

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11174 of 2006

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Bhashanand Prasad, son of Late Ravi Mahaton resident of village Mathurapur, P.S. and District Khagaria

.... Petitioner/s

Versus

1. The State of Bihar
2. The Additional Member, Board of Revenue, Bihar Patna
3. the Collector Khagaria, District Khagaria
4. the Deputy Collector Land Reforms, Khagaria, District Khagaria
5. Savitri Devi wife of Laddu Lal Mahaton resident of village Mathurapur P.S. and District Khagaria
6. Ajay Kumar son of Sri Parmanand Gupta, resident of village / town – Sanhaulia, Ward No. 6, Under Municipality Khagaria

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Vishwanath Prasad Singh, Sr. Advocate
Mr. Prabhas Ranjan Thakur

For the Respondent/s : Mr. Dronachary, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
CAV ORDER

9 22 -06-2015 The petitioner, invoking writ jurisdiction of this court under Article 226 of the Constitution of India, has prayed for quashing of an order dated 30.1.2006 passed by learned Additional Member, Board of Revenue, Bihar, Patna in Case No. 180 of 2005. By the said order the learned Additional Member, Board of Revenue has allowed the revision application filed by the respondent no. 5 /purchaser against the order dated 26.12.2001 passed by the Collector, Khagaria, in Pre-emption Appeal Case No. 13 of 1995-96 and also the order dated 28.11.1995 passed by the Deputy Collector Land Reforms, Khagaria (hereinafter referred to as “D.C.L.R.”), in Pre-emption

Case No. 7 of 1993-94.

Short fact of the case is that after respondent no. 5 purchased land measuring 11 Kathas 1 Dhur 11 Dhurkies appertaining to Khata No. 377, Khesra No. 121, Mauza - Mathura, Khagaria through registered sale deed from respondent no. 6, the petitioner claiming right of pre-emption filed a petition under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area And Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the "Act") claiming himself to be adjoining raiyat of the land on Southern and Eastern boundary after completing all formalities including depositing consideration amount with additional 10% and as such, a case vide Pre-emption Case No. 7 of 1993-94 was initiated in the court of D.C.L.R. The learned D.C.L.R. after hearing the parties concluded that petitioner was adjoining raiyat over the land in question and allowed the pre-emption case by its order dated 28.11.1995. The purchaser/ respondent no. 5 thereafter preferred an Appeal, which was numbered as Pre-Emption Appeal Case No. 13 of 1995-96 which too, was rejected by the learned Collector, Khagaria. Thereafter, the respondent no. 5 firstly preferred a revision before the Divisional Commissioner, Munger against the order of Collector dated 26.12.2002. The learned Divisional



Commissioner on 11.10.2002 passed an order for remanding the case to the D.C.L.R. The learned Divisional Commissioner though held that against the order passed by the Collector in Appeal a revision was not maintainable before the Commissioner and it lies before the Member, Board of Revenue, the learned Divisional Commissioner passed an order for remanding the case to the D.C.L.R., Khagaria. The pre-emptor /petitioner aggrieved with the order of learned Divisional Commissioner approached this court by filing a writ petition vide C.W.J.C. No. 715 of 2003. The said writ petition was allowed and the order of the Commissioner was set aside by order dated 1.7.2005 passed in C.W.J.C. No. 715 of 2003. Thereafter, the purchaser /respondent no. 5 preferred a revision before the Additional Member, Board of Revenue, Bihar, Patna, which was registered as Case No. 180 of 2005. Before the learned Additional Member, Board of Revenue besides taking a plea that purchaser /respondent no. 5 was also adjoining raiyat, she raised an issue that she was a landless person and as such, Section 16(3) of the Act was not applicable. The learned Additional Member, Board of Revenue, allowed the Revision case and quashed the order passed by the court below. Aggrieved with the order of learned Additional Member, Board of Revenue dated 30.1.2006 passed in Case No.

180 of 2005 the pre-emptor / petitioner has approached this court by filing the present writ petition.

Sri Vishwanath Prasad Singh, learned senior counsel, who was assisted by Sri Prabhash Ranjan Thakur, learned counsel for the petitioner assailing the order of learned Additional Member, Board of Revenue has firstly argued that on the question of fact regarding adjoining raiyat in respect of claim of the petitioner, there was concurrent finding of two courts i.e. the court of D.C.L.R. and the learned Collector, wherein it was established that the petitioner was adjoining raiyat to the land in question from Eastern and Southern side. He submits that once on question of fact two courts below have already recorded its finding, the learned Additional Member, Board of Revenue while exercising revisional jurisdiction was not authorized to unsettle those points. On the point of accepting the claim of the purchaser of landlessness, it has been argued that neither before the D.C.L.R. nor before the appellate court such plea was taken by the respondent no. 5 and suddenly in revision, which was preferred by her, that too after more than three years six months, such a new plea was not required to be entertained by the Additional Member, Board of Revenue. By way of referring to statement made in paragraph no. 34 to the writ petition Sri Singh, learned



senior counsel, submits that the respondent no. 5 was not a landless person. He submits that the petitioner subsequently had filed information slip seeking information with regard to Jamabandi No. 1689, Tauzi No. 3717, Mauza - Mathurapur, Jamabandi No. 1691, Tauzi No. 3717, Mauza -Mathurapur and Jamabandi No. 1690, Tauzi No. 3717, Mauza -Mathurapur and the petitioner got information that the aforesaid Jamabandi stands in the name of Smt. Savitri Devi/ respondent no. 5 of the present writ petition and she is having 2 Katha 12 Dhurs 5 Dhurki , 6 Katha and 7 Katha 17 Dhurs 15 Dhurki respectively in the aforesaid Jamabandi. Similarly Jamabandi No. 69, Tauzi No. 525, Mauza Chatar Area 1 Bigha 1 Katha 9 Dhur stands in the name of Late Ramu Mahto, grand father of husband of respondent no. 5. Jamabandi No. 77, Tauzi No. 525, Mauza- Chatar Area 6 Katha 13 dhurs 10 dhurkies, stands in the name of Late Rama Mahto grand father of the husband of respondent no. 5. Jamabandi No. 961, Tauzi No. 3717, Mauza -Mathurapur Area 1 Katha 12 dhurs stand in the name of Smt. Sumitra Devi, wife of Jamun Mahto, mother- in- law of respondent no. 5 and Sitaram Mahto, son of Jalim Mahto, Jamabandi No. 152, Tauzi No. 3717, Mauza – Mathurapur, Area - 5 Katha 15 dhurs stand in the name of Narsing Mahto and Ladu Mahto, son of Jamun Mahto who



are elder brother of husband of respondent no. 5 and her husband respectively and Jamabandi No. 747, Tauzi No. 3717, Mauza- Mathurapur Area 15 dhurs stands in the name of Jamun Mahto, father-in-law of respondent no. 5. Accordingly, he submits that in view of the facts and circumstances elaborated hereinabove the purchaser /respondent no. 5 is not a landless lady. In respect of claim raised by the respondent no. 5 on the point that she was adjoining raiyat to the Eastern side is concerned, Sri Singh, learned senior counsel submits that besides Southern boundary the petitioner is adjoining raiyat on the Eastern boundary of the land in question also. The said land was purchased by the petitioner through sale deed dated 2.2.1980 executed by one Smt. Kalari Devi. By way of referring to statement made in paragraph no. 10 and onward in the writ petition it was argued that the husband of respondent no. 5 had filed a Title Suit No. 29 of 1980 for Specific Performance of Contract on the basis of forged and fabricated agreement with respect to the same land i.e. land on the Eastern boundary of the land in dispute in the court of Munsif, Khagaria. The said Suit was dismissed against which the husband of respondent no. 5 had preferred a Title Appeal vide Title Appeal No. 13 of 1982, in the court of Sub Judge, Khagaria, which was also dismissed and



thereafter, against the said judgment Second Appeal too was dismissed by this Court and as such, the petitioner's right and title over the said land was finally set at rest. He submits that besides ignoring the findings of fact recorded by the two courts below as well as the fact that the husband of respondent no. 5 had lost even up to the Second Appeal stage, the learned Additional Member, Board of Revenue in the impugned order has held that the respondent no. 5/ purchaser was also adjoining raiyat on the Eastern side of the land in question. On aforesaid grounds it has been argued that the learned Additional Member, Board of Revenue has committed serious error of law as well as fact. Sri Singh, learned senior counsel for the petitioner further submits that though the right of pre-emption has been considered as a weak right, the Apex Court has held that this is statutory right and mandatorily it is required to be enforced. To elaborate his submission, he has placed reliance on a judgment of the Apex Court reported in **2010(2) PLJR (SC) 167 (Suresh Prasad Singh vs. Dulhin Phulkumari Devi)**. He further submits that the Apex Court even after lapse of about 19 years has interfered in the matter and upheld the right of pre-emptor. He has specifically referred to paragraph no. 13 of the said judgment, which is quoted hereinbelow:-



“13. The learned Single Judge deciding the writ petition and the Division bench of the High Court deciding the L.P.A. appear to have taken a view that the right of pre-emption is a weak right, presumably because the Division Bench of Patna High Court in Sudama Devi vs. Rajendra Singh (AIR 1973 Patna 199) and learned Single Judge in Ram Pravesh Singh vs. The Additional Member, Board of Revenue and Others (supra), has taken this view. Whatever may have been the views of the Patna High Court and this court in the earlier decisions cited by learned counsel for the respondent No. 1, a five Judges bench of this Court in Shyam Sunder & Ors. Vs. Ram Kumar & Anr. (supra) has now held that where a right of pre-emption is recognized by statute, it has to be treated as mandatory and not discretionary. The relevant passage from the judgment in Shyam Sunder & Ors. vs. Ram Kumar & Anr. (supra) is quoted hereinbelow:-

“17... The right of pre-emption of a co-sharer is an incident of property attached to the land itself. It is some sort of encumbrance carrying with the land which can be enforced by or against the co-owner of the land. The main object behind the right of preemption, either based on custom or statutory law, is to prevent intrusion of a stranger into the family-holding or property. A co-sharer under the law of pre-emption has right to substitute himself in place of a stranger in respect of a portion of the property purchased by him, meaning thereby, that where a co-sharer transfers his share in holding, the other co-sharer has right to veto such transfer and thereby prevent the stranger from acquiring the holding in an area where the law of pre-emption prevails. Such a right at present may be characterized as archaic, feudal

and outmoded but this was law for nearly two centuries, either based on custom or statutory law. It is in this background the right of pre-emption under statutory law has been held to be mandatory and not mere discretionary...”

Thus, even if there has been a long lapse of 19 years, the High Court could not have rejected the claim of the appellant for pre-emption when the claim was recognized by the statute, had been lodged in accordance with the statute and within the time prescribed by the statute and in the manner provided by the statute.”

In view of the facts and circumstances, particularly the decision of the Apex Court quoted hereinabove, the learned senior counsel for the petitioner prayed for setting aside the order of the Additional Member, Board of Revenue.

Despite the fact that notice on respondent no. 6 /vendor was validly served, he preferred not to appear in the present case.

Sri Dronacharya, learned counsel for the purchaser/ respondent no. 5 opposing the writ petition has argued that admittedly the purchaser is a landless person. Controverting the stand taken in paragraph no. 24 of the writ petition, he submits that same has been replied by the respondent no. 5 in paragraph no. 8 of the counter affidavit. He submits that even if the stand of the petitioner taken in paragraph no. 34 of the writ petition is



taken as correct, the total land comes to 17 Katha and 10 Dhurs which is admittedly less than 1 Acre of land and as such, the purchaser is a landless person under the Act. He submits that since the purchaser is a landless person, there was no application of Section 16(3) of the Act in respect of present transaction. He further submits that even in case of land in the name of husband, the wife may not be treated as having any share in the said land. In support of his contention he has placed reliance on a judgment of this court reported in **1969 PLJR 517 (Ramjiwan Singh and others v. State of Bihar)**. To corroborate his argument regarding landlessness of respondent no. 5 he has referred to judgments reported in **2005(2) PLJR 24 (Bharat Prasad & Anr. vs. The State of Bihar & Ors.)** and **2008(4) PLJR 178 (Ramayan Sah vs. The State of Bihar & Ors.)**. He further submits that the learned Additional Member, Board of Revenue examining each and every aspect has correctly held that the purchaser/ respondent no. 5 was adjoining raiyat on the Eastern boundary of the land in question and also she is a landless person and as such the order passed by D.C.L.R in Pre-emption Case No. 7 of 1993-94 and Pre-emption Appeal Case No. 13 of 1995 -96 passed by the Collector, Khagaria, has rightly been set aside by the Additional Member, Board of Revenue.



Besides hearing learned counsel for the parties, I have also perused the materials available on record. Fact remains that there is concurrent finding of fact on the point that petitioner was adjoining raiyat of the land in question from the Southern side as well as Eastern side. It is evident from the record that in the sale deed in question itself on the Southern side of the land in question while describing boundary, name of father of the petitioner was mentioned. Those facts were noticed by the two courts of fact i.e. D.C.L.R. and the Collector. Even the learned Collector had noticed that the nature of land was not homestead in view of Pleader Commissioner's report. So far claim of respondent no. 5 regarding landlessness is concerned, it is evident that neither before the D.C.L.R. nor before the Collector such plea was taken by the purchaser /respondent no. 5. However, only at the stage of revision before the Additional Member, Board of Revenue, which was admittedly filed belatedly, a new plea was taken that respondent no. 5 was a landless person. Of- course, the court is not entering into the controversy as to whether the respondent no. 5 is having 17 Katha and odd land or beyond 1 Acre, the court is of the opinion that the question of landlessness is to be examined at the time of contesting the pre-emption application at initial stage itself. In the present case it is admitted that pre-emption case was



filed long back in the year 1993-94 and revision was preferred in the court of Additional Member, Board of Revenue in the year 2005. Accordingly, while entertaining objection of the purchaser regarding claim of landlessness, the learned Additional Member, Board of Revenue was required to ask the purchaser to specify as to whether on the date of filing objection in the pre-emption case before the D.C.L.R. whether such issue was raised or not. However, ignoring those facts, the learned Additional Member, Board of Revenue incorrectly decided that the purchaser is a landless person and her transaction was beyond the purview of Section 16(3) of the Act. The court is of the considered opinion that since at the first stage i.e. while filing objection before the D.C.L.R. no plea was taken that the purchaser was a landless person, at much belated stage such plea has incorrectly and illegally been accepted by the learned Additional Member, Board of Revenue. So far the plea of the respondent no. 5 / purchaser that she was also an adjoining raiyat is concerned, there is concurrent finding of fact by the two courts i.e. D.C.L.R. as well as the learned Collector and as such, while exercising revisional jurisdiction the learned Additional Member, Board of Revenue has erred in holding that the purchaser was also a adjoining raiyat and as such, on both counts the learned Additional Member,

Board of Revenue has committed serious error. Accordingly, there is no reason to allow the order of the Additional Member, Board of Revenue dated 30.1.2006 (Annexure - 5) to further continue and accordingly, the same is hereby set aside.

The writ petition stands allowed.

(Rakesh Kumar, J)

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