

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4855 of 1999

1. Deo Chandra Sahu
2. Ram Chandra Sahu
Both s/o Late Majhi Sahu

Both residents of village Salempur, P.S. Saharghat, District Madhubani

.... Petitioner/s

Versus

1. The State of Bihar
2. The Additional Member, Board of Revenue, Bihar, Patna
3. the Additional Collector, Madhubani, District Madhubani
4. The Deputy Collector Land Reforms, Benipatti -cum-S.D.O. Benipatti in the district of Madhubani
5. Pachkauri Mandal, son of Late Manchit Mandal resident of village Salempur P.S. Saharghat, District Madhubani
6. Baiju Sahu, son of Late Faudar Sahu
7. Ram Bhagat Sahu, son of Late Faudar Sahu
Both nos. 6 & 7 are residents of village Salempur, P.S. Saharghat, District Madhubani

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Hemendra Prasad Singh, Sr. Advocate
Mr. Ram Naresh Roy, Advocate
For the Respondent No. 5 : Mr. T.N. Maitin, Sr. Advocate
Mr. Ramadhar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

ORAL JUDGMENT

Date: 09-07-2015

Heard Sri Hemendra Prasad Singh, learned senior counsel who was assisted by Sri Ram Naresh Roy, learned counsel for the petitioners, learned AC to GA No. 12 as well as Sri T.N. Maitin, learned senior counsel, who was assisted by Sri Ramadhar Singh, learned counsel for the respondent no. 5 /purchaser.

The petitioners invoking writ jurisdiction of this court under Article 226 of the Constitution of India, have prayed for quashing of an order dated 27.3.1999 passed in Board's Case No. 79 of 1996 as



contained in Annexure – 4 to the writ petition. By the said order the learned Additional Member, Board of Revenue, Bihar while exercising Revisional jurisdiction has set aside the order dated 15.2.1996 passed by the learned Additional Collector, Madhubani in Ceiling Appeal Case No. 53 of 1994-95. The appellate court had affirmed the order dated 12.1.1994 passed by the Deputy Director Land Reforms, Benipatti in Pre-emption Case No. 2 of 1991-92.

Short fact of the case is that the respondent no. 5 had purchased a piece of land measuring 5 katha 2 dhurs appertaining to C.S. plot no. 4026, 4028 and 4155 equivalent to R.S. plot no. 7514 of C.S. khata no. 247 and 238/1 in village –Salempur, Anchal – Madhwapur, district - Madhubani. The purchase of the land was made through a sale deed executed by the father of the respondent no. 6 and 7 on 1.4.1987. Subsequently, the sale deed was got registered on 20.9.1991. After the sale deed was registered the petitioners who were adjoining raiyat filed a petition under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 claiming right of pre-emption over the land in question. During the pendency of the pre-emption case it is evident that the purchaser got his Building constructed over the land in question. This fact was noticed by the D.C.L.R. in its order dated 12.1.1994. However, since the petitioners were adjoining raiyat the



learned D.C.L.R. allowed the pre-emption case by its order dated 12.1.1994 which was assailed by the respondent no. 5 / purchaser in appeal before the Additional Collector vide Ceiling Appeal Case No. 53 of 1994-95. The purchaser lost before the Additional Collector, and finally, he approached the Revisional authority i.e. Additional Member, Board of Revenue, Bihar, which was registered as Board's Case No. 79 of 1996. The learned Additional Member, Board of Revenue accepting the fact that the petitioners were adjoining raiyat decided the revision in favour of the purchaser and unsettled the orders passed by the D.C.L.R. as well as Additional Collector primarily on the ground that the nature of land had already changed in view of the fact that the purchaser had constructed his Building over the land in question. Aggrieved with the order of the Revisional Court the petitioners approached this court and assailed the order in the present writ petition.

Sri Hemendra Prasad Singh, learned senior counsel assailing the order of the Revisional Court submits that once the statute had prescribed to do a thing in a particular manner then that thing was to be done in the same manner and not in any other way. He submits that there was concurrent findings of two courts regarding the fact that the petitioners were adjoining raiyat. He submits that the land was purchased for agricultural purpose. There was no recital in the



sale deed that the land was being purchased for the purpose of construction of house. He submits that only with a view to defeat the statutory right of the petitioners it appears that the purchaser in haste manner started construction of his house/ building and during the pendency of the Pre-emption Case the building was constructed. He submits that even though a long period has expired after construction of the house, the right of the petitioners was not required to be defeated only on the plea that subsequently building was constructed by the purchaser. Sri Singh, learned senior counsel has placed heavy reliance on a judgment of the Apex Court reported in **2010(2) PLJR (SC) 167 (Suresh Prasad Singh vs. Dulhin Phulkumari Devi & Ors.)**. He has specifically placed reliance on paragraph no. 13 of the judgment of the Apex court. It would be better to quote the same, which is as follows:-

“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. Rajenda 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 pre-emption, 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.”



Taking cue from the judgment of the Apex Court, Sri Singh has argued that now in view of the judgment of the Apex Court the right of pre-emption may not be rejected only on the ground that it is a weak right, rather, it has been held that as a statutory right, it may not be defeated in any manner. He submits that in the case before the Supreme Court also about 19 years had expired, even then the Supreme Court had interfered with the matter. In similar manner, a prayer has been made to set aside the impugned order of the Additional Member, Board of Revenue.

Sri T.N. Maitin, learned senior counsel, who has appeared on behalf of the respondent no. 5 / purchaser, opposing the prayer of the petitioners, submits that the writ petition is fit to be rejected in view of the fact that nature of land has already been changed. He submits that it was a small piece of land measuring about 5 katha 2 dhur. He accepts that it is true that in recital of the sale deed there was no mentioning regarding the purpose for purchase of the land, but fact remains that the land was purchased for construction of house and after purchasing the land steps were taken to construct the house which had started immediately after the registration of the same. He further submits that though there was provision in the Act itself enabling the pre-emptor to restrain the purchaser from taking any step for construction or there was a provision for filing a petition for



delivery of possession even during the pendency of the Pre-emption Case, the petitioners did not take any such recourse. Virtually the petitioners allowed the purchaser to construct the building, and as such, at subsequent stage, the petitioners may not be allowed to submit that even after change of nature of the land the right of pre-emption may not be defeated. He further submits that the building was already constructed during the pendency of the Pre-emption case before the D.C.L.R. and since thereafter, the purchaser is residing in the building in question. He further submits that the object of Section 16(3) of the Act is to prevent fragmentation of the agricultural land. However, the land which was measuring only 5 katha and odd over which building has already been constructed, the provisions of Section 16(3) of the Act, at this stage may not be applicable. In support of this submission he has placed reliance on a Division Bench judgment of this court reported in **2007 (4) BBCJ 519 (Deo Narain Mandal vs. Ram Chandra Mandal & Ors.)** and placed paragraph no. 7 and 8, which are quoted hereinbelow:-

“7. if by insisting upon the right granted by the Act, the pre-emptor had taken possession of the land in question, the transferees could not make any construction thereon and, accordingly, the pre-emptor could get the land sought to be transferred in favour of the transferees by a boundary raiyat at the agreed price plus 10% thereof, but by not taking possession,

despite making the application, and thereby permitting the transferees to make construction on the land in question, the pre-emptor himself permitted the transferees to change the nature and character of the land and, accordingly, he himself made his pre-emption applications no further maintainable.

8. In the circumstances, we feel that the learned Single Judge, who dealt with the writ petition, ought to have interfered with the order of the revisional authority, which had set aside the appellate order, which in turn had upheld the order of the D.C.L.R. rejecting the pre-emption applications. The learned Judge while dealing with the Writ Petition though took notice of the fact that a construction has come upon the land transferred, but did not take notice of the fact that such construction has come up by reason of the neglect or default on the part of the pre-emptor and, accordingly, the pre-emptor lost his right to keep the pre-emption applications maintainable.”

He has also relied on **2009(3) PLJR 833 (Ramayan Sah vs. The State of Bihar & Ors.)**. He has placed paragraph no. 5 of the order. The same is quoted hereinbelow:-

“5. The writ petitioner- appellant claiming to be an adjoining raiyat filed application for pre-emption under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. The area of the land is 1 katha 4-1/2 dhurs. An Advocate Commissioner was appointed, who in his report has stated that purchaser had raised

a house / shop over the land in question. The Revenue authorities including the Board of Revenue have held that nature of the vended land has changed and accordingly rejected the application for pre-emption. The learned Single Judge concurred with the said conclusion and dismissed the writ petition.”

He has further placed paragraph no. 10 of **1994(2) BLJR 774 (Hari Narayan Pandey versus State of Bihar & Ors.)**. For just decision in the matter it is required to quote the same, which is as follows:-

“10. The said Act, however, has been enacted for fixation of ceiling, restriction of sub-letting and resumption of certain raiyats for personal cultivation of land , acquisition of status of raiyat by certain under raiyat and acquisition of surplus land in the State of Bihar and the matter connected therewith.

The said Act has been enacted for the purpose of preventing fragmentation of agricultural lands. The purpose of pre-emption is evidently to prevent fragmentation. Only a co-sharer of raiyat or raiyat of adjoining land can exercise his right to pre-emption. Such right can be exercised only by a raiyat who in view of its definition, is primarily a person who has acquired right to hold and for the purpose of cultivation. A land which is not capable of cultivation and thus not a raiyati land, should not normally be the subject –matter of a proceeding under Section 16(3) of the Act.”

In view of the principles laid down in the aforesaid cases it has been argued that only on the ground that the petitioners were

adjoining raiyat, at this stage the purchaser's right over the land in question may not be disturbed and he makes a prayer for rejection of the writ petition.

Learned State Counsel has also supported the stand of Sri Maitin, learned senior counsel for the purchaser.

Besides hearing learned counsel for the parties, I have also perused the materials available on record. Before delving into the matter the court proposes to incorporate the provisions contained in Section 16(3) of the Act, which is quoted hereinbelow:-

“16(3)(i) When any transfer of land is made after the commencement of the Act to any person other than a co-sharer or a raiyat of adjoining land, any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled, within three months of the date of registration of the document, of transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed:

Provided that no such application shall be entertained by the Collector unless the purchase money together with a sum equal to ten per cent thereof is deposited in the prescribed manner within the said period.

(ii) On such deposit being made the co-sharer or the raiyat shall be entitled to be put in possession of the land irrespective of the fact that the application under clause (i) is pending for decision:

Provided that where the

application is rejected, the co-sharer or the raiyat, as the case may be, shall be evicted from the land and possession thereof shall be restored to the transferee and the transferee shall be entitled to be paid a sum equal to ten percent of the purchase money out of the deposit made under clause (i).

(iii) if the application is allowed, the Collector shall by an order direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a period to be specified in the order and, if he neglects or refuses to comply with the direction, the procedure prescribed in Order 21, rule 34 of the Code of Civil Procedure, 1908 (V of 1908), shall be, so far as may be, followed.”

On perusal of the provisions contained in Section 16(3)(ii) of the Act, it is evident that the petitioners after filing of the application were having a right to make a prayer for delivery of possession of the land in question. On perusal of the record it is evident that no such step was taken by the petitioners. Meaning thereby, that the petitioners allowed the purchaser / respondent no. 5 to proceed with the peaceful possession over the land in question in his own manner. It is also accepted that during the pendency of the Pre-emption Case building was already constructed which was noticed by the learned D.C.L.R. in its order. From the facts on record it is evident that nature of land had already been changed. Meaning thereby, that the purchased land had now changed its nature from ‘agricultural land’

to ‘residential land’ and as such, the court considers that the learned Additional Member, Board Of Revenue, Bihar has rightly interfered with the matter. So far Suresh Prasad Singh Case (Supra) is concerned, on which heavy reliance was placed by learned senior counsel for the petitioners, it is evident that in the said case total land of 1.30 Acres was involved. Obviously, it was for the agriculture purpose, whereas, in the present case land measuring 5 katha 2 dhurs has been involved. Even in the said case it was not the stand of the purchaser that after purchasing the land any building was constructed, whereas, in the present case after purchase of the land construction work has taken place and during the pendency of the Pre-emption case itself construction was already completed, which was noticed by the learned D.C.L.R. in its order. Accordingly, the petitioners may not get any advantage from the judgment of the Apex Court reported in 2010 (2) PLJR (SC) 167.

In view of the facts and circumstances, I do not find any ground to interfere with the order of the Revisional Court i.e. the order dated 27.3.1999 in Board’s Case No. 79 of 1996.

The writ petition stands dismissed.

(Rakesh Kumar, J)

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