

IN THE COURT OF THE SENIOR CIVIL JUDGE, BANPUR.

Present:

Sri Satya Ranjan Pradhan, LL.B.,
Senior Civil Judge, Banpur.Civil Suit No. 56/210 of 2014/2008Duryodhan Narendrasingh, aged about 60 years, S/o Late Godabarish
Narendrasingh of Vill: Jhintikapalli, Po: Punjiama Sasan, P.S: Banpur,
Dist: Khurda

..... Plaintiff.

-Versus-

1. Gitanjali Swain, aged about 28 years, W/o Sidheswar @ Sudarsan Narendrasingh.
2. Sidheswar @ Sudarsan Narendrasingh, aged about 35 years, S/o Late Godabarish Narendrasingh.
Both are of Vill: Jhintikapally, Po: Punjiama Sasan, P.S: Banpur, Dist: Khurda.

.....Defendants

3. Dusasan @ Dhaneswar Narendrasingh, aged about 50 years, S/o Late Godabarish Narendrasingh of Vill: Jhintikapalli, Po: Punjiama Sasan, P.S: Banpur, Dist: Khurda.

..... Prof. Defendants.

Counsel for the plaintiff ...

Sri B.S. Satapathy, Advocate
& his Associates.

Counsel for the defendants

Sri S.N.Mishra, Advocate
& his associates.

Date of Argument – 22.10. 2014

Date of Judgment – 30.10.2014

J U D G M E N T .

1. This is a suit for declaration filed by the plaintiff Duryodhan Narendrasingh.

2. The case of the plaintiff as per the plaint is that:

He along with defendant No.2 and proforma defendant No. 3 are the sons of Late Godabarish Narendrasingh and defendant No.1 is the wife of defendant No.2. Their father Godabarish Narendrasingh had died on 24.04.2002. Prior to his

death the mother of the parties namely Kalabati had died. On 26.04.1972 there was a partition among the brothers and parents vide registered partition deed No.3058. In that partition properties were divided among the sons and some properties were kept with the parents. Although some properties were allotted to the father but the parents were maintained by the sons. So far as the suit properties are concerned it is mentioned in the plaint that the suit properties are the tank and its embankment. The plaintiff had filled up some portion of the tank with earth and using it as his thrashing field. The plaintiff and his brothers were enjoying all the suit properties according to their convenience but defendant No.1 and 2 prevailed over their father Godavarish Narendrasngh and could able to obtain the registered sale deed bearing No.145 dated 25.01.2001 in the name of defendant No.1 Gitanjali Swain. It was alleged by the plaintiff in the plaint that although the said execution of sale deed was made by their father late Godavarish Narendrasingh in fact there was no necessity for sale of the suit properties as their father was earning a sum of Rs.30,000/- from the fruit bearing trees situated over the suit land and the fishes reared in the tank. Apart from that the sons were always supplying food to him. Moreover at the time of the execution of the sale deed his father was pretty old and was not in proper state of mind. The defendants No.1 and 2 along with some others had given him some false information and thereby obtained the said sale deed. Although the said sale deed was executed no consideration money was given by the said defendants to their father, Similarly delivery of possession was also not handed over to her. Out of the suit properties some were possessed by Late Godavarish Narendrasingh along with his cousin brothers which were not partitioned. Apart

from the aforesaid fact consolidation proceeding was also going on in their village at that particular time. So far as his knowledge and cause of action for filing of the suit is concerned it was mentioned by the plaintiff that on 11.01.2008 he could know about the said sale deed after receipt of the notice to appear in Remand Revision Case No. 536 and 537 of 2002 and after obtaining the certified copy of the R.S.D No.145 dated 25.01.2001 on 01.10.2008. Citing the aforesaid fact the plaintiff had prayed to declare the said sale deed bearing No. 145 dated 25.01.2001 to be null and void and not binding upon him.

3. Here in the suit only defendant No.1 and 2 appeared and filed their W.S whereas defendant No.3 did not appear and was set exparte. In their W.S defendant No.1 and 2 denied all the averments mentioned by the plaintiff except the fact of previous partition which took place among them and the fact of execution of sale deed made by Godavarish Narendrasingh in favour of defendant No.1. It is the case of the defendants that on 26.04.1972 the partition took place between the three sons of Godavarish Narendrasingh and him as the plaintiff who was aged about 24 years old created disturbances in the family and demanded partition. At that time Defendant No.2 was aged about 7 years and proforma defendant No.3 was aged about 12 years. After partition the plaintiff severed all his relationship with his father and brothers and resided separately. On the other hand defendant Nos 2 and 3 who were minor resided with their fathers and some of their properties were alienated by their father, at the time of necessity of family. Defendant No.2 after being major looked after the property and was providing food and medicine to their father. So far as the suit property is concerned it is mentioned in the W.S that it was the property of

their late father and he was possessing it exclusively till he transferred it to defendant No.1. So far as the necessity for selling it is mentioned in the W.S that their father was suffering from leprosy 7-8 years prior to his death. So for his management as well as for his treatment he had borrowed money from other people. Citing the aforesaid facts the defendants prayed to dismiss the suit of the plaintiff.

4. On the above pleadings of the parties the following issues were settled.

- 1) Whether the suit is maintainable ?
- 2) Whether the plaintiff has any cause of action to institute this suit?
- 3) Whether the suit is defective for non-joinder of necessary parties?
- 4) Whether the suit is barred by limitation?
- 5) Whether the registered sale deed bearing No.145 dated 25.01.2001 in respect of 'B' schedule property is null and void and not binding upon the plaintiff?
- 6) Whether the plaintiff is entitled to seek any other relief?

5. In order to substantiate his case the plaintiff has examined only two witnesses including himself as P.W.1 and proved certain documents in his favour. On the other hand the defendants examined two witnesses and produced certain documents.

F I N D I N G S.

6. Issue No.5 :-

This being the most important issue is taken in to account first for discussion.

Here it is to be decided as to whether the RSD bearing No.145 dated 25.01.2001 executed in respect of schedule-B property is null and void and not binding upon the plaintiff or not. The plaintiff had challenged the execution of the

alleged sale deed on the ground (i) that the said sale deed was executed during the consolidation operation which was going on in their village. (ii) Secondly it was challenged on the ground of fraud and undue influence and (iii) Thirdly on the ground that there was no necessity on the part of Godavarish Narendrasingh to sale the suit property. So far as challenging the sale deed on the ground of consolidation operation is concerned it was urged by the counsel for the plaintiff that the alleged sale deed was executed on 25.01.01 while the consolidation operation was going on in the mouza Jhintikapalli. In this context he had brought the notice of the court to the contents of the sale deed wherein it is clearly mentioned that the vendor Godavarish Narendrasingh had received the ROR prepared U/s 9(3) of the OCHPFL Act-1972. The defendants during their cross examination also admitted the said fact that consolidation proceeding was going on while the alleged sale deed was executed. So now the question is whether the alleged sale deed executed on 25.01.01 by Godavarish Narendrasingh in favour of Gitanjali Swain is void on that account or not. In this regard reference can be made to section 4(2) of the said Act which reads as follows:-

“ Notwithstanding anything contained in any law for the time being in force no land owner , except with the permission, in writing of the Consolidation Officer previously obtained, shall after publication of the notification under Sub-section (1) of Section 13 transfer by way of sale, gift, mortgage or exchange any land, and no document purporting to effect any such transfer shall be registered by a Registering officer appointed under the Registration Act, 1908 unless the document accompanied by a certified copy of the aforesaid written permission. Provided that no

permission of the Consolidation Officer shall be necessary for transfer by way of sale, gift, mortgage or exchange of lands, which are covered by orchards, groves or homestead lands, which in the opinion of the Director of Consolidation is subject to several fluvial action, intensive soil erosion, or prolonged water logging or is otherwise for cultivations". So as per the aforesaid law any sale deed executed after publication of notification under sub section-1 of section-13 will be void. In this context the plaintiff had relied upon the decision of the Hon'ble court which was decided between Padmalabha Swain- Vrs- Prasana Kumar Raut and others reported in 1994 (II)OLR page-53 wherein the Hon'ble court has held that " Section 4(2) of the Act mandatorily prohibits the transfer of any agricultural land by way of sale gift, mortgage or exchange after publication of notification U/s 13(1) of the Act unless it has been done with the written previous permission of the Consolidation Officer and further directs that no document purporting to effect such transfer shall be registered by the registering authority unless it is accompanied by the certified copy of the written permission. There can be hardly any dispute that the provision is in a mandatory cast and compels rigorous performance. Any transaction effected in contravention of that provision would be automatically void as is enjoined under Sec.23 of the Act". Learned counsel appearing for the defendants also admitted the said fact and contended that although the father of the parties i.e. late Godavarish Narendrasingh had received the ROR U/s 9(3) of the OCHPFL Act, still then it is to be proved by the plaintiff that at the time of execution of the deed notification as per the section -13 (i) of the said Act has been published. Unless and until plaintiff proves the publication of the same, prior to the execution of the said sale deed it

can not be held that the said sale deed executed by Godavarish Narendrasingh is void. Considering the aforesaid provision of law as well as the ratio laid down by the Hon'ble court I am of the opinion that it was to be proved by the plaintiff that before the execution of the sale deed notification U/s 13(1) of the OCHPFL Act has already been published but the plaintiff could not establish the same by way of producing any documentary evidence or by bringing it out from the mouth of any of the defendants. Unless it is proved it can not be held that the sale deed is void on account of continuance of consolidation proceeding during the period when the alleged sale deed was executed.

So far as the fraud or undue influence is concerned it is alleged by the plaintiff that the defendants (defendant No.1 and 2) prevailed over late Godavarish Narendrasingh and could get the sale deed executed through him with the help of some hunchback without giving him proper information. It is further alleged by the plaintiff that at that time their father was aged about 80 years and was not in a proper state of mind. The defendants by practicing fraud could able to get the sale deed executed. Accordingly he claimed the sale deed to be fraudulent and void. On the other hand the defendants claimed that their father was in a proper state of mind and had executed the same as he was requiring money for the treatment of his leprosy. It is a rule of law that where fraud is alleged as having been perpetuated on a party, the party alleging fraud must set out clearly the particulars of fraud and onus lies on him to prove that fraud has been practised for execution of the said sale deed. During the course of the argument of the case the counsel appearing for the defendants submitted that as because the plaintiff claims that

fraud has been practised by the defendants for obtaining the sale deed it is the duty of the plaintiff to prove that fraud has been practised and moreover it is to be proved by him that as to how the said fraud has been practised by late Godavarish Narendrasingh for execution of the sale deed. More over the said fact must be specifically pleaded in the pleadings and substantiated. Mere allegation of fraud by the plaintiff would not sufficient but must be clearly pleaded & substantiated. In this regard he had relied upon the judgment of the Hon'ble Court fortified in AIR-1974-Orissa -110 decided in the matter of Madan Panda – versus - Hadibandhu Panda and another and in the case between Harekrushna Sahoo and another – versus – Bhagirathi Sahoo and others reported in AIR-1975-Orissa-97. On the other hand the counsel appearing for the plaintiff contended that the burden of proof of the fact that no undue influence was made on late Godavarish Narendrasingh is on the defendants for that matter he had relied upon the judgment of the Hon'ble Court passed in the case of Banchha Bholu and others – versus- Saria Bewa and others reported in AIR-1973-Orissa-18. After going through the decisions filed by both the parties I am of the humble opinion that the decision referred by the plaintiff is not applicable in this case, as the fact and circumstances of that case is different from the fact and circumstances of this case at hand. More over the fact of shifting of onus was clarified by the Hon'ble court in the judgment pronounced by the Hon'ble Court fortified in AIR 1974 -Orissa-110 by referring the judgment of the Apex Court in the case of Ladli Prashad Jaiswal -vrs- The Karnal Distillery Co. Ltd., Karnal, AIR 1963 SC 1279. While dealing with a case of plea of fraud and undue influence the Hon'ble Court has held that “ The rule of pleading is clear that where fraud is

alleged as having been perpetrated on pardanashin lady in getting a document from her, the party alleging fraud must set out clearly the particulars of fraud. No such particulars of fraud have been disclosed in the objection petition of the appellant or respondent No.2 except a bare assertion of fraud. This plea of fraud must be dismissed as not entertain-able. The law also requires that the party who raises a plea of undue influence shall also set out full particulars thereof. The plea of undue influence must be precise and all necessary particulars in support of the plea must be embodied in the pleading. Regarding the doctrine of undue influence, the Supreme Court in the case of Ladli Prashad Jaiswal- vesus- the Karnal Distillery Co. Ltd., Karnal, AIR 1963 SC 1279 has said as follows:

“A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction: he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position. Cl. (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by

evidence or by the presumption arising under sub-section (2) and he enters into a transaction with that other person which on the face of it or on the evidence adduced appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift.”

In the case of Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib. AIR 1967 SC 878 it is said :-

“The Court trying a case of undue influence must consider two things to start with namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor ? Upon the determination of these issues a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of a solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and

child are those in which such a presumption arises.”

So as revealed from the aforesaid judgment of the Hon'ble Court it was the duty of the plaintiff to clearly mention in the pleading itself the full particulars of fraud or undue influence along with the fact as to how the fraud and undue influence was used as a means for getting the sale deed executed. A mere plea or a bare assertion of fraud is not sufficient. Here although the plaintiff alleged that the defendant Nos. 1 and 2 prevailed over Godavarish Narendrasingh but did not furnish the full particulars of fraud and the manner in which Defendant No.1 and 2 able to practise fraud for obtaining the said sale deed. More over the sale deed was executed in the year-2001 and the plaintiff could able to know about the execution of sale deed in the year 2008. His father had died in the year 2002. In this circumstances it was very important on the part of the plaintiff to establish as to how he came to know about the alleged fraud although the sale deed was executed seven years prior to his knowledge and by that time his father who had executed the deed had also been dead. One other plea is taken by the plaintiff that at the time of execution of sale deed his father was aged about 80 years and was not in a proper state of mind. So far as the plea of old age of his father is concerned the same can be clarified from the judgment of the Hon'ble court which was referred earlier. In the said judgment as mentioned earlier the Hon'ble court had held that “merely because the parties were only related to each of them or merely because the donor was old or weak character no presumption of undue influence can be arise”. So as held by the Hon'ble Court It can not be presumed that the defendant No.1 and 2 could able to prevail over Godavarish Narendrasingh for getting the

sale deed executed taking advantage of his old age. So far as mental condition of his old father is concerned the plaintiff could not able to produce any oral or documentary evidence proving the same. In this circumstances as well as considering the ratio of the Hon'ble Court I am of the opinion that the plaintiff could not be able to establish the fact of fraud or undue influence as alleged by him. The aforesaid judgment of the Apex court (Ladil Prasad Jaiswal – versus -Kardish Co. Ltd. AIR-1962 page-1279) also clearly discussed the situation when the burden shifts to other party to prove that no undue influence was used in getting the sale deed executed and those ingredients (i) are the relation between donor and donee such that the donee is in a position to dominate the will of the doner (ii) has the donee used that possession to obtain an unfair advantage over the donor? only after satisfying the aforesaid two conditions the burden will shift to the other side to prove it otherwise. Here in this case as the plaintiff could not able to prove that as to how the defendants used their position to obtain any advantage over late Godavarish Narendrasingh who was residing separately the burden can not be shifted on to the defendants to prove that no undue influence was used by them for getting sale deed executed in their favour.

The other ground upon which the plaintiff had challenged the sale deed is that there was no necessity on the part of late Godavarish Narendrasingh to execute the sale deed in favour of defendant No.2 on the ground that there were some fruit bearing trees over the suit land along with a tank where fish were reared. It was alleged that from the said properties their late father was deriving income of rupees more than 30,000/-. Apart from that the sons were also supplying food to him by

rotation. Moreover no loan was outstanding against him. So at the age of 80 there was no necessity to sell the suit properties in favour of defendant No.2 on the other hand the contention of the defendants is that the plaintiff after partition in the year 1972 had severed all his relationship with his father and the present defendants and started staying in a separate house situated in the same village. He never cared for his family members as he was very much self centered. In the partition he had taken a share of Ac.6.656 decimals of land out of the total land of Ac.19.766 decimals whereas others had got less amount of property in comparison to him. From the said property the father of the parties had sold some land for family necessity. 7 to 8 years prior to his death Godavarish Narendrasingh was suffering from leprosy. For his treatment as well as for other expenses he required money and he was having no income from the suit land. So for his necessity he sold the lands which were exclusively possessed by him. Before analyzing the facts from the statement of the witnesses to find out as to Whether there was any necessity on the part of late Godavarish Narendrasingh for the alleged sale of the suit property or not, it is pertinent to find out as to whether the suit properties were his separate property or the ancestral joint family property. If it was his separate and self acquired property he was free to deal with the property in the manner he liked. Neither the plaintiff nor the defendants could have a right to question about the same. But if those were ancestral joint family property then it is to be seen whether there was any legal necessity for the alleged sale or not, even though the term " legal necessity" was not used in the pleading, instead it was mentioned to be "necessity". So far as the nature of the suit property is concerned the plaint is silent in this

regard. It was not mentioned as to whether they were the self acquired property or joint family property. On the other hand the defendants claimed that the suit properties were the property of his late father and he was possessing it exclusively till the transfer of the same to defendant No.1. During the course of the argument the counsel for the plaintiff had submitted that those were the joint family properties. In this regard he drew the attention of the court to the ROR which revealed that the said property in Sabik Khata No.22 & 23 that stands recorded in the name of late Godavarish Narendrasingh along with one Rajendra Narendrasingh who is his uncle. But this by itself does not indicate that the suit property is his ancestral property. To substantiate the same the plaintiff did not produce the previous ROR. It was also not mentioned in the pleading. If it was their ancestral property then a question will arise as to why the same has not been partitioned at the time of partition in the year 1972. The said fact was neither mentioned in the said partition deed nor in the pleading of the plaintiff. So solely on the ground that late Godavarish Narendrasingh was the recorded owner of the suit property along with his uncle in Sabik Khata and and with his cousin brothers in Hal khata it can not be said that the same was their ancestral property. It is pertinent to mention here that before seeking for any declaration in respect of the land it is important to specifically mentioned in the pleading as to whether the property in question is a separate property or a joint family property. In absence of the specific pleading or proof of the same, it can not be presumed to be a joint family property. As because the plaintiff could not establish the fact that the said property as their ancestral properties we should not go into further details to find out whether there was any necessity on the part of late

Godavarish Narendrasingh for the sale of the suit property or not.

Issue No.3

7. Whether the suit is defective for non-joinder of necessary parties? So far as this issue is concerned the defendants specifically pleaded and argued that it is admitted by the plaintiff in para-5 and 6 of the plaint that the suit properties were possessed by Late Godavarish Narendrasigh with his cousin brothers and those were not partitioned between them. On perusal of the Sabik as well as Hal ROR it reveals that the said properties are jointly recorded in the name of Godavarish Narendrasingh and Rajendra Narendrasingh and in Hal in the Name of Godavarish Narendrasingh and the legal heirs of Rajendra Narendrasingh, who are necessary parties to suit. But they are not arrayed as parties to the suit. So if that property was not partitioned as claimed by the plaintiff it was his duty to make all the said persons as party to the present suit. The reason for not making them parties to the present proceeding was not explained in the plaint or by the plaintiff during his examination in the court. Although this question was categorically asked to the plaintiff during his cross examination the same was not satisfactorily answered by him (reference made to para-32 of the cross examination). In this circumstance it can be said that the suit is defective for non-joinder of necessary parties.

Issue No.2 and 4.

8) During the course of hearing either party did not press these issues. Hence no finding.

Isssue No.1.& 6

9) So far as the maintainability of the suit is concerned it is not specifically

mentioned in the W.S submitted by defendant No.1 and 2 as to on which ground they claim the suit to be not maintainable. However during the course of the argument the learned counsel for the defendants raised doubt about the maintainability of the suit on the basis of proviso laid down U/s 34 of the Specific Relief Act which reads as follows “ S-34,Discretion of court as to declaration of status or right. “Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief” . Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so”. In this regard he has also relied upon the judgment of the Hon'ble court passed in 2006(I) CLR-182 in between Jagannath @ Jagamohan Dharua and others – versus- Prithwiraj Singh Dharua and others and in 1992 (I)OLR-177 between Hari Mallick – versus Chittaranjan Samal and others. In the aforesaid judgment which are relied upon by the defendants the Hon'ble court has held that the suit for mere declaration without prayer for recovery of possession is not maintainable and also further held that the parties who could have asked for further relief than a mere declaration but did not seek for those reliefs the suit instituted by him could not be decreed in his favour. So far as the present suit is concerned as revealed from the prayer portion of the plaint the suit was instituted by the plaintiff with a prayer to declare the sale deed executed by their father Late Godavarish Narendrasingh in favour of defendant No.1 as null and void. It is the contention of the defendants that

here the plaintiff could have prayed for the additional relief such as for cancellation of sale deed but he omitted to do so. However on perusal of the plaint it reveals that although the plaintiff had categorically have not prayed for such relief in his prayer portion but in para-1 of the plaint it was specifically mentioned by him that the suit was instituted by him against defendant Nos. 1 and 2 for declaration and for cancellation of registered sale deed executed in respect of the suit property which was described in the schedule -A of the plaint. So considering the aforesaid fact I am of the opinion that although the said fact has not been specifically pleaded in the prayer portion of the plaint, the relief as claimed by the plaintiff in the body of the plaint can be granted and there is no legal bar on it. Accordingly this issued is answered. After going through the pleadings of both parties and the evidence led by them I am of the view that the plaintiff is not entitled to any other relief.

O R D E R.

The suit be and the same is dismissed on contest against the defendant No.1 & 2 and without contest against proforma defendant No. 3 but in the circumstances without cost.

Advocate's fee is at the contested scale.

Senior Civil Judge, Banpur.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 30th day of October, 2014.

Senior Civil Judge, Banpur.

List of witness examined on behalf of the Plaintiff :-

P.W.1 Duryodhan Narendrasingh.

P.W.2 Ganeswar Baral

List of witness examined on behalf of defendants :-

D.W.1 Gitanjali Narendrasingh

D.W.2 Gopinath Narendrasingh

List of documents admitted into evidence by the Plaintiff:-

Ext-1 Certified copy of the ROR of khata No.23.

Ext.2 Certified copy of the ROR of Khata No. 22.

Ext.3 ROR of Khata No.27.

Ext. 4 Certified copy of the R.O.R. Of Khata No.26

Ext.5 Certified copy of Sale deed marked as Ext.5.

Ext.6 Certified copy of partition deed No.3058 dated 26.04.1972.

Ext.7 Notice issued by Board of Revenue in R.P.Case No.536/2002.

Ext.8 Notices issued by Board of Revenue in R.P.Case No.537/2002.

List of documents admitted into evidence by defendants :-

Nil

Senior Civil Judge, Banpur.