
(2008) 08 PAT CK 0081

In the Patna High Court

Jaleshwar Chaubey and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Citation : (2008) 08 PAT CK 0081

Final Decision : Dismissed

Judgement

V.N. Sinha, J.—Heard learned Counsel for the petitioners and the counsel for private Respondents.

2. Petitioner No. 1 is the son and petitioner No. 2 is the grand son of the purchaser, Most. Kabutari who purchased 1 Bigha 6 Kathas 13 Dhurs of lands in Plot Nos. 1463, 1592, 1700, 1774 appertaining to Khata No. 446 of Village Khajuria, P.S. Barauli, District Gopalganj from Raghunandan Tiwari under registered sale deed dated 27.1.1977. They are aggrieved by the orders passed by the appellate authority dated 21.12.1998, Annexure-3 as also the revisional authority dated 22.5.2000, Annexure-4 whereunder order dated 22.9.1995, Annexure-2 dismissing the pre-emption case filed by original private Respondent No. 5 was set aside in appeal and the appellate order was affirmed in revision. The subject matter of the pre-emption case is the aforesaid 1 Bigha 6 Kathas and 13 Dhurs of land. On 11.1.1943 Ram Subhag Choubey, one of the recorded tenant and father-in-law of Most. Kabutari sold his half share in aforesaid Plot Nos. 1453, 1592, 1700 and 1774, in favour of Raghunandan Tiwari through registered sale deed dated 11.1.1943. Raghunandan Tiwari executed a mortgage deed for part of the aforesaid lands to the extent of 6 Kathas 1 Dhur of Plot No. 1774 in favour of pre-emptor Bhagwat Choubey, Respondent No. 5 and his brother Dharmdeo Choubey vide registered mortgage deed dated 10.8.1953, Annexure-1 to this writ application. The lands mortgaged was redeemed on 29.7.1970 by petitioner No. 1 as also the father of petitioner No. 2 in terms of the redemption note scribed and signed by Dharmdeo Choubey for himself and his brother Bhagwat Choubey on the reverse of page-1 of the registered

mortgage deed dated 10.8.1953 and is dated 29.7.1970. It is submitted on behalf of the petitioners that having redeemed the land, the mortgage deed was also returned to petitioner No. 1 and his brother and endorsement to that effect was also made in the redemption note. The lands in question including the mortgaged lands were thereafter transferred by Raghunandan Tiwari in favour of Most. Kabutari vide registered sale deed dated 27.1.1977. The original private Respondent No. 5 being the son of the other recorded tenant and nephew of Ram Subhag Choubey having learnt about the sale deed dated 27.1.1977 claiming to be boundary raiyat of each of the four vended plot filed preemption case under Sub-section (3) of Section 16 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as "the Act") impleading Most. Kabutari and the vendor Raghunandan Tiwari. Purchaser refuted the claim on the ground that she being a name lender preemption case is fit to be rejected for failure to implead her husband Thakur Choubey as Opposite Party. The authorities under the Act considered and dismissed the pre-emption claim. The pre-emptor, private Respondent No. 5 approached this Court in C.W.J.C. No. 5899 of 1983 and this Court having heard counsel for the parties under judgment dated 12.1.1995, Annexure-A to the counter affidavit, remanded the matter to the Collector under the Act for fresh consideration of the matter on merits with further direction to decide whether Most. Kabutari was the name lender for her husband Thakur Choubey. Once the matter was remanded, the Collector under the Act reconsidered the matter on the basis of the documents already on record and concluded under orders dated 22.9.1995, Annexure-2 with reference to the mortgage deed dated 10.8.1953 as also the redemption note dated 29.7.1970 recorded over the reverse of page-1 of the mortgage deed itself that the initial sale transaction under registered sale deed dated 11.1.1943 executed by Ram Subhag Choubey in favour of Raghunandan Tiwari was itself a sham transaction and the objectors remained in possession of the subject matter of the sale deed dated 11.1.1943 as also the mortgage deed dated 10.8.1953 throughout and the impugned sale transaction dated 27.1.1977 is also a sham transaction and in fact there has been no transfer of land from Raghunandan Tiwari to Most. Kabutari and as there is no sale transaction under registered sale deed dated 27.1.1977 the pre-emption application at the instance of the pre-emptor is not maintainable. On the question of original private Respondent No. 5 being a boundary raiyat of the transferred land, the Collector under the Act held after perusing sale deed dated 27.1.1977 that the pre-emptor is not shown as boundary raiyat of the lands in question, as such, his claim on that ground also must fail. Aforesaid order dated 22.9.1995, Annexure-2 was challenged in appeal. The appellate court having referred to the orders of this Court dated 12.1.1995, Annexure-A as also the contents of the pleadings filed by the parties held that the pre-emptor was the boundary raiyat of the vended plot as in all the plots he had his half share together with his brother Dharmdeo Choubey and further held that Most. Kabutari was not the name lender for her husband and in the light of the aforesaid two findings, allowed the pre-emption case under orders dated 21.12.1998, Annexure-3. Petitioners herein assailed the said order

by filing revision before the Board of Revenue. The Board of Revenue considered the revision application as also the contents of the sale deed dated 11.1.1943 and the contents of the impugned sale deed dated 27.1.1977 and recorded a finding that the pre-emptor was the boundary raiyat of the vended land as he had his half share in all the plots by virtue of the fact that he was the son of Vidyapat Choubey, the other recorded tenant and nephew of Ram Subhag Choubey, who had executed sale deed dated 11.1.1943 for his half share in the plots in question. On the question whether Most. Kabutari was the name lender for her husband, the Board of Revenue also found that Most. Kabutari was not name lender, rather, she was purchaser of the lands in question under the sale deed dated 27.1.1977.

3. The two orders passed by the appellate authority, Annexure-3 and the revisional authority Annexure-4 are being assailed by filing the present writ application. Learned Counsel for the petitioners has submitted that the orders passed by the appellate authority and the revisional authority are fit to be set aside on the ground that the two authorities while setting aside the order of the Deputy Collector, Land Reforms have not considered the effect of the registered mortgage deed dated 10.8.1953, Annexure-1 and the redemption note dated 29.7.1970 recorded over the reverse of page-1 of the deed coupled with the fact that the deed was returned by the mortgagee to the petitioner No. 1 and his brother, father of petitioner No. 2 and from their custody the same was produced to establish that the two sale transactions were only sham/paper transaction as throughout the lands in question remained with Ram Subhag Choubey, Thakur Choubey and his sons and Raghunandan Tiwari was only a name lender. He further contended that admittedly the pre-emptor, original Respondent No. 5 is the raiyat of the adjoining lands along with his brother, Dharmdeo Choubey who having not been impleaded as party in the pre-emption case, the pre-emption case on behalf of Bhagwat Choubey, Respondent No. 5 was not maintainable as other raiyat of the adjoining plots have not chosen to join the preemption case. In this connection, he referred to the provisions contained in Sub-section (3) of Section 16 of the Act and submitted that it is the raiyat who is given the statutory right to apply for pre-emption and the raiyat of the adjoining plots were both Respondent No. 5, Bhagwat Choubey and Dharmdeo Choubey and as Dharmdeo Choubey has not chosen to join the preemption case, the pre-emption case is fit to be dismissed as it is well known that right to pre-empt is a weak right and can be defeated on account of laches to implead a necessary party.

4. Counsel for the private Respondents, however, has opposed the prayer. He, with reference to the findings recorded by this Court under judgment dated 12.1.1995, submitted that while remanding this case, this Court had observed at page 3 of its order that it was not in dispute that petitioner in CWJC No. 5899 of 1983 (original Respondent No. 5 herein) is a co-sharer and/or at least the adjoining raiyat and having observed as above, the Court directed the authorities to adjudicate as to whether Most. Kabutari, the purchaser in the sale deed dated 27.1.1977 was the name lender for her husband, Thakur Choubey since dead,

With reference to the said observation of the High Court, learned Counsel for the pre-emptor submitted that the Collector under the Act while passing order dated 22.9.1995, Annexure-2 exceeded his jurisdiction when he recorded the finding that the sale deed dated 11.1.1943 is a sham transaction. According to the learned Counsel no such case was ever pleaded and proved by the petitioners in the first round of litigation and while passing the order dated 22.9.1995, Annexure-2, the Collector under the Act should have confined himself only to the question whether Most. Kabutari was name lender for her husband as regards the sale deed dated 27.1.1977 and that original private Respondent No. 5 being a raiyat of the adjoining portion of the vended plot even in absence of his brother Dharmdeo Choubey could maintain pre-emption case as there was no partition by metes and bounds between him and Dharmdeo Choubey and both had interest in every nook and corner of the adjoining plot. In this connection, he relied upon a judgment of this Court in the case of Ramji Ram and Ors. v. The Member, Board of Revenue and Ors. reported in 1997(1) PUR 888, paragraphs 6 and 7. As regards the redemption note dated 29.7.1970, learned Counsel for the original Private Respondent No. 5 submitted that the said redemption note has been recorded by his brother Dharmdeo Choubey in collusion with the petitioners and in any case the redemption note shall only bind Dharmdeo Choubey and not the private Respondent No. 5. He further submitted that on the basis of the mortgage deed and the redemption note, the Collector under the Act could not have recorded a finding that the sale transaction dated 11.1.1943 was a sham transaction as the mortgage deed and the redemption note was only for 6 kathas and 1 dhur of land in Plot No. 1774, whereas the subject matter of the sale deeds dated 11.1.1943 and 27.1.1977 was 1 Bigha, 6 Kathas and 13 Dhurs. He further submitted that the factum of Benami transaction could have been considered only on the basis of evidence about the factum of payment in lieu of the two sale deeds as also who remained in possession of the lands in question/ title documents after the execution of the sale deed. The motive behind the Benami transaction is also required to be proved. Raghunandan Tiwari, who was the vendee under sale deed dated 11.1.1943 and vendor under sale deed dated 27.1.1977 was the best witness to depose about the nature of the two transactions as also about the factum of possession of the lands in question during the interregnum between 11.1.1943-27.1.1977. Raghunandan Tiwari being alive at the time of filing of the pre-emption case, should have been examined as a witness to support the story of Benami as he was the best person to depose about the nature of both the transactions. Petitioner No. 1 and his brother were also competent to come to the witness box to assert that they along with their father, Thakur Choubey remained in possession of the lands in question during the period of interregnum between the date of execution of the two sale deeds. In this connection, learned Counsel, with reference to the judgments of the Hon'ble Supreme Court in the case of Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, and in the case of Gapadibai Vs. State of Madhya Pradesh, , pointed out that the sale deed is a solemn document prepared and executed after considerable deliberation and

the person expressly shown as the purchaser in the sale deed is presumed to be the purchaser until the person asserting the sale deed to be Benami discharged the burden by adducing legal evidence of a definite character, which would either directly prove the fact of Benami or establish circumstances raising reasonable inference of that fact by leading evidence about the source from which the purchase money came , the nature and possession of the property/title deeds after the purchase, motive for giving the transaction a Benami colour, the position and relationship of the parties as also the conduct of the parties in dealing with the Benami property after the sale.

5. Having heard counsel for the parties and having perused the earlier orders of this Court dated 12.1.1995, Annexure-A as also the subsequent orders passed by the Collector under the Act, appellate/revisional authority as contained in Annexures-2, 3 and 4, I am of the view that this Court under the remand order dated 12.1.1995 directed the authorities under the Act to consider the pre-emption case as set out by the original private Respondent No. 5 and opposed by these petitioners on merit and while deciding the said case on merit also to consider whether Most. Kabutari, the vendee in sale deed dated 27.1.1977 was the name lender for her husband, Thakur Choubey. In view of the specific direction of this Court, while considering the case of the parties on merit, the authorities were only to consider the nature of the transaction dated 27.1.1977 as to whether Most. Kabutari was the name lender for her husband. The authorities under the Act, in my opinion, were not authorized by this Court to consider the question as to whether the contents of the earlier sale deed dated 11.1.1943 itself was sham. In view of the clear direction of the High Court in the earlier order, in my opinion, the Collector under the Act exceeded his jurisdiction when he considered the nature of the earlier transaction dated 11.1.1943 and the orders passed by the Collector under the Act has been rightly set aside by the appellate court and the appellate order has rightly been affirmed by the revisional court. Even otherwise it is evident that the purchaser has not led any oral/documentary evidence except the mortgage deed and redemption note to suggest that the two sale transactions were Benami transactions.

6. In the circumstances, there is nothing to establish that no consideration at all was paid in lieu of the two sale deeds as also possession of the lands in question remained throughout with Ram Subhag Choubey, Bhagwat Choubey and the petitioners. The mortgage deed and the redemption note cannot be relied upon in support of the case of the petitioners as the same is only for 5 kathas and 1 dhur of land in plot No. 1774, whereas the subject matter of the two sale deeds is 1 Bigha, 6 Kathas and 13 Dhurs.

7. The two authorities have categorically found that Bhagwat Choubey, original private Respondent No. 5 along with his brother Dharamdeo Choubey is the boundary raiyat of the vended plots as both of them have their half share in the adjoining plots. In terms of the provisions contained in Sub-section (3) of Section 16 of the Act, boundary raiyat of the adjoining plots has the option to file pre-

emption case impugning the transaction made in the sale deed. Original private Respondent No. 5 was the raiyat of the adjoining plots by virtue of being tenant in common with his brother, Dharamdeo Choubey. In the circumstances, original private Respondent No. 5 was competent to maintain the preemption case even in absence of Dharmdeo Choubey as both the original private Respondent No. 5 and Dharmdeo Choubey have their interest in the adjoining plots as there is only separation and no partition between them.

8. In view of my findings above, I do not see any illegality in the appellate order dated 21.12.1998, Annexure-3 as also in the revisional order dated 22.5.2000, Annexure-4 and this writ application is, accordingly, dismissed.