

(1980) 07 PAT CK 0003
In the Patna High Court
Case No : C.W.J.C. No. 815 of 1978

Mir Rafique

APPELLANT

Vs

Additional Member, Board of Revenue and Others

RESPONDENT

Date of Decision : 21-07-1980

Acts Referred:

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 — Section 16(3)
Constitution of India, 1950 — Article 19(1)(f), 226, 227
Registration Act, 1908 — Section 47
Transfer of Property Act, 1882 — Section 52

Citation : (1980) PLJR 432

Hon'ble Judges : Hari Lal Agrawal, J

Bench : Single Bench

Advocate : Mojibul Haque and Md. Hasibuddin, for the Appellant;
Awalokiteshwar Misra, J.C. to S.C. 5 for the Respondent Nos. 1 to 3, A.K. Lal and Uma Kant Verma for the Respondent No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Hari Lal Agrawal, J.—This application under Articles 226 and 227 of the Constitution of India is directed against an order of the Board of Revenue, Bihar, allowing a revision application of respondent no. 4 in a proceeding initiated under the provisions of Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. The relevant facts, briefly stated, are that on 14-10-1969 a sale deed was executed by respondent nos. 5 and 6 in favour of respondent no. 4 (Ajablal Yadav) with respect to 4 kathas from west of survey plot no. 2399, situate in Village Bhawanpur, Police Station Madhubani. The sale deed was registered on 12.11.1969. The petitioner filed an application u/s 16(3) of the Act before the Deputy Collector Land Reforms, Madhubani on 18-12-1969, claiming to be the cosharer as well as an adjoining raiyat of the plot in question. On the same day respondent no. 4 had executed a sale deed selling the property in question to Awadh Lal Yadav, respondent no. 7.

This sale deed was registered on 22-12-1969.

Notice of this proceeding was issued by the Deputy Collector to respondent no. 4 who filed his show cause on 15.6.1970 disputing the claim of the petitioner that he was a cosharer or an adjoining raiyat of the land in question. It was further, said by him that the land in question was already transferred in favour of Awadh Lal Yadav and possession was also delivered to him. It may be mentioned that in spite of this disclosure the petitioner did not implead the second transferee, the said Awadh Lal Yadav, in the proceeding and for the first time he has been impleaded in this court as respondent No. 7. It may also be usefully mentioned that it has not been the stand of the petitioner that the transfer in favour of respondent no. 7 by respondent no. 4 was either Farzi or sham, but his only plea was that respondent no. 4 had executed the sale deed with the sole motive to defeat the claim of the petitioner and to circumvent the provision of law.

2. The Deputy Collector allowed the claim of pre-emption accepting both the grounds advanced by the petitioner. Respondent No. 4 then preferred an appeal before the Collector, Madhubani, against the order of the Deputy Collector, which was dismissed by order dated 10.1.1977. The Addl. Collector took the view that in as much as the sale deed in favour of respondent no. 7 was finally registered on 22.12.1969, i.e., sub-sequent to the filing of the application for pre-emption, the land in question could not be deemed to have been transferred from the possession of respondent no. 4 to the possession of respondent no. 7 on 18.12.1969, the date of the filing of the application for pre-emption, since it was the date of the final registration and not the date of execution of the document that mattered in a pre-emption case. In support of his view the learned Additional Collector placed reliance upon the case of (1) Ramnath Giri V. Ramsundar Giri and others (1970 PLJR 8 Rev.) and therefore, the sale deed aforesaid was held to be invalid in law.

3. Respondent no. 4 then filed a revision before the Board of Revenue and the Board, on reference to the provisions of Section 47 of the Registration Act, came to hold that the sale deed in favour of respondent no. 7 became effective from 18-12-1969. It further held that on the pre-emption application already stayed respondent no. 4 had right to deal with the property. The Board, therefore, allowed the application and set aside the orders of both the courts below. The petitioner has accordingly come to this Court.

4. Mr. Mojibul Haque, appearing in support of this application, raised the following points:

(i) The transaction of sale by respondent no. 4 in favour of respondent no. 7 was inoperative as it was hit by the doctrine of *lis pendens*; and

(ii) In any event, the case should be remitted back to the first court to enquire into the validity of the said transaction as the same was effected only for the purpose of defeating the claim of the petitioner, meaning thereby that the

transaction was fictitious and sham in nature.

5. I now proceed to consider the first point raised by Mr. Haque which is the main point for consideration in this case. Somewhat similar questions have fallen for consideration by this court on earlier occasion also and reference may be made in this connection to the case namely (2) Ramchandra Yadav V. Anutha Yadav and others (1971 B.L.J.R. 994) and (3) Smt. Sudama Devi and Others Vs. Rajendra Singh and Others, . In Ramchandra's case the second transfer was made on 3-4-1967, a day prior to the filing of the application u/s 16(3), but it was registered on 24.6.1967 and in as much as u/s 47 of the Indian Registration Act the second transferee became the owner of the land right from 3-4-1967 and derived title from the said date, the application against the original transferee u/s 16(3) failed. It was however observed that in such circumstances it was obligatory for the pre-emptor to implead Chhatti (the subsequent transferee) as a party in his application u/s 16(3) and "to seek such relief as may be available to him in presence of Chhatti".

In the next case, i.e., Sudama Devi's case, the matter was discussed by Untwalia, J. (as he then was) in some more detail. On reference to the scheme of Section 16(3), particularly Clause (iii), it was observed that in Section 16(3) there was absolutely no provision made for making an order of pre-emption against a subsequent transferee on an application filed for pre-emption against the first transferee, and if the subsequent transferee is in fact and in law, a transferee of the property in respect of which claim for pre-emption had been made, then a question of his being a transferee with notice of the pre-emption application, was not relevant view of what was said in Ramchandra's case, (to which also Untwalia, J. was a party). In that case the learned Judge had pointed out three situations, namely, (i) if the transferee of the property transferred it to a second purchaser by a document executed and registered before the filing of the application, the second transferee got a good title in the property and there was no question of his right being defeated by a subsequent application for pre-emption; (ii) the second sale deed being executed and registered after the filing of the application for pre-emption, the second transfer was clearly hit by the doctrine of *lis pendens* engrafted u/s 52 of the Transfer of Property Act, and (iii) when a document of sale is executed before the filing of an application for pre-emption but is registered after its filing.

The first two situations being obvious, do not create much difficulty. Difficulty may, however, arise in the third category of the case and it was this difficulty which was resolved in Sudama Devi's case. On consideration of the entire subject and relevant law relating to the rule of pre-emption, it was ultimately held that when a sale deed is executed prior to the filing of an application for pre-emption; merely because it is registered subsequent to the filing of the application, it cannot be said to have been hit by the doctrine of *lis pendens*, as the transferee becomes the owner of the property in view of the provisions of law contained in Section 47 of the Registration Act prior to the date of filing of the

application.

6. In spite of this authoritative decision of this court, I am faced with a somewhat anomalous position in this case and that is that the impugned transfer in favour of respondent no. 7 and the application for pre-emption were both made on the same day, i.e.; 18.12.1969. For the reasons discussed in the above authorities and the provisions of law contained in Section 47 of the Registration Act, respondent no. 7 undisputedly became the owner of the property on 18.12.1969, the date when the application for pre-emption was made. It is not possible to decide the question of priority of either the execution of the sale deed or the making of the application for pre-emption in point of time and, therefore, I would assume that both the events took place simultaneously and they stand on equal footing. Question now arises as to what would be its effect, in the eye of law, on the legal rights of each of the contenders, namely, as to whether the petitioners' right to claim pre-emption would survive and prevail or it will be defeated on account of respondent no. 7 becoming the owner of the property.

7. I do not find any relevancy of the fact of the taking "cognizance" by the Deputy Collector of the application for pre-emption, in view of the explanation added to Section 52 of the Transfer of Property Act, according to which the pendency of a suit or proceeding is to be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction. This anomaly, therefore, leads me to consider the question from an entirely different angle. It was observed in *Sudama Devis* case that had the Act in question been not a protected legislation having been included in the Ninth Schedule of the Constitution, the law engrafted in Section 16(3) could have been struck down as being violative of Article 19(1)(f) of the Constitution. It has further been observed that the law of pre-emption engrafted in Section 16(3) was of a still weaker nature than the customary law of pre-emption. I also feel tempted to rely upon the observation of Subbarao, J. in the case of (4) *Bishan Singh and Others Vs. Khazan Singh and Another*, where he said that the vendee may defeat the right by selling the property to a rival pre-emption with preferential or equal right. The following observation of the learned Judge is eloquent;

The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee....this superior right must subsist at the time the pre-emptor exercises his right and that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee.....The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means.....preferred being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. The right being a very weak right, it can be defeated by all legitimate methods such as the vendee allowing the claimant of a superior or equal right being substituted in his place.

8. The above observations which were also referred to by Untwalia, J. in *Sudama*

Devi's case, in my view, provide the key to resolve the problem. I have already said that on the facts, of the present case the application for pre-emption and the transfer by respondent no. 4 may be held to have been simultaneously made. In that event, the pre-emptor and the subsequent transferee standing on equal footings, unless the pre-emptor would show that his right was still superior to that of the vendee (respondent no. 7), he cannot be allowed to succeed because if both the parties have equal rights then the right of the pre-emptor being a much weaker right, must give way to the right acquired by the vendee, who must be given preference over the pre-emptor. I would, therefore, reject the claim of pre-emption on this ground.

9. The second point urged by Mr. Haque can be noticed simply to be rejected, for the simple reason that it has never been the petitioner's case, as already observed earlier, that the transfer by respondent no. 4 to respondent no. 7 was either farzi or sham. All that was contended on this front by the petitioner was that the transaction was entered into only for the purpose of defeating the claim of the pre-emptor. That they may be a position even in the case of a genuine transaction and, as already observed in a large body of cases that a vendee can take all legitimate steps to defeat the right of pre-emption. The notice of respondent no. 4 as such cannot be assailed and accordingly no question arises for any further investigation in the matter as to whether the impugned transfer by respondent no. 4 was vitiated on any account, particularly when the petitioner took no steps to implead respondent no. 4 after being aware of the assignment of the disputed Land in his favour. In Sudama Devi's case the subsequent transfer was impeached from the very beginning as bring sham. For the reasons discussed above and both the points urged in support of this application having been found to be of without any merit, this application must fail. Accordingly it is hereby dismissed, but in the circumstances I shall make no order as to costs.