
(2008) 06 OHC CK 0045
In the Orissa High Court

Sri Krushna, Chandra Patnaik

APPELLANT

Vs

Commissioner, Consolidation and Others

RESPONDENT

Date of Decision : 18-06-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 53, 54

Citation : (2008) 106 CLT 568 : (2008) 2 OLR 695 Supp

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sanju Panda, J.—This Writ Petition is directed against the Order Dated 12th September, 1997 passed by the Commissioner, Consolidation, Bhubaneswar in Revision Case No. 559 of 1996 confirming the Order Dated 31st August, 1996 passed by the Deputy Director, Consolidation, Puri in Consolidation Appeal Case No. 149 of 1994.

2. The main contention of the Petitioner is that though the consolidation authorities have the jurisdiction to decide the dispute between the parties, they have decided the same illegally and arbitrarily and without considering the facts and circumstances of the matter. Thus, the questions to be decided in the Writ Petition are, whether the Consolidation authorities have the jurisdiction to consider a document as sham transaction which is a void document and whether the findings given by the consolidation authorities are in accordance with law.

3. It appears that one Radhanath Pattanaik was an occupancy raiyat in respect of the disputed land who died unmarried. He was the paternal uncle of the Petitioner. He executed the nominal and inoperative registered sale deed dated 6.8.1984 in respect of the disputed property in favour of Opposite Party No. 4, who is the son of his friend, without receiving any consideration and also the possession of the disputed land was not delivered by Radhanath in favour of Opposite Party No. 4. Taking advantage of the said document and after the death

of Radhanath, Opposite Party No. 4. managed to obtain the Parcha in respect of the property in question in his favour which has been granted basing upon the certified copy of the said sale deed without any explanation as to the non-existence of the original sale deed. Thereafter, he has claimed his title and possession on the basis of the said sale deed. The further case of the Petitioner is that being the sole successor of late Radhanath he has possessed his land and the original sale deed was all along in the custody of said Radhanath who before his death explained every thing to the Petitioner and also handed over the original sale deed to him for taking appropriate steps to retain the property with him. Radhanath was paying the rent of the land till his death and after his death, the Petitioner paid the rent regularly till 1993 and all these facts prove that the alleged sale deed was a sham transaction and was never acted upon.

4. During the consolidation operation, the present Petitioner filed an objection with a prayer to record his name in respect of the property in question instead of the name of the present Opposite Party No. 4 and Opposite Party No. 4 objected to the same and stated that the disputed property has been purchased by him from late Radhanath and he has been possessing the same from the date of the purchase and also paying the rent thereof. The specific case of Opposite Party No. 4 is that the disputed property is Bagayat in nature and as such is not coming under the definition of "Holding" and therefore the Consolidation authorities have no jurisdiction to decide the questions as to whether a document is a void document, as alleged by the Petitioner and whether the Civil Court is the only competent Court to decide the same.

5. In support of their respective pleas, Petitioner as well as Opposite Party No. 4 adduced oral as well as documentary evidence to prove the genuineness of the claim. The Consolidation Commissioner without dealing the evidence adduced by the parties gave a general finding that the registered sale deed dated 6.8.1984 per se appears to be genuine. The deed can be at the best a voidable one. The Consolidation authorities have power to declare the same void. On the above finding the revision filed by the Petitioner was dismissed, as there was no allegation that the original sale deed had been stolen or lost or it did exist in the custody of the Petitioner.

6. This Court has gone through the records as well as the order passed by the consolidation authorities. It reveals therefrom that the Consolidation authorities have not discussed the evidence adduced by the parties and they have also not distinguished the transaction whether it is a sham transaction or a sale deed as per Section 53 or 54 of the Transfer of Property Act. So far as a sham transaction is concerned, in order to come to a conclusion, it has to be determined, whether the transaction is a sham transaction or not.

7. In the case of Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, , the Apex Court has clearly made distinction between "Sham transaction" and "Benami transaction" and held that two kinds of benami transactions are generally recognized in India. "It is necessary to note that the

word "Benami" is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when "A" sells properties to "B" but the sale deed mentions "X" as the purchaser. Here the sale itself is genuine, but the real purchaser is "B", "X" being his benamidar. This is the class of transactions which is usually termed as benami. But the word "Benami" is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when "A" purports to sell his property to "B" without intending that his title should cease or pass to "B". The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or "B", to enquire into the question as to who paid the consideration for the transfer, "X" or "B". But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.

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8. It is settled that while determining the transaction as a "Benami, Sham or Genuine" the Court has to look into the following terms;

1. the source from which the purchase money was delivered;
2. possession of the property-
 - a. the party in possession of and not the nature and character of his possession;
 - b. whether possession was taken after the purchase;
3. the position of the parties and their relationship;
4. the circumstances of the parties;
5. the motive for resorting to the benami transaction; 6; custody and production of the title deeds;
7. previous and subsequent conduct of the parties; and
8. as has been appropriately indicated by the Supreme Court in the aforementioned reported decision, the source for consideration is almost the deciding feature.
9. While ordinarily these are the features which enter into the arena of consideration in deciding whether a transaction is benami or not, right conclusion can only be reached by adopting a cumulative appreciation of the entire evidence. A combination of some or all of them and a proper weighing and appreciation of their value may in a given case go a great way towards indicating

as to where the real title lies.

10. In view of the above settled position of law, the consolidation authorities should have scrutinized the evidence adduced by the parties in the present case and given findings as to whether the sale deed is a "Sham transaction" or "Benami transaction" and whether the title passed through the said sale deed, but they have not done so while passing the impugned orders. Therefore, this Court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India sets aside the Order Dated 12th September, 1997 passed by the Commissioner, Consolidation, Bhubaneswar in Revision Case No. 559 of 1996 and remands the matter back to the Commissioner, Consolidation, Bhubaneswar to decide the dispute as per the above guidelines.

With the above direction, the Writ Petition is allowed. No costs.