

**(1955) 01 OHC CK 0018**  
**In the Orissa High Court**  
**Case No : S.A. No. 55 of 1951**

Allavarapu Ammayamma

APPELLANT

Vs

Chapadhar Chowdhury

RESPONDENT

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**Date of Decision :** 31-01-1955

**Acts Referred:**

**Citation :** (1955) 21 CLT 364

**Hon'ble Judges :** Misra, J

**Bench :** Single Bench

**Advocate :** G.K. Misra, for the Appellant; B.K. Pal and R.K. Ratho, for the Respondent

**Final Decision :** Allowed

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## Judgement

Misra, J.—The Plaintiff has filed this second appeal against the judgment and decree of the learned Subordinate Judge of Berhampur dated 30th November, 1950, reversing the judgment and decree of the learned Additional Munsif of Berhampur, dated 17th January, 1949, in a suit for setting aside a sale-deed, Ext. A, dated 19-4-1945 for Rs. 450/-, executed by the Plaintiff, in favour of the Defendant in respect of a house.

2. The Plaintiff's case was that she was a midwife and that the Plaintiff and the Defendant were leading a life of immoral intimacy for the last twenty years and the Plaintiff had full confidence in the Defendant who was in a position to dominate her will. In the early months of 1945, the Plaintiff was ill and the Defendant was attending upon the Plaintiff and looking after her comforts, and during that period the Defendant exercised undue influence over her and misrepresented to her that the suit house should not continue to stand in her name, she happened to be a Government servant and made her believe that the house should be conveyed in the name of the Defendant nominally and benami for her. Under that impression the Plaintiff executed a sale-deed dated 19-4-45 in favour of the Defendant, and the recitals in the sale deed about the discharge of the prior loans incurred by the Plaintiff as necessary for the sale were false, and

the Plaintiff was not paid a single pie by the Defendant although a show of payment was made before the Sub-Registrar, and in spite of the execution of the sale-deed the Plaintiff was continuing in possession of the suit-house. She further averred in the plaint that she had no independent advice of her own in connection with this transaction, and the Defendant was always putting the Plaintiff as the real owner of the suit-house and was also acting as her agent in realising the rent for the suit-house and paying the me to the Plaintiff. The Defendant also wrote a post-card dated 10-8-45 to the Plaintiff wherein he clearly agreed to register a document reconveying the suit-house to the Plaintiff. As however the Defendant had been postponing the execution of the deed of reconveyance, the Plaintiff suspected that the Defendant had the idea of benefiting himself and was not willing to reconvey the property to the Plaintiff in spite of repeated requests. Her case was that the document was a nominal transaction and was vitiated by undue influence and misrepresentation, and as such was liable to be set aside.

3. The Defendant stoutly denied the Plaintiff's allegation that the Plaintiff and the Defendant had ever led a life of immoral intimacy for any period. The Defendant was a respectable Oriya Brahmin, and had been living with his wife and children in Gosaninuagan, and he could never dominate the will of the Plaintiff as there was no confidence between him and the Plaintiff nor did he ever attend upon the Plaintiff and look after her comforts during her alleged illness. The sale was perfectly bonafide transaction, and conveyed full title to the Defendant who was the absolute owner of the property, and the recitals about the necessity and passing of consideration were perfectly true and real. The Defendant for the first time came to know the Plaintiff while she was practising prostitution as a profession, and in that capacity was visiting the G.V.V. Chetty's Choultry under the management of the District Board of Ganjam, where men and officers of all ranks used to stay. The Defendant was a clerk in charge of the choultry under the District Board for about sixteen years. The postcard dated 10-8-1945 referred to in paragraph 5 of the plaint did not contain the Defendant's signature, but was written by the Defendant under instructions and directions of the Plaintiff. The Defendant, out of sheer generosity, had accommodated the Plaintiff to stay in the house subsequent to the execution of the sale-deed, as the Plaintiff wanted to stay at Berhampur for a month or two but when the Plaintiff continued her stay indefinitely, the Defendant required her to execute a rent-deed or quit- the house. It is on account of this that the present suit has been filed by the Plaintiff on the evil advice of certain persons.

4. The following issues were framed in the suit-

(1) Whether the sale of the suit-house by the Plaintiff in favour of the Defendant is a nominal one and not borne out by any consideration and brought about by the Defendant by exercising undue influence.

(2) Whether Defendant agreed to reconvey the suit-house to the Plaintiff.

(3) Whether Plaintiff is not estopped from contending that the sale is not a genuine transaction.

(4) What relief ?

In the trial court, the main contention between the parties was whether there was any immoral intimacy between the Plaintiff and the Defendant which could have resulted in the Defendant exercising undue influence over the Plaintiff in the matter of execution of the sale deed. The Defendant strongly denied any suggestion of any such immoral intimacy. A volume of letters were produced and were marked as Ex. I series in the case (Exts. I to 1/M). These letters were written by the Defendant to the Plaintiff. On a consideration of these letters, the learned Munsif came to the conclusion that the immoral intimacy between the parties had been proved. Regarding benami nature of the transaction, the learned Munsif Came to the conclusion after a consideration of the oral and documentary evidence that in spite of the execution of the sale-deed, the Plaintiff has all along been treated as the real owner of the house to whom even the rent for the house was paid. During the trial another document Ext. 2 which purports to be an agreement by the Defendant and his sons was filed by the Plaintiff. This document shows that in spite of the execution of the sale-deed, the Defendant and his sons agreed to allow the Plaintiff to continue to reside in the house till her death. Relying on Exts. I/H, I/K and 11M, the learned Munsif came to the conclusion that the subsequent conduct of the Defendant as gathered from these letters shows that the Plaintiff was treated as the real owner of the house inspite of the execution of the sale-deed.

5. Regarding the recitals in the sale-deed about necessity for the execution of Ext. A, the learned Munsif pointed out that the recitals were at variance with the Defendant's evidence in the court, inasmuch as the Defendant stated that the Plaintiff sold the house to start a money-lending business with this sale-consideration. It may be noted that the recitals in the sale-deed were that the necessity for the sale arose for the purchase of medicine and for maintenance and for expenses of a visit to Tirupathi. Naturally the learned Munsif concluded that the necessity now mentioned by the Defendant was at complete variance with the necessity recited in the sale-deed. The learned Munsif therefore concluded that the Defendant had very often tried to avoid the truth and had given false statements and was far -from straightforward in his conduct in the suit. He accordingly found that the sale-deed was not a real transaction and he accepted the Plaintiff's version of the circumstances under which she came to execute it. Accordingly he decreed the suit in favour of the Plaintiff.

6. Against this decree, the Defendant filed an appeal. The learned Subordinate Judge came to the conclusion that the usual tests for deciding the the benami nature of a transaction have not been satisfied by the Plaintiff. Curiously enough the Defendant who fought so strongly about the existence of immoral intimacy between the Plaintiff and the Defendant for over twenty years in the trial court, gave up this case at the appellate stage and admitted that the Plaintiff was his

mistress and that immoral intimacy had existed between them for over twenty years before the suit. The learned Subordinate Judge also on a consideration of the letters, Exts. 1 series, agreed with the finding of the learned Munsif on this point. In spite of this, the learned Subordinate Judge was of opinion that the Plaintiff must satisfy the usual tests of proving the benami nature of the transaction. In this case, he found that the sale-deed came from the custody of the Defendant, and further, the consideration had been paid before the Sub-Registrar, and this, in view of the learned Subordinate Judge, was a very strong circumstance about the genuine nature of the transaction. The learned Munsif had found that the Defendant had not the means to pay the consideration of the sale-deed, that is, Rs. 450/- as he had very little land in his possession. The learned Subordinate Judge disagreed with this finding and held, believing evidence of the Defendant (D.W. 2), that he had sold some lands to purchase the suit-house. The Defendant had moreover mutated himself in the Municipal Registers on the strength of the sale-deed, and had paid the Municipal taxes. The motive suggested in the plaint for the execution of the sale-deed was, in the opinion of the learned Subordinate Judge, certainly fantastic. On the question of motive, the Plaintiff had examined P.W. 3, who said that there was relationship between the parties as husband and wife, and the Plaintiff had asked the witness that her salary was less and that the Defendant had told her that her salary would not be increased unless she nominally transferred the suit-house in favour of the Defendant, and the witness told her that she could do so if she had confidence in him. The learned Subordinate Judge thought that this motive as alleged by P.W. 3 was at variance with the motive alleged in the plaint. Regarding the letter dated 10-8-45 the learned Subordinate Judge held that it in no way conflicted with the genuine character of the original sale-deed, for, even in the case of a genuine transaction there may be an understanding between the parties that under some circumstances the vendee would reconvey the property to the vendor. Such an understanding did not show that the transaction at its inception was not genuine. On a consideration of the evidence, the learned Subordinate Judge came to the conclusion that the Plaintiff had failed to discharge the heavy onus that lay upon her to prove that the transaction was benami in nature. He, therefore, allowed the appeal, and dismissed the Plaintiff's suit. The present second appeal has been filed by the Plaintiff against this decree.

7. Mr. G.K. Misra, learned Counsel for the Appellant, frankly concedes that if the ordinary criteria which applied to the case of a benami transaction are applied to the present case, then the finding of the learned Subordinate Judge will be deemed to be correct and he would be deemed to have been justified in dismissing the Plaintiff's suit. He contends that the learned Subordinate Judge has not correctly interpreted the various letters that passed between the parties, and he has not taken the circumstances of the Case as a whole into consideration in coming to a conclusion as to the real nature of the transaction. The question involved in this appeal is a mixed question of law and fact and if the final court of fact does not keep in view the broad probabilities of the case as evidenced by the

letters, and the circumstances under which a transaction comes into existence, it becomes the duty of this Court to examine the question afresh and come to a finding as to whether on the proved facts the proper inference has been drawn by the first court of appeal.

8. In the trial Court, the attention of the parties was mostly revetted on the question whether there was prior immoral intimacy between the Plaintiff and the Defendant so as to probablise the case of undue influence pleaded by the Plaintiff. The Defendant stoutly refused to admit it, and the parties went to trial on this issue. The Plaintiff produced a large number of letters which conclusively demonstrated the existence of immoral intimacy, between her and the Defendant. The learned Munsif having concluded in Plaintiff's favour on this point, was justified in holding that the Defendant was in a position to dominate the will of the Plaintiff and the Plaintiff's case that she had no independent advice in the matter of the execution of the sale-deed was true. This aspect of the case has been entirely lost sight of by the learned Subordinate Judge. Once it is established that the Plaintiff and the Defendant were living as husband and wife for over twenty years, there is no wonder that the Defendant made the Plaintiff believe that as a Government servant she ought not to retain the house in her name, and should execute a benami sale-deed in his favour. It is true that in law there is no prohibition against a Government servant owning private property. But the question is whether the Defendant was in such a position as to make the Plaintiff believe in such a statement. The learned Munsif who examined the Plaintiff and saw her in the box accepted her statement after examining the other evidence in the case. With regard to the Defendant, he observed that he had very often tried to avoid the truth and had given out false statements and was far from straightforward in his conduct in the suit. It may be noted that issue No. 1 covered the Case of undue influence. It read as follows "Whether the sale of the suit-house by the Plaintiff in favour of the Defendant is a nominal one and not borne out by any consideration" and brought about by the Defendant by exercising undue influence." The issue was answered in favour of the Plaintiff. The learned Subordinate Judge does not appear to have considered the question of undue influence at all. Having regard to the circumstances of the case, I am of opinion, that the sale-deed, apart from the question of Benami, was vitiated by undue influence that the Plaintiff had no independent advice in the matter of its execution.

9. The question of the custody of the document is not in my opinion, very material in the circumstances of the case. The Plaintiff and the Defendant were living together and the Defendant was her paramour. She had complete confidence in the Defendant. Under those circumstances, if the document remained in the custody of the Defendant, he cannot take advantage of such custody. It has been argued by Mr. B.K. Pal, learned Counsel for the Respondent, that the fact that Ex. 2, that is the agreement executed by the Defendant and his sons on the same day was in the custody of the Plaintiff goes to show that the custody of the sale-deed by the Defendant was a great factor in favour of the

Defendant Respondent. Mr. G.K. Misra, learned Counsel for the Appellant, points out that the agreement, Ext. 2, was executed not only by the Defendant but by his sons also, that is why the Defendant might have well asked her, the Plaintiff, to keep the agreement in her custody, so that if any untoward event at any future time happened, she could fall back upon the agreement. In my opinion that is a very natural explanation and should be accepted. There are three letters, Exts. 1 dated 10-8-45, 1/k dated 1-9-46 and Ext. 1/M bearing no date, which have a great bearing on the case. It is surprising that although the Plaintiff filed all these letters written by the Defendant, the corresponding letters of the Plaintiff written to the Defendant to which these are replies or contemporaneous letters written by the Plaintiff to the Defendant have not been filed by the Defendant. In Ext. 1 the Defendant says that the Plaintiff's relations saw the Defendant and expressed their annoyance and "spoke very harsh words of blame to me and said that they have lost their confidence in me and went back". The implication is that the Plaintiff's relations were annoyed, because the Defendant had induced her to execute a nominal sale deed in favour of the Defendant, and the Defendant further says in the letter that the Defendant said that the Plaintiff would purchase another site in the village. The Defendant was rather sorry for this, and he promised that he would register another document reconveying the house in favor of the Plaintiff. He had no objection to this, and he asked the Plaintiff not to hesitate to take back the house and she need be afraid of that. It is common ground that the word "they" used in this letter refers to the Plaintiff. This letter shows that four months after the execution of the sale-deed, when the Plaintiff's relations took exception to the execution of this benami sale-deed, the Defendant was agreeable to execute and register a document reconveying the property in favour of the Plaintiff, and asked the Plaintiff to take back the house.

10. Ext. 1/H is another letter dated 31-5-46 in which the Defendant says as follows "In my life God has not taught me to give ingratitude for gratitude. In whatever way you are disposed to me I am looking well after you according to Dharma and I shall be so doing. As regards you, you know about it." This letter had been written very shortly after the execution of the sale-deed, and it shows it the Defendant was grateful to the Plaintiff and he purported to remain grateful during his life.

11. Ext. 1/K dated 1-9-46 is another letter written by the Defendant to the Plaintiff. It runs as follows

Since many days there is no news about your welfare. I presume you forgot everything because you are otherwise happy with others. I took a separate house for rent here. As soon as you come and occupy of this house, we shall go away with children to the rented house. Till the construction of our front house is completed, out almirah will be in this house. After the completion of our front house we shall shift our almirah to our house. Till your arrival be writing your welfare. All are safe here. Be watching the rest of the events carefully.

It will be seen that this letter talks of three houses, one is a disputed house

where the Plaintiff would come and live, the second is a rented house where the Defendant would live when the Plaintiff came and lived in the disputed house and the third is the Defendant's own house the front portion of which had not been completed, and so the Defendant wanted that his almirah should remain in the disputed house till the completion of the front house of the Defendant. It is difficult to understand the argument of the Defendant that by the agreement, Ext. 2, they had agreed that the Plaintiff would have a right to reside in the house during her lifetime, and therefore, he had written this letter to the Plaintiff. The Plaintiff's residence in the house need not have compelled the Defendant to leave this house and take a rented house until the completion of his own house. It shows that till the date of this letter the Defendant was treating the disputed house as the house of the Plaintiff in spite of the execution of the sale-deed. Ext. 1/M is another letter which is very important. It recites "Till now nobody occupied your house. There is a likelihood of some one occupying it.... As soon as they occupy, I shall send the rent-deed to you.... You need not send me the money for the repairs effected to your house. You better appropriate the amount towards the sale-proceeds of your box and Temmetlu (ear-rings)." This clearly shows that the Plaintiff has been recognized as the owner of the suit-house in this letter. The only difficulty is that there is no date given in this letter. But the learned Munsif has given good reasons to hold that this letter has been written long after the execution of the sale-deed, and long after Ext. 1/K. Ext. 1/M further says "The key that is with me is herewith sent". The Plaintiff in her evidence says that she received this key after her retirement which means long after the execution of the sale-deed. There is a sentence at the end of this letter, i.e. "Your friend that has deceived you". This shows that the parties had found out by that time that the Defendant had taken undue advantage over the Plaintiff and had made her to execute a nominal sale-deed, and that is why he describes himself as the Plaintiff's friend that had-deceived the Plaintiff.

12. On a consideration of the entire facts and circumstances of the case, I am clearly of opinion that the Plaintiff has proved that the sale-deed in question which was obtained by the Defendant was a nominal document and without consideration, and it had been executed by the Plaintiff as a result of undue influence practised upon her by the Defendant. The various aspects of the case which I have dealt with and which have been discussed by the learned Munsif were lost sight of by the learned subordinate Judge who decided the case treating it as a simple case of a benami transaction.

For the reasons stated above, I would allow this appeal, set aside the judgment and decree of the learned Subordinate Judge and restore the judgment and decree of the learned Munsif. The Plaintiff-Appellant is entitled to her costs.