

CASE NO.:
Appeal (civil) 3267 of 2001

PETITIONER:
Fulchand Munda

RESPONDENT:
State of Bihar & Ors.

DATE OF JUDGMENT: 24/01/2008

BENCH:
P.P. NAOLEKAR & DALVEER BHANDARI

JUDGMENT:
J U D G M E N T

P.P. NAOLEKAR, J.

1. The brief facts of the case necessary for deciding the questions involved are that the land of plot Nos. 1695, 517 and 802 under Khata No. 288 within Khewat No. 6/1 of Village Hoher, P.S. Kanke, District Ranchi was recorded in the record of rights as Bakast Bhuinhari land in the name of Chamtu Pahan & others as landlords. In the record of rights in the remarks column, these lands were shown in possession of Kolha Kumhar & others, the predecessors-in-interest of the private respondents herein as Beyayani Bakbaje. The recorded bhumidar Chamtu Pahan & others filed a title suit against Kolha Kumhar & others for relief of declaration of title and recovery of possession. The said suit was decreed by the trial court and the appeal preferred by the predecessors-in-interest of the respondents herein was dismissed. A second appeal being Appeal from Appellate Decree No. 1909 of 1948 filed by the defendants in the original suit was allowed by the High Court on 20.9.1951 and the judgment & decree passed by the trial court and that of the first appellate court was set aside. The Court came to the finding that the appellant's predecessors neither redeemed mortgage nor came in possession of the land and that the suit for recovery of possession was not maintainable. The Court recorded the finding that there was an oral usufructuary mortgage as not yet been repaid and that mortgage, under Section 59 of the Transfer of Property Act, is bad in law and as such the defendants' possession as mortgagees must be ignored. After commencement of the Bihar Scheduled Areas Regulation, 1969 (Regulation 1 of 1969), successive applications were filed under Section 71A of the Chota Nagpur Tenancy Act, 1908 (for short 'the CNT Act') by the predecessors-in-interest of Chamtu Pahan bearing SAR Nos. 65/76, 82/77 and 543/83. All these applications were ultimately rejected by the Special Officer, Scheduled Areas Regulation, in terms of the orders dated 16.9.1976, 7.7.1977 and 31.12.1983 respectively holding that the predecessors-in-interest of the respondents had perfected their title and the applications for restoration were barred by limitation. Despite rejection of the suit and the applications moved under Section 71A of the CNT Act, a fresh application was moved by the appellant claiming himself to be the heir of Chamtu Pahan alleging therein that he by caste is

Munda and is a member of the Scheduled Tribes and is the priest (Pahan) of his village and the land in question measuring a total area of 6.38 acres is Bakast Bhuinhari Pahani land recorded in the name of his grandfather Chamtu Munda/Pahan and others in the record of rights. It was alleged that the land in question is community land, the usufruct of which is used for the community feast at the time of Sarna Puja or Bhut Puja held by the community members on several occasions of the agricultural year and the said land cannot be transferred to a person other than the members of a Bhuinhari family as provided under Section 48 of the CNT Act. It was further alleged that although such land is non-alienable, the ancestors of the respondents by playing fraud on the grandfather of the appellant, namely, Chamtu Munda, took the same on oral zerpesgi (mortgage) for Rs.154/- for a period of 20 years as mentioned in the record of rights in the year 1922 and, thus, the transfer being in contravention of Section 46 of the CNT Act, possession of the land be restored. The application moved by the appellant was allowed vide order dated 21.12.1987 by the Special Officer, Scheduled Areas Regulation, who directed restoration of possession of the land in favour of the appellant. The private respondents herein thereupon preferred an appeal before the Additional Collector, Ranchi which was allowed by him. Considering the judgment & order passed in the second appeal by the High Court as also the orders passed on successive applications under Section 71A of the CNT Act, he came to the conclusion that fresh application under Section 71A was not maintainable. Consequently, the order of restoration of possession was set aside. The appellant preferred a revision before the Divisional Commissioner under Section 217 of the CNT Act, which was allowed and restoration of possession order was restored. That was challenged by the respondents by filing a writ petition in the High Court. Learned Single Judge of the High Court while allowing the writ petition held that the revisional authority committed an error in ignoring the findings arrived at by the High Court in the second appeal and also the successive orders passed by the Special Officer earlier rejecting the applications for restoration filed by the predecessors-in-interest of the appellant. The Court also held that the Commissioner totally ignored the effect of Section 27 of the Limitation Act and failed to see that the application for restoration was barred by limitation as also by the principle of res judicata. The order of the learned Single Judge was upheld by the Division Bench in letters patent appeal. That is how the matter has come before us.

2. It is contended by Mr. S.B. Upadhyay, learned senior counsel for the appellant that the orders of the High Court are contrary to the provisions, intendment, letter and spirit of the Bihar Scheduled Areas Regulation, 1969 (Regulation 1 of 1969) which is a welfare legislation concerning the members of the Scheduled Tribes, which is mainly intended, by insertion of Section 71A in the CNT Act, for restoration of their lands transferred in favour of non-tribals fraudulently or in contravention of Sections 46 and 48 and other provisions of the CNT Act. It is further urged by the learned senior counsel that there is no limitation prescribed for resorting to the provision of Section 71A of the CNT Act; and that the earlier decision of the High Court will not operate as res judicata. Whereas, it is contended by Mr. Sunil Kumar, learned

senior counsel for the private respondents that when successive applications under Section 71A of the CNT Act moved by the predecessors-in-interest of the appellant have been rejected, the Special Officer committed an error in entertaining the fresh application moved by the appellant. It is further urged that the earlier decision of the High Court operates as res judicata and in any case the principle of constructive res judicata would be applicable as all the questions available with the appellant to be agitated before the court shall be deemed to have been adjudicated against him.

3. To better appreciate the arguments advanced by the counsel on both sides, it would be pertinent to note the relevant provisions of the Chota Nagpur Tenancy Act, 1908(CNT Act). The relevant provisions of Section 46(1) of the CNT Act as it stood in 1908 Act and substituted by Amendment Act of 1947 which came into force with effect from 5.1.1948 read as under:

\023Restrictions on transfer of their rights by raiyats: (1) No transfer by a raiyat of his right in his holding or any portion thereof \026

(a) by mortgage or lease for any period expressed or implied which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement,

shall be valid to any extent:

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4. In the CNT Act, Section 71A was inserted by the Bihar Scheduled Areas Regulation, 1969 (Regulation 1 of 1969). Later on, by the Bihar Scheduled Areas (Amendment) Regulation, 1985 (Regulation 1 of 1985), after the word 'raiya\022, the words 'or a Mundari Khunt Kattidar or a Bhuinhar\022 were inserted. Section 71A, as amended by Bihar Scheduled Areas (Amendment) Regulation, 1985, reads as under:

\023Power 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 Bhuinhar who is a member of the Scheduled Tribes has taken place in contravention of Section 46 or any other provision 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 transferee 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, resettle it with another raiyat belonging to the Scheduled Tribes according to the village custom for the disposal of an abandoned holding:

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5. As per Section 46 of the CNT Act, 1908, as it

stood in 1922, no transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period expressed or implied would be effected which exceeds or might in any possible event exceed five years. It further restricted transfer by way of sale, gift or any other contract or agreement and such transfer shall not be valid to any extent. The suit of the appellant's predecessors for possession on the basis of oral mortgage was culminated into a decision by the High Court in second appeal (AFAD No.1909/1948) where a clear-cut finding was recorded that there could not have been an oral usufructuary mortgage of immovable property for value of more than Rs.100/- under Section 59 of the Transfer of Property Act, the same being bad in law. Thus, the predecessors of the respondents could not be treated to be in possession under the mortgage. Under the CNT Act as it stood in the year 1922, the transfer could have been challenged as it contravenes Section 46 of the CNT Act, being a contract or agreement of transfer. That plea having not been taken by the appellant's predecessors, the appellant and his predecessors were not entitled to raise the question of transfer being invalid under Section 46 of the CNT Act as it stood in 1922 on the principle of constructive res judicata. Section 46 of the CNT Act, by virtue of its amendment with effect from 5.1.1948, restricts and prohibits transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period expressed or implied, which exceeds or might in any possible event exceed five years. It further restricts transfer by a raiyat of his right in his holding or any portion thereof, apart from mortgage etc., by way of sale, gift or any other contract or agreement and if such transfer is effected it shall be invalid. Section 71A of the CNT Act authorizes the Deputy Commissioner to evict the transferee from such land and to restore possession to the raiyat if the transfer is being effected in contravention of Section 46 or any other provision of the CNT Act. Thus, if there is contravention of Section 46, the Deputy Commissioner is authorized to evict the transferee from such land and restore it to the transferor under Section 71A of the CNT Act. The predecessors of the respondents could not be treated to be in possession in contravention of Section 46 as possession of land by them has been upheld by the High Court in its decision. The decision of the High Court cannot be reopened by taking advantage of amendment in Section 46 which came into force with effect from 5.1.1948. Section 71A of the CNT Act would be attracted only in case the Deputy Commissioner finds that the impugned transfer was made in contravention of Section 46 or any other provision of the CNT Act. The decision of the High Court comes in the way of the Deputy Commissioner in arriving at any such findings. The possession having been denied to the appellant's predecessors holding that there was no contravention of Section 46 as it stood in 1922, the appellant cannot be permitted to take advantage under Section 46 on same having been amended by an Act of 1947. That apart, although there is no period of limitation prescribed for exercising the power under Section 71A by the Deputy Commissioner, the party affected is called upon to approach the appropriate authority or the power has to be exercised by the Deputy Commissioner within a reasonable period of time. The gap of more than 50 years for challenging the transaction of 1922 cannot be

said to be a reasonable time for exercising the power even if it is not hedged in by a period of limitation.

6. For the aforesaid reasons, the appeal is without substance and is dismissed.

JUDIS