

IN THE COURT OF CIVIL JUDGE(SR. DIVN.), BHUBANESWAR

Present : **Sri Sitikantha Samal**
Civil Judge(Sr. Divn.)
Bhubaneswar.

C.S No.711/2010

Ch.Jawaharlal Patra, aged 61 years
S/o Chinari Antarijyami Patra
At-Aska road, PO/PS-Berhampur, Dist-Ganjam.
Permanently at Flat No. 110,
Ashirbad Apartment, Cuttack Road,
PS-Laxmisagar, Bhubaneswar, Khurda.

..... Plaintiff

- Versus -

Dr. A. Nageswar Sarab, aged about 55 years
S/o late A. Balakrishna Sarab
C/o Bhubaneswar Municipal Corporation
Po/Ps-Badagada, Dist-Khurda,
Presently at Flat No. 110,
Ashirbad Apartment, Cuttack Road
PS-Laxmisagar, Bhubaneswar, Khurda.

..... Defendant

COUNSELS APPEARED FOR THE PARTIES:

For the Plaintiff : M/s H.N.Routray & Associates

For the defendant : M/s S.N.Das & Associates

DATE OF ARGUMENT : 12.08.2014

DATE OF FINDINGS : 21.08.2014

J U D G E M E N T

The plaintiff has filed the suit for recovery of possession & realisation of damages.

2. The case of the plaintiff in brief is that the defendant is his cousin brother and their relationship was quite cordial. In view of their good relation, due to heavy loss in business, the plaintiff being in urgent need of money approached the defendant to give him a friendly loan of Rs. 2,50,000/-. Accordingly, the defendant agreed to the proposal of plaintiff and on 12.04.2002 gave him Rs. 2,50,000/- on condition that the defendant shall enjoy the plaintiff's house bearing Apartment No. 110 of Ashirbad Apartment situated at Cuttack Puri road of Bhubaneswar without any monthly rent till the return of Rs. 2,50,000/- by the plaintiff without any interest for three years and accordingly on the same day, they both executed a written document to that respect. When the plaintiff failed to pay the amount, after three years i.e. on 13.04.2005, it was further agreed between them that the defendant shall enjoy the suit house for a further period of two years on the self same conditions and the

above transaction was also endorsed on the receipt dt. 12.04.2002.

It is the further plea of the plaintiff that he being in further need of money approached the defendant for a friendly loan of Rs. 2,00,000/- and the defendant had provided the same on 25.12.2002 with the condition that the plaintiff will pay a monthly interest @ Rs. 1.25 paise only and as such, Rs. 2,500/- was fixed for monthly interest till full refund of Rs. 2,00,000/- and to that effect, the plaintiff executed one hand written receipt. Accordingly, the plaintiff went on paying the interest to the defendant and after completion of seven months, the plaintiff has refunded the full amount of Rs. 2,00,000/- received on 25.12.2002 to the defendant and closed the said transaction. On dt. 13.04.2007, the plaintiff approached the defendant to receive the amount of Rs. 2,50,000/- as per receipt dt. 12.04.2002 and to vacate the suit premises, but the defendant on various pleas, avoided to receive the amount and to vacate the suit premises. The plaintiff sent a notice on dt. 23.12.2009 to vacate the premises within 15 days there from but in spite of vacating the suit premises, the defendant in toto demanded Rs, 20,64,891/- from the plaintiff informing him that he has not paid the interests on the second advance dt. 25.12.2002 along with the principal amount, after paying the 7 months interest only and he shall vacate the suit premises only when he shall suitably compensated. Hence, finding

no other alternative, the plaintiff by showing the above cause of action filed the present suit for the aforementioned reliefs.

- 3.** The defendant appeared and filed written statement challenging the suit on the grounds of maintainability, lack of cause of action, under-valuation, barred by law of limitation and also bad for non-joinder of necessary party. The defendant has also taken the plea that this suit is hit by the principles of Estoppel and Resjudicata since his wife has filed a suit against the present plaintiff for specific performance of contract. The defendant in his W.S though admitted the transaction dt. 12.04.2002 and the conditions there upon so also the transaction of Rs. 2,00,000/- dt. 25.12.2002 has categorically taken the plea that the plaintiff neither returned Rs. 2,50,000/- received on 12.04.2002 and even not returned Rs. 2,00,000/- which the plaintiff received on 25.12.2002 along with interest just after paying the interest for the first seven months on the said Rs. 2,00,000/- for which he sustained a huge loss as he has arranged the said amount from the market on interest. The defendant has also taken the plea that at completion of five years so far as the transaction of Rs. 2.5 lakhs is concerned, the defendant demanded the same as he was in need of money for his daughter's marriage and to purchase a neighbouring flat. But the

plaintiff avoided to repay the same for which the defendant and his wife sustained mental agony and torture. It is the further plea of the defendant that after getting the reply of the plaintiff's notice dt. 23.12.2009, the plaintiff and his wife came to the defendant's residence on 14.02.2010 for settlement and it was agreed in the settlement that even the defendant and his wife are entitled to get Rs. 17,41,119.39 from the plaintiff excluding Rs. 2,50,000/- to which the wife of the defendant initially paid to the plaintiff, the defendant will only get Rs. 8,00,000/- instead of Rs. 17,41,119.39 and that the plaintiff will transfer the suit premises in favour of the defendant's wife within a period of two months as against a total consideration amount of Rs. 8.21 lakhs which will be adjusted towards the consideration amount of Rs. 8 lakhs as per which the defendant and his wife have to pay rest Rs. 21,000/- to the plaintiff and accordingly on the same date, the defendant paid Rs. 21,000/- to the plaintiff in cash. As the plaintiff and the defendant are cousin brothers, when the wife of the defendant demanded for a written agreement, the plaintiff apprised her to keep faith on him. But taking advantage of the simplicity of the defendant's wife and the defendant, the plaintiff neither executed any written agreement nor paid any money receipt to the defendant. The plaintiff and his son in various occasions also abused the defendant in filthy languages with dire consequences

and behind their above illegal act, their only intention is not to give any effect to the settlement/ agreement dt. 14.02.2010. Since the plaintiff has not performed his part of the contract dt. 14.02.2010, the _____ wife of the defendant has filed a suit bearing C.S No. 571/2010 for specific performance of contract in respect of the suit premises. With the above pleas, the defendant prays to dismiss the suit.

4. On the basis of the aforesaid rival pleadings of the parties, the following issues have been framed for consideration.

ISSUES

- (i) Is the suit maintainable ?
- (ii) Whether there is any cause of action to file the suit ?
- (iii) Whether the suit is barred by law of limitation ?
- (iv) Whether the suit is bad for non-joinder of necessary party ?
- (v) Whether the suit has been grossly undervalued ?
- (vi) Whether the suit is hit by the principle of estoppel and res-judicata ?

(vii) Whether the plaintiff is entitled for the relief of

recovery of possession of the suit premises ?

(viii) Whether the plaintiff is entitled for damages ?

(ix) To what other reliefs, the parties are entitled ?

- 5.** In support of their case, besides adducing his own evidence who is referred to as P.W.1, the plaintiff has also adduced the evidences of his son and brother as P.W.2 & 3 respectively. The plaintiff has exhibited various documents vide Ext.1 to 9 in support of his plea. On the other hand, the defendant adduced his own evidence who is referred to as D.W.1 hereinafter. Besides he has also adduced the evidence of one of his relation as D.W.2. The defendant has exhibited some documents vide Ext.A to Ext.B/1 in support of his plea. All the oral and documentary evidences adduced on behalf of the parties have been reflected in detail at the foot of this judgment.

FINDINGS

- 6. Issue No. (iv), (vii), (vii) & (viii) :-** Since these two issues are the subject matter of the dispute are taken together for consideration. Before going to the matters of dispute, let us reiterate the admitted

facts of this case. It remains admitted that the plaintiff is the owner of the suit premises i.e. Apartment No. 110, Ashirbad Apartment, Cuttack-Puri road, Laxmisagar which he purchased from one Balajee Builders and the letter of Balajee Builder issued to the plaintiff in respect of the said apartment is admitted in evidence as Ext.9 and the sale deed bearing no. 2656 dt. 14.08.1999 which is admitted in evidence as Ext.1. In the pleadings so also the evidence of the plaintiff and the defendant, it remains admitted that the plaintiff being in need of money on 12.04.2002 received Rs. 2,50,000/- from the defendant on the condition that the defendant will occupy and enjoy the suit premises for three years without any rent and in turn the plaintiff will not pay any interest on the aforesaid amount advanced. It also remains admitted that after completion of three years, the same terms and conditions extended for another two years. Further it remains admitted that till the date of suit and even till now, the plaintiff has not returned the aforesaid amounts of Rs. 2,50,000/- to the defendant and the defendant is in occupation of the suit premises. Another fact remains admitted that the plaintiff being in further need of money received a friendly loan of Rs. 2 lakhs from the defendant on 25.12.2002 with condition that the plaintiff will pay the interest @ Rs. 1.25 paise i.e. Rs. 2,500/- per month to the defendant till realisation of Rs. 2 lakhs. So far as the transaction dt.

12.04.2002 basing upon which the defendant entered into the occupation of the suit premises, there was written plain paper agreement between the plaintiff and the defendant on the same date and the said agreement is not only admitted in evidence as Ext.2 from the side of the plaintiff but also relying upon the same, it is in evidence as Ext.A from the side of the defendant. Furthermore so far as the second transaction of Rs. 2 lakhs is concerned, the written receipt to that effect executed by the plaintiff is also admitted in evidence from the side of the plaintiff as Ext.3 and from the side of the defendant as Ext.B. Keeping in mind the aforesaid admitted facts, let us examine the facts on which the parties are contesting the suit in tooth and nail. The pleas so also the evidence of the plaintiff is that at the time of the Ext.1, the house rent of the suit flat was Rs. 5000/- per month and during the year 2007, on the completion of the agreed tenure, the monthly rent of the said suit flat was Rs. 10,000/- per month and at present it is Rs. 13,000/- per month and accordingly, claimed damages of Rs. 3,03,000/- deducting Rs. 2,50,000/- which he has received on 12.04.2002. The plaintiff in his pleading and evidence has categorically stated that so far as the friendly loan of Rs. 2 lakhs is concerned, he has repaid it to the defendant after seven months from the date of Ext.3/Ext.B. The P.W.3 who is the brother of the plaintiff has deposed regarding

the monthly rent of the neighbouring flats of the said apartment who has not been cross-examined by the defendant. The P.W.2 who is the son of the plaintiff stated about the rent of the suit premises and supporting the evidence of his father and by the way denying the allegations against him concerning the criminal activities alleged by the defendant.

On the other hand, the learned counsel relying upon the plea so also the evidence of the defendant who has been examined as D.W.1 though admitted the aforesaid transactions, has submitted that the plaintiff has not yet returned the friendly loan of Rs. 2,00,000/- and has not paid the interest there upon after seven months from the date of Ext.B/Ext.3. The defendant-D.W.1 in his evidence has stated that on 14.02.2010, the plaintiff and his wife came to his residence for settlement and it was decided that he is entitled to get Rs. 17,41,119.39 from the plaintiff excluding Rs. 2,00,000/-. But on settlement, it was reduced to Rs. 8,00,000/- and at the same time there was an agreement between the plaintiff and the wife of the defendant that the plaintiff will transfer the suit premises to the wife of the defendant for a consideration of Rs. 8,21,000/- and after such adjustment of Rs. 8 lakhs, the plaintiff received the rest Rs. 21,000/- from the wife of the defendant with a promise to execute the deed after obtaining the no objection certificate from the bank in respect of

the suit premises. To support the case of the defendant, the D.W.2 has been examined who is none else but the 'Samudi' of the defendant. The D.W.2 in his cross-examination has categorically admitted that he has not seen any payment by the defendant to the plaintiff and he made the plaintiff only once about six to seven months back in the marriage ceremony of a person and there was no discussion in between them relating to the subject matter of this case. So the evidence of the D.W.2 is of no help to decide this case. The learned counsel for the plaintiff submitted that the transaction vide Ext.2/Ext.A is altogether different from the transaction vide Ext.3/Ext.B and such transaction vide Ext.B has no nexus with the present suit. The learned counsel for the defendant submitted that as per the settlement and agreement dt. 14.02.2010 in between the wife of the defendant and the plaintiff to transfer the suit premises and in view of the tendency of C.S 571/2010 for specific performance of contract in respect of the suit premises filed by the wife of the defendant against the present plaintiff, the plaintiff is not entitled to get the recovery of possession of the suit premises.

Though the defendant has taken the plea that there was a settlement so also an oral agreement on 14.02.2010 in between the wife of the defendant and the plaintiff for transfer of the

suit premises for a consideration of Rs. 8,21,000/- and after adjustment the plaintiff received the rest of the consideration amount i.e. Rs. 21,000/-, which is also supported by the evidence of D.W.1, but there is no single scrap of paper or any other convincing material to establish such an agreement. The explanation given by the defendant that when his wife demanded a written document to that effect on the saying of the plaintiff to have faith on him, no such document was prepared is not worthy of trust because at that time as revealed from the pleadings and evidence of P.W.1 & D.W.1, their relationship with each other was not cordial rather it was strained. Moreover, if such transaction was believed for the sake of argument, it has no nexus with the present suit and such matter is the subject matter of the C.S No. 571/2010 which is admittedly adjudicated. The wife of the defendant being the plaintiff of C.S No. 571/2010 which is a suit for specific performance of contract and stands on a separate footing than that of this case can not be a ground to defend this case or the claim of the plaintiff in this case specially when the wife of the defendant is not a party to the present case. The learned counsel for the defendant though vehemently urged that this suit is hit by the principle of estoppel and res-judicata, but no material is forthcoming either to attract the principle of estoppel and res-judicata. The claim of the wife of the defendant being on separate and independent

footing, the plea of non-joinder of necessary party is of no avail to the defendant.

The learned counsel for the defendant also submitted that since the plaintiff has received Rs. 4,50,000/- vide Ext.2 & 3 on two occasions, the plaintiff is also liable to pay the same along with the interest at the agreed rate on Rs. 2,00,000/- which the plaintiff received vide Ext.3. On perusal of the Ext.2 and 3, it is found that those two transactions are independent transactions. In other words, vide Ext.2 the defendant advanced Rs. 2,5 lakhs to the plaintiff with the condition of no rent and in return to occupy the suit premises. But the Ext.3 shows that the defendant gave a friendly loan of Rs. 2 lakhs to the plaintiff with the interest @ Rs. 1.25 paise i.e Rs. 2,500/- per month. There is dispute as to the payment and non-payment of the said Rs. 2 lakhs and its interest between the parties. But from the Ext.3 so also from the pleadings and evidences of both the parties, it is found that the said transaction vide Ext.3 has got no bearing on the transaction vide Ext.2 on the basis of which the defendant occupied the suit premises. That being so there is no necessity to decide the matter of payment and non-payment of the aforesaid Rs. 2 lakhs vide Ext.3 in this suit specially when there is no set up or counter-claim to that effect. The learned counsel for the plaintiff

though bases his case so also relied upon the Ext.2, but during course of argument submitted that the Ext.2 is a invalid and void document as the contents of it reveals that it is an usufructuary mortgage and the same is compulsory registrable. On that score, the learned counsel for the defendant submitted that when the plaintiff relied upon the said document and both the parties were/are acting as per the terms and conditions of the said document and when there is no clear recitals as to the mortgage of the suit premises, the argument raised by the learned counsel for the plaintiff is neither tenable nor acceptable. On perusal of the Ext. 2, it is found that the word "bhogabandha" is there. But neither the plaintiff in his pleading and evidence nor the defendant in his pleading and evidence has stated that the transaction vide Ext.2 is a mortgage and even they have not attempted to plead and adduce evidence regarding the case of mortgage. Rather both the parties relied upon the said document and proved the same and more interestingly the said document has been admitted in evidence as Ext.2 & Ext.B from the side of the plaintiff and defendant respectively. Though the Ext.2 has not been registered, it can be used for the purpose of this case as the parties are relying upon the same.

The plaintiff in his pleadings so also evidence claims

damages and the house rent from the defendant. So far as damages are concerned, there is no specific and clear pleading and evidence as to how and to what extent the plaintiff sustained the damages and on what parameters he claims the compensation. In absence of the same, this Court is of the view that the plaintiff is not entitled for any damages or compensation. It is the specific case of the plaintiff that at the time of the Ext.2, the monthly rent of the suit premises was Rs. 5,000/- with a hike of @ Rs. 1000/- per month during the subsequent years and at present, the monthly rent of the suit premises is Rs. 13,000/-. The P.W.2 and 3 also supports the aforesaid rate of house rent per month in their respective evidences. At this juncture, the learned counsel for the defendant submitted that since it was agreed by the plaintiff and the defendant vide Ext.2 that the plaintiff will not pay any interest and the defendant will not pay any rent in respect of the suit premises, the question of hike in monthly rent and payment of monthly rent does not arise and the defendant is not liable to pay any rent in respect of the suit premises to the plaintiff. Admittedly, on the aforesaid conditions, the defendant continued to occupy the suit premises without paying any rent as per the agreed tenure i.e till 13.04.2007. The available material reveals that after 13.04.2007, the defendant is also not paying rent for the same. It is also not the case of the plaintiff that he has repaid the amount i.e. Rs. 2,50,000/- to the

defendant. As per his submission, when the plaintiff has not repaid the said amount, the question of payment of rent does not arise even if the defendant is continuing in occupation of the suit premises. The plaintiff has pleaded that on 13.04.2007 he approached the defendant to receive the amount of Rs. 2.5 lakhs but the defendant avoided the same on some pretext. There is no convincing material to show that the plaintiff tendered the money to the defendant which he received from him vide Ext.2 and the defendant refused to accept the same prior to 23.12.2009 i.e. the notice given by the plaintiff to the defendant which is admitted as Ext.4. Rather the Ext.4 shows that the plaintiff has not whispered the refund of the said amount to the defendant in it, though he requested the defendant to vacate the suit premise within 15 days from the date of the said notice. When the plaintiff has not repaid the money to the defendant as agreed in between them, it can be presumed that the said agreement is continuing till the said repayment is made. The plaintiff in his pleading at para-11 and para-14 of his evidence in chief has stated that he is ready and willing to return Rs. 2,50,000/- received vide Ext.2. So for the ends of justice, considering the agreement in between the plaintiff and the defendant and the recitals of Ext. 2, in the aforesaid facts and circumstances, it can be safely held that the plaintiff has to return the Rs. 2,50,000/- to the defendant and the

defendant has to vacate the suit premises on receiving the same.

Accordingly, these issues are answered.

7. **Issue No. (i) to (iii), (v) & (ix)** :- In view of of aforesaid findings in the foregoing issues, there is cause of action for the suit and the suit is maintainable. So far as the limitation is concerned, since as per the agreement between the parties, the defendant is continuing in occupation of the suit premises without paying any rent and the plaintiff is not paying interest in respect of the money he received from the defendant, it is to be held that the agreement is still continuing and accordingly, the suit is not barred by limitation. So far as the valuation of the suit is concerned, though the said issue has been framed, but the parties have not pressed on the said issue. The plaintiff is not entitled to any other relief in the aforesaid facts and circumstances of the case. These issues are answered accordingly.

Hence, it is ordered :

ORDER

The suit be and the same is hereby decreed in part as against the defendant, under the circumstances without cost. The defendant is directed to deliver the vacant possession of the suit premises to the plaintiff on receiving a sum of Rs. 2,50,000/- from the plaintiff within two months from the date of this order failing which the plaintiff

is at liberty to execute the decree through the process of Court.

Advocate's fees be assessed at the contested scale.

Civil Judge(Sr.Divn.)

Bhubaneswar.

The judgment is typed to my dictation by the Stenographer attached to this Court directly on the Computer provided under e-court project, corrected and pronounced by me in the open court today i.e. the 21st day of August, 2014 under my seal and signature below.

Civil Judge(Sr.Divn.)

Bhubaneswar.

List of witnesses examined for the plaintiff:

P.W.1 Ch. Jawaharlal Patro

P.W.2 Ch. Subramanyam Patro

P.W.3 Sri Sibaram Patro

List of witnesses examined from the side of defendant:

D.W.1 A.Nageswar Sarab

D.W.2 D.Rajeswar Patra

List of documents exhibited on behalf of the plaintiff:

Ext.1 Original sale deed no. 2856 dt. 14.05.99
Ext.2 Agreement dt. 12.04.2002
Ext.3 Money receipt dt. 25.12.2002
Ext.4 Original letter dt. 23.12.2009
Ext.5 Reply notice dt. 08.01.2010.
Ext.6 Pleader notice dt. 08.02.2010
Ext.7 Reply notice dt. 23.03.2010
Ext.8 to 8/h Holding tax receipt
Ext.9 Allotment letter issued in favour of Ch.J.Patro
by Balaji Builders.

List of documents exhibited on behalf of the defendants:

Ext.A Agreement executed between the defendant and
the plaintiff.
Ext.A/1 & Signatures of the defendant on Ext.A.
Ext.A/2
Ext.A/3 & Signatures of the plaintiff on Ext.A.

Ext.A/4

Ext.B Money receipt executed by the plaintiff.

Ext.B/1 Signature of the plaintiff on Ext.B

Civil Judge(Sr.Divn.)

Bhubaneswar.