

(1995) 08 PAT CK 0041

In the Patna High Court

Case No : Letter Patent Appeal No. 56 of 1990 (R)

Daniel Oraon

APPELLANT

Vs

Shamim Ahmad and Others

RESPONDENT

Date of Decision : 31-08-1995

Acts Referred:

Citation : (1995) 08 PAT CK 0041

Judgement

S.K. Homchaudhuri, J.—This appeal is directed against the judgment and order dated 17th March, 1990, passed by the learned Single Judge in C.W.J.C. No. 962 of 1984 (R).

2. Undisputed facts in this case are that the land measuring 11.36 acres appertaining to Khata No. 34 of village Changatoli, P.S. Karra, District Ranchi, was recorded in the name of Nabi Munda, father of the appellant and others. The appellant, a member of Scheduled Tribes, made an application u/s 71A of the Chotanagpur Tenancy Act (hereinafter mentioned as the "Act") for restoration of the possession of the said land. The claim of the appellant was resisted by Respondent No. 1, the petitioner in C.W.J.C. No. 962 of 1984 (R), contending, inter-alia, that the holding was sold in Execution Case No. 66R 9 of 1940-41 to Chaugatoli Co-operative Society on 10.3.1941 and the sale was confirmed on 29.8.1941. The Co-operative Society having surrendered the land, landlord settled the same with one Yukub Khan. As Yakub failed to pay the rent, the landlord instituted a suit for recovery of arrear and the holding was sold in Rent Execution Case No. 96 Rule 9 of 1950-51 and respondent No. 1 purchased the said land in the execution case, and the sale certificate was issued in his favour.

3. The application u/s 71A of the Act filed by the appellant on 30.9.1970 was registered as Case No. 182 of 1970-71. The Sub-Divisional Officer, Khunti, Ranchi, who are delegated with the power of the Deputy Commissioner u/s 71A of the Act, by the order dated 21.2.1975, rejected the application of the appellant. The appellant preferred an appeal against the order dated 21.2.1975 and the appellate authority, by the order dated 07.8.1979, allowed the appeal

and remanded the case to the Sub-Divisional Officer for fresh enquiry and disposal of the application in accordance with law. On perusal of the materials on record, the Sub-Divisional Officer, amongst others, found:-

(i) Rent Suit No. 506 Rule 8 of 1938-39 against the father of the appellant, namely, Nabin Oraon was decreed for realisation of Rs. 61/- on account of arrear of rent and that on 27.2.1941 the decree-holder land-lord received Rs. 50/- from the judgment-debtor on account of arrear of rent and allowed time for 10 (ten) months to the judgment-debtor, Nabin Oraon, to clear the balance. However, keeping the raiyat Nabin Oraon in the dark, the decree was executed in Execution Case No. 66R 9 of 1940-41 and the entire raiyati land measuring 11 acres and odd was sold in auction for paltry sum of Rs. 20/- to Chaugatoli Co-operative Society, and the sale was confirmed by the court by order dated 28.8.1941. There was nothing on the record to show that Chaugatoli Co-operative Society was delivered possession on the tenanted holding.

(ii) The holding was sold in auction in execution of the decree in flagrant violation of the provisions of Section 208 of the Act; inasmuch as (a) under the provision of Section 208 of the Act, only the portion of such holding should be sold the proceeds of the sale of which would be sufficient to satisfy the sale or satisfy the amount due under the decree. In the instant case, the value of the holding was assessed at Rs. 746/- and 8 annas, yet for realisation of the decretal amount of Rs. 61/-, the entire holding was sold in auction for paltry sum of Rs. 20/- and (b) Section 208 of the Act also mandates that if the holding of an aboriginal "Raiyat" or of a "Raiyat" who is a member of a Scheduled caste, is sold, such land should be sold to the highest bidder who is an aboriginal or a member of a Scheduled caste, as the case may be and shall not be sold to any person other than an aboriginal or a member of a Scheduled caste unless no aboriginal or member of a Scheduled caste bids for such land an amount which is not less than the amount specified in the proclamation of sale. There was, however, nothing on the record which discloses that before selling the land in the auction to the Chaugatoli Co-operative Society, any member of the Scheduled Caste and/or the Scheduled Tribe participated in the auction sale or not and if participated the amount of the bid was less than the amount specified in the proclamation of sale.

(iii) The Chaugatoli Co-operative Society surrendered the holding to the landlord for consideration of Rs. 425/-, which was not in accordance with law; inasmuch as no surrender could be made for a consideration.

(iv) Although after the alleged surrender, holding was said to have been settled with one Yakub and for failure of Yakub to pay the rent, for realisation of the arrears of rent, the holding was again sold in Execution Case No. 96 Rule 9 of 1950-51, and the original respondent No. 1, Abdul Salim, purchased the said plot in the execution case and sale certificate was issued in his favour, the appellant, however, produced challan to show that he deposited Rs. 87/7/6 (Rupees eightyseven, annas seven and paise six) against the arrear of rent in respect of the holding payable to the land-lord on 29.4.1952.

The Sub-Divisional Officer further found that both Yakub Khan and original Respondent No. 1 Abdul Salim, who purported to have purchased the land in auction sale in Execution Case No. 96 Rule 9 of 1950-51, were permanent resident of Ranchi Town and Yakub did not take possession of the land in question after the same was allegedly settled with him.

4. Under all the facts and circumstances, the Sub-Divisional Officer came to the conclusion that the holding was sold in execution of decrees for realisation of arrear of rent, once in 1941 and, thereafter, in 1951 by playing fraud to deprive the father of the appellant, Nabin Oraon, of the valuable right on the holding as raiyat and that Changatoli Co-operative Society, Yakub Khan and Abdul Salim (original respondent No. 1) had just appeared as benamidars in the collusive transactions at the behest of the land-lord. The entire transactions of sale of the holding in execution of decrees having been found collusive and fraudulent, the learned Sub-Divisional Officer passed order dated 27.10.1980 passed in Case No. 182 of 1970-71 for restoration of the land to the appellant from original respondents No. 1 Abdul Salim by evicting the latter therefrom.

5. Original Respondent No. 1, Abdul Salim, impugned the order dated 27.10.1980 passed by the Sub-Divisional Officer in Appeal Case No. 56 Rule 15 of 1980-81 before the Collector. The Additional Collector by the appellate order dated 2.2.1982 did not interfere with the finding of the Sub-Divisional Officer and dismissed the appeal. Against the appellate order, the original Respondent No. 1 preferred a revision application before the Commissioner, South Chotanagpur and the application was registered as Revision No. 31 of 1982. The Commissioner South Chotanagpur Division, Ranchi, by the Order dated the 23rd of May, 1980, dismissed the revision petition and upheld the finding of the Sub-Divisional Officer and that of the appellate authority.

The original Respondent No. 1, thereafter, impugned the orders passed by the Sub-Divisional Officer, the Additional Collector and the Commissioner in this Court in C.W.J.C. No. 962 of 1984 (R).

6. The learned Single Judge, after hearing the parties, by the impugned judgment and order dated 17.3.1990, allowed the petition and set aside the orders passed by the Sub-Divisional Officer, the Additional Collector and the learned Commissioner, holding that the transfer of the land having been effected by operation of law, namely, by execution of the decree by a competent court was not covered by Section 71A of the Act; inasmuch if that was allowed, judicial sale would have no sanctity. The operative part of the judgment of the learned Single Judge is as follows:-

12. 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 provision in Section 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.

13. 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 172 .

7. Feeling aggrieved by the judgment and order passed by the learned Single Judge, the appellant has preferred this Letters Patent Appeal.

8. We heard learned Counsel for the appellant and learned Counsel for the Respondents.

9. Learned Counsel for the appellant submitted that the learned Single Judge passed the impugned judgment following the decision of this Court in the case of *Raj Sewak Singh v. State of Bihar* reported in 1988 BLT 172 . Besides, the view expressed by the Learned Single Judge was upheld in the decision of a Full Bench of this Court in the case of *Ram Chandar Sahu Vs. The Commissioner and Others*, holding, amongst others, that the conditions precedent for invoking the jurisdiction of the Deputy Commissioner under the provision of Section 71A of the Chhotanagpur Tenancy Act was the transfer of land belonging to a member of the Scheduled Tribe in contravention to the provisions of the Act or by any fraudulent method and that if a wider meaning is assigned to the word "transfer", forcible possession of a raiyat by another person cannot by any stretch of imagination be held to be a transfer. However, the Hon'ble Supreme Court by a decision in the case of *Pandey Orson Vs. Ram Chander Sahu and others*, , reversed the decision of the Full Bench of this Court in the case of *Ram Chander Sahu* (supra). Consequently the reason and ground on which the learned Single Judge allowed the writ petition, have also been reversed by the decision of the Supreme Court and the impugned judgment cannot be sustained and liable to be set aside.

10. In exercise of the power conferred by Sub-section (1) of paragraph 6 of the Fifth Schedule to the Constitution of India, the President was pleased to make the order, known as the Scheduled Areas (Part A States) Order, 1950, declaring (1) Ranchi District, (2) Singhbhum District excluding Dhalbhum Sub-Division, (3) Santhal Parganas District excluding Godda and Deoghar Sub-Divisions and (4) Latehar Sub-Division of Palamu District as the Scheduled Areas within the State of Bihar. After the Scheduled Area (Part A States) Order, 1950, was passed, the

Government of Bihar enacted Bihar Scheduled Areas Regulation, 1969 (Bihar Regulation 1 of 1969), making certain provisions and amending certain laws in their application to the Scheduled Areas in the State of Bihar for the peace and good government of the areas. Under the aforesaid Regulation, Section 71A was inserted after Section 71 of the Chotanagpur Tenancy Act, 1908 (Bengal Act 6 of 1908), which provides 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 (or a Mundari Khunt Kattidar or a Bhinhar) who is a member of the Scheduled Tribes has taken place in contravention of Section 46 (or Section 48 or Section 240) or any other provisions 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 transfer, 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:

...

After the enactment of Bihar Regulation 1 of 1969, the Government, by notification on 13.2.1970, published in the Bihar Gazette on 16.2.1970, specially empowered the Sub-Divisional Officers of the Scheduled areas (Sub-Divisions) to exercise powers and any of the functions of the Deputy Commissioner in their respective areas under the provisions of the Act.

11. Learned Counsel for the appellant has drawn our attention to the fact that the constitutional validity of the provision of Regulation 1 of 1969 as well as Section 71A of the Act was challenged in this Court and a Full Bench of this Court in the case of Amrendra Nath Dutta v. State of Bihar reported in 1983 B.B.C.J. 254 held that Regulation 1969 as well as Section 71A of the Act inserted by the said Regulation were valid. It was further held that in respect of operation of Section 71A of the Act, the adverse possession would mean possession for thirty years from the date of transfer.

12. Learned Counsel for the Respondents, on the other hand, submitted that u/s 212 of the Act, an application for setting aside sale of immovable property on deposit of debt and compensation to purchaser could have been filed by the original raiyat i.e. the father of the appellant, but he did not avail of the remedy provided u/s 212 of the Act. He also did not avail of the remedy provided u/s 213 of the Act for setting aside sale of immovable property on ground of irregularity or fraud. After about three decades, the appellant came up for restoration of the land in the application u/s 71A of the Act. The appellant or his predecessor-in-interest not having approached the statutory forum for appropriate relief as

provided under Sections 212, 213 and 214 of the Act, the application u/s 71A of the Act is not maintainable at this belated stage. It is too late to allege that the decree was vitiated by fraud and collusion. Learned Counsel for the Respondents further submitted that u/s 71A of the Act, the Deputy Commissioner has been empowered to restore the land belonging to a raiyat, who is a member of the Scheduled Tribes, if the transfer of his land took place in contravention of Section 46 or any other provision of the Act or by any fraudulent method, including decrees obtained in the suit by fraud and collusion. But it is not the finding of the Sub-Divisional Officer or the Additional Collector or the Commissioner that the decrees in the rent suits were obtained by fraud or collusion. As such, the question of restoration of the holding to the appellant did not and could not arise.

13. In reply, learned Counsel for the appellant submitted that the Chotanagpur Tenancy Act applies to the whole Chotanagpur Division, but the provision of Section 71A of the Act applies only to the Scheduled areas declared in the aforesaid President's order, failing within the Chotanagpur Division. Ranchi District has been declared as scheduled area by President's order, 1950 and in the subsequent Order, 1977. As such, the provision of Section 71A of the Act applies in respect of the holding in question. Section 71A of the Act has been inserted by the Regulation for giving special protection to the members of the Scheduled Tribes, who were deprived of their land in contravention of Section 46 or any provision of the Act or by any fraudulent method, including decrees obtained in suit by fraud and collusion. Thus, the power given to the Deputy Commissioner under the provision of Section 71A of the Act has the overriding effect over other provisions, namely, Sections 212, 213 and 214 of the Act. The power has been given because the Scheduled Tribes of those scheduled areas were unable to protect their area under the provisions of the Act, learned Counsel for the appellant further submitted that the word "decree" appearing in Section 71A of the Act cannot confine to decree only but also in its sweep includes the execution of the decree.

14. I have considered the submissions made by learned Counsel for the appellant and learned Counsel for the Respondent;; and perused the materials on record. The Hon'ble Supreme Court in the case of Pandey Orson (supra), reversing the decision of the Full Bench of this Court in the case of Ram Chander Sahu (supra) in paragraphs 6 and 6-A of the judgment held as follows:-

6. In Section 71A in the absence of a definition of transfer and considering the situation in which exercise of jurisdiction is contemplated, it would not be proper to confine the meaning of transfer to transfer under the Transfer of Property Act or a situation where transfer has a statutory definition. What exactly is contemplated in the provision is where possession has passed from one to another and as a physical fact the member of the Scheduled Tribe, who is entitled to hold possession and a non-member has come into possession would be covered by transfer and a situation of that type would be amenable to exercise of jurisdiction within the ambit of Section 71A of the Act.

6-A. The provision is beneficial and the legislative intention is to extend protection to a class of citizens who are not in a position to keep their property to themselves in the absence of protection. Therefore, when the legislature is extending special protection to the named category, the Court has to give a liberal construction to the protective mechanism which would work out the protection and enable the sphere of protection to be effective than limit by the scope....

15. I find force in the submission of the learned Counsel for the appellant that the decision of the learned Single Judge is impliedly overruled by the decision of the Hon"ble Supreme Court in the case of Pandey Orson (supra); inasmuch as in giving limited meaning of the word "transfer" as was given by the Full Bench in the case of Ram Chander Sahu (supra), the learned Single Judge held that the transfer effected by operation of law i.e. by execution of a decree was not covered by the provision of Section 71A of the Act.

16. Submission of the learned Counsel for the Respondents that in the absence of finding that the decrees obtained in the rent suits were due to playing fraud or collusion, there is no scope for application of provision of Section 71A of the Act for restoration of the holding in question, in my opinion, is not at all tenable. The term "decree" cannot give a limited meaning. It includes the execution thereof also. If a person, who is a member of the Scheduled Tribe within the Scheduled areas, has been deprived of his land in fraudulent execution of decree, the Deputy Commissioner is empowered to restore the land to that person in exercise of power u/s 71A of the Act. It is not the case of Respondent No. 1 that the finding of the Sub-Divisional Officer or the appellate authority or the revisional authority below that the execution of the decrees passed in the rent suits was vitiated by fraud, is arbitrary on perverse.

17. I find force in the submission of the learned Counsel for the appellant that u/s 71A of the Act, over-riding power has been conferred on the Deputy Commissioner to restore the land to a raiyat, who is a member of the Scheduled Tribes, transfer of which took place in contravention of Section 46 or any provision of the Act including decrees obtained in suit by fraud and collusion and that because of the fact that a raiyat, who is a member of the Scheduled Tribes did not seek remedy as provided under Sections 212, 213 and 214 of the Act, he would not be disentitled to get relief u/s 71A of the Act.

18. For the reasons stated above, I hold that the impugned judgment and order dated 17th March, 1990, passed by the learned Single judge in C.W.J.C. No. 962 of 1984 (R) cannot be sustained. The appeal is, therefore, allowed and the impugned judgment is set aside. I make no order as to cost.

Gurusharan Sharma, J.

19. I agree.