

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3855 of 1992

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Dhrubpati Devi, W/o Rajanikant Singh, resident of village Latarahiya Pragana
Maker, P.O. Latrahiya, P.S. Parsa, District Saran

... .. Petitioner

Versus

1(i) Sudhir Kumar Singh
(ii) Randhir Kumar Singh
(I) & (ii) S/o Lila Kant Singh (deceased)
(iii) Poonam Devi, W/o Surendra Nath Shukla
(iv) Pawn Devi, W/o Rakesh Singh
(iii) & (iv) D/o Lila Kant Singh (deceased)
2. Satrugan Singh, son of Singeshwar Singh
Both residents of village Latarahiya, Pargana Maker, P.O. Latrahiya, P.S.
Parsa, District Saran
3. Additional Member, Board of Revenue, Bihar, Patna
4. Additional Collector, Saran at Chapra
5. Dy. Collector, Land Reforms, Bihar, Sadar Chapra

... .. Respondents

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Appearance :

For the Petitioner/s	:	Mr. J.S.Arora, Sr.Adv. Mr. Mithlesh Kumar Khare, Adv.
For the Respondent/s	:	Mr. Ajay, GA-5
For the private respondents:	:	Mr. Shailendra Kumar Verma, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE JUSTICE SMT. NILU AGRAWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 05-02-2019

It is feeling aggrieved by the order dated 22.4.1991
passed by the appellate authority in unsettling the decision of the
Deputy Collector, Land Reforms under the Bihar Land Reforms
(Fixation of Ceiling Area and Acquisition of Surplus Land) Act,
1961 (hereinafter referred to as 'the Act'), whereby the Deputy
Collector, Land Reforms had rejected the preemption application



filed by respondents no. 1 and 2 under section 16(3) of 'the Act' which order of the appellate authority has been affirmed by the revisional authority vide order dated 6.12.1991, that the purchaser-petitioner is before this Court through the writ petition to question the orders of the appellate and revisional authority, which are impugned at Annexures 2 and 4 respectively.

This writ petition was admitted for hearing by a Division Bench on 15.2.1993 which admission order directed the matter to be placed for hearing before a Division Bench. The writ petition was dismissed for non-prosecution on 6.12.2013. It was restored on 19.8.2014 vide order passed in M.J.C.No. 1929/2014 only to be again dismissed for default on 4.12.2014. A second restoration application was filed and vide order passed on 4.7.2017 in M.J.C.No. 2012/2015, the writ petition was restored and was taken up for hearing by this Bench. Since there was no representation on behalf of the State that on request Mr. Ajay, learned G.A.-5 assisted the Court in support of the order impugned.

Before we would proceed to deal with the issues as raised and contested before this Court by the parties, we deem it necessary to reproduce the family genealogy which is present at paragraph-4 of the writ petition and runs under:



Ram Gulam Singh			
/		/	
Bhuneshwar Singh		Jagnarain Singh	

/		/	
Rajeshwar Singh		Singheshwar Singh	
/		/	
Tulsi Kuar		Satrughna	
@ Dikha Kuar		Singh	
Lilakant		Fakira Singh	
Singh		Rajnikant Singh	
		Dhrubpati Devi(wife)	

According to the petitioner, Tulsi Kuar @ Dikha Kuar, the widow of Rajeshwar Singh intended to sell 4 bigha 10 katha and 15 ½ dhurs of land as she fell in need of money. A negotiation took place between her and the petitioner's husband for the sale/ purchase of land. On consideration money being paid that a sale deed was executed on 22.4.1988 in the name of the wife i.e. petitioner before this Court. According to the writ petitioner, her husband Rajnikant Singh was the real purchaser as she had no separate fund to pay for consideration amount and after purchase the land got amalgamated in the land owned and possessed by her husband Rajnikant Singh.

On registration of the sale deed that the deceased respondent no.1 and respondent no.2 filed an application under section 16(3) of 'the Act' giving rise of L.C.Case No. 11/1988-89 before the Deputy Collector Land Reforms (hereinafter referred to as 'the D.C.L.R.') questioning the right of the writ petitioner to



make purchase as she was neither a co-sharer nor a boundary raiyat. It was further their case that since a partition had already taken place, even the husband of the petitioner was not a co-sharer. The matter was considered by the D.C.L.R. as the Collector under 'the Act' who on consideration of the rival claims did not find merit in the application filed by deceased respondent no. 1 and respondent no. 2 seeking preemption and by the order dated 24.10.1989 the application was rejected. A copy of this order is enclosed at Annexure 1 to the writ petition.

Feeling aggrieved respondents no. 1 and 2 filed a statutory appeal before the Addl. Collector giving rise to L.C.Appeal No. 51/1989 and the Addl. Collector on hearing the parties allowed the appeal vide order passed on 22.4.1991 and set aside the order dated 24.10.1989. A copy of the appellate order is enclosed at Annexure 2. It was now the turn of the writ petitioner to question the appellate order through process of revision which she filed before the Board of Revenue giving rise to Revision Case No. 193/1991 but the Addl. Member, Board of Revenue by the order dated 6.12.1991 dismissed the revision application which is impugned at Annexure 4 to the writ petition. It is feeling aggrieved by the orders of the appellate authority impugned at Annexures 2



and the revisional authority impugned at Annexure 4 that the purchaser is before this Court.

Mr. J.S.Arora, learned Senior Counsel has appeared for the petitioner alongwith Mr. Manoj Kumar, Advocate, the pre-emptors are represented through Mr. S.K.Verma, Advocate and the State is represented through Mr. Ajay, learned GA-5 assisted by Mr. Pratik Kumar Sinha, learned AC to GA-5.

Learned counsel for the parties in support of their arguments have also filed written submissions.

Mr. Arora, learned Senior Counsel appearing for the petitioner has submitted that the only issue raised by the pre-emptors to obstruct the transaction and to seek transfer in their favour is on grounds that the sale to the petitioner by the land holder is benami and since the writ petitioner is neither a co-sharer nor a boundary raiyat and hence, they are entitled to a preemption. He submits that it is relying on the provisions of the Benami Transaction (Prohibition) Act, 1988 and on a judgment of the Supreme Court reported in AIR 1989 SC 1247 (**Mithilesh Kumari & anr. vs. Prem Behari Khare**) that the claim had been set up but the learned DCLR as the Collector under 'the Act' in consideration of the facts and the materials on record as also stand of the writ petitioner that her husband was a real owner and that



she was an ostensible owner and she had no fund to support the purchase, decided the contest in favour of the purchaser because the pre-emptors were not in a position to contest the stand taken by the purchaser or to demonstrate that the purchase was made from the own funds of the purchaser. He submits that the judgment of the Supreme Court in the case of **Mithilesh Kumari** (supra) so relied upon by the pre-emptors was overruled by a subsequent judgment of the Supreme Court reported in AIR 1996 SC 238 (**R. Rajagopal Reddy & ors. v. Padmini Chandrasekharan**). It is argued that while the judgment in the case of **Mithilesh Kumari** (supra) held the Benami Transaction (Prohibition) Act, 1988 retroactive to cover all transaction which were pending final decision, but this opinion was overruled by the Supreme Court in the subsequent judgment rendered in the case of **R. Rajagopal Reddy** (supra) to hold that the Act had a prospective operation and would cover only those transactions which took place after Section 3(1) came into operation.

It is further the argument of Mr. Arora relying upon a Full Bench judgment of this Court reported in AIR 1985 Patna 265 (**Yugal Kishore Singh & anr. v. the State of Bihar & ors.**) that the issue that a plea of Benami transaction can be taken even in a preemption proceeding, has been upheld and it has further been



held that once such issue is raised in a preemption proceeding, the statutory authority would be under obligation to make an investigation in this regard before passing a final order. Learned counsel relies on the opinion recorded by the Full Bench at paragraphs 4A, 10 and 13 of the judgment.

According to Mr. Arora, although the DCLR as the Collector under 'the Act' appreciated the merit in the stand taken by the petitioner as the purchaser of the land as also the frivolity of the objection raised by the pre-emptors relying upon the provisions of the Benami Transaction (Prohibition) Act, 1988 which was enforced subsequently, the appellate and the revisional authorities have been mechanical in their discharge because even if they were persuaded by the arguments of the pre-emptors regarding benami purchase by the petitioner, they were obliged to investigate into the claim of Benami set up by the petitioner before holding it otherwise. Learned counsel relying upon a recent judgment of the Supreme Court reported in AIR 2018 SC 3470 (**Vinod Kumar Dhall v. Dharampal Dhall & ors.**) in particular reference to paragraph 13 of the judgment has submitted that the Supreme Court has held that any purchase of property by a person/ family in the name of other persons, has been made permissible and if the property is held in fiduciary capacity or is held by the trustee of



another person for whom he is trustee or with whom he stands in such capacity, then the real owner would be entitled to possess the right to recover the property and the power under the Benami Transactions (Prohibition) Act would not apply.

According to Mr. Arora, learned Senior Counsel, apart from the plea of Benamidar set up by the petitioner, which did not find favour from the appellate or the revisional authority, yet they could not interfere with the order passed by the DCLR nor the preemption application was capable of being allowed in view of the legal position settled by the Division Bench of this Court in a judgment reported in 1979 BBCJ 151 (**Mukhi Mali vs. the State of Bihar & ors.**) endorsed with approval in a subsequent judgment reported in 1997(1) PLJR 848 (**Nathuni Singh Yadav vs. the State of Bihar & ors.**), whereby it was held that a preemption application is maintainable only if all the three parties are land holders and since there is nothing on record to demonstrate that the petitioner was a land holder, the preemption application under section 16(3) of 'the Act' itself was not maintainable.

It is raising these issues and placing reliance on the judgments so noted above that Mr. Arora canvasses that the orders passed by the appellate authority and the revisional authority are not sustainable and are fit to be set aside.



The argument of Mr. Arora has been contested by Mr. Ajay, learned GA-5 as well as Mr. Shailendra Kumar Verma. According to Mr. Ajay, the preemption application was much maintainable because the transaction was not benami and it is the petitioner who was the real owner of the property. According to Mr. Ajay, it was for the purchaser to demonstrate that the consideration amount was paid by her husband and having failed to do so, she cannot be permitted to defend the transaction on the plea of benami. According to Mr. Ajay, the orders passed by the appellate and the revisional authority is in tune with the legal position and these authorities have seen through the game to decide in favour of the pre-emptors. Learned counsel has relied upon a judgment reported in AIR 1980 SC 727 (**Kan Singh v. Bhim Singh**) and a judgment reported in AIR 2007 SC 2637 (**V.Shankaranarayana Rao (D) v. Leelavathy (D)**) in support of his submission. Learned counsel in support of his submission has also relied upon a judgment reported in AIR 1972 Patna 1 (**Narendra Kr. Ghose v. Sheodeni Ram & ors.**) and the Full Bench decision of this Court reported in 2017(2) PLJR 285 (**Laxmi Narain Singh vs. the State of Bihar & ors.**). In response to the argument of Mr. Arora on the maintainability of preemption application relying upon the judgments of this Court in **Mukhi**



Mali and Nathuni Singh Yadav (supra) he submits that these issues have been raised for the first time before this Court.

Mr. Verma, learned counsel appearing on behalf of the pre-emptors, has submitted that the issue has been rendered academic because while the writ petition lay in a dismissed condition that the sale deed has been executed by the statutory authority in favour of the pre-emptors on 28.1.2016. According to Mr. Verma, that the orders impugned in the writ petition has taken its effect to result in execution of the sale deed for the plots in question in favour of the pre-emptors, the writ petition has been rendered infructuous and should be dismissed accordingly.

Mr. Verma responding to the issues raised by Mr. Arora has reiterated the same objections as canvassed by Mr. Ajay, learned GA-5 to support the orders of the appellate and the revisional authority. It is the argument of Mr. Verma that in undisputed position where the petitioner is the purchaser of the land, her plea of benami had to be supported through cogent piece of evidence and not on oral assertions. It is submitted that although such plea was taken during the proceedings before the DCLR but no evidence was led by the purchaser to support that the consideration amount was paid by the husband of the purchaser nor the husband came forward to support the plea. While



supporting the orders passed by the appellate and the revisional authority it is argued that each and every aspect of the matter has been examined by these authorities to draw in favour of the pre-emptors and which opinion requires no intervention. Learned counsel relying upon the judgment of this Court reported in 1983 PLJR 16 (**Sk. Halaluddin & ors. v. Habi Hasan & ors.**), has submitted that the plea of benami has to be supported with evidence and since the sale deed is silent on these issues, it cannot be raised as an afterthought.

We have heard learned counsel for the parties and have perused the records.

Before we would proceed to examine the arguments advanced by the learned counsel appearing for the contesting parties on the merits of contest, we consider it appropriate to first deal with the objection raised by Mr. Verma questioning the maintainability of the writ petition in view of the execution of the sale deed by the DCLR, Chapra in obedience of the order passed by the appellate authority/ revisional authority on dismissal of the writ petition even if, on ground of non-prosecution. We note that the admission order on 15.2.1993 did not stay operation of the orders passed by the appellate and the revisional authority impugned in the writ petition. Since the Division Bench while



admitting the writ petition itself did not give any interim protection to the writ petitioner, the dismissal of the writ petition for non-prosecution not once but twice would not be making much of a difference because the issue put to contest is to be adjudicated on its merits and even if the statutory authorities have taken steps in consequence of the order passed by the appellate authority and the revisional authority, such action would be governed by the final outcome of the present proceeding. The legal position on the doctrine of 'lis Pendens' is too well settled for inviting any decision.

Had the writ petitioner lost interest in the matter, in such case the matter would be otherwise but the records of the restoration application would show that the notice was issued to the pre-emptors who also registered appearance in the restoration application to oppose the same by filing an application on appearance. It is thereafter that the writ petition was restored on 4.7.2017 and since it is during pendency of the restoration application bearing M.J.C.No. 2012/2015 that the sale deed has been executed in favour of the pre-emptors, obviously it has to sink or sail on the outcome of the present proceedings.

Adverting to the merits of the contest it is noted that while the sale deed was executed in favour of the purchaser on



22.4.1988 by the land holder, the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 was promulgated on 19.5.1988 and which translated into the Benami Transactions (Prohibition) Act, which was enforced on 5.9.1988. The Ordinance and the Act thus came into force after the sale deed was executed in favour of the petitioner on 22.4.1988.

Now in view of the judgment of the Supreme Court rendered in the case of **R. Rajagopal Reddy and Vinod Kumar Dhall** (supra), two issues are put to rest, namely:

(a) The Benami Transactions (Prohibition) Act, 1988 is not retroactive to cover past transaction rather is prospective; and

(b) If a plea is taken that the property is held benami i.e. as a trustee or in fiduciary capacity, the real owner would be entitled to maintain his/her claim against the Benamidar.

In so far as the contest in hand is concerned, I am persuaded to refer to the order of the Deputy Collector Land Reforms enclosed at Annexure 1 to the writ petition in consideration of the preemption application and taking note of the stand taken by the petitioner that she held the property as a Benamidar of her husband. A plain reading of the order of the DCLR at Annexure 1 would confirm that this is the sole plea taken by the purchaser before him to contest the preemption application



and except for relying upon an overruled judgment of the Supreme Court rendered in the case of **Mithilesh Kumari** (supra) to invoke the provisions of Benami Transactions (Prohibition) Act, 1985, the pre-emptors did not lead any evidence either to contest the plea of 'benami' raised by the purchaser or to show that the property had been purchased by the petitioner from her own resources.

In our opinion, where the purchaser had specifically pleaded before the DCLR that the land was purchased by her husband who had also paid consideration amount and which stand had been opposed by the pre-emptors relying upon the provisions of the Benami Transactions (Prohibition) Act, 1988 to canvass that once the purchase is made in the name of the wife, it would stand in her name or would be hit by the penal provisions of the Benami Transactions (Prohibition) Act, that the judgment so relied upon by the preemptors rendered in the case of **Mithilesh Kumari** (supra) has been overruled by the judgment of **R.Rajagopal Reddy** (supra) and no evidence was led by the pre-emptors to demonstrate that the purchase was made by the petitioner from her own resources, the opinion expressed by the DCLR was not capable of interference either by the appellate authority or the revisional authority who have simply based their conclusion on a presumptive opinion that a property standing in the name of the



purchaser wife, shall be deemed to be her own property, without bothering to discharge their obligation as cast under the Full Bench judgment of this Court rendered in the case of **Yugal Kishore Singh** (supra) to examine the plea of benami so set up by the petitioner. A copy of the written submission filed by the petitioner before the Addl. Member, Board of Revenue, in the revisional proceeding is enclosed at Annexure 3 and the reference to the Full Bench judgment in the case of **Yugal Kishore Singh** (supra) finds reference therein which casts an obligation on the statutory authority to investigate into the plea of benami.

In our opinion, once a plea of benami was taken by the purchaser and since the pre-emptors did not choose to contest the plea with supportive evidence rather simply tried to brush it aside by relying upon the provisions of Benami Transactions (Prohibition) Act, 1988, in case the appellate and the revisional authority had other views on the plea of benami taken by the purchaser, they were bound under the Full Bench judgment to investigate into the plea but which essential obligation has been abdicated by a mechanical rejection by each of the two superior authorities in appeal and in revision. The conclusion drawn by the Revisional authority while affirming the appellate order that even if the plea of the petitioner is accepted, yet the property standing in



the name of the purchaser wife shall be deemed to be her property and cannot be held the property of the husband may have merited consideration if, there were cogent evidence on record to strike down the plea of benami.

It is not in dispute that the husband did not come up to claim this property or to support the plea advanced by the petitioner but then the consequences of such avoidance would be that the orders passed would be binding on him and he cannot be allowed to wriggle out of the conclusion so arrived, on the contest.

In our opinion, once a plea was taken by the petitioner that the land in question was purchased by the husband in her name then until such time that:

- (a) the statement is found untrue; or
- (b) the land held is found in excess of the ceiling limit; or
- (c) the real owner i.e. the husband herein, is held neither a cosharer nor a boundary raiyat, any such plea cannot be rejected mechanically as done by the orders impugned.

An additional feature which draws the contest in favour of the petitioner is the judicial pronouncement of this Court in the case of **Mukhi Mali** (supra) and **Nathuni Singh Yadav** (supra). Their Lordships of this Court in the judgment under reference have held that a preemption application is maintainable only in



conditions where the three connected parties, i.e. the seller, the purchaser and the pre-emptor, all are land holders and if a purchase is made by a landless then it would be iniquitous to either deprive a landless of any such purchase or to subject every purchase by a landless, to cross over the rigors of section 16(3) of 'the Act'.

We do appreciate that the provision of Section 16(3) has been incorporated with a view to avoid fragmentation but it is taking note of such exceptional and special circumstances where a landless is deprived of a valuable right that the Division Bench of this Court in each of the two judgments have held that unless the relevant parties to such transaction i.e. the seller, the purchaser and the pre-emptor are 'land holders', the preemption application would not be maintainable. The Division Bench in the case of **Nathuni Singh Yadav** (supra) while placing reliance on the judgment of **Mukhi Mali** (supra) have held at paragraph 7 thus:

“7. It should be kept in mind that the right of pre-emption, although created by statute, is a clog on the right of a person to acquire land in Radhakishan Laxminarayan Toshniwal vs. Shridhar Ramchandra Alshi (AIR 1960 Supreme Court 1368) it has been observed:-

“There are no equities in favour of a pre-emptor, whose sole object is to obstruct valid transaction by virtue of the rights created in him by statutes.”



If a landless purchaser is not allowed the protection it may mean, taking the matter to its logical conclusion, that he cannot acquire any land, for in the event any claim is made by a co-sharer or adjacent Raiyat of the land transferred, he cannot resist the claim as in terms of the provisions, only such persons who are either co-sharers or adjacent Raiyats can resist the claim. This would put him to an unjust and inequitable position.”

For the discussions above, we are persuaded by the arguments of Mr. Arora to hold that the benami purchase made by the writ petitioner on behalf of her husband, as a trustee or in a fiduciary capacity, in absence of any evidence to the contrary, was sufficient to defeat the preemption claim and has been wrongly interfered with by the appellate and the revisional authority.

In any other circumstances, we may have remand the matter to the revisional authority to examine the claim of benami set up by the purchaser and accepted by the DCLR while rejecting the Section 16(3) application by the preemptors but for the complete absence of evidence led by them at any stage of the proceedings until this Court, either to demonstrate or put up a cloud on the plea of benami set up by the purchaser.

In our view the purchase made by the writ petitioner was not capable of interference either on the plea of ‘benami’ or in view of the Division Bench Judgment(s) in the case of **Mukhi**



Mali and Nathuni Singh Yadav (supra), in absence of any evidence to the contrary.

In result, the order(s) dated 22.4.1991 of the Additional Collector, appellate authority and the order dated 6.12.1991 of the Additional Member, Board of Revenue, the revisional authority are quashed and set aside. Consequentially, the sale deed executed in favour of the pre-emptors on 28.1.2016 i.e. during the pendency of the present proceedings shall neither be enforceable nor be binding on the petitioner.

The writ petition is allowed but with no order as to costs.

(Jyoti Saran, J)

(Nilu Agrawal, J)

Surendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	11.03.2019
Transmission Date	NA

