

HIGH COURT OF ORISSA : CUTTACK

SA NO.220 of 1998

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 16.05.1998 and 30.06.1998 passed by the learned District Judge, Mayurbhanj, Baripada in Title Appeal No.25 of 1991 in confirming the judgment and decree dated 29.03.1990 and 16.04.1990 passed by the learned Subordinate Judge, Baripada in Title Suit No.143 of 1987.

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Sri Damodar Murmu

::: ***Appellant***

-:: VERSUS ::-

Smt. Jhana Dei & Others

::: ***Respondents***

**Advocate(s) who appeared in this case by hybrid arrangement
(virtual/physical) mode.**

For Appellant

... Dr. Sujata Dash, Advocate

For Respondents

... M/s.S.D. Das, Sr. Advocate
A.K. Nayak, L. Samantaray,
B.K. Sinha, B. Pattnaik,
A. Mohanty, D.R. Bhokta,
H.S. Satpathy, D.R. Sundaray,
M.K. Das & D.R. Behera
(Advocates)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing: 15.12.2022 :: Date of Judgment: 23 .12.2022

D.Dash,J. The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') has assailed the

judgment and preliminary decree passed by the learned District Judge, Mayurbhanj, Baripada in Title Appeal No.25 of 1991. By the same, the Appeal filed by the present Appellant being the aggrieved Defendant in Title Suit No.143 of 1987 of the court of the learned Subordinate Judge, Baripada under section 96 of the Code has been dismissed. The suit filed by the predecessor-in-interest of Respondent, who was the original Defendant before the Trial Court has been dismissed.

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

3. Plaintiff's case is that one Suna Majhi was the owner of the land in schedule 'A' of the plaint. He had a daughter, namely, Nangi. Nangi was given in marriage to one Pachu. The Plaintiff is the son of Nangi and Pachu. In the year 1974, Pachu died where after his wife Nangi died in the year 1982. The Plaintiff remained in possession of the suit land in schedule 'A' of the Plaint after the death of his father Pachu. It is stated that the land in suit was purchased by Pachu from his father-in-law for a consideration of Rs.600/- way back in the year 1949 by registered sale deed dated 31.11.1949. The purchase although was in the name of Nangi; in fact, Pachu was the real purchaser. He had paid the money, obtained possession and used the same as its owner in every respect till

his death. The property is said to have been purchased benami in the name of Nangi. It is stated that Nangi had no income of her own and Pachu from his own earning had paid the consideration. The Plaintiff has a sister, namely, Bhaga. She had married Bahadur. She wanted some property to be given to her from schedule 'A'. Then Nangi, who was living, sided that Bhaga and filed a maintenance case against the Plaintiff which was dismissed for non-prosecution. Thereafter, being ill advised by Bhaga and others, Langi executed a sale deed on 12.03.1979 selling away the land in schedule 'B' from out of schedule 'A' to the Defendant for a consideration of Rs.6,000/- It is stated that there was no physical delivery of possession of the said land. There was no payment of consideration and the transaction is said to be a sham transaction. Nangi is said to be having no right of alienation over schedule 'B' land. She had filed a suit, i.e., Title Suit No.80 of 1980 in the Court of the Subordinate Judge, Baripada for declaration of her right, title, interest and possession of the suit land wherein the Plaintiff and Defendant were the parties. In the said suit, the Defendant had been set ex parte. But thereafter in view of death of Nangi the suit stood abated.

The Defendant then again initiated a proceeding under section 145, Cr.P.C. wherein the property in suit, i.e., schedule 'B' was

attached. The Plaintiff, therefore, filed a suit for declaration of right, title, interest and possession.

4. The Defendant in the written statement denied the fact that the transaction in the name of Langi was a banami one. It is stated that said property was her stridhan property. Thus, she having the right of alienation over the property in question had sold to the Defendant for a consideration of Rs.6,000/- by registered sale deed dated 12.03.1979. It is stated that the father of the Plaintiff was staying in his father-in-law's house as an illatum son-in-law. The Defendant claims that Nangi had her own income and the property having been purchased, it had been mutated in her name.

5. On the above rival pleadings, the Trial Court having framed six issues, upon examination of evidence and their evaluation has arrived at a conclusion that the transaction which was made on 23.11.1949 was a benami one in the name of Nangi and it had been purchased by the father of the Plaintiff by spending money from his own purse when Nangi had absolutely no income. It is stated that the Plaintiff is in possession of the entire schedule 'A' land of which schedule 'B' is a part and Nangi was having saleable right and legal necessity, the sale deed standing in favour of Defendant is said to be of no legal value.

6. The suit thus having been decreed, the Defendant being aggrieved by the same had carried the First Appeal, which too has been dismissed.

Hence, the present Second Appeal is at the instance of the Defendant. The Plaintiff having died in the meantime, his legal representatives are there on record as the Respondents (Plaintiffs).

7. In course of hearing, the following substantial question of law has been framed:-

“Whether the Courts below are right in holding that the property standing purchased in the name of female Nangi is not her own property but it is the property of her husband-Pachu, who had purchased it in the name of Nangi for the namesake?”

8. Learned counsel for the Appellant submitted that when the property as per the registered sale deed dated 23.11.1949 had been purchased by Nangi as it reveals therefrom, the Courts below ought not to have accepted the claim of the Plaintiff that it was a benami purchase in the name of nangi by her husband Pachu. She further submitted that the transaction standing in favour of Nangi when has been recognized by the order passed in the mutation proceeding, the findings of the Courts below that Pachu was the real owner and said Nangi was the owner apparent is contrary to the overwhelming evidence on record. She further submitted that the Courts below having perversely appreciated the evidence on record and without keeping in view the settled position

of law governing the field of adjudication of a transaction as to whether benami or not having returned their verdict; those are liable to be set at naught

9. Learned Senior Counsel for the Respondent while supporting the findings returned by the Courts below reminded this Court of its power to interfere with a concurrent finding on fact returned by the Courts below. He submitted that the Courts below having properly appreciated the evidence on record when have found the evidence to be acceptable on each of the factor as to payment of consideration, non-existence of any source of income of Langi, non-possession of the suit land by Nangi and all other associated activities relating to the suit land and those have been established; they have rightly have rendered the finding that it was not the property of Nangi but the property of Pachu, the father of the Plaintiff. He thus submitted that the answer to the substantial question of law must be rendered in favour of the Plaintiff in sustaining those judgments and decrees impugned in this Appeal.

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

11. The document through which the parties lay their claim over the property in different channels is the sale deed dated 23.11.1949 which has been admitted in evidence and marked Ext.23. In the sale deed no doubt, Nangi is shown to be the purchaser. The parties are santals by caste and as such the members of the Scheduled Tribe Community. They are governed by Mitakhara School of the Traditional Hindu law and provisions of Hindu Succession Act, 1956 do not apply to them insofar as the inheritance and succession are concerned. The vendor under the sale deed (Ext.23) is Suna Majhi. The question arises as to whether by the sale deed Nangi became the owner of the property or it was Pachu, who happens to be her husband. The suit having been filed much before coming into force of the Benami Transaction (Prohibition) Act, 1988 as it was initially; as per the position of law settled the provisions contained therein would have no application to the case in hand. Therefore, this Court is now called upon to answer the substantial question of law by undertaking the exercise to ascertain as to if the concurrent findings rendered by the Courts below with the available evidence can sustain or not.

It is the settled position of law that the court in seisin of a Second Appeal can only interfere with the finding of fact returned by the Courts below if any such perversity is noticed therein. For the purpose of

interference, the Appellate Court is to see as to whether the Courts below while answering the said disputed question of fact either have ignored some material fact emerging from evidence from being taken into consideration or have taken something extraneous to the evidence into account which if would have not been done, the finding would have been otherwise.

Bearing the above in mind, approaching the evidence available in the case, it is seen therefrom that Pachu the husband of Nangi was staying at Gholmunha with his father-in-law and he was a native of Chamardhuni. No such evidence either relating to the source of income of Nangi nor about the fact that any fund was coming to her hands is forthcoming. The family is a Hindu tribal family and in those days, which was just after the merger of the erstwhile princely State of Mayurbhanj with Orissa, judicial notice of the fact can be taken that hardly the female members of such family were having control over the financial aspect of the family and even though they were some time or seasonally working, mostly as field labourers, the dependence on male counter parts for all purposes was prevailing. Two witnesses examined from the side of the Plaintiff have said that Pachu had brought some money from his brother at that time. It has been stated by P.W.4 that property had been purchased by Pachu for himself and not for his wife.

With such oral evidence, the recital of Ext.23 being gone through, it is seen that the vendor Suna Majhi received the money from Pachu, the husband of Nangi. It is not stated therein that the money had been paid by the vendee to the vendor. The document (Ext.23) has remained in possession of Pachu and it has come to the hands of the Plaintiff after the death of Pachu. The evidence on record reveals that the Plaintiff was in possession of the property since the death of his father who was in possession of the same during his lifetime. In the earlier suit, i.e., Title Suit No.80 of 1980, it had been stated by Nangi that she was not in possession of any movable or immobile property as can be seen from the order dated 25.02.1980 passed in M.J.C. No.15 of 1980. The Defendant does not deny about the filing of the said suit by Nangi. From this, the Courts below having gone to say that the suit land was not in possession of Nangi, this Court is not in a position to say that the same is the outcome of perverse appreciation of evidence. For all the aforesaid, this Court is not in a position to tinker with the concurrent findings on fact rendered by the Courts below that Pachu was the owner of the property in suit. The substantial question of law stands answered accordingly.

Consequent upon the same, the suit land being held to be the property of Pachu although Nangi had an interest equal to that of the Plaintiff in the said property as having been so devolved on them after

the death of Pachu, by virtue of Hindu Women's Right to Property Act, 1937, which came into force in the princely State of Mayurbhanj after its merger with the State of Orissa on 01.10.1949, Nangi by executing the sale deed in favour of the Defendant, it can only be said that there was transfer of that limited right which Nangi was having over the property in favour of the Defendant. After the death of Nangi, since it has neither been pleaded by the Defendant nor proved that Nangi had sold the property for legal necessity as recognized under the Traditional Hindu law of which the burden of proof was lying on the Defendant, the right of the Defendant by virtue of that purchase stood reverted to the Plaintiff.

12. In the wake of aforesaid, the Appeal stands dismissed. No order as to cost.

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

Himansu