
(2011) 01 PAT CK 0091

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6980 of 1995

Bibi Jubeda Khatoon and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 05-01-2011

Acts Referred:

Citation : (2011) 01 PAT CK 0091

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—This writ petition at the instance of the purchaser (Petitioner No. 1), as well as the oral donee i.e. the transferee (Petitioner No. 2), is directed against the resolution dated 16.8.1995, passed by the learned Additional Member, Board of Revenue, passed in purported exercise of power u/s 32 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as "the Act?"), in Revision Case No. 154 of 1994 (Md. Shaheed Ansari v. Lallanjee Lal and Ors.), whereby the revision application has been dismissed, and the appellate order has been up-held. The order of the learned Land Reforms Deputy Collector, rejecting the pre-emption application at the instance of Respondent Nos. 6 and 7 herein was set aside by the learned appellate authority and the claim of pre-emption was allowed. We shall go by the description of the parties occurring in the present proceedings.

2. A brief statement of facts essential for the disposal of this writ petition may be indicated. Petitioner No. 1 had purchased the following plots of land situate at village Sahiyar, P.S. Simari, District-Buxar, by a registered deed of absolute sale, executed on 14.7.1987, and registered on 18.4.1991, from Respondent Nos. 8 and 9. Khata No. Khesra No. Area 257 975 33 decimals 257 977 32 decimals. We may Incidentally mention that this writ petition was dismissed against Respondent Nos. 8 and 9, the vendors, for non-compliance of the peremptory order dated 22.4.1997.

3. Respondent Nos. 6 and 7 filed an application u/s 16(3) of the Act before the learned Land Reforms

4. The pre-emption application was rejected by the

5. While assailing the validity of the impugned order, learned Counsel for the Petitioners submits that the oral gift is fully recognized in Mohammedan Law, and the oral gift in favour of Petitioner No. 2 is valid. Petitioner No. 1 did not have the right, title and interest with respect to the plots in question on the date the pre-emption application was filed. It is, therefore, prayed that the impugned order may be set aside. Learned Counsel for the Petitioners relies on the following reported judgments:

(1) Bibi Rehana Khatoon Vs. Bibi Jabrunnisa and Others, .

2. Imbichimoideenkutty Vs. Pathumunni Umma and Others, .

(3) A Razzaque Sajansaheb Vs. Ibrahim Haji Mohammed Husain, .

6. Learned Counsel for Respondent Nos. 6 and 7 has supported the impugned order. He has taken us through the relevant provisions of the Act and submits that a gift, much less an oral gift between Mohammedans, can not defeat the claim of pre-emption.

7. Before we proceed further, we must notice the order dated 22.4.1997, passed by a learned Single Judge of this Court on this writ petition whereby, on an apparent conflict of views in two decisions of this Court, the matter has been referred to a Division Bench. That is how the matter comes up before us to resolve the issue. The order dated 22.4.1997, is reproduced hereinbelow:

This application will be heard by a Division Bench. In an earlier decision, a learned Single Judge of this Court in 1985 BBCJ 378 held that in view of the provision of Section 16(2)(iii) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, 1961, an oral gift, even by a person governed by the Mohammedan Law, of any raiyati land was illegal. The aforesaid judgment of this Court has not been noticed in the subsequent decision of a Division Bench of this Court in 1987 PLJR 934 wherein it has been held that the aforesaid provision of the Act will not come in the way of a Mohammedan to make an oral gift with respect to his occupancy holding. It is perhaps possible to distinguish the subsequent Division Bench judgment, but with a view to settle the law once for all, it will be appropriate if the matter is heard by a Division Bench. The State and its officers are represented by the Standing Counsel (Ceiling) while Respondents 6 and 7 have appeared through Advocate. Let notice issue to Respondents 8 and 9 by a registered post with A.D for which requisites. etc., must be filed within a week, failing which this application as against them shall stand dismissed without further reference to Bench.

8. We have perused the materials on record and considered the submissions of learned Counsel for the parties. We must at the very inception consider the relevant provisions of the Act. The explanation to Section 16(1) of the Act provides that "For the purposes of this Section "transfer" does not include inheritance, bequest or gift." Section 16(2)(iii) of the Act provides that "No land

shall be transferred, exchanged, leased, mortgaged, bequeathed or gifted without a document registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908)". It is thus evident that Section 16(3)(i) of the Act, whereunder a pre-emption application is filed, is reproduced hereinbelow:

"3(1) 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 documents, of the 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

9. It is evident on a plain reading of the same that a co-sharer or an adjoining raiyat with respect to transfer of the land shall be entitled to the claim of pre-emption. As noticed hereinabove, transfer does not include a gift. Furthermore, a gift for the purpose of Section 16 of the Act has to be registered. The admitted position in the instant case is that the alleged gift from Petitioner No. 1, in favour of Petitioner No. 2, was an oral gift. The same has to be read in the strident background of the non-obstante clause engrafted in Section 3 of the Act which is reproduced hereinbelow:

"3. Provisions of the Act to prevail over other laws.- The provisions of this Act shall have effect, notwithstanding anything to the contrary contained in any other law, custom, usage or agreement, for the time being in force or in any decree or order of any Court: Provided that nothing contained in this Act shall be deemed to have any effect on the provisions of the Bihar Bhoodan Yagna Act, 1954 (Bihar Act XXII of 1954)."

10. We are, therefore, of the view that the alleged oral gift in favour of Petitioner No. 2 is invalid, and cannot be countenanced, while considering an application u/s 16(3) of the Act, and the claim for pre-emption set up by Respondent Nos. 6 and 7 can not be defeated on the strength of the alleged oral gift in favour of Petitioner No. 2. It is further relevant to state that the learned appellate

11. authority, as well as the learned revisional authority, have concurrently held that Respondent Nos. 6 and 7 are adjoining raiyats with respect to the plots in question, i.e. the plots purchased by Petitioner No. 1. We agree with the discussions in both the orders. The order of the learned first authority was rightly set aside. 10. We must consider the two judgments indicated in the order dated 22.4.1997. The decision of the learned Single Judge of this Court in the case of Dasrath Sao and Anr. v. The Additional Members Board of Revenue and others 1985 BBCJ 378, is the most relevant judgment brought to our notice. That was also a case of pre-emption under the Act. It has been held that the provisions of

Mohammadan Law do not apply to claims of pre-emption u/s 16(3) of the Act. Oral gift even by a person governed by Mohammadan Law or any raiyat is inoperative and illegal. Paragraph 7 of the decision is reproduced hereinbelow, and we are in full agreement with the views expressed therein:

"7. Section 16(2)(3 of the Ceiling Act also creates a restriction on the transfer, exchange, lease, mortgage, bequeathe or gift of any land without a document registered under the provisions of the Indian Registration Act. It may well be that the restriction contemplated u/s 16 of the Act on future acquisition by transfer etc. to check frivolous transfers between the parties for the purpose of the Ceiling Act enabled the revenue authorities to decide as to whether by such an acquisition a person has come into possession of land and is likely to retain land in excess of the ceiling area or a person has tried to part with certain lands to save

11. The case of Bibi Rehana Khatoon (supra), did not arise out of the proceedings u/s 16(3) of the Act. The Division Bench of this Court was dealing with a second appeal in terms of Section 100 of the Code of Civil Procedure, which had arisen out of suit and involved issues relating to the provisions of Section 129 of the Transfer of Property Act, read with Sections 12 and 26 A of the Bihar Tenancy Act. In that context, validity of an oral gift was in question. The Division Bench noticed the provisions of section 16(2)(iii) of the Act and held that the same do not come in the way of a Mohammedan in making an oral gift with respect to his occupancy holding. The issues under consideration before the Division Bench were primarily with respect to matters under the Bihar Tenancy Act and, therefore, the decision is not relevant in the context of the present case.

12. The decision of the Supreme Court in A. Razzaque Sajansaheb Bagwan (supra), dealt with the right of pre-emption under the common law of Muslims, and not with respect to a claims of pre-emption under or comparable to section 16(3), read with Section 3, of the Act. The judgment dealt with different issues, and is not relevant in the facts and circumstances of the case.

13. The Division Bench decision of the Kerala High Court in Imbichimoideenkutty (supra), did not deal with provisions comparable to section 16(3) of the Act, and dealt with different issues altogether. The same is inapplicable in the facts and circumstances of the present case.

14. In the result, we do not find any merit in this writ petition. It is accordingly dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

Birendra Prasad Verma, J.—I have had the advantage of perusing the erudite judgment prepared by my learned brother S.K. Katriar, J. and, I entirely agree with the conclusion that the writ petition is fit to be dismissed. However, in view of the importance of the issue involved in this case, I wish to add my own reasonings for the conclusion arrived at.

2. The central issue involved in this case, referred to a Division Bench by a learned Single Judge of this Court by an order dated 22.04.1997, is : Whether on the basis of an unregistered oral gift (Hiba) by a person governed by Mahomedan Law, can a claim of pre-emption with respect to such land u/s 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as "the Land Ceiling Act" in short), be defeated ?

3. There is little controversy about the facts involved in the present litigation. Petitioner No.1 Bibi Jubeda Khatun purchased the lands in dispute from respondent nos. 8 and 9 through a sale deed dated 14.07.1987, which was duly registered on 18.04.1991. Respondent nos. 6 and 7, full brothers, after completing the formalities as required u/s 16(3) of the Land Ceiling Act, filed a petition before the prescribed authority well within the period of limitation claiming right of pre-emption with respect to vended lands on the ground of being boundary raiyats, having plot nos. 980 and 982 adjacent to vended plots. The respondent- Deputy Collector Land Reforms, Buxar, accordingly registered Ceiling Act Case No. 2 of 1991-92. In the aforesaid pre-emption case filed by respondent nos. 6 and 7, originally petitioner no.1 alone, as purchaser, was impleaded as Opposite party and petitioner no.2 was not impleaded as a party in that proceeding.

4. On issuance of notice by the respondent- Deputy Collector Land Reforms, petitioner no.1 appears to have entered appearance through a lawyer and the parties were heard on 16.07.1991 and again on 25.07.1991. As per order dated 30.07.1991 passed by the respondent- Deputy Collector Land Reforms delivery of possession of the lands in question was given to the pre-emptors- respondent nos. 6 and 7 on 04.08.1991.

5. Thereafter, on 08.08.1991 petitioner no.1 filed her show cause (Annexure-2), wherein for the first time it was disclosed that she has already gifted the lands in question on 19.04.1991 to petitioner no.2 by a "Hiba" (oral gift) . Petitioner no.2 happens to be the brother of husband of petitioner no.1. On that basis it was claimed, that since she has already gifted the lands in question to petitioner no.2, the pre-emption application filed by the pre-emptors (respondent nos. 6 and 7) was not maintainable against her. Subsequently on 26.08.1991, petitioner no.2 also appears to have entered appearance in the case through a lawyer and a prayer was made that he may be impleaded as opposite party. He also claimed that the lands in question had been gifted to him by petitioner no. 1 and, therefore, the aforesaid pre-emption case was fit to be rejected.

6. Though petitioner nos. 1 and 2 both have challenged the maintainability of the pre-emption case on the basis of alleged oral gift (Hiba) dated 19.04.1991, which fact was strongly disputed by the pre-emptors, but they have not disputed the claim of respondent nos. 6 and 7 that they are the boundary raiyats of the vended plots. Neither petitioner no.1 nor petitioner no.2 has claimed that they are having any other plot adjacent to the vended plots.

7. By order dated 07.11.1991, the learned Deputy Collector Land Reforms directed for impleading petitioner no.2 as opposite party in the pre-emption case. The aforesaid order was challenged by the pre-emptors before the District Collector in a ceiling appeal, which was allowed by the order dated 19.05.1992 and the order of the learned Deputy Collector Land Reforms passed on 07.11.1991 was set aside. Aggrieved by the aforesaid appellate order dated 19.05.1992, C.W.J.C. No. 5810 of 1992 was preferred by the petitioners, which was disposed of by the order dated 19.01.1993 (Annexure-3) by a Division Bench of this Court with a direction that the pre-emption proceeding be decided in presence of petitioner no.2. However, all other issues including the issue of validity or otherwise of the oral gift (Hiba) were left open to be decided by the learned Deputy Collector Land Reforms in accordance with law.

8. The learned Deputy Collector Land Reforms by order dated 05.05.1993 (Annexure-4) came to a finding that the "Hiba" made by petitioner no.1 in favour of petitioner no.2 on 19.04.1991 was valid and, therefore, pre-emption case filed on behalf of respondent nos. 6 and 7 was not maintainable and was accordingly dismissed. However, on appeal filed by respondent nos. 6 and 7, the order passed by the learned D.C.L.R. was reversed and claim of pre-emption was allowed by the impugned appellate order dated 16.02.1994 (Annexure-5) by recording a finding of facts that the pre-emptors are the boundary raiyats of the vended plots. The revision filed by the petitioners was dismissed by the impugned order dated 16.08.1995 (Annexure-1) and the appellate order dated 16.02.1994 was affirmed for the reasons recorded in that order. Hence, the present writ petition.

9. Apparently the petitioners are not resisting the claim of pre-emption made by respondent nos. 6 and 7 with respect to vended plots on any other grounds except on the basis of the oral Hiba (unregistered oral gift) dated 19.04.1991. Chapter XI of the Mulla's Principles of Mahomedan Law, edited by Shri M. Hidayatullah, former Chief Justice and, Vice- President of India, deals with the gift. Sections 138 and 147 of the said Mahomedan Law are relevant and are being quoted herein below:

138. Hiba or gift. "A hiba or gift is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter.

147. Writing not necessary.-Writing is not essential to the validity of a gift either of movable or of immovable property (d).

10. It is true that under Mahommedan Law gift or hiba is not always required to be reduced to writing either with respect to movable or immovable property. Oral gift is permissible under the Mahommedan Law. A Mahommedan can make an oral gift is a general rule, applicable to property of any kind, but the question remains as to whether on the basis of aforesaid oral gift can a claim of pre-emption under the provision of Land Ceiling Act be defeated? The Land Ceiling

Act is a self contained special Code. It prescribes the mode and manner for filing and disposal of the pre-emption cases. It is well established that a general law must give way to special law. Where a special law prescribes the mode and manner of a particular thing, then that has to be done in accordance with that manner prescribed under the special Act and the applicability of a general law is automatically excluded under such proceedings.

11. At this place, I am tempted to refer to a judgment of five judges of the Privy Council in the case of AIR 1936 253 (Privy Council) , wherein while interpreting the object and scope of section 164 of the Code of Criminal Procedure, 1898, it was observed as follows:-

The rule which applies is a different and not less well recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

12. The dominant object of the Land Ceiling Act is the imposition of a ceiling on the holding of the landholders in relation to the appointed day, i.e., 09.09.1970 and for taking over surplus land in the hands of those landholders, in excess of ceiling limit, and for equitable distribution of such surplus land amongst the landless persons. In the case of Authorised Officer, Thanjavur and Another Vs. S. Naganatha Ayyar and Others, , V.R. Krishna Iyer, J. has aptly delineated the object of the ceiling law in paragraph 2 of the said judgment in the following manner, which is reproduced herein below:

The Ceiling Act, in its structure and process, follows the common pattern. The object is equitable distribution of land to the landless by relieving those who hold more than the optimum extent fixed by the law. The success of the scheme depends on maximization of surplus land to be taken over by the State from large land-holders.

13. Section 3 of the Land Ceiling Act provides that the provisions of this Act shall have overriding effect on all other law, custom, usage or agreement save and except the provisions of The Bihar Bhoodan Yagna Act, 1954. This leads to further conclusion in unequivocal terms that the Land Ceiling Act overrides the personal law in its application with respect to any proceeding under it. Obviously the object of The Bihar Bhoodan Yagna Act, 1954 is also to acquire lands by way of donation and to settle such lands amongst landless persons. Therefore, there is absolutely no conflict in the object of Land Ceiling Act and The Bihar Bhoodan Yagna Act, 1954. Section 4 of the Land Ceiling Act prescribes the ceiling area of land for a family, and section 5 mandates that it shall not be lawful for any family to hold land in excess of the ceiling area, except provided under the said Act.

14. Section 16(1) of the Land Ceiling Act imposes a restriction on a future acquisition by transfer by any mode prescribed therein, if the land, proposed to be acquired together with the land, if any, already held by such person, exceeds in the aggregate to the ceiling area. However, by virtue of Explanation to Section

16(1), inheritance, bequeath or gift have been excluded from the purview of such transfer. In order to prevent any abuse of exception given in the Explanation of section 16(1), at the hands of any unscrupulous person, section 16(2)(iii) of the Land Ceiling Act mandates that no land shall be transferred, exchanged, leased, mortgaged, bequeathed or gifted without a document of registration as per Indian Registration Act. Thus, in order to take benefits of gift under the meaning of Land Ceiling Act and to avoid the claim of pre-emption with respect to such transfer of land by a gift, the gift deed is required to be registered one. The legislative intent appears to be very clear that nobody is permitted to defeat the provisions of the Land Ceiling Act on the basis of unregistered deed of gift or hiba. The general principles of hiba or gift governed by Mahommedan Law shall not be applicable with respect to gift under the provisions of Land Ceiling Act. If a person governed by a Mahommedan Law wants to take benefits of gift u/s 16(1) of the Land Ceiling Act with respect to his or her land for excluding the claim of pre-emption u/s 16(3) of the said Act, then that has to be registered one enabling the authorities concerned to test the rigours of the provisions of the Land Ceiling Act for achieving its object.

15. Heavy reliance placed by learned Counsel appearing on behalf of the petitioners on a Division Bench Judgment of this Court in the case of Bibi Rehana Khatoon Vs. Bibi Jabrunnisa and Others, is completely misplaced. In that case the High Court was considering a second appeal, arising out of a title suit, where validity of oral gift (hiba) was subject matter of controversy. The scheme, scope and mandate of The Land Ceiling Act were not at all under consideration before that Division Bench. On the strength of sections 12 and 26A of The Bihar Tenancy Act, the validity of the aforesaid oral gift (hiba) was being questioned in that litigation. In that background it was held that Muslims are governed by their personal law in the matters of gift, which permits oral gift. The discussion and observations regarding section 16(2)(iii) of The Land Ceiling Act was an obiter-dictum and that cannot be treated as binding precedent with respect to oral gift, which may be subject matter of controversy in a pre-emption proceeding u/s 16(3) of the Land Ceiling Act.

16. 16. At this place it would be relevant to refer to section 2 of The Muslim Personal Law (Shariat) Application Act, 1937 (26 of 1937), which is reproduced herein below:

2. Application of Personal Law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, illa, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

From a plain perusal of the aforesaid provision of the Shariat Act, 1937, it is apparent that the questions relating to agricultural land belonging to Muslims have been excluded from the applicability of Personal Law of the Muslims. This aspect of the matter was not brought to the notice of the Division Bench of this Court in Bibi Rehana Khatoon Vs. Bibi Jabrunnisa (supra). Admittedly in the present case right of pre-emption has been claimed with respect to an agricultural land. Thus, this leads to a conclusion that the claim of pre-emption of Respondent No. 6 and 7 u/s 16(3) of the Land Ceiling Act cannot be defeated on the strength of Personal Law governing the petitioners, as both of them are Muslims.

17. It is also important to notice that respondent nos. 6 and 7 have not filed their pre-emption case with respect to transfer made by petitioner no.1 in favour of petitioner no.2 through the alleged oral gift (hiba), rather the claim is based against the sale deed dated 14.07.1987, whereby the lands in question were transferred by respondent nos. 8 and 9 in favour of petitioner no. 1. Therefore, on that ground also the petitioners are not entitled to resist the claim of pre-emption on the basis of subsequent unregistered oral gift dated 19.04.1991.

18. For the reasons recorded above, the question posed at the very outset in paragraph-2 of my judgment has to be answered in negative. Accordingly, it is held that claim of pre-emption u/s 16(3) of the Land Ceiling Act cannot be defeated with respect to transfer of land on the basis of an unregistered oral gift (hiba) by a person governed by Mahommedan Law. If a transferor or transferee wants to take benefit of the Explanation of Section 16(1) of the Land Ceiling Act, with respect to a gift of his or her land and intends to avoid any claim of pre-emption u/s 16(3) of the Land Ceiling Act by a co-sharer or a boundary raiyat, then that gift must be registered one, so that the revenue authorities under the Land Ceiling Act get an opportunity to test its validity when occasion arises that such gift made by a person governed by Mahommedan Law was not with a view to defeat the object of the Land Ceiling Act. It is needless to state that if oral gifts are permitted at this stage, then the very object of the Land Ceiling Act shall get defeated at the hands of unscrupulous landholders and it would be contrary to the legislative intent of the Land Ceiling Act.

19. In the result, I am in respectful agreement with the conclusions arrived at by my learned brother S.K. Katriar, J. and accordingly, writ petition is dismissed.