

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.422 of 2011

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 29.10.2011 and 03.11.2011 respectively passed by the learned Additional District Judge, Rourkela in R.F.A. No.03 of 2010 setting aside the judgment and decree dated 08.12.2009 and 16.12.2009 respectively passed by the learned Civil Judge, Senior Division, Rourkela in Civil Suit No.219 of 2008.

Smt. Balbir Kaur

....

Appellant

-versus-

Balbir Singh & Others

....

Respondents

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellant

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Mr.A.C. Panda, B.K. Sahoo
A.R. Mohanty, S. Sahoo
A. Mishra

For Respondents

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Mr.Sanjeev Udgata,
Satyabrata Udgata & A. Mishra

CORAM:

MR. JUSTICE D.DASH

Date of Hearing & Judgment : 31.03.2022

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree dated 29.10.2011 and 03.11.2011 respectively passed by the learned Additional District Judge, Rourkela in R.F.A. No.03 of 2010.

By the same, the judgment and decree dated 08.12.2009 and 16.12.2009 respectively passed by the learned Civil Judge, Senior Division, Rourkela in Civil Suit No.219 of 2008 have been set aside.

The Appellant with her parents, being the Plaintiffs before the Trial Court, had succeeded in getting a preliminary decree by allotment of 1/10th share for each from out of the suit land having obtained a declaration that registered sale deed dated 10.03.1973 (Ext.2) is a benami transaction of the suit land which had been filed purchased by Plaintiff No.1 (father) in the name of her three sons. The Respondents 1 to 3 (Defendants) having suffered from the said judgment and decree passed by the Trial Court, had carried the First Appeal under Section 96 of the Code. They have been successful in the said Appeal.

The present second Appeal has been filed by the Plaintiff No.3 alone arraigning, the co-Plaintiffs as Respondent No.8 when the other Plaintiff (mother) had expired for which she was not made a part. Said Respondent No.8 has in the meantime passed away.

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 Suit.

3. Plaintiffs' case is that Plaintiff No.1 was an employee under the Steel Authority of India Limited in its Steel Plant at Rourkela since the year 1955. During his service period, he had purchased the suit property measuring 9.5 decimals of land from one Mangal Oram for a consideration of Rs.10,000/- in the name of his sons, the Defendants 1 to 3, who were then minors. It is their case that the sale deed was executed benami in the name of three sons (Defendants 1 to 3) for

protection of the property for a long period and for the benefit of the members of the family. It is stated that Plaintiff No.1 has constructed a house over the said suit land and the Plaintiffs were staying in the living rooms and some shop rooms had been let out to different tenants. It is also stated the name of Plaintiff No.2 (mother) and the Defendants 1 to 3 were running a registered partnership firm in the name and style of M/s.Preetam Engineering Works. When Defendants 1 to 3 attained majority, they got the suit land recorded in their name. The Plaintiffs then demanded their share on the profit and the rent to which the Defendants did not agree. It is stated that Defendant No.1 thereafter started to put up new construction over the suit land for which the matter had to be reported at the police station and as no action was taken, the suit has come to be filed.

4. The Defendants 1 to 3, while traversing the averments taken in the plaint, have stated that they have purchased the suit property from out of their own income from milk business. It is stated that the owner of suit land, namely, Mangal Oram has executed the sale deed in their name and as they were minors, their father, as the guardian, represented them in the said sale deed. It is stated that they being the owners of the suit land, the Record of Right in respect of the suit land stands in their name. It is their case that the Plaintiff was a low paid employee of the Steel Plant and had no capacity to purchase the land, construct a house and shop rooms over the same by spending money after meeting all the expenses for running the family. The Defendants 1 to 3 assert to have constructed the house over the purchased land and in course of time to have established the business firm in the name M/s.Preetam Engineering Works by incurring loan from the Bank of Baroda. They state that the

rent and profits of the business is of course being distributed amongst the Plaintiffs and the Defendants 1 to 3 as per the verbal statement amongst them in that regard. In summing up, it has been stated that they are the owners in possession of the suit property where the Plaintiffs have got nothing to do.

5. Faced with above rival pleadings, the Trial Court, framing six issues, has rightly taken up issue no.3, at the first instance as it is the foundation upon which the fate of the lis stands. This issue is whether the transaction in question by registered sale deed dated 10.03.1973 is to be held to be a benami transaction and thereby whether it is to be said that the suit property is the property of the Plaintiffs and Defendants or it be said that Defendants 1 to 3 are the owners of the same wherein the parties other than them have no claim.

The Trial Court, upon examination of the evidence and their evaluation, has held that the Plaintiff No.1 has paid the consideration for the transaction and then the Defendants 1 to 3 had no source of income and there was no contribution from their side. With such finding it having taken other surrounding circumstances with regard to dealing and user of the property keeping in view the relationship between the parties, the answer has been returned that the property is the property of the parties although from Ext.2, it appears to have been purchased in the name of Defendants 1 to 3. Practically this finding has led the Trial Court to pass the preliminary decree for partition entitling the parties to their respective shares.

6. The Defendants 1 to 3 being aggrieved by the judgment and decree passed by the Trial Court having filed an Appeal, have been

successful. Therefore, the Plaintiffs being non-suited; the Plaintiff No.3 has filed the instant Second Appeal.

7. The present Appeal has been admitted on 18.05.2012 on the following substantial questions of law-

“(a) Whether the learned lower appellate court was justified in holding that the suit transaction under Ext.2 was hit by the bar under section 4(1) of the Benami Transaction (Prohibition) Act, 1988? ; and

(ii) Whether the suit transaction attracts the provision under section 4(3) of the Benami Transaction (Prohibition) Act, 1988”

8. Mr.A.C. Panda, learned counsel for the Appellant submits that when duly analyzing the evidence on record both oral and documentary, the Trial Court had arrived at a conclusion that price for the transaction has been paid by Plaintiff No.1 and thereafter he with his other family members enjoyed the property stretching over a long period; such finding being justified, the Trial Court had rightly held the properties not to be the property of Defendants 1 to 3 to the exclusion of others but to be the property of all the parties. According to him the First Appellate Court ought not to have negated the finding of the trial on the foundational facts. It is submitted that the property being purchased under the sale deed by the father by spending money from his own source and as thereafter all the members of the family since have continued to enjoy the properties as such; the First Appellate Court has fallen in grave error in holding that the suit is hit by the provision of Section 4(1) of the Benami Transaction (Prohibition) Act, 1988 (in short, ‘the BTP Act’) as it was prior to coming into force of Amendment

Act 43 of 2016 w.e.f. 01.11.2016 when it is clearly out of the purview of the same as provided in clause (a) to section 3 of section 4 of the Act.

9. Mr.S.Udgata, learned counsel for the Respondents 1 to 3, on the contrary, has supported the findings recorded by the First Appellate Court. According to him, mere payment of price for the same by the father is not the conclusive proof that although the property has been purchased in the name of the minor sons; the same would enure to his own benefit and also to the benefit of other members of the family. It is submitted that even if for a moment, it is accepted that Plaintiff No.1 had paid the consideration for the said purchase of the suit land, that would not suffice the purpose of recording the finding that the property is not the property of Defendants 1 to 3. He further submits that the relationship between the parties, the dealing of the property by all or some of them, during the entire or some period is not of that significance to record the finding in the facts and circumstances of the present case in favour of the claim of the Plaintiffs.

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

11. In order to search out the answer for the substantial questions of law, at the cost of repetition, the foundational facts for the claim of the Plaintiffs over the suit property need be narrated. It has been averred in the plaint that Plaintiff No.1 was an employee in the Steel Plant at Rourkela and he, out of his income from salary, had purchased the suit land from the owner in possession in the name of his minor sons

(Defendants 1 to 3). The registered sale deed in question is Ext.2. The Defendants 1 to 3 are the vendees therein and they have been represented by Plaintiff No.1 as their father guardian as then they were aged about 4, 8 and 12 years respectively.

So, even without going for churning out the evidence, this Court is of the view that at that time, Defendants 1 to 3 could not have provided the funds for the said purchase of the suit land and it must be provided either by Plaintiff No.1 himself or he by arranging the funds from his own source or with the help of others must have so arranged for the transaction.

In a case of benami transaction when the claim of one of the members of the family arises against the other in whose name the father has purchased the properties, when he was a minor, the most important aspect to be taken into account is the intention of the father behind the purchase of the property in the name of that minor son, i.e, whether the father at that time, purchased the property in the name of his minor son/s not to solely benefit him them or to benefit himself as well as other members too. In the instant case, the Defendants 1 to 3 are the three sons of the Plaintiff Nos.1 and 2. All others are the daughters. So, whether the purchase was with intention to exclude the daughters from the said property and to benefit the sons by acquiring that property is the paramount consideration and that stands for being answered.

Adverting, the plaint averments, it is seen that the Plaintiffs claim that the sale deed was executed in the name of Defendants 1 to 3 for protection of the property for a long period and for benefit of the members of the family. This, on a plain reading, does not make any meaning to cull out the intention in either way. If we look to the first

part that it was to protect the property for a long period, it gives rise to an inference that the intention was to deprive the other members of the family. So, this fundamental aspect as to the intention of Plaintiff No.1 is not getting expressed in the pleading. The evidence of P.W.2 (father) when read carefully also do not show that he had the intention at the time of purchase to benefit all the members of the family but not the three sons of Defendants 1 to 3 to the exclusion of others.

12. The provision of sub-section 4 of the BTP Act is as under:-

“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 section 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.”

The provision as it stood then contained a prohibition as to the right to the recovery of the property held benami. Sub-section 3 in its clause (a) was excluding the cases where a person in whose name the

property is held as a coparcener in a Hindu undivided family and when the property is held for the benefit of them in the family. The Trial Court when banking upon this clause (a) to sub-section (3) of section 4 of BPT Act says that the suit is not hit by the provision of section 4 of the Act; the First Appellate Court has taken a view to the contrary. Without going to examine the tenability of the reasons given by the Courts below, taking the view at their respective level, when the plaint case is given a careful reading, it appears to have not been pleaded that there was a Hindu undivided family at the relevant point of time of purchase and that said Hindu undivided family had any joint family property at their hands being under the enjoyment of the members of the joint family either directly or indirectly and more importantly, that the joint family had the income and that has been the source in providing the consideration for the transaction. So, the basic facts to bring the case within the exception under clause (a) of sub-section (3) of section 4 of the Act are wholly lacking in the pleading and evidence. In fact the very coparcenery being then so in existence is stated nowhere. The evidence of P.W.1 being gone through, it is seen that he has stated in his examination in chief that the said sale was benami transaction and he had purchased the said land by paying money from his own salary but in place of purchaser, the names of Defendants 1 to 3 was mentioned and they were then aged about 12, 10 and 4 years respectively. His intention as he states to protect the property for a long period and for the benefits of the members of his own family and not otherwise. This P.W.1 has nowhere stated that purchase was never to benefit to Defendants 1 to 3. In cross-examination, he has again stated that he does not so want. The case projected is thus the purchase was to benefit the Defendants 1 to 3

as well as all others. He has also stated that the record of right in respect of the said land has been prepared in the name of Defendant Nos.1 to 3 to his knowledge and he had never raised any objection to the same.

For all the aforesaid; the answers to the substantial questions of law run in the direction of non-suiting the Plaintiffs enforcing their right in claiming share over the suit properties as against Defendants 1 to 3.

15. Resultantly, the Appeal stands dismissed. There shall, however, be no order as to cost.



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