

(1990) 03 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurisdiction Case no. 962 of 1984 (R)

Abdul Salim

APPELLANT

Vs

The Commissioner, South Chotanagpur Division, Ranchi and
others

RESPONDENT

Date of Decision : 17-03-1990

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 208, 71A, 71A

Citation : (1990) 2 PLJR 517

Hon'ble Judges : S. Roy, J

Bench : Single Bench

Advocate : V. Shivnath, for the Appellant; P.C. Roy, for the Respondent

Final Decision : Allowed

Judgement

Satyeshwar Roy, J.—The petitioner has challenged the validity of Annexure-4, the order passed by respondent no. 3 in a proceeding u/s 71A of the Chotanagpur Tenancy Act, 1908 (the Act) by which the application filed by respondent no. 4 for restoration of land was allowed by respondent no. 3, Annexure-5, the order passed in appeal by respondent no. 2 confirming the order of respondent no. 3 and Annexure-6, the order passed in revision by respondent no. 1 dismissing the revision of the petitioner. Admittedly khata no. 34 of village Changatoli, police station Karra, District Ranchi was recorded in the name of Nabi Munda, father of respondent no. 4 and others. Respondent No. 4 filed an application for restoration of the land. The application was resisted by the petitioner. He, inter alia, stated that the holding was sold in Rent Execution Case No. 66 R9 of 1940-41. The sale was confirmed on 11.6.1941. This was evident by Annexure-1. Holding was sold to the Co-operative Society. The Co-operative Society surrendered it to the landlord who settled it with one Yakub. As Yakub failed to pay the rent, a rent decree was obtained by landlord. The landlord executed rent decree in Rent Execution Case No. 96 R 9 of 1950-51. The holding was purchased by the petitioner in this case. The sale certificate was given to the

petitioner which is contained in Annexure-2. According to the petitioner since it was sold in execution case, there was no question of restoring it to respondent no. 4.

2. Respondents No. 1, 2 and 3 held that for the dues of rent decree of Rs. 61/- the holding could not have been sold. They also held that the sale was in contravention of section 208 of the Act.

3. It was submitted on behalf of the petitioner that since the holding was sold by court auction in execution of rent decree, Section 71-A was not attracted as it was not a transfer by a raiyat. He also urged that if there was any contravention of section 208 of the Act, the remedy of respondent no. 4 or his father was to take recourse to appeal or revision as provided under that Act. On behalf of respondent no. 4 it was submitted that no case has been made out by the petitioner for interfering with the order passed by the different authorities.

4. Relevant portion of Section 71-A of the Act is as follows :--

71 A. Power to restore possession to member of the Scheduled Tribes over land unlawfully transferred.--If at any time it comes to the notice of the Deputy Commissioner that transfer of land belonging to a raiyat who is a member of the Scheduled Tribes has taken place in contravention of section 46 or any other provision of this Act or by any fraudulent method (including decrees obtained in suit by fraud and collusion) he may, after giving reasonable opportunity to the transferee who is proposed to be evicted, to show cause and after making necessary enquiry in the matter, evict the transferee from such land without payment of compensation and restore it to the transferor or his heir, or in case the transferor or his heir is not available or is not willing to agree to such restoration, re-settle it with another raiyat belonging to the Scheduled Tribes according to the village custom for the disposal of an abandoned holding.

5. Deputy Commissioner has been vested with the power to restore land belonging to a raiyat who is member of scheduled tribe if the person in possession is in possession on the basis of a transfer which may include a decree obtained by fraudulent method. Change in possession must, therefore, be because of a transfer within the meaning of section 71 A.

6. The question in this case is when there has been change in possession on the basis of court auction of a holding of a raiyat belonging to scheduled tribe, whether application u/s 71A is maintainable.

7. Some facts are required to be noticed in detail. As the recorded raiyat fell in arrear of rent, Rent Suit No. 506 R 8 of 1938-39 was filed by the landlord. It was decreed. The decree was executed in Rent Execution Case No. 66 R 6 of 1940-41, copy of order of which is Annexure-1, Part of the holding was put to auction, but as no bidder turned up, the whole holding was put to auction. It was sold to a Co-operative Society. The sale was confirmed on 11.6.1941 and sale certificate issued.

8. Co-operative Society surrendered the holding to the landlord. The landlord settled it with one Md. Yakub Khan. Yakub also fell in arrear of rent and the landlord obtained a rent decree in Rent Suit No. 88-R-8 of 1949-50. The decree was executed in Rent Execution Case No. 96-R-9 of 1950-51 and the holding was sold in court auction on 14.9.1953. It was purchased by the petitioner. Sale certificate was issued to him as evidenced by Annexure-2. Thus Nabi Munda, the recorded raiyat was dispossessed in 1940-41 by court in Rent Execution Case No. 66-R-9 of 1940-41. Respondent No. 3 has held that the transfer of the holding was obtained by fraud and that the auction sale was made in contravention of section 208 of the Act. These findings have been confirmed by respondents no. 1 and 2.

9. The inference of fraud is a question of law and that inference may be drawn on proved facts. No evidence was led by respondent no. 4 on this question. The holding was sold for satisfaction of a decree of about Rs. 90/-. Respondent Nos. 1 to 3 have noticed that fact the basis for holding that the holding was sold by practising fraud. This inference was not available.

10. Sections 199 to 214A of the Act deal with sale in execution of decree. On the facts of this case, the relevant sections are 208 and 213.

Section 208, inter alia, provides that when a holding belonging to a member of scheduled tribe is sold, such holding shall be sold to a person who is such member and shall not be sold to a person who is not such member unless no such member bids for such land, Section 213 entitles both the decree holder and the judgment debtor for filing application to set aside sale of immovable property on the ground of irregularity and fraud.

11. It will be seen that there was already provision in the Act which entitled a judgment debtor (here Nabi Munda) to file application in the executing court for setting aside sale on the ground of fraud. There was, therefore, no necessity for making a fresh application u/s 71A in 1969 for challenging auction sale in execution case on the ground of fraud. When Section 71A speaks of fraud, it speaks about decree obtained by fraud and transfer obtained by fraud.

12. Is auction sale by Court in execution of decree a transfer ? Transfer means voluntary transfer by two living persons. When I say voluntary transfer, I do not mean to include such transfer which may later be proved to have been obtained by fraud. Transfer creates interest in immovable property; it may be a permanent interest, say sale; it may be limited interest, say mortgage; it may be interest for limited duration, say lease. These are by way of illustration. If no interest of any kind is created by any act of a raiyat how can it be said that a transfer was made by the raiyat? When property is sold by Court, the raiyat does not himself make any alienation or transfer. He has no choice. The transfer is effected by operation of law. Such a transfer is not covered by Section 71A of the Act. If that is allowed, judicial sale will have no sanctity. This view has been taken in *Raj Sewak Singh v. State of Bihar* : 1988 BLT (Rep) 172 : 1988 PLJR (NOC) 53. This

application is allowed and Annexures-4, 5 and 6 are quashed. There shall be no order as to costs.