

(1985) 02 PAT CK 0013
In the Patna High Court
Case No : C.W.J.C. No. 296 of 1979

Dasrath Sao and Another

APPELLANT

Vs

Additional Member, Board of Revenue and Others

RESPONDENT

Date of Decision : 20-02-1985

Acts Referred:

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 — Section 16(3)
Bihar Tenancy Act, 1885 — Section 12, 26A

Citation : (1985) 33 BLJR 274 : (1985) PLJR 653

Hon'ble Judges : Hari Lal Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hari Lal, Agrawal, J.—This application arises out of a proceeding for pre-emption started u/s 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (for short the Ceiling Act). The purchasers are the petitioners. They purchased 27.05 acres of land from one Sakoor Sah (respondent No. 5) appertaining to plot Nos. 1309, 929 and 732 of Khata No. 267 through a registered deed of sale dated 6.1.1975.

2. Respondent No. 4 Chhotan Sah, then filed the application for preemption against the petitioners on the ground that he was a cosharer of the vendor as well as a raiyat of the adjoining lands. The claim of being a cosharer is on the basis of his being the descendant of the common ancestor Bhattu Sah and thus being a member of the same Mohammedan family. He claimed to be an adjoining raiyat on the basis of an oral gift alleged to be made by his father, supported by an affidavit of his father Ramzani.

3. The defence of the petitioners was that (1) the pre-emptor being a Mohammedan had no interest in the property of his father during his life time and, therefore, he could not be said to be a co-sharer and (2) the affidavit filed by the father of the pre-emptor was, motivated and intended to defeat the

provisions of the Ceiling Act. Undisputedly the pre-emptor had got no land in his own name in the boundary of any of the plots.

4. The case of the pre-emptor was rejected by the Land Reforms Deputy Collector, Nawadah by his order dated 31. 7, 1976 (Annexure 1). He recorded the following findings:

(i) It could not be said with certainty as to whether Ramzani was actually a cosharer of all the plots in question.

(ii) There was nothing on the record to show that he was an adjoining raiyat of one plot No. 1309 also.

He further rejected the claim of the pre-emptor on the basis of oral gift by his father on the view that the Ceiling Act prohibited transfer even by a Mohammedan by an oral gift.

5. Respondent No. 4 then filed an appeal before the Additional Collector, Nawadah, respondent No. 2, which was allowed. The petitioners challenged the order of the Additional Collector before the Board of Revenue but lost at that stage also. The appellate order and that of the Additional Member, Board of Revenue are Annexures 2 and 3 respectively.

The Additional Collector accepted the story and the validity of the oral gift, as under the Mohammedan Law that was permissible, although he does not appear to have accepted the claim of the pre-emptor of being a co-sharer. The learned Additional Member, Board of Revenue, has gone a step further and on reading the definition of the expression "raiyat" under the Ceiling Act, which I shall deal hereinafter, has held the pre-emptor to be a "raiyat" as being a successor-in-interest of his father during his life time. The Member, Board of Revenue, also stated that the petitioner in the revision petition [paragraph 7 (iv)] had admitted that the father of the pre-emptor was an adjoining raiyat of plot Nos. 1309 and 929. As regards the third plot, namely, 732, the father of the pre-emptor was already shown in the boundary. He accordingly held that the pre-emptor was thus boundary tenant of all the three disputed plots.

6. Before I proceed to consider the contentions advanced before me and the points arising in this case, I may refer to some of the relevant statutory provisions which would govern this case. First I would refer to two Sections of the Bihar Tenancy Act, namely, Sections 12 and 26A, which read as follows:

12. Voluntary transfer of permanent tenure.

(1) A transfer of a permanent tenure by sale, gift, exchange or mortgage other than a transfer by a sale in execution of a decree or by summary sale under any law relating to patni or other tenures can be made only by a registered document.

(2) XX XX XX (3) XX XX XX (4) XX XX XX

26A. Transfer and bequest of occupancy-holdings or portions thereof.

XX XX XX (1) Every transfer of an occupancy holding or a portion thereof, together with the right of occupancy therein, by sale, exchange or gift and every bequest of such holding or portion, together with the right of occupancy therein, shall be made in the same manner and subject to the same conditions as a permanent tenure in respect of registration and the payment of landlord's registration fee.

The alleged transfer by way of oral gift by the father of the pre-emptor or of the plots in question which are agricultural in nature is, therefore, in violation of restrictions imposed under the provisions of the B. T. Act, being riot by registered document.

I find full support for this view from a decision of this Court in the case of *Mosst. Bibi Sharifan v. Sheikh Salahuddin and Ors.* 1959 B.L J.R. 757. That also happened to be a case of an oral gift of occupancy holding made by a Mohammedan and with reference to the above provisions it was held that the gift was void although it might satisfy all other requirements of a valid gift under the personal law, since it was not effected by a registered instrument as required by Section 26A (2) of the B. T. Act.

7. Section 16 (2) (3) of the Ceiling Act also creates a restriction on the transfers, exchange, lease, mortgage, bequeath or gift on 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 it from being declared as surplus land. But reading the provisions of the B. T. Act and the Ceiling Act referred to above, I do not feel any hesitation to hold that the principles and provisions of the Mohammedan Law governing the right of the pre-emptor must give way to this specific law. In this connection I may usefully refer to the non-obstante provision contained in Section 3 of the Ceiling Act which provides that the provisions effected notwithstanding anything contrary contained in any other law, custom, usage or agreement for the time being in force, or any decree or order of any Court; the only exception being made to the provisions of the Bihar Bhudan Yagqa Act, 1944.

Similarly, explanation 2 to Section 2 (ee) defining "family" makes the personal law inapplicable from being taken into consideration. Apart from this fact, neither the Board of Revenue has answered the suspicions indicated by the Deputy Collector who had rejected the case of oral gift of the pre-emptor on the ground that no details of the gift were mentioned in the affidavit of his father nor any supporting evidence, such as mutation of the name or grant of the rent receipt in favour of the pre-emptor, was brought on record. He had, therefore, concluded that the father of the pre-emptor had come out with a mala fide intention to file an affidavit in the proceeding. That apart, even if the story of gift could be true, that

would not have helped the pre-emptor because no oral gift event by a person governed by the Mohammedan Law of any raiyati land can be operative and legal. Once the basis of the claim for the pre-emption, namely, the oral gift set up by the pre-emptor vanishes, then the claim on the basis of adjacency has got to fail.

8. One of the grounds for succeeding in a claim for pre-emption is that the claimant must be "a raiyat of adjoining land". The expression "raiyyat" has been defined in Section 2 (k) of the Ceiling Act which is somewhat similar to that as defined in Section 5 (2) of the B. T. Act and reads as follows:

raiyyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants or with aid of partners, and includes also the successors in interest or persons who have acquired such a right and includes, in the district of Santhal Parganas, village headman in respect of his private land, if any, but does not include in the areas to which the Chotanagpur Tenancy Act, 1908 (Ben. Act VI of 1908), applies, a Mundari Khuntkattidar or a Bhuihar.

9. The reasoning of the Board of Revenue has already been stated earlier and, therefore, I need not repeat it. It has been said that the pre-emptor being a descendant of the common ancestors of the vendor, and the family of his father, must be deemed to be a successor-in-interest.

I find myself unable to accept the reasoning of the learned Additional Member of the Board of Revenue that the pre-emptor being governed by the Muslim law would be deemed to be successor-in-interest of his father like Hindu son. Under the Mohammedan Law, right in property by the mere birth is not recognised. The right of an heir apparent or presumptive heir, comes into existence for the first time on the death of the ancestor. Till that time he is not entitled to any interest in the property to which he would succeed as an heir if he survived the ancestor. For becoming a raiyyat the pre-emptor has had a right to hold the land in his own right. The position of a son under the Hindu Law is, however, quite different. This proposition is firmly settled by a Full Bench decision of this Court in *Imamul Hassan Choudhary Vs. State of Bihar and Others*, .

10. For the reasons discussed above, it must be held that the Additional Collector and the Additional Member, Board of Revenue have committed serious and apparent errors of law in allowing the case of preemption of respondent No. 4. This application, therefore, must succeed and it is accordingly allowed. The petitioners must also get their costs. Hearing fee is assessed at Rs. 200/-only.