
(1972) 09 PAT CK 0038
In the Patna High Court
Case No : Civil Revision No. 1333 of 1970

Bishwanath Bishwakarma and Others	Vs	APPELLANT
Rameshwar Kuar and Others		RESPONDENT

Date of Decision : 20-09-1972

Acts Referred:

Bihar Tenancy Act, 1885 — Section 49M

Citation : AIR 1973 Patna 309 : (1973) 6 PLJR 242

Hon'ble Judges : G.N. Prasad, J

Bench : Single Bench

Advocate : Ajit Gopal Roy, for the Appellant; Tribeni Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

G.N. Prasad, J.—The petitioners are the judgment-debtors. They have filed this application against the order of the executing Court rejecting their objection u/s 47 of the Code of Civil Procedure, which was to the effect that Section 49-M of the Bihar Tenancy Act operated as a bar to any order being passed by the court for the sale of their tenancy land on the ground that they are Lohars by caste and thus belonging to the Scheduled Tribes. The objection thus preferred by the petitioners has been rejected substantially on two grounds. Firstly, the executing Court has taken the view that the petitioners are not members of the Scheduled Tribes to which the relevant notification contained in the Bihar Gazette Part III dated the 21st August, 1957 relates. The -notification mentions "Lohara" or "Lohra" as a member of the Scheduled Tribe as per the order of the President of India made under the Scheduled Castes and Scheduled Tribes Lists (Modification) Order. 1956, whereas the petitioners are Lohars or blacksmiths by caste. In other words, although the petitioners might have been following the profession of smithy which the members of the Scheduled Tribe, known as Lohara or Lohra follow, no conclusion can be drawn that the petitioners are entitled to the protection of Section 49-M of the Bihar Tenancy Act.

2. The second ground, upon which the petitioners' objection has failed in the trial Court, is that the plea which they put forward on the basis of Section 49-M of the Tenancy Act, is no longer available to them on the ground of constructive res judicata.

3. So far as the second ground of the decision of the executing Court is concerned. I am of opinion that it is not sound. If otherwise the provisions of Section 49-M of the Tenancy Act are attracted, then they would operate as a total bar to the exercise of the power of the court to direct the sale of the petitioners' tenancy land. This bar is upon the exercise of the power of the court quite irrespective of any plea having been raised to that effect or not. In other words, it is an absolute bar which cannot be got over on the ground that a plea to this effect is barred by constructive res judicata. Secondly. I am of the opinion that the bar of constructive res judicata is not applicable as the executing Court has held. The executing Court has referred to an earlier order passed in the same execution case on the 18th June, 1965, for the purpose of holding that it would operate as constructive res judicata. But I find on referring to that order that all that it transpired then was that the court had directed the decree-holders to take steps for issue of sale proclamation and in pursuance of the said direction by the said executing Court the decree-holders had filed a sale proclamation wherein it was proposed to bring the petitioners' tenancy land in question to sale. But no order had been passed by the court thereafter for the issue of sale proclamation as filed. The reason was that before any such order could be passed for the issue of sale proclamation, certain objection was taken by the petitioners to the maintainability of the execution case. The objection, which they had then taken, was subsequently withdrawn and again before any order for issue of the sale proclamation could be made, the petitioners filed a second objection u/s 47 of the Code of Civil Procedure, on the score of satisfaction of the decree by payment out of court. This second objection succeeded in the executing Court but it was dismissed by this Court. Thereafter the execution case was again restored to its file and on the 25th February, 1970, the decree-holders filed another sale proclamation in respect of the tenancy land of the petitioners. On the 5th June, 1970, the executing Court for the first time passed an order for issue of sale proclamation in respect of the petitioners' tenancy land in question fixing 3rd August, 1970, for sale. In the meantime on the 30th June, 1970, the petitioners filed their present objection on the basis of the provisions of Section 49-M of the Tenancy Act. It is quite clear that during the pendency of the present objection, which was registered as Misc. Case No. 8 of 1970, no order of the execution Court can possibly operate as bar by constructive res judicata against the plea taken by the petitioners, and, as I have already pointed out, prior to the 5th June, 1970 no order had been passed by the executing Court for the issue of sale proclamation against the petitioners' tenancy land, which might possibly operate as res indicate against the plea now taken by the petitioners. I would not, therefore, reject the petitioners' objection on the ground of constructive res judicata.

4. The real question for consideration is whether the protection of Section 49-M of the Tenancy Act is available to the petitioners. In other words, are the petitioners Loharas or Lohras as stated in the Presidential Notification published in the Bihar Gazette of the 21st August, 1957, to which I have made reference above. A perusal of the Scheduled Tribes listed in the Presidential order leaves no room for doubt that Lohara or Lohra, mentioned in Item No. 21 of the said list in Part III of Schedule III is intended to refer to the aboriginal or Adivasi community, popularly known as such, and not to Lohars or blacksmiths, who do not belong to the Scheduled Tribes. Learned counsel for the petitioners has drawn my attention to the Bihar Gazetteers of the district of Saran edited by P. O. Roy Chaudhury in 1960, at page 211 in Chapter V of which the following passage occurs

"The metal worker or smith worked on metal and catered to the needs of the villages. This industry is still carried on by a community known as Lohars and Sonars....."

5. In my opinion, Lohars referred to in the District Gazetteers of Saran are not the same community as Loharas or Lohras mentioned in the Presidential order, referred to above. I, therefore, hold that the petitioners are not entitled to the protection of Section 49-M of the Tenancy Act. In the result. I uphold the order of the executing Court and dismiss this application, but in the circumstances there will be no order as to costs.