteen years may be taken in adoption. The expressions of the "custom" and "usage" have been defined u/s 3 of the Act, 1956. According to this definition, the expressions "custom" and "usage" signify any rule which having been continuously and uniformly observed for a long time has obtained the force of law among Hindus in any local area, tribe, community, group or family provided that the rule is certain and not unreasonable or opposed to public policy. Now the evidence on the point of age as well as on the fact of adoption has to be considered. The plaintiff Sh. Kashiram denied the fact that he took the defendant No. 1 in adoption. In cross-examination he denied the suggestions that he adopted Virendra Singh on 28-8-1977 and that Sh. Virendra Singh is residing with him. He pleaded ignorance about the marriage of Sh. Virendra and denied the suggestion that he performed all the ceremonies of the marriage of the defendant No. 1. P.W. 2 Ganeshi pleaded ignorance about the fact of adoption. P.W. 3 Sh. Ratan Lal and P.W. 4 Chandagi Ram are sons-in-law of the plaintiff and both of them have denied the fact that the defendant Virendra was taken in adoption by the plaintiff. The statement of D.W. 1 Sh. Deen Dayal was recorded on 20-5-1989. According to his statement, the plaintiff asked him to give his son in adoption 12 years ago. He further stated that initially he denied but later on he agreed and thereafter the plaintiff executed the Will as well as the gift deed in favour of his own son Virendra on 20-6-1977 and thereafter his son was adopted by the plaintiff and his wife on 28-8-1977 and Virendra thereafter started living with the plaintiff and it was the plaintiff who got his son Virendra married and the age of the Virendra at that time was 14 years. D.W. 2 Sh. Virendra Singh has supported the statement of his father. He further stated Ex. A1 is the original ration card, Ex.A6 is a copy of the ration card and Ex.A7 and Ex.A8 are respectively copies of voter lists of the year 1980 and the year 1981. In cross-examination, he admitted that he has produced all the copies which are correct. It was also admitted by him that his age is recorded to be 25 years in Ex. A7 which is correct.

20. I have considered the entire evidence on the point of age of the defendant No. 1 in August, 1977. It is well proved that his age was above 15 years at that time. Ex. A1 is the ration card of the family of the defendants. It is of the year 1977 and name of the defendant No. 1 has not been included in the list of the family members. But there is no evidence to show as to who applied for this ration card and as to when such application was moved and merely on the basis of the omission of the name of the defendant No. 1 in this ration card, no such inference can be drawn that the defendant No. 1 had gone in adoption, hence his name was dropped in this ration card and further this document Ex. A1 is not relevant on the point of the age of the defendant No. 1. Ex. A6 is not the copy of the ration card, rather it is copy of the application for the ration card which has been moved in the name of the plaintiff but it has not been proved that this application was moved by the plaintiff. D.W. 8 Sh. Thawar Singh was examined

on behalf of the defendants who was working as a Secretary in the Gram Panchayat. He stated that Ex. A6 is the true copy of the original. In cross-examination, he admitted that he is unable to say as to who presented this application and it was also admitted by him that he was not the Secretary of this Gram Panchayat in the year 1981 when this application is said to be filed for ration card. Thus, it is not proved that this application was moved by the plaintiff containing the name of the defendant No. 1 Virendra Singh at serial No. 4 as the son of the plaintiff. But age of Virendra Singh has been recorded 25 years in this application dated 20-5-1981 and this document has been filed by the defendants and according to the statement of Sh. Virendra Singh this is correct copy of the original. In the voter list of the year 1980 Ex. A7 the age of Virendra Singh is recorded to be 25 years and 26 years in voter list Ex. A8 for the year 1981 and both these documents have also been produced by the defendants and are correct as stated by defendant Virendra Singh. Thus, the trial Court rightly came to this conclusion on the basis of this documentary evidence that the defendant No. 1 Virendra Singh was about 22 years of age at the time of alleged adoption and according to Sub-clause (iv) of Section 10 of the Act, 1956 he was not capable of being taken in adoption by the plaintiff. Learned counsel for the defendants contended that he was taken in adoption according to the custom applicable to the parties but this argument is devoid of merit as there is no pleading and evidence with regard to any custom or usage applicable to the parties permitting persons to be adopted above the age of 15 years. Hence, the defendant No. 1 was not capable of being taken in adoption by the plaintiff.

21. Secondly, the fact of adoption itself is not proved at all and there is no reason to interfere with the findings of the trial Court on this point also. According to the statement of D.W. 1 Sh. Deen Dayal, Virendra Singh's age was 14 years at that time and this oral testimony of D.W. 1 has been found untrue as being contrary to the documentary evidence produced by the defendants themselves. Similar is the position of the statement of the defendant Virendra Singh himself. D.W. 3 Gheesa Ram and D.W. 4 Hukam Chand who is brother-in-law of the defendant Virendra Singh have given hearsay evidence about the fact of adoption. D.W. 5 Sh. Sultan stated that the plaintiff took Sh. Virendra in adoption and at that time Virendra's age was 13-14 years. He did not specifically state that he was also present at that time and his statement regarding the age is wholly unreliable. According to his statement, he belongs to the village Bheekawas the village of the parties while in cross-examination contrary to it he stated that his village is 1 mile away from the village of the parties. D.W. 7 Sh. Kailash belongs to the other village. He stated that the plaintiff took the defendant No. 1 in adoption and one Pandit performed Seva Pooja but even the defendants and none of the other witnesses stated that any Seva Pooja was performed by any Pandit and even the name of the Pandit has not been disclosed and no such person has been examined who performed any such Pooja. D.W. 9 Shriram belongs to the village of the parties. According to his statement Sh. Virendra was taken in adoption by the plaintiff in presence of the entire villagers

and since then Sh. Virendra is residing with the plaintiff and is still residing with him and at that time Virendra's age was 13-14 years. His statement is also not reliable as the presence of entire villagers has not been stated even by the defendants themselves and the oral testimony of this witness regarding the age of Sh. Virendra is also untrue as observed hereinabove. Therefore, the fact of adoption was rightly disbelieved by the learned trial Court. Therefore, the defendants failed to prove that the plaintiff adopted Sh. Virendra Singh and it was a valid adoption.

22. Next comes the question of limitation. It was contended by learned counsel for the defendants that the gift deed was executed in the year 1977 and the adoption also took place in the same year and the present suit was filed in Feb. 1986 and thus it was barred by limitation. Learned counsel for the defendants referred Articles 57 and 59 of the Limitation Act, 1963. According to Article 57 a suit for declaration that an alleged adoption is invalid or never in fact took place can be filed within three years from the date when the alleged adoption becomes known to the plaintiff. According to Article 59 a suit to cancel or set aside an instrument may be filed within three years when the facts entitling the plaintiff to have the instrument cancelled or set aside first becomes known to him. Learned counsel for the defendants referred the statement of the plaintiff Kashiram recorded under Order 10, C.P.C. by the trial Court on 14-4-1988 wherein the plaintiff admitted that the defendant Virendra Singh is in possession of 15 1/4 beeghas of land and thus the plaintiff knew these facts since the date of execution of the gift deed as well as the date of adoption and the plea of the plaintiff that he came to know about the true character of the gift deed only when he received the notice issued by the Revenue Court in revenue suit filed by the defendant Virendra Singh is unreliable. Per contra, learned counsel for the plaintiff contended that it is the case of the plaintiff that in the guise of the Will his thumb impressions were obtained on gift deed and the plaintiff came to know about the contents of this document only when he received the notice from the Revenue Court in Feb. 1986 and thereafter he filed the present suit without any delay and starting point of limitation cannot be taken to be the date of execution of the document and the alleged adoption. He placed reliance upon *Ningawwa Vs. Byrappa and Others*, wherein it was held that it is not the date of execution of the gift deed but time when fraud became known to the plaintiff.

23. I have considered the rival submissions. While deciding the question of gift deed it has been held by this Court that the transaction of the gift appears to be unconscionable and the plaintiff did not execute this document knowingly it to be the gift deed. Therefore, in view of the judgment of the Hon'ble Supreme Court in *Ningawwa Vs. Byrappa and Others*, the period of three year's limitation is applicable from the date when the plaintiff discovered the true nature of the deed and not from the date of the execution of the gift deed as well as the alleged date of adoption. Therefore, the statement of the plaintiff was rightly relied upon by the trial Court that he came to know about the true nature of this document and the fact of adoption when the defendant No. 1 filed a revenue suit against

him in Feb., 1986. Therefore, the decision of the trial Court on this issue also does not call for any interference.

24. Thus, in view of the entire discussion made hereinabove, this appeal is hereby dismissed with costs.