IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6844 of 1994

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Ashrafi Devi, Wife of Ram Lakhan Sah, resident of village: Rangpura Tola Milky, P.S. Dhamdaha (Mirganj), District : Purnea

.... Petitioner/s

Versus

1. The State of Bihar
2. The Additional Member, Board of Revenue, Bihar
3. Bhowmeshwar Mistry alias Bhubneshwar Mistry, son of Late Siri Mistry, resident of village : Ranpura Tola Milky, P.S. Dhamdaha (Mirganj), District : Purnea
4. Smt. Janki Devi, wife of Ganga Mistry, resident of village : Burhia, P.S. Sarsi, District : Purnea
5. Smt. Tara Devi, wife of Rajendra Prasad, resident of village :Amari, P.S. Dhamdaha, District Purnea
6. Manju Kumari, daughter of Late Baldeo Mistry
7. Sulekha Kumari, Daughter of late Baldeo Mistry, both resident of village Ranpura Milky Tola, P.S. Dhandaha, District Purnea
8. The Additional Collector, Purnea
9. The Deputy Collector, Land Reforms, Purnea

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Bidhanesh Mishra, Advocate
Mrs. Tanuja Mishra, Advocate

For the Respondent no.3 : Mr. Arun Prasad Ambastha, Advocate

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA

C.A.V. JUDGMENT

Date: 24 -06-2015

Petitioner is the purchaser of the lands in question. She has filed this writ petition on 10.08.1994 assailing the Resolution dated 30.05.1994, Annexure-1 passed by Additional Member, Board of Revenue in Case No. 658 of 1990 whereunder learned Additional Member, Board of Revenue has set aside the order dated 30.10.1990, Annexure-3 passed by Additional Collector, Purnea in Case No. 166 of 1986-87, 23 of 1989 and the order dated 22.10.1986, Annexure-2 passed by Deputy Collector, Land Reforms, Sadar Purnea in Case No.

27 of 1983-84 and thereby allowed the pre-emption case filed by Respondent no.3.

2. From the order-sheet of the writ case, it appears that notice in the matter was issued to Respondent nos. 3 to 7 under order dated 05.04.1995 asking them to show cause as to why final orders may not be passed in the case at the stage of admission with further direction that in the meanwhile, petitioner shall not be dispossessed from the lands in question. This writ case was, however, admitted under order dated 17.05.1996 when again notice was directed to be served on non-appearing respondents with further direction that during the pendency of the application operation of the order directing execution of the sale deed in favour of the pre-emptor-respondent by the petitioner shall remain stayed. After admission, the case was taken up for hearing on 07.05.2015 when after argument, learned counsel for the respondents submitted that besides the case law reported in 1985 PLJR 554 he has to cite few more case law and matter be adjourned for tomorrow. Acceding to the request of learned counsel for the respondents, matter was adjourned with direction that the case shall be taken up for further hearing on the following day at 1:00 P.M. so as to enable the counsel for the respondents to produce case law. Having taken adjournment for producing few case law, learned counsel for the respondents filed an application under Order

22 Rule 3(2) and 4(3) of the Code of Civil Procedure duly affirmed by himself stating that the writ petition has abated as the sole petitioner, Respondent no. 3 and Respondent no. 6 died 10 years earlier in 2005, 12 years earlier in 2003 and 6 years earlier in 2009 respectively. Copy of the said application was served on the counsel for the petitioner on 07.05.2015 at 3:00 P.M., which is evident from the receipt granted on the index page of the application filed under Order 22 Rule 3(2) and 4(3) of the Code of Civil Procedure. When the matter was taken up on the following day i.e. 08.05.2015, counsel for the petitioner stated that he has no information about the death of petitioner, Respondent nos. 3 and 6 as claimed in the application filed by the counsel for the respondents and application having been filed within 24 hours, the same is not maintainable and further he has no means to get the facts mentioned therein verified from the Pairvikar of the petitioner and submitted that matter may proceed. Counsel for the respondents also submitted that he has no objection if the matter proceeds but the aforesaid application may be kept on record.

3. From the impugned order passed by the learned Additional Member, Board of Revenue, it is quite evident that he has concluded that petitioner-purchaser does not have land adjoining the lands in question after he concluded that the adjoining plot no. 3851 does not belong to her as the same is recorded in the name of her

husband and his brother. In this connection, learned counsel for the petitioner submitted that plot no. 3851 was purchased by her father-in-law, Sanokhelal Sah and Nokhelal Sah from Sachindra Narayan Thakur and Kaushalya Devi through registered sale deed in the name of her husband and his brother. The lands in question were also purchased by Sanokhelal Sah and Nokhelal Sah, father-in-law of the petitioner in the name of the petitioner out of their love and affection for her as they had purchased plot no. 3851 in the name of her husband and his brother. Learned counsel for the petitioner also submitted that the reliance placed by the learned Additional Member, Board of Revenue over the case law reported in the case of **Upendra Mishra and another Vrs. Smt. Inchan Mishra and another, 1986 PLJR 763** is also misplaced as the facts of the said case are different from the present one. In the case of **Upendra Mishra and another (supra)** plea of Benami was not raised at the initial stage, as such, plea was taken before the Revisional Court, but in the present case, petitioner in her show cause filed before the Deputy Collector Land Reforms, Purnea clearly stated that the lands in question had been purchased by her father-in-law in her name who also purchased plot no. 3851 adjacent to plot in question in the name of her husband and his brother. In this connection, learned counsel also pointed out that learned Additional Member, Board of Revenue failed to appreciate that pre-emptor-Respondent no.3 is neither co-sharer nor holder of the adjoining land as petitioner placed on record documents to indicate that his vendor Bhowmeshwar Mistry had separated from Respondent no.3 much before the execution of the sale deed. In this connection, learned counsel for the petitioner also submitted that petitioner has placed on record the documents to suggest that Respondent no.3 is not raiyat of adjoining plot no. 3853.

4. Learned counsel for the respondents, with reference to his written submission filed on 11.05.2015, submitted that pre-emptor-Respondent no.3 and the vendor of the petitioner were joint until the execution of the sale deed, which is evident from their joint Jamabandi, Annexures-A/1 and A/2 to the counter affidavit. Annexures-A/1 and A/2 are the rent receipt issued on 25.03.1990 and 30.03.1991. In paragraph 4 of the written submission, learned counsel for the respondents further submitted that one of the brothers of Respondent no.3, the vendor of petitioner, transferred his share to the petitioner and Respondent no.3 being the co-sharer had every right to claim pre-emption over the lands in question. In this connection, he placed reliance on the findings recorded by the DCLR in his order dated 22.10.1986, Annexure-2 page 42 – 43 as thereunder learned DCLR held that it is presumed that pre-emptor and his two full brothers are not joint, no document was filed on behalf of Respondent

no.3 to show jointness, therefore, his claim for jointness was dismissed. In this connection, it is pointed out that the purchaser- writ petitioner had not come up with any story of Benami purchase before the DCLR. Learned counsel next referred to the finding recorded by the Additional Member, Board of Revenue under order dated 30.10.1990, Annexure-3 page 44 – 47 that Respondent no. 3 filed Appeal No. 166 of 1986-87, in the appeal also writ petitioner-purchaser did not come up with story of Benami purchase in her name by her father-in-law yet the appeal was erroneously dismissed by the Additional Collector.

5. Learned counsel for Respondent no.3, with reference to the findings recorded by the Additional Member, Board of Revenue in his order dated 30.05.1994, Annexure-1 at page 38-41, submitted that for the first time at the stage of revision, writ petitioner-purchaser took the stand of Benami purchase of plot no. 3851 by her father-in-law in the name of her husband and his brother situate adjacent west to the lands in question, which were purchased by her father-in-law in her name. It is submitted by the counsel for Respondent no.3 that the story of Benami purchase raised by the writ petitioner did not find favour with the Revisional Authority and the revision filed by Respondent no.3 was allowed. Learned counsel for Respondent no.3 lastly submitted that the story of Benami purchase of

the lands in question by the father-in-law of the writ petitioner could never be accepted as he never filed any declaration in terms of the provisions of Section 16(2)(i) of the Act. In this connection, it is pointed out that declaration in writing duly verified is required to be filed at the time of registration of the documents which according to the counsel for Respondent no.3 is the surest test under the Ceiling Law to find out the correctness of the story of Benami purchase. In support of the aforesaid submission, learned counsel for Respondent no.3 placed reliance on the judgment of the Full Bench of this Court in the case of **Yugal Kishor Singh and another Versus The State of Bihar & Ors., 1985 PLJR 554, paragraph 20 and Upendra Mishra and another Versus Smt. Inchan Mishra and another, 1986 PLJR 763, paragraphs 4, 7** and placed reliance over the observation of the Bench in paragraph 7 that wife-Respondent no.1 cannot claim protection against the claim of pre-emption simply because her husband was a co-sharer of some of the adjoining lands.

6. Learned counsel for Respondent no.3 next submitted that Section 16(3)(i) of the Act talks about any person which is different from the term family relevant in the case of land holding surplus land beyond the prescribed limit. He also submitted that Supreme Court has repealed the earlier view that right of pre-emption under Section 16(3) of the Act is a weak right in its judgment

rendered in the case of **Shyam Sundar and others Vrs. Ram Kumar and another, (2001) 8 SCC 24** and held that right of pre-emption under the statutory law is mandatory. He further submitted that placing reliance on the aforesaid judgment in the case of **Shyam Sundar (supra)** Supreme Court in the case of **Suresh Prasad Singh Vrs. Dulhin Phulkumari Devi and others, 2010 (2) PLJR 167(SC)** has held that the main object behind the right of pre-emption is to prevent the intrusion of the stranger in the family holding or property. In this connection, he submitted that where a co-sharer transfers his share in the holding, the other co-sharer has right to veto such transfer and thereby to prevent the stranger from acquiring the holding. It is submitted that the writ petitioner is stranger to the family of Respondent no.3 and his brother Baldeo Mistry, the original vendor and submitted that the prayer made in the writ petition be rejected.

7. Having considered the rival submissions of the parties, it is evident that the lands in question are by the side of plot no. 3851, which was earlier purchased by the father-in-law of the petitioner-purchaser Sanokhelal Sah and Nokhelal Sah from Sachindra Narayan Thakur and his wife Kaushalya Devi through registered sale deed in the name of the husband of the petitioner and his brother. Aforesaid stand has been taken before the Collector under the Act i.e. DCLR and statement to that effect has been made in

paragraphs 24, 25 of the writ petition and does not appear to have been contested by Respondent no.3 in the counter affidavit filed on his behalf. In paragraph 20 of the counter affidavit, Respondent no. 3 has averred that the adjoining land of plot no. 3851 is the acquisition in the name of Sanokhelal Sah and Nokhelal Sah, which is incorrect as the said acquisition has been made by Sanokhelal Sah and Nokhelal Sah in the name of the husband of the writ petitioner and his brother. Similarly, the lands in question though ostensibly purchased in the name of the petitioner but the same is also a Benami purchase of her father-in-law as petitioner does not have any independent income of her own like her husband and his brother. It appears, father-in-law of the petitioner was the Karta of the family and from the family income, he earlier purchased plot no. 3851 in the name of his two sons i.e. husband of the writ petitioner and his brother. The lands in question situate by the side of plot no. 3851 was also purchased by the father-in-law of the petitioner in the name of writ petitioner. Both the plots being adjoining to each other, there was no occasion for the pre-emptor-Respondent no.3 to intermeddle by filing pre-emption case. Before interfering with the findings recorded by the original and the appellate authority, Additional Member, Board of Revenue under the impugned order should have first verified from the records i.e. show cause filed on behalf of the purchaser before the original authority, DCLR that plot no. 3851 was purchased by her father-in-law Sanokhelal Sah and Nokhelal Sah from Sachindra Narayan Thakur and his wife Kaushalya Devi through registered sale deed in the name of her husband and his brother. Similarly, Additional Member, Board of Revenue was also required to have confirmed from the records that she had taken the stand that the lands in question was also a Benami purchase by her father-in-law in her name and only after recording the finding that such stand was not taken by her before the DCLR, the two orders passed in her favour should have been set aside.

8. From the impugned resolution of the Additional member, Board of Revenue, Bihar, it does not appear that any such exercise has been taken, in the circumstances, I am of the view that the impugned resolution dated 30.05.1994, Annexure-1 passed by the Additional Member proceeds on surmises and conjecture and is set aside.

9. The writ petition is, accordingly, allowed.

(V.N. Sinha, J.)

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