(2002) 07 PAT CK 0084

In the Patna High Court

Case No : C.W.J.C. No. 6560 of 1998

Surendra Prasad Mishra @ Khalu Mishra and Another — APPELLANT

Vs

State of Bihar and Others — RESPONDENT

Date of Decision : 19-07-2002

Acts Referred:

Bihar and Orissa Public Demands Recovery Act, 1914 — Section 21(2), 40(1)

Citation : (2003) 1 BC 316 : (2002) 4 PLJR 134

Hon'ble Judges : Prasun Kumar Deb, J

Bench : Single Bench

Advocate : Mahesh Narayan Parbat, for the Appellant; Harshwardhan Prasad, J.C. to S.C. II for State and Satendra Kumar Dubey, for the Respondent

Final Decision : Allowed

Judgement

P.K. Deb, J.—In this writ petition the grievance of the petitioners is that although they have raised objection but the District Co-operative Officer-cum-Certificate Officer, Katihar in Case No. 315/1994-95 has auctioned vide order dated 9.3.1996 the lands mortgaged in lieu of loan although a part of the land belonged to the petitioners.

2. The brief facts are as follows :

One Jaishree Lal Mishra was the owner of the land of R.S. Khata No. 830 Plot No. 328 measuring an area of 6 acres 22 decimals along with other land. He died leaving behind three sons, namely, Bhola Prasad Mishra, Digambar Prasad Mishra and Sarju Pd. Mishra. Bhola Prasad Mishra has got three sons one of them is petitioner No. 2 Nirendra Prasad Mishra. Digambar Prasad Mishra has got four sons including Jitendra Prasad Mishra who happens to be the certificate debtor in Certificate Case No. 315/94-95. The third son Sarju Pd. Mishra has got one son, namely, Surendra Prasad Mishra who happens to be the petitioner No. 1 in this case. After the death of Jaisri Lal Mishra records of right were published in the name of his three sons. There was a society at village Kolashi in the name and style of Kolashi Bricks Construction Co-operative Society Ltd. of which Jitendra Pd. Mishra the certificate debtor was the Secretary. The said society had taken a loan of Rs. 3 lacs in the year 1987 from the Katihar District Central Co-operative Bank Ltd. (respondent No. 2). The said loan was taken for and on behalf of the Co-operative Society by its Secretary who happens to be the first cousin of the petitioners. The father of Jitendra Pd. Mishra, namely, Digambar Pd. Mishra for securing the loan had mortgaged 14 acres 36 decimals of land by way of equitable mortgage in favour of the Bank respondent No. 2. As the Co-operative Society could not repay the loan then the respondent No. 2 Bank started the certificate case for realisation of Rs. 6,82,205.58 paise. The petitioners were neither connected in any way with the said Cooperative Society nor they were parties in the certificate proceeding at any stage but when auction sale of the mortgaged properly was proposed and notice was published in the newspaper Hindusthan dated 29.12.1995 and on 10.1.1996 then from the schedule of the land they could understand that their shares of 6 acres 22 decimals in R.S. Khata No. 830 Plot No. 328 was going 10 be sold in auction. The date of auction was fixed on 15.1.1996. On seeing such notice published in the newspaper the petitioners had gone to consult the records and find that as the loanee Jitendra Pd. Mishra could not pay up the loan amount then he was proceeded in Certificate Case No. 315/94-95. Jitendra Pd. Mishra was arrested and put in civil prison for non-payment of the loan amount. Later on he was released after remaining in the custody for six months as contemplated u/s 40(1)(a) of the Public Demand Recovery Act, 3 940. Even after civil prison also when the loan amount had not been paid then the Certificate Officer proceeded for auction sale of the properties which were mortgaged as security of the loan. The mortgage as already stated above had been executed by father of Jitendra Pd. Mishra i.e. the uncle of the present petitioner Digambar Pd. Mishra and according to the petitioners, in Plot No. 328 not only the certificate debtor Jitendra Pd. Mishra has share of 1/3rd but the petitioners have also got 1/3rd shares each on that land and, as such, shares of the petitioners in respect of that plot of land cannot be auctioned as they are in no way connected either with the loan or in the certificate proceeding itself. They filed an objection stating all these facts on 12.1.1996. Such objection should be construed as an objection u/s 21 of the Public Demand Recovery Act. As per that section a duty was cast on the Certificate Officer to investigate on the objection as to whether the attachment or sale proposed can be made or the claimants have got valid objection to that effect. Such investigation may not be made by the Certificate Officer if he finds that such objection had been filed designedly or unnecessarily delayed the auction sale or the attachment thereof. Sub-Section (2) of Section 21 provides that till such objection is being investigated the advertised sale shall be postponed. In para 16 of the writ petition it has further been mentioned by the petitioners not only the petitioners have a valid legitimate claim over apart of the land mortgaged but most of the land mortgaged had already been sold away by Digambar Pd. Mishra in his life-time during the period from 1983-1990 to different persons in the village. There is elaborate mention of such sale and area of lands involved on such sales in paragraph 16 of the writ petition. It has also been mentioned that one Rajan Kumar Jha who was also a purchaser from Digambar Pd. Mishrain respect of the part of the attached land had also filed an object on 9.1.1996. Those objections were kept on records by order of the Certificate Officer but no investigation was made nor the petitioners were given any scope or opportunity to raise their claims in proper perspective but then sale as proposed on 15.1.1996 was postponed and actually sale was made on 9.3.1996. As no further bidder was there and on the basis of the auction as contained in the certificate proceeding the land was sold in favour of the Bank. This sale on 9.3.1996 had been challenged in this writ petition as being without jurisdiction and of complete violation of the statutory laws as per the P.D.R. Act. It has further been urged that besides the writ jurisdiction the petitioners have got no other remedy as they were not in a position to prefer any appeal or revision as provided under the P.D.R. Act as they were neither party to the certificate proceeding nor party to the auction sale.

3. A counter affidavit has been filed for and on behalf of the respondent No. 2 denying all the allegations made by the petitioners. Their plea is that the petitioners being the first cousin of the certificate debtor Jitendra Prasad Mishra have come up to challenge the sale which was held long back in the year 1996. Only to frustrate the cause of the respondent and also to make delay in realisation of the public money. A plea has been taken on limitation on the ground that after the sale was made in the year 1996 the Bank could get their names mutated in the records of right and such mutation was definitely allowed by giving general notice but the petitioners had never raised any objection regarding mutation in favour of the respondent Bank and in that way when the sale in favour of the Bank authorities have become absolute there is no scope to challenge the same in this writ petition.

4. The points involved in this writ petition can be categorised in the following manner:

(i) Whether the petitioners have got any scope to challenge the auction sale when they were neither the party in the certificate proceeding and when the certificate debtor has not raised any objection so.

(ii) Whether petitioners'' claim can be construed to be barred by limitation or whether they can raise their grievance in appropriate forum of Civil Court vis-a-vis the maintainability of the writ petition can be there or not.

5. On the first point it can be found that the petitioners have come on record itself when they had filed objection regarding the sale notice as published and such objection of the petitioners had been kept on records by the order of the Certificate Officer itself on 12.1.1996. There was an order on 15.1.1996 to give notice to Ranjan Kumar Jha regarding his objection but nowhere it appears that the petitioners were given any notice of hearing on their objections. The sale auction as proposed fixed on 15.1.1996 had been postponed and the same had

been held on 9.3.1996 but from the copy of the order-sheet as has been filed as Annexure-3 it does not appear that after postponement of sale on 15.1.1996 any further notice was published fixing the date of sale on 9.3.1996. As already stated above when objection has been filed by an interested person regarding the proposed sale and attachment then the Certificate Officer shall have to proceed for investigation of such claims and objection as contemplated u/s 21 of the P.D.R. Act. But on the face of it as per the order-sheet reveals that no investigation was made nor any hearing has been given with regard to the objections raised from the side of the petitioners. In that way when the valuable rights of the petitioners in respect of their title over the land had been sold in auction without giving an opportunity to establish their claims as per the law/ Statute as mentioned above then definitely the petitioners have got right to challenge such auction sale even if not being a party to the certificate proceeding itself. Statute itself give a right to a third party to raise objection regarding the sale and such objection should be disposed of legally by following the procedure as enumerated within the Act itself. But that has not been done on the face of it and in that way definitely the petitioners have got right to challenge such sale. Now the question comes in as to whether the petitioners can have any alternative way of challenging such sale. Definitely the petitioners have the right to go in a Civil Court but when they had been given their right to raise an objection under the statute and the P.D.R. Act itself in such a certificate proceeding and when they raised such objection and the same has not been disposed of as per the provisions of law then they can definitely challenge the same under the extraordinary jurisdiction also because the petitioners can have no right under the P.D.R. Act itself to challenge by way of appeal or revision. As the petitioners'' objection had neither been dismissed nor being allowed rather kept in abeyance then definitely the petitioners can come within the purview of infringement of their fundamental right as contemplated under Article 226 or the Constitution of India. So the first point as formulated goes in favour of the petitioner. Regarding the second point about limitation nowhere it has been stated in the counter affidavit that after the sale was made and mutation proceedings were initiated by the Bank authorities the petitioners were ever served with any notice so everything was done behind the back of the petitioners as the records do not disclose that the petitioners were ever informed about the sale being made in favour of the Bank on 9.3.1996 and then mutation was made in their favour in the year 1996 so the petitioners have got right to come up as soon as they heard or gathered information regarding infringement of the irright. In that way I do not find that limitation comes as a barrier. Moreover, if we advent to the provisions of the Limitation Act, when the claim of the petitioners is based on title and possession then 12 years being the limitation period the petitioners have definitely come within the period itself. In that way do not find that limitation comes as a barrier in the present case.

6. As discussed above the writ petition is definitely maintainable and when the petitioners'' right has been infringed by auction sale then such sale can he

challenged by the petitioners although they were not directly parties in the certificate proceeding but they have come within the ambit of the certificate proceeding when their objections had been entertained and kept on record. Moreover there is also infringement of the mandatory Rules framed under the Act itself. The date of sale was published in the newspaper. Only regarding the previous date fixed i.e. on 15.1.1996 but afterwards when the sale was postponed to a future date then no publication was there under Rule 26 which is a mandatory one as per Rule 28(2) of the Rules framed as the postponement is beyond the period of 7 days. In that way also the sale made on 9.3.1996 is an illegal one. It has been mentioned in the order-sheet itself that except the Bank authorities i.e. the Certificate granter non eelse were present to bid. The question of any other person to be present for bidding does not arise at all as there was no publication/proclamation of sale on 9.3.1996 so in that score also the sale in favour of the respondent No. 2 is void in the eye of law.

7. Thus, on consideration of all points as mentioned above the writ petition is hereby allowed and all orders passed after 12.1.1996 in the certificate proceeding in Certificate Case No. 315/94-95 are hereby quashed and the Certificate Officer shall proceed afresh in the matter by giving proper notice to all parties in the light of the observations made above.

