

IN THE HIGH COURT OF ORISSA AT CUTTACK

RFA No.130 of 2007

(From the judgment dated 9th March, 2007 of learned Additional District Judge (F.T.), Sambalpur in Title Suit No.157/3 of 2001-05)

Jayadev Chandra Biswas and Another Appellants

Versus

Chandeswar Prasad Sahu Respondent

Advocate (s) appeared in this case :-

For Appellants : Mr. Sidhartha Mishra, Advocate

For Respondent : Mr. Amiya Kumar Mishra, Advocate

**CORAM :
JUSTICE B.P. ROUTRAY**

**JUDGMENT
10th October, 2022**

B.P. Routray, J.

1. The Defendants have come up in the present appeal against judgment and decree dated 9th March, 2007 of the learned Additional District Judge (Fast Track), Sambalpur in T.S. NO.157/3 of 2001-05.

2. Suit property consists of four parts, Viz. Schedule 'A', 'B', 'C' and 'D'. Schedule-A is the land measuring Ac.0.020 decimals out of MS Plot No.1648/2583 of Khata No.190 corresponding to Plot

No.1648/5752 in Khata No.733/1762 mutated in the name of Chandeswar Prasad Sahu (Plaintiff).

Schedule 'B' property is a pump house situating over the land measuring Ac.0.040 decimals (adjoining to Schedule 'A' land) out of plot No.1648/2583 in Khata No.190.

Schedule 'C' property is eastern side quarters of the ground floor of the building constructed over Schedule-A land, consisting of one bed room, one drawing room, one kitchen and one toilet with a small covered space in between the toilet and kitchen.

Schedule 'D' property is the 1st floor of the same building constructed over Schedule-A land having two quarters each with same description mentioned for the ground floor.

3. Plaintiff – Respondent filed the suit praying for his declaration of right, title, interest over Schedule 'A' property, and to declare his right of use of Schedule 'B' property, recovery of arrear rent as well as recovery of mesne profit in respect of Schedule 'C' & 'D' properties from different dates.

4. As per Plaintiff's case, he and Defendant No.1 were friends initially and they decided to purchase lands. Accordingly, Plaintiff

purchased Ac.0.020 dec by registered sale deed No.22 dated 3rd January, 1997 and Defendant No.1 purchased Ac.0.040 dec by registered sale deed No.23 dated 3rd January, 1997 from one Jagannath Panda out of M.S. Plot No.1648/2583 in Khata No.190. Both the lands are adjoining to each other. The land purchased by the Plaintiff is having dimension of 42 feet in north, 46 feet in south, 20 feet in east and west each, i.e. Schedule 'A' land. He constructed the building thereon, which was completed in April, 1998. The stair-case of the said building runs jointly over the land of the Plaintiff as well as Defendant No.1. Said stair-case is having 2 feet 6 inch on Plaintiff's Schedule 'A' land and 3 feet 6 inch over adjoining land of Defendant No.1, with the understanding that the same would be used by both of them as a common passage. Further Plaintiff constructed a pump house over the adjoining land of Defendant No.1 affixing the tube well with motor pump. The pump house is of size 10' x 10' adjoining towards southern side of the common passage.

The Defendants took rent of Schedule 'C' house (ground floor) for Rs.1500/- per month in March, 1998. The Defendants then forcibly occupied Schedule 'D' house (1st floor) by breaking open the locks. As the defendants did not pay the rents subsequently and forcibly occupied Schedule 'D' house, he reported the matter to police. This did not yield

any result. So he sent Lawyer's notice on 28th August, 2001 to the Defendants terminating the agreement in respect of Schedule 'C' house as well as for vacation of possession in respect of Schedule 'D' house. But the Defendants in their reply have claimed their ownership over those properties without any basis and in addition to the same, they further claimed certain amount of money owing from the Plaintiff towards cost of repairing of the bus of the Plaintiff in the guise of false partnership.

5. The Defendant's case is that, Defendant No.1 purchased entire land measuring Ac.0.060 dec. from Jagannath Panda vide registered sale deed Nos.22 and 23 dated 3rd January, 1997 and constructed the building over Schedule 'A' land. Schedule 'A' land was purchased in the name of the Plaintiff by him (defendant no.1) and the consideration amount was paid by him (defendant No.1). The purchase of the land in the name of Plaintiff was as per their understanding for obtaining finance where the Plaintiff would stand as a guarantor utilizing the properties over Schedule 'A' land. It is the further case of the defendants that, the Plaintiff did not account of their partnership business from 1998 and stopped payment relating to partnership from June, 2000.

6. Keeping in view such pleadings of the parties, the trial court framed 8 issues to adjudicate the dispute. Those issues are as follows:-

1. Whether the suit is maintainable in law?
2. Whether the plaintiff or the defendants have right, title, interest over the Schedule 'A' land and the houses standing thereon?
3. Whether the plaintiff and defendants have right to use the common passage, stair-case, and if the plaintiff has right to use the pump house situated over Schedule 'B' of the land?
4. Whether the plaintiff is entitled to recovery of arrear rent of Rs.54,000/- mesne profit and compensation of Rs.48,000/- over the Schedule 'C' & 'D' land and mesne profit / compensation of Rs.4500/- per month from October 2001 till the defendants vacate the suit house described in Schedule 'C' & 'D' land?
5. Whether the plaintiff is entitled to eviction of the defendants from the suit Schedule 'C' & 'D' property?
6. Whether the defendant No.1 has a joint partnership bus business with the plaintiff with basic investment of Rs.3,27,000/-, outstanding against the plaintiff on account of construction and repair of the bodies of the

buses of the plaintiff and entitled to get Rs.50% loss and profit of the said bus business?

7. Whether the defendant No.1 is / was a tenant over the Schedule 'C' property and forcibly possessing the Schedule 'D' property and the plaintiff is entitled to the rent and mesne profit of Schedule 'C' & 'D' land from plaintiff?

8. To what relief the plaintiff is entitled to?"

7. The trial court upon adjudication came to the conclusion that Plaintiff is the rightful owner of Schedule 'A' land and the defendants have no right to occupy. It is further concluded that the plaintiff has no right to use the pump house and the portion of the stair case situated over Schedule 'B' land. The defendants were further directed to deliver vacant possession of Schedule 'C' & 'D' houses with mesne profit @ Rs.1000/- per month for the ground floor and further Rs.1000/- each for two quarters in the 1st floor from such different dates fixed.

8. The defendants challenge such findings and direction of the trial court in the present appeal contending that the same is against the evidence adduced from the side of the defendants where the provisions of the Benami Transaction (Prohibition) Act, 1988 (hereinafter referred as 'the Benami Act') has been mis-interpreted. When the case of the

defendants is that, the plaintiff and defendant No.1 were in partnership transport business, the prohibition contained in Section 4(2) of the Benami Act would not be a bar for acquiring property in the name of the plaintiff.

9. The plaintiff as respondent raised cross-objection in the appeal against refusal of grant of right to the plaintiff for use of the stair-case as a common passage.

10. Keeping in view the pleadings of the parties as narrated in earlier paragraphs, the crux of the dispute is relating to acquiring Schedule 'A' property by defendant No.1 in the name of the plaintiff in terms of their claim. The question is that, whether such a claim advanced by the defendants would sustain heavier than the claim of ownership by the plaintiff over Schedule 'A' land ?

11. Section 4 of the Benami Act prior to its 2016 amendment was as follows:-

“4. Prohibition of the right to recover property held benami. – (1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held *benami*, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this sections shall apply,-

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

12. It is true that, burden of proof lies on the person who claims the property to be benami. In the instant case, defendant no.1 claims suit Schedule ‘A’ property as benami. Admittedly, the sale deed under Ext.1 in respect of the land under Schedule ‘A’ is not disputed by the defendants. As per the recitals of Ext.1, the consideration amount was paid by the plaintiff and the property was sold to the plaintiff. Jagannath Panda, the common vendor of plaintiff and defendant no.1 has not been examined by any of the parties. None of the attesting witnesses to the sale deed could be examined by either party. Such non-examination of those relevant witnesses in the trial is more damaging to the defendants

who claim contrary to the explicit recitals of the sale document as a benami transaction.

13. Next coming to the pleading of partnership business between the plaintiff and defendant no.1, no document has been adduced in that respect by the defendants. Neither any agreement nor any registration document of partnership business under the Partnership Act has been produced on record. As per sub-Section (3) of Section 4 of the Benami Act, to get exception to the prohibition contained in sub-section (1) and (2), the requirement is that the party in whose name the property stands must be in a fiduciary capacity. So the partnership business between the parties is required to be established on record with adequate evidence and it must be established that the benami property purchased is in the benefit of the partnership business. All such requirements in support of the contention of the defendants are found absent on record and therefore, the plea of benami transaction in the name of the plaintiff is disproved, particularly keeping in view the recitals of the sale deed.

14. When the foundation of the claim either about partnership business or regarding benami acquisition of property is disproved and the evidence adduced from the side of the plaintiff is satisfying payment of consideration money by him, no further case remains in favour of the

defendants to maintain their claim over the suit schedule 'A' land. Similarly, the evidences adduced from the side of the plaintiff regarding construction of the building over schedule 'A' land is found more probable in favour of the plaintiff than the claim of the defendants. The oral evidence of P.W.2 and the telephone bills under Ext.15 and Ext.16 along with materials relating to purchase of building materials makes out a higher probability in support of the plaintiff. The evidence of P.W.2 that he constructed the building over the suit schedule 'A' land for the plaintiff is left unimpeached. Therefore, the preponderance of probability being in favour of the plaintiff, the plea of the plaintiff regarding the land and building as per Schedule 'A' 'C' & 'D' properties are established.

15. Regarding the cross-objection raised by the plaintiff that he should be allowed with the right of use over the stair-case, the admitted case of the parties is that, a portion of the same measuring 3' 6" is over the land of defendant No.1. No such agreement between the parties either for construction of the stair-case jointly or for common use of the same by both parties is produced. No clear evidence has also been brought on record regarding the same except the oral statements of P.W.1. Therefore, the finding of the trial court in refusing to grant right

over said portion of the stair case for use by the plaintiff cannot be faulted with. The plaintiff without any right or agreement from defendant no.1 cannot have the authority to use the property admittedly situating over the land of defendant no.1. Therefore, the cross-objection raised by the plaintiff is rejected herewith.

16. As stated earlier the defendant being failed in his claim of benami transaction in the name of the plaintiff, no more case is left in support of his case. Their possession over the suit schedule 'C' property and 'D' property being admitted, the claim of the plaintiff that they entered and continued with the same illegally is well presumed.

17. A further dispute is raised with regard to date of possession of Schedule 'C' and 'D' property. For suit schedule 'D' properties the evidence of P.W.6 is important, which speaks that he was a tenant under the plaintiff in respect of the 1st floor of the building till May, 2000. The tenancy of P.W.6 in respect of Schedule 'D' property is not disputed by the defendants. Rather their case is that the same was lying vacant since May, 2006 and prior to that the same was in possession by the tenants of the defendants is nullified. When the tenancy of P.W.6 under the plaintiff over the Schedule 'D' property is not rebutted who continued in possession of the same till May, 2000, subsequent occupation of the

same by the defendants as per the claim of the plaintiff is more probable. Therefore, no illegality is seen in such finding of the trial court given in favour of the plaintiff. Once the right of the defendant to possess Schedule 'C' and 'D' properties is denied, their possession over the same becomes illegal and unlawful against the rightful owner. The plaintiff who has established his right over the property being its lawful owner, he is entitled for the mesne profit arising out of wrongful use of the defendants over the same. As such, the entitlement of the plaintiff for the mesne profit enjoyed by the defendant is found justified. The direction of the trial court for recovery of such benefits of wrongful enjoyment of possession from the defendants in respect of schedule 'C' and 'D' properties and determination of amount thereof is confirmed.

18. In the result the appeal is dismissed being without merit. But in the circumstances no order as to cost.

(B.P.Routray)
Judge

M.K. Panda, Sr. Steno