

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5590 of 2005

SHIV LAL MANDAR, son of Late Mahavir Mandar, resident of village-
Arga, Police Station- Biraul, District-Darbhangha

... .. Petitioner

Versus

1. The State of Bihar
2. The Member, Board of Revenue, Bihar, Patna
3. The Additional Collector, Darbhanga
4. The Deputy Collector Land Reforms, Biraul, Darbhanga
5. Naresh Kumar Mandar, son of Sita Ram Mandar, resident of village- Arga,
Police Station- Biraul, District-Darbhangha
6. Raj Narain Mandar, son of Sita Ram Mandar, resident of village- Arga,
Police Station- Biraul, District-Darbhangha
7. Bilti Devi, wife of Deo Narain Mandar, resident of village- Arga, Police
Station- Biraul, District-Darbhangha

... .. Respondents

Appearance :

For the Petitioner : Mr. Shashinath Jha
For Respondents 5 & 6 : Mr. Jagdish Prasad Singh

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER
ORAL

Date : 04-01-2019

The petitioner is a pre-emptor in a pre-emption proceeding, under Section 16 (3) of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as 'the Act'). His pre-emption application was allowed by the Deputy Collector Land Reforms, Biraul, Darbhanga (hereinafter referred to as 'DCLR'), by an order, dated 04.05.2001. An appeal, giving rise to Appeal Case No. 3 of 2001-02 was preferred against the said order of the DCLR, before the Additional Collector, Darbhanga, who, by order, dated 26.05.2003,



set aside the order of the DCLR, on the ground that the disputed land did not come within the definition of 'land' under Section 2 (f) of the Act. Aggrieved by the said decision of the Additional Collector, Darbhanga, the petitioner filed a revision application before the Board of Revenue, Patna. The Member, Board of Revenue, Patna, by his order, dated 21.02.2005, passed in Revision Case No. 141 of 2003, has upheld the order of the Appellate Authority, i.e., the Additional Collector, Darbhanga, on recording a finding that the land, which was subject matter of pre-emption proceeding, did not come within the definition of 'land' under Section 2(f) of the Act. The order of the Member, Board of Revenue, Patna, dated 21.02.2005, passed in Revision Case No. 141 of 2003 and the order passed by the Additional Collector, Darbhanga, dated, 26.05.2003, are under challenge in the present writ petition, filed under Article 226 of the Constitution of India.

2. I have heard learned Counsel for the petitioner and learned Counsel representing private respondent nos. 5 and 6, who are the purchasers of the land in question.

3. The case has a chequered history. This writ application was earlier allowed by judgment and order, dated 14.03.2011, passed by a co-ordinate Bench of this Court. It seems that there was no representation on behalf of the private



respondent nos. 5 and 6 when the matter was taken up, though notices were validly served on them and they had also entered appearance through vakalatnama. There was no counter affidavit filed on their behalf. The said respondents, thereafter, preferred an appeal under the Letters Patent of this Court against the order, dated, 14.03.2011, passed in this case, being L.P.A. No. 853 of 2012, which was dismissed by a Division Bench of this Court by order, dated 22.11.2012, on the ground of delay. A review application, being Civil Review No. 2 of 2013, seeking review of the order, dated 22.11.2012, passed by the Division Bench, filed by respondent nos. 5 and 6, also came to be dismissed by an order, dated 26.09.2013. Respondent nos. 5 and 6, thereafter, preferred Special Leave Petition before the Supreme Court against the dismissal of the Letters Patent Appeal and review application, giving rise to SLP (C) No. 7918-7919 of 2014, which were subsequently converted into Civil Appeal Nos. 416-417 of 2017. The Supreme Court, by judgment and order, dated 13.01.2017, allowed the civil appeals mainly on the ground that there were reasons available for condonation of delay in preferring Letters Patent Appeal. Accordingly, after setting aside the order of the Division Bench, dated 22.11.2012, passed in L.P.A. 853 of 2012 and the order, dated 26.09.2013, passed in Civil Review No. 2 of



2013, the Supreme Court remanded the matter back to this Court for deciding the Letters Patent Appeal on merit. L.P.A. No. 853 of 2012, on remand from the Supreme Court, has been disposed of by judgment and order, dated 01.02.2018, passed by a Division Bench of this Court. The Division Bench has allowed the appeal and set aside the order, dated 14.03.2011, passed in this case and has, again, remanded the matter back to this Court for fresh adjudication.

4. This is the background in which the matter has been placed today before me for final adjudication.

5. Counter affidavit has been filed on behalf of the private respondent nos. 5 and 6. The petitioner has also filed rejoinder to the said counter affidavit.

6. The dispute relates to a land appertaining to Khata No. 370, Old Plot No. 808 and 809 (New Plot No. 860 and 872) ad-measuring 12 dhurs which was purchased by respondent nos. 5 and 6 through a registered sale deed, dated 24.05.2000, from respondent no. 7. The petitioner filed his application for pre-emption under Section 16 (3) of the Act in accordance with the procedure prescribed therein, claiming to be boundary raiyat of the purchased land, which, according to him, was evident from the sale deed itself, in which he was shown to be on the western



boundary of the land, the subject matter of pre-emption. He claimed that the purchaser was not a co-sharer and the land being agricultural land, Section 16 (3) of the Act conferred upon him a right to seek pre-emption. The claim of pre-emption was resisted by the private respondent nos. 5 and 6, mainly on the ground that the land in question did not fall within the definition of 'land' under Section 2 (f) of the Act. A plea was also taken by respondents 5 and 6 that vendees were co-sharers of the vendor.

7. There is no dispute about the genealogy. One Hanuman Mandar had three sons, Ishwar Mandar, Mehi Mandar and Parsi Mandar. Ishwar had two sons, Yadu and Boku. Yadu had four sons, Mahavir, Narsingh, Makun and Sitaram. Boku had a son, Pyare. The vendor, Bilti, is the daughter of Pyare and granddaughter of Boku. The petitioner, who is the pre-emptor, is the son of Mahavir. Sons of Sitaram are the purchasers. Apparently thus, the petitioner and the purchasers are the first cousin sons of Yadu and Boku. This is also not in dispute that the land, subject matter of pre-emption, was acquired by the vendor, Bilti, through a deed of gift executed by her father in the year 1993.

8. Relying on the recitals of the sale deed, the petitioner claimed before the revenue authorities that the land in question was capable of being used for agricultural purposes, as it was



mentioned in the sale deed itself that the vendees could use the land in question either for residential purpose or for the agricultural purpose. The pre-emptor claimed that evidently, land could be used for agricultural purposes and, therefore, it was a land within the meaning of Section 2 (f) of the Act.

9. Learned Counsel appearing on behalf of the petitioner has made his submissions at length, mainly on two aspects; firstly, that the vendees are not co-sharers of the vendor and in view of the admitted fact that the petitioner is adjoining raiyat on the western side of the land in question, he had right of pre-emption under Section 16 (3) of the Act. He has, secondly, argued that the land falls within the definition of 'land' under Section 2 (f) of the act, which has been seriously disputed by learned Counsel appearing on behalf of the private respondent nos. 5 and 6.

10. Learned Counsel appearing on behalf of private respondent nos. 5 and 6, referring to genealogical table, has contended that visibly the vendor and the vendees come from the same family. He has, however, fairly conceded that the purchasers cannot be strictly said to be co-sharers of the vendor.

11. The dispute, in the present case, is thus confined to the question as to whether the land, which has been subject matter of pre-emption proceeding, can be said to be 'land' within the



meaning of Section 2 (f) of the Act for the purpose of application of Section 16 (3) of the Act.

12. Learned Counsel appearing on behalf of the petitioner has placed reliance on a Division Bench decision, in the case of **Jugeshwar Singh and Another v. Jainandan Prasad Singh and Others**, reported in **1970 BLJR 1010**, to submit that there is no distinction between homestead area, residential area and non-residential area, in Section 16 (3) of the Act and, therefore, even homestead land can be subject matter of pre-emption, under Section 16 (3) of the Act. He has also relied on another Division Bench decision, in case of **Hiralal Chauhan v. the State of Bihar and Others**, reported in **2004 (2) PLJR 339**, in order to make out his case that even homestead land falls within the purview of Section 16 (3) of the Act. He has given much emphasis on his submission, with reference to recitals in the sale deed, to submit that the land capable of being used for agricultural purposes can be subject matter of pre-emption, under Section 16 (3) of the Act, even if it is a homestead land.

13. Learned Counsel appearing on behalf of the private respondent nos. 5 and 6, has submitted, with reference to the sale deed in question, that apparently, the land, which was sold, was a *parti* land and there was no structure standing over the said land



which could be said to be useful for agricultural purposes. He submits that a homestead land can fall within the definition of 'land', under Section 2 (f) of the Act, if it is shown that such land, with facilities available, can be used for agricultural purposes. In support of his submission, he has relied on a decision of this Court, in the case of **Fakir Mohammad v. Salahuddin and Others (AIR 1975 PATNA 119)**, which has been approved by the Supreme Court in the case of **Ramji Sharma Alias Ramji Babu (Dead) By Lrs. v. State of Bihar and Others**, reported in **(1996) 10 SCC 671**.

14. Another aspect which has emerged in course of hearing of the case is that certain construction has been made over the land during the pendency of pre-emption proceeding(s) and the present case before this Court. In that background, it is the case of respondent nos. 5 and 6 that nature of the land having changed, no right of pre-emption in favour of the petitioner survives any more. In support of such submission, reference has been made to the case of **Ram Niwas Singh and Another v. The State of Bihar and Others**, reported in **2010 (1) PLJR 845** and the case of **Ramayan Sah v. The State of Bihar and Others**, reported in **2009 (3) PLJR 833**.



15. In view of this subsequent development, it is also being argued on behalf of the private respondents nos. 5 and 6 that right of pre-emption, being a weak right, can be defeated by any legitimate means and since constructions have already been made, nature of land having changed, right of pre-emption if any sinks into oblivion.

16. In response to the aforesaid submission, learned Counsel appearing on behalf of the petitioner has drawn my attention to the affidavits filed on behalf of the respondent nos. 5 and 6, alongwith which certain photographs of the construction made over the land in question have been brought on record. With reference to the photographs, it is being submitted that since the said land is being apparently used for keeping cattle, which is an agricultural purposes' and, therefore, the right of pre-emption of the petitioner survives even after the construction having been made over the land in question. Relying on the Supreme Court's decision, in the case of **Suresh Prasad Singh v. Dulhin Phulkumari Devi and Others**, reported in **2010 (2) PLJR 167 (SC)**, he contends that right of pre-emption is not a weak right; rather, it is a statutory right.

17. Based on the pleadings on record and the orders passed by the authorities under the Act and in view of the



observation, which has been made by the Division Bench in the order, dated 01.02.2018, in my view, the only question which this writ application involves is as to whether the petitioner could be said to have established his case that the land, which was subject matter of pre-emption, falls within the definition of 'land' under Section 2 (f) of the Act.

18. I will be dealing with the second aspect also, which is, in my view, secondary in nature i.e. 'whether the right of pre-emption stands defeated with the change of the nature of the land'.

19. Before I consider the decisions of this Court referred to by learned Counsel appearing for the contesting parties in support of their rival submissions, which have been noted above, I need to take note of the statutory provision under Section 16 (3) of the Act and definition of 'land' given under Section 2 (f) of the Act. Section 2 (f) of the Act reads thus:-

2. "(f) ***"land"*** means land which is used or capable of being used for agriculture or horticulture and includes land which is an orchard, *Kharhur* or pasturage or [forest land or [also the land] perennially submerged under water] or the homestead of land-holder;



Explanation I. - "Homestead"

means a dwelling house for the purpose of living or for the purpose of letting out on rent together with any courtyard, compound, attached garden, orchard and out building and includes any out building for the purpose connected with agriculture or horticulture and any tank, library and place of worship appertaining to such dwelling house.

[Explanation II. - Land perennially

submerged under water shall not include submerged in the bed of a river.]”

20. It is also mentioned in the sale deed that the purchasers would use it either for residential purpose or for the purpose of agriculture. The purport of the word ‘land’, occurring in Section 2 (f) of the Act has been extensively gone into by the Full Bench of this Court, in the case of **Fakir Mohammad** (supra). It has to be seen whether on applying the said Full Bench decision, it can be said that pre-emptor was able to establish his case that the ‘land’, subject matter of pre-emption, fell within the definition of ‘land’ under Section 2 (f) of the Act. In the case of **Fakir Mohammad** (supra), the Full Bench has ruled that a *parti*



piece of land, belonging to a raiyat, an agriculturist, which is homestead on which there is no dwelling house, or any of the things as mentioned in the Explanations is not covered by the Act. It is not being disputed that the land, which was subject matter of pre-emption proceeding, was homestead of the vendor.

21. In my opinion, on examination of the Full Bench decision, in the case of **Fakir Mohammad** (supra), it can be conclusively held that a homestead can be said to be 'land' within the meaning of Section 2 (f) of the Act, if the conditions mentioned in Explanation-I are satisfied. The Full Bench, in the case of **Fakir Mohammad** (supra), has enunciated the law in this regard, in paragraph 5, relevant portion of which is being quoted herein below:-

“5. The consensus of opinion - and, as I shall presently show, there is no conflict in any of the decisions - is that a parti piece of land belonging to a raiyat, an agriculturist, which is his homestead on which there is no dwelling house or any of the things as mentioned in the Explanation, is not a land covered by the Act.”

22. The said Full Bench decision, in the case of **Fakir Mohammad** (supra), has been approved by the Supreme Court, in the case of **Ramji Sharma** (supra). In view of clear enunciation of



law by the Full Bench, in the case of **Fakir Mohammad** (supra), as noticed above, I have not any hesitation in coming to a definite conclusion that in the absence of any material on record, to show that the homestead, which does not satisfy other requirements of Explanation I of Section 2 (f) of the Act, can not fall within the definition of land under the said Section 2 (f) of the Act.

23. That being the position, in my considered view, Section 16 (3) of the Act shall not apply in such cases.

24. There is no dispute over the proposition of law, as laid down in the case of **Jugeshwar Singh** (supra) by the Division Bench, that there is no provision making distinction between homestead area, residential area and non-residential area. Homestead has been defined under Explanation-I of Section 2 (f) of the Act. A 'homestead', unless the requirement of homestead in Explanation-I of Section 2 (f) of the Act are satisfied, in my opinion, it cannot fall under the definition of Section 2 (f) of the Act in view of the Full Bench decision, in the case of **Fakir Mohammad** (supra).

25. Similarly, the Division Bench decision, in the case of **Hiralal Chauhan** (supra), cannot be said to be applicable on facts and in the circumstances of the present case, in view of the admitted fact that the land in question was admittedly *parti* land,



which is apparently not fulfilling other requirements, as laid down in the case of **Fakir Mohammad** (supra).

26. In such view of the matter, I do not find any illegality in the finding recorded by the Additional Collector, Darbhanga, in his order, dated 26.05.2003, and the Member, Board of Revenue, Patna, in the order, dated 21.02.2005, whereby they have found the land, subject matter of pre-emption proceeding, not falling within the meaning of 'land', defined under Section 2 (f) of the Act.

27. Having held so, I am not required to go into the another question that whether right of pre-emption would stand defeated with the change of the nature of the land. Law, in this regard, has been clearly laid down by the Division Bench, in the cases of **Ram Niwas Singh** (supra) and **Ramayan Sah** (supra).

28. I, therefore, do not find any merit in this application. This writ application is accordingly dismissed.

29. There shall be no order as to costs.

(Chakradhari Sharan Singh, J.)

Ragini/-

AFR/NAFR	AFR
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