

**(2015) 01 JH CK 0145**  
**In the Jharkhand High Court**  
**Case No : Writ Petition (c) No. 4530 Of 2002**

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|-----------------------------|----|------------|
| Manishankar Mahato and Ors. | Vs | APPELLANT  |
| State Of Jharkhand and Ors  |    | RESPONDENT |

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**Date of Decision :** 13-01-2015

**Acts Referred:**

Bihar Land Reforms (Fixation Of Ceiling Area and Acquisition Of Surplus Land) Act,  
1961 — Section 2(f), 16(3), 16(3)(i)  
Constitution Of India, 1950 — Article 226

**Citation :** (2018) 4 JLJR 282

**Hon'ble Judges :** Anubha Rawat Choudhary, J

**Bench :** Single Bench

**Advocate :** Pratik Sen, Vishal Kumar Singh

**Final Decision :** Dismissed

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## Judgement

Anubha Rawat Choudhary, J

1. Heard Mr. Pratik Sen, counsel appearing for the petitioners.
2. Heard Mr. V. Shivnath, Senior counsel assisted by Mr. Niraj Kishore, counsel appearing on behalf of the private respondents.
3. Heard Mr. Vishal Kumar Singh, Associate counsel to Standing counsel (Land & Ceiling) appearing on behalf of the respondent Nos. 1 to 4.
4. This writ petition has been filed by the petitioners challenging the order dated 11.07.2002 passed in Board's Case No. 54 of 2001 by Member, Board of Revenue, whereby the said authority has been pleased to set-aside the order dated 17.12.1999 passed by Deputy Collector Land Reforms, Dhanbad in L.C. Case No. 28/1996-97.
5. Counsel for the petitioners submits as under:
  - a. The property involved in this case is relating to Plot No. 2058 area 6 decimal of Khata No. 18 of Mauza Pradhan Khanta of P.O. and P.S. Govindpur, district-

Dhanbad.

b. This property was transferred by Siromoni Devi, wife of Sri Satish Chandra Verma to Kunti Mahato, wife of Sri Umakant Mahato by a registered sale-deed dated 07.01.1997 for a consideration of Rs. 4,000/-.

c. The original Respondent No. 5 in the writ petition (since deceased) filed an application for pre-emption under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the "Act") on the ground of being the adjoining raiyat of the land as per the aforesaid sale-deed dated 07.01.1997.

d. The said application filed by the original Respondent No. 5 was numbered as L.C. Case No. 28/1996-97 and the same was rejected.

e. Against this, the original Respondent No. 5 filed appeal being L.C. Appeal No. 1 of 1998 and the appellate court also dismissed the appeal vide order dated 17.12.1999.

f. Against the order of dismissal passed by the appellate authority, the original Respondent No. 5 filed revision case before the Member, Board of Revenue which was numbered as Board's case No. 54 of 2001 and the Member, Board of Revenue vide order dated 11.07.2002 allowed the revision case and thus allowed the claim of preemption as made by the original Respondent No. 5.

g. Counsel for the petitioners has made four-fold submissions:

(i) Original Respondent No. 5 was not the adjoining raiyat.

(ii) The nature of the property is homestead and therefore, the aforesaid Act has no application.

(iii) The property was purchased by Siromoni Devi as back as in the year, 1986 and the original Respondent No. 5 did not exercise his right of pre-emption at the relevant point of time and accordingly, he had waived his right of pre-emption which he could not have exercised subsequently when the property was purchased by the original petitioner from Siromoni Devi in the year, 1997 vide sale-deed dated 07.01.1997.

(iv) Right of pre-emption is a weak right.

h. Counsel for the petitioners, on the point No. 1 (i.e. regarding original Respondent No. 5 not being an adjoining raiyat) has referred to Annexure-1 i.e. the sale-deed and while referring to the sale-deed, the counsel for the petitioners submits that towards the West, a portion of this plot (i.e. plot No. 2058) has been shown in the name of original Respondent No. 5. He submits that on the West side of the property as per the description mentioned in the sale-deed itself, there is portion of the same plot and accordingly, from the sale-deed itself the original Respondent No. 5 cannot be said to be the adjoining raiyat.

i. To buttress this argument, the counsel for the petitioners has referred to the

sale-deed dated 11.04.1983 by which the original Respondent No. 5 claims to be the adjoining raiyat. He submits that towards the East of this property, it has been shown as a portion of the plot No. 2058.

j. On the 2nd point i.e. on the point of homestead land, the counsel for the petitioners submits that no doubt this property is recorded as an agricultural land in the record of rights but from the sale-deed which has been produced by the petitioners, it is apparent that the property was purchased for constructing the houses and accordingly, the petitioners having constructed the house, the nature of the land has changed and therefore, the Act does not have any application to the facts of the case. The counsel submits that this aspect of the matter has not been considered by the authorities.

k. On the point of waiver of right of pre-emption, counsel for the petitioners submits that the property which has been purchased by the original petitioner from Siromoni Devi was purchased by her in the year, 1986 and at that time the original Respondent No. 5 did not exercise his right of pre-emption and has accordingly waived his right of pre-emption and cannot exercise his right of preemption when the same property has been purchased by the original petitioner in the year, 1997 from Siromoni Devi.

l. Counsel for the petitioners submits that right of preemption is a weak right and under the facts and circumstances of this case the order passed in favour of the pre-emptor should not have been passed.

m. Counsel for the petitioners submits that these aspects of the matter has not been properly considered by the Member, Board of Revenue while passing the impugned order dated 11.07.2002 passed in Board's Case No. 54 of 2001 and accordingly, he submits that the impugned order is perverse and is fit to be set-aside.

n. Counsel for the petitioners has relied upon the judgments reported in MANU/BH/0299/1983 : 1984 PLJR 128 and judgment reported in 2015 (2) JCR 140 (Jhr.) and 2004 (3) JCR 256 (Jhr.) in support of his contentions.

6. Counsel for the private respondent, on the other hand submits that it is clear from the sale-deed itself that towards the West the remaining portion of the plot of original Respondent No. 5 is mentioned and he submits that since the boundary of the property is clearly mentioned in the sale-deed itself, it is not open to the petitioners being a party to the sale-deed to dispute the boundary. Moreover, in the sale-deed of the original Respondent No. 5 dated 11.04.1983 also, towards the East of the property, it has been shown as a portion of the plot No. 2058. Thus there cannot be any doubt that the original Respondent No. 5 is the adjoining raiyat of the original petitioner.

7. The counsel for the respondents further submits that so far as sale-deed of the year 1983 is concerned, the same does not lead anywhere as in the year 1983, there was no occasion for the original Respondent No. 5 to mention the

property of the vendor of the original petitioner as the vendor of the original petitioner had purchased the property only in the year 1986.

8. Counsel for the respondents further submits that admittedly the nature of the land as recorded in the record of rights as well as even in the sale-deed was agricultural and merely because the original petitioner had purchased the property for constructing the house, will not change the nature of the land particularly when the right of pre-emption was exercised by the original petitioner within the stipulated time as per the provisions of the Act. Counsel for the Respondent No. 5 also refers to definition of land as defined under Section 2(f) of the aforesaid Act and submits that even for the homestead land when capable of being used for agricultural and horticultural purposes, the Act is applicable.

9. The counsel for the respondents, on the point of waiver submit that there is no question of alleging waiver against original Respondent No. 5 in view of the fact that there is no estoppel under law restraining the original Respondent No. 5 from exercising his statutory right of pre-emption although he had not exercised his right of pre-emption in the year, 1986, when the property was purchased by the vendor of the original petitioner.

10. Counsel for the respondents also submits that there is no perversity in the impugned order and accordingly, this Court may not exercise its powers under Article 226 of the Constitution of India to disturb the findings of the fact, which has been conclusively recorded by the Member, Board of Revenue in the impugned order.

11. Counsel appearing on behalf of the State submits that there is no illegality or perversity in the impugned order and accordingly, the same may not be set-aside.

12. After hearing the counsel for the parties, this Court is not inclined to grant any relief to the petitioners on account of the following facts and reasons:

(a) On the point raised by the petitioners that Original Respondent No. 5 was not the adjoining raiyat.

On this point this Court finds from the sale-deed which has been annexed by the writ petitioners as Annexure-1 that towards the West side in the sale-deed itself a portion of the same plot as well as the name of original Respondent No. 5 i.e. Bhola Modak (since deceased and substituted) appears. It is nobody's case that the description of the property in the sale deed is not correct. Otherwise also the description of property, as mentioned in the sale-deed is certainly binding on the parties to the sale deed. The original authority while deciding the case held that in the sale deed on the West of the vended property there was vacant land of the plot and thereafter it was the land of the original Respondent No. 5. However from the perusal of the sale deed it is mentioned as follows:- which certainly does not mean that Bhola Modak i.e. original Respondent No. 5 was after the remaining portion of the plot. Accordingly, this Court finds that the order of the

original authority was incorrect and the revisional authority has rightly held that the original Respondent No. 5 was the adjoining raiyat and this is apparent from the boundary mentioned in the sale deed of the vended property itself. Thus this Court finds that this point has been rightly decided by the revisional authority and the same does not require any interference.

(b) On the point that the nature of the property is homestead and therefore, the aforesaid Act has no application.

So far as the applicability of the Act on the property is concerned, it is an admitted case of the parties that the land is originally recorded as agricultural land and it is the case of the petitioners that the property was purchased for the purposes of constructing a house. The counsel for the petitioners has also submitted that the house was constructed over the property during the pendency of the pre-emption application filed by original Respondent No. 5. This Court is of the considered view that the original petitioner had admittedly purchased the agricultural land and the original Respondent No. 5 had exercised his right of pre-emption within the stipulated time and as per the mandate of the Act, any change with regard to the use of property does not defeat the right of original Respondent No. 5 which is the statutory right under the Act. Moreover the term "land" has been defined under the said Act as under:-

"'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.]"

Section 16(3)(i) of the said act reads as under:-

"When any transfer of land is made after the commencement of this 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 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 ten percent thereof is deposited in the prescribed manner within the said period."

From the perusal of the definition of 'land' read with section 16(3) of the Act it is apparent that the right of preemption is applicable to the homestead of a land holder. From the perusal of the show cause filed by the parties before the original authority it is apparent that a specific stand was taken that there was a JHOPRI standing on the property and the rest portion was being used for cultivation of MAKAI. Thus the records of the case shows that the property at the time of sale was agricultural land but afterwards it became a homestead land by construction of a hut but still the land was fit for agriculture or horticulture and therefore, the property was covered by the definition of "land" as defined under the Act and therefore the provisions of section 16(3) of the Act was applicable and the right of pre-emption was available to the original Respondent No. 5.

So far as the judgment reported in MANU/JH/0352/2004 : 2004 (3) JCR 256 (jhr) is concerned, this judgment also does not help the petitioners in any manner. It does not apply to the facts and circumstances of this case because in that case during the consideration of preemption application, there was on the spot inspection conducted by Land Reforms Deputy Collector and upon on the spot inspection, it was found that a pucca house was standing on the property and a shop was also being run. There was an electricity connection in the house and the cadastral survey had recorded the land as Gharbari. In the instant case, admittedly the property is recorded as an agricultural land and moreover, there is no on the spot inspection conducted by any of the authorities. It is the specific case of the vendor of the property before the original authority that there was a hut constructed on the property and the rest of the land was being used to grow Makai. Thus the property which was originally recorded and sold as agricultural land was subsequently found out to be homestead along with remaining land fit for cultivation. Thus the property was covered by the definition of land as defined under the Act and accordingly the original Respondent No. 5 had the right of pre-emption under section 16(3) of the said Act.

(c) On the point that the property was purchased by Siromoni Devi as back as in the year, 1986 and the original Respondent No. 5 did not exercise his right of pre-emption at the relevant point of time and accordingly, he hadwaived his right of pre-emption which he could not have exercised subsequently when the property was purchased by the original petitioner from Siromoni Devi in the year, 1997 vide sale-deed dated 07.01.1997.

This argument is also fit to be rejected particularly in view of the fact that neither any judgment nor any provision of the Act has been cited by the petitioners which says that if the property is once sold and the right of pre-emption is not exercised, then the right of pre-emption cannot be exercised when the property is subsequently sold. From the perusal of the Act it appears that the cause of action for filing an application for right of preemption is the sale-deed itself and accordingly, the moment the sale-deed dated 07.01.1997 was executed, a right of pre-emption accrued to the adjoining raiyats i.e. the original Respondent No. 5 herein to make an application for pre-emption before the competent authority as

per the provision of the Act. The Respondent No. 5 having done so, the claim of waiver as submitted by the petitioner is hereby rejected.

So far as the judgment reported in MANU/BH/0299/1983 : 1984 PLJR 128 is concerned, the said judgment has no application to the facts of this case. In the said case, the sale-deed was registered on 09.11.1979 and application for pre-emption was filed on 11.12.1979 and when the notices were issued to the transferee, the transferee appeared and took a stand that she has already transferred the land purchased by her in favour of another person. In this background, the Hon'ble Court held that if the transferee of the property transfers it to a 2nd purchaser by a document executed and registered before the filing of the application, the 2nd transferee gets a good title to the property and there is no question of his right being defeated by the subsequent application filed by the pre-emptor and he could not be presumed to have any knowledge of the application which may be filed in future. In the instant case, the sale had taken place in the year, 1986 in favour of the vendor and at that point of time, no application for pre-emption was filed and thereafter, the vendor sold the property to the original petitioner on 07.01.1997 when the adjoining raiyat i.e. original Respondent No. 5 filed his application for pre-emption. Thus the judgment reported in MANU/BH/0299/1983 : 1984 PLJR 128 does not apply to the facts and circumstances of this case as the facts of the said case were totally different from the present case. This Court is of the considered view that every sale of property covered under the said Act gives a fresh cause of action to the adjoining raiyat of the property and merely because the right to pre-emption was not exercised at the first sale that does not mean that the adjoining raiyat has waived his right to apply for pre-emption forever. The moment the same property is sold again the adjoining raiyat has a fresh cause of action to exercise his right of pre-emption under the Act and he cannot be estopped from doing so merely because he has not exercised his right at the stage of earlier sale of the same property.

(d) On the point that pre-emption is a weak right.

The counsel for the petitioners has relied upon the judgment reported in 2015 (2) JCR 140 (Jhr) to submit that right to preemption is a weak right.

Upon perusal of the said judgment it appear that the facts involved in the said case were totally different from the present case. In the said case the matter related to a gift deed which was itself alleged to be a sham document. This Judgment has no applicability to the facts and circumstances of this case.

Moreover it will be useful to refer to the judgment passed by the Supreme court reported in MANU/SC/0363/2010 : (2010) 6 SCC 441 wherein it has been held that where a right of pre-emption is recognized by statute it has to be treated as mandatory and not discretionary. In the said judgment the view of Patna High Court that right to pre-emption is a weak right has been taken into consideration and has been held as under:-

"20. The learned Single Judge deciding the writ petition and the Division Bench of the High Court deciding the LPA appear to have taken a view that the right of pre-emption is a weak right, presumably because the Division Bench of the Patna High Court in *Sudama Devi v. Rajendra Singh* and the learned Single Judge in *Ram Pravesh Singh v. Board of Revenue* have taken this view. Whatever may have been the views of the Patna High Court and this Court in the earlier decisions cited by the learned counsel for Respondent 1, a five-Judge Bench of this Court in *Shyam Sunder v. Ram Kumar* has now held that where a right of pre-emption is recognised by statute, it has to be treated as mandatory and not discretionary. The relevant passage from the judgment in *Shyam Sunder v. Ram Kumar* is quoted hereinbelow: (SCC pp. 37-38, para 17)

"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 characterised 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 recognised 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."

In view of the judgment of Hon'ble Supreme court this point is also decided against the petitioners.

13. In this background, this Court finds no merit in the writ petition and accordingly, the writ petition is dismissed.