(2015) 11 PAT CK 0056

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 10728 and 10730 of 1992

Ram Udar Upadhaya and Others APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 04-11-2015

Acts Referred:

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 — Section 16(3)
Constitution of India, 1950 — Article 226, 277

Citation : (2015) 11 PAT CK 0056

Hon'ble Judges : Chakradhari Sharan Singh, J.

Bench : Single Bench

Advocate : Prabhu Nath Roy, Sr. Advocate and Nirmal Kumar Sinha-3, for the Appellant; Kamal Nayan Choubey, Senior Advocate and Bindeshwar Pd. Singh, for the Respondent

Judgement

Chakradhari Sharan Singh, J.—One Kedar Nath Tiwari (Respondent No. 6 in both the cases, hereinafter referred to as the ''Vendor'') had executed two sale deeds one in favour of Ram Udar Upadhyay (since deceased and substituted by his legal heirs/representatives) and other in favour of Din Bandhu Upadhyay with respect to certain lands belonging to him on payment of consideration money on 28.12.1978, which were duly registered on 29.01.1978. These two transactions gave rise to separate pre-emption proceedings, upto the level of revision before the Board of Revenue, Bihar.

2. These writ applications filed under Article 226 & 277 of the Constitution of India arise out of the orders passed by learned Additional Member, Board of Revenue, both dated 30.03.1992, in separate Revision proceedings, whereby he has set aside the orders dated 12.08.1991, passed by the Additional Collector, Bhojpur, in Ceiling Appeal Nos. 14 and 15 of 1988-89. Both the applications have been heard together with the consent of the learned counsel for the parties, as the question of facts and law involved in both the cases are almost similar and are being thus adjudicated upon, by the present common judgment.

3. Briefly stated, facts of CWJC No. 10728 of 1992 are as follows:--

"(i) Petitioner had purchased from the vendor lands of Plot No. 32 (1.36 acres), Plot No. 43 (55 decimal) and Plot No. 84 (73 decimal), appertaining to Khata No. 19, situate in village Parasia P.S. Buxar of the District of Buxar, through a sale deed executed on 28.12.1978 and registered on 29.01.1979 for a consideration of Rs. 20,000/-, whereafter he was put in possession over the said land. One Shankar Dayal Upadhyay (Respondent No. 5, since deceased), claiming himself to be co-sharer of the transferor/an adjoining raiyat of the vended land filed an application under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Act), before the Deputy Collector, Land Reforms, Buxar on 01.05.1979, giving rise to pre-emption case No. 5 of 1979-80. According to him, he held Plot Nos. 33, 485 and 483 which were adjacent to the vended plots. Upon notice the petitioner appeared in the pre-emption proceeding and took plea, inter alia, that respondent No. 5 was neither a co-sharer of the transferor/vendor nor an adjoining raiyat of the said plots. He also took a plea that in the absence of description of land in his application, as required under Section 16(3) of the Act, the pre-emption application was not maintainable. The Deputy Collector, Land Reforms by an order dated 10.03.1980 held Respondent No. 5 not to be an adjoining raiyat to Plot Nos. 32 and 43 of the land in question and he accordingly, dismissed the preemption application.

(ii) The Deputy Collector, Land Reforms, recorded in his order, while rejecting pre-emption application that on the southern boundary of Plot No. 32 in question, there was plot No. 33 but so far as Plot No. 43 in question was concerned, respondent No. 5 did not hold any land. He further recorded that between Plot Nos. 32 and 33 in question, there existed a public road having separate Plot No. 36 and accordingly, Plot Nos. 32 and 43 could not be said to be constituting a compact block. He also recorded that respondent No. 5 was not an owner of Plot No. 33 said to be adjacent to Plot No. 32. Plot No. 33 belonged to one Most. Baudhiya who died in the year 1978, leaving behind her daughter as a legal heir and accordingly respondent No. 5 was in no way concerned with the aforesaid plot.

(iii) Respondent No. 5 thereafter, preferred an appeal under Section 30 of the Act against the order of the Deputy Collector, Land Reforms, giving rise to Appeal No. 15 of 1988-89, before the Additional Collector, Land Reforms, Bhojpur at Ara, who by an order, dated 12.08.1991 dismissed the appeal, upholding the finding of the Deputy Collector, Land Reforms, Bhojpur at Ara. He specifically held that between the Plot Nos. 32 and 43, there existed Plot No. 36, which was a District Board road and, therefore, Respondent No. 5 was no way on either of the boundary of Plot Nos. 32 and 43 in question.

(iv) Challenging the said orders passed by the Deputy Collector, Land Reforms and the Additional Collector, Land Reforms, respondent No. 5 preferred a revision petition before the Member Board of Revenue under Section 32 of the Act, giving rise to Revision case No. 325 of 1991, claiming that he was a co-sharer as well as adjoining raiyat of the plots in question. He claimed that Most Budhiya, the owner of Plot No. 33 though died in the year 1978, he had succeeded her and inherited property as her heir. He relied upon an order passed by Consolidation Officer to the effect that Plot Nos. 33 and 485 were recorded in his name. He also took a plea that Plot Nos. 32 and 43 were adjacent to each other and thus formed a compact block and that there was no existence of any road (Chour) in between the two plots. He also took a plea that his pre-emption application was filed within the period as prescribed under that Act i.e. 90 days.

(v) Learned Additional Member, Board of Revenue vide an order dated 03.10.1992 set aside the order passed by the Deputy Collector, land Reforms and the Additional Collector, Land Reforms and allowed the pre-emption claim of the Respondent No. 5. He held that though there was a kacha path way between plot Nos. 32 and 43, the two plots were still adjacent to each other, for the purpose of consideration of the claim of pre-emption, under Section 16(3) of the Act."

4. Facts of CWJC No. 10730 of 1992 are as follows:--

"(i) The petitioner of this case, through a sale deed executed by the same vendor on the same date as in the previous case, i.e. 28.12.1978 purchased Plot No. 480 (Area 81 decimal), Plot No. 57 (Area 1.36 decimal) and Plot No. 9 (Area 56 decimal) appertaining to Kahata No. 19 situate in the same village, Parasia of the District Buxar which was registered on 29.01.1979. Respondent No. 5 (since deceased), substituted by his legal heirs preferred pre-emption case under Section 16(3) of the Act on 01.05.1997 which came to be registered as Ceiling Case No. 4 of 1979-80, claiming himself to be an adjoining raiyat on the ground of being owners of Plot Nos. 49 and 481. In this case also, upon notice, the petitioner appeared in the preemption case taking similar plea that pre-emption application having been filed beyond 90 days from the date of the registration of sale deed and respondent No. 5 had not mentioned the nature and classification of lands as required under statutory rules, the preemption was not maintainable. Disputing the claim of adjacency of the Plots of Respondent No. 5 to the vended land, the petitioner claimed that he held Plot No. 55, on the northern boundary of Plot No. 57 which he had acquired by virtue of registered deed of Bajidawa dated 24.07.1979 from Sheo Behari Upadhayay and others and the said Plot No. 55 stood recorded in the cadastral survey of rights in the name of his ancestors, but out of clerical mistake, it was wrongly recorded in the name of Sheo Behari Upadhayay and Sheo Kishun Upadhayay. Sheo Behari Upadhayay and Most. Basmati Devi wife of late Shri Kishun Upadhayay, had, in such circumstance, had executed the Bajidawa in favour of the petitioner, admitting his right title and interest over the said plot. He accordingly, claimed that he himself being the adjoining raiyat of the vended plot, the pre-emption claim by a third party on any ground could not be maintained.

(ii) Learned Deputy Collector, Land Reforms, Buxar upheld the claim of the petitioner that he himself being the adjoining raiyat, being owner of Plot No. 55

which is adjacent to plot in question No. 57, there would be no question of right of pre-emption.

(iii) An appeal came to be preferred, thereafter, by Respondent No. 5 against the order of the Deputy Collector, under Section 30 of the Act, giving rise to Appeal No. 14 of 1988-89 before the Additional Collector, Bhojpur at Ara. He claimed that be being the owner of Plot No. 84, situate on the southern boundary of Plot No. 9, owner of Plot No. 49 on the boundary of Plot No. 57 and owner of Plot No. 481 on the boundary of Plot No. 480, he was adjoining raiyat of all the vended lands.

(iv) Rejecting the claim of Respondent No. 5, the appellate revenue Court held that Plot No. 49 did not belong to respondent No. 5, rather, it belonged to one Moti Rano Kuer. The appellate Court disbelieved the case of Respondent No. 5 that Plot No. 49 was acquired by him by a deed of gift as the consolidation authority had found the said deed of gift to be forged and fabricated one. As regards the claim of Respondent No. 5 that he was owner of Plot No. 84, which situate on southern boundary of Plot No. 9, the appellate Court held that the said claim was based on a deed of exchange was not maintainable as it was not registered. In any event, the appellate Revenue Court found that one Shankar Dayal Upadhayay was the recorded tenant of Plot No. 84, who had not executed any deed of exchange. This is to be noted here that the pre-emptor had not claimed to be raiyat of Plot No. 84 in his pre-emption application to seek his claim of preemption.

(v) The appellate Court thus, upon arriving at the conclusion that the Respondent No. 5 was not the owner of Plot Nos. 84, 49 and 481 and he was, therefore, not entitled to any pre-emption right recognized under Section 16(3) of the Act. He, accordingly, upheld the order of the Deputy Collector, Land Reforms, and dismissed the appeal by an order dated 12.08.1991."

5. From the order of the appellate Court, I find that it did not advert to the claim of the petitioner that he himself was the adjoining raiyat of the vended land, which claim was upheld by the original Court of Deputy Collector, land Reforms, as he did not find any reason to interfere with the order on the reasoning as noticed above.

6. Respondent No. 5 thereafter preferred Revision petition under Section 32 of the Act, giving rise to Revision Case No. 326 of 1990-91, before the Board of Revenue, which finally came to be adjudicated upon by the impugned order dated 03.10.1992 by the learned Additional Member, Board of Revenue.

7. There is one crucial aspects which need to be taken note of at this stage. There is specific plea in paragraph 16 of the application that the finding recorded by the Deputy Collector, Land Reforms to the effect that the petitioner himself was an adjacent raiyat by virtue of holding Plot No. 55, adjoining the vended Plot No. 57, was not challenged by respondent No. 5 before the Revisional Court. This specific statement has not been denied in the counter affidavit filed on behalf of

respondent No. 5 and thus stands admitted.

8. Learned Additional Member, Board of Revenue by the order impugned dated 03.10.1992, set aside the orders of the Deputy Collector, Land Reforms and the Additional Collector, Buxar. He allowed the claim of pre-emption raised by respondent No. 5 holding that omission regarding the nature of land in preemption application was not mandatory as per Rule 19 of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Rules, 1963 (hereinafter referred to as the Rules). Rejecting the claim of the petitioner that he himself was adjoining raiyat of one of the vended plots and therefore, pre-emption claim was not sustainable, learned Additional Member, Board of Revenue held that on the ground that purchaser is on the boundary of one of the plots out of three plots purchased by him, the right of pre-emption could not be defeated.

9. When these matters were earlier taken up by this Court on 18.12.1992, while issuing notices to parties a Division Bench of this Court had directed for maintaining status-quo as on that date. CWJC No. 10728 of 1992 was admitted for final hearing by an order dated 08.01.1993. Status quo in the meanwhile, was directed to be maintained. By an order dated 11.01.1993, CWJC No. 10730 of 1992 was admitted for final hearing along with CWJC No. 10728 of 1992, again with an order to maintain status-quo.

10. I have heard Mr. Prabhu Nath Roy, learned senior counsel, appearing on behalf of the petitioner and Mr. Kamal Nayan Choubey, learned senior counsel appearing on behalf of Respondent No. 5 in both the cases.

11. Mr. Prabhu Nath Roy, learned senior counsel, leading the argument on behalf of the petitioner has submitted, with reference to CWJC No. 10730 of 1992 that the Deputy Collector, Land Reforms, had rejected the claim of pre-emptor on two grounds, firstly, that the pre-emptor had claimed to be adjoining raiyat of Plot No. 9 as he would appear from Schedule II to his petition in Form LC-13 of the Rules and secondly, the pre-emption application was filed beyond period of three months as prescribed under the Act. He has submitted that for the first time before the appellate Court, the pre-emptor had taken a plea that Plot No. 84, which was adjacent to Plot No. 9 also belonged to him. As regards his claim of title over Plot Nos. 49 and 481 for the purpose of asserting himself to be adjoining raiyat of Plot Nos. 57 and 480, he had taken a plea that he acquired them on the basis of gift deed made by Most. Moti Rano Kuer, which was disbelieved in Revisional case No. 57 of 1979 under Section 35 of the Consolidation Act. He has further submitted, referring to Annexure-4 of the writ petition that son of the brother of the husband of Moti Rano kuer, viz. Ratan Kumar Upadhayay had filed a Probate Case No. 89 of 1983 before a Court of learned Additional District Judge, Buxar on the strength of a Will executed by said Most. Moti Rano Kuer with respect to her lands of Plot Nos. 49 and 481 which was finally allowed in his favour on 29.08.1986. As regards claim of Respondent No. 5 with respect of Plot No. 84, Mr. Rai would submit that such claim was set up belatedly, for the first time before the appellate Court which

was never raised before the original Court of Deputy Collector, Land Reforms. He has also contended that the appellate Court rightly refused to accept this plea, as the alleged deed of exchange was not registered one.

12. He has further submitted that there was no material before the revisional authority to reverse concurrent findings of fact arrived at by the Deputy Collector Land Reforms and Additional Collector, Land Reforms. He has submitted, placing reliance on a decision of this Court reported in Smt. Satya Bhama Chaudharain Vs. The State of Bihar and Others, and 2007 (suppl) PLJR 395 (Smt. Soma Pathak v. State of Bihar and ors), in support of his submission that the Additional Member Board of Revenue erroneously shifted the onus upon the purchaser to prove that some one else had succeeded the property of Most. Baudhiya, and not the pre-emptor.

13. Referring to the facts of CWJC No. 10728/1992, it has been argued that the Additional Member Board of Revenue had himself found the existence of path way between Plot Nos. 32 to 43. Despite their being such finding, he erroneously concluded that Plot Nos. 32 and 43 were adjacent to each other. It is submitted on behalf of the petitioner that the finding as regards Plot No. 43 to the effect that the pre-emptor was the adjoining raiyat by virtue of the orders passed by the Consolidation Officer is concerned, it has been submitted that the same is erroneous in the facts and circumstances of the case. It has been contended that apparently, Plot Nos. 32, 43 and 484 (the vended lands) are not in one block. In such circumstance, in order to successfully claim the right of pre-emption, the pre-emptor was required to establish his claim with respect to all plots of lands in all the three plots as partial pre-emption is not permissible. It has been submitted that as per his own pleading, the respondent No. 5 has claimed to be adjoining raiyat of Plot No. 484 only. No partial claim of pre-emption can be allowed, according to the learned counsel for the petitioner. He has relied upon a decision of this Court reported in Smt. Sudama Devi and Others Vs. Rajendra Singh and Others, in order to contend that the respondent No. 5 miserably failed to prove the facts that he was the co-sharer or adjoining raiyat of all the three plots. In the absence of clear findings that respondent No. 5 the adjoining raiyat or co-sharer of the transferor with respect to all the plots, learned Additional member, Board of Revenue erroneously allowed the claim of preemption by the impugned order. It is submitted that the findings recorded by the learned Additional Member Board of Revenue is even otherwise not sustainable being erroneous and contrary to the evidence on record.

14. Before testing the legality of the impugned order passed by the learned Additional Member, Board of Revenue, it has to be kept in mind that Section 16(3) of the Act gives right of preemption to two classes of persons, in the event of transfer of a ''land'' within the meaning of the Act. The pre-emptor may either be co-sharer or a raiyat of "adjoining land". The pre-emptor in the present case has not raised any claim of being co-sharer of the transferor. Their claim is solely based on them being on they having land adjoining the vended land. Adjoining

literally means to be joined to something. In order to claim right of pre-emption under Section 16(3) of the Act, a pre-emptor has to establish that the land owned by him adjoins all the vended lands and his claim will fail if he fails to establish that he is not the raiyat holding land adjacent to adjoining all the plots. He will be required to prove that the boundary of the land owned by him must touch the boundary of all the lands so-vended. Further, right of pre-emption under Section 16(3) of the Act will have to be determined on the basis of the facts asserted in the original application keeping in view the pre-emption.

15. Keeping in view these premises in mind, I will now be considering the claim of the pre-emptor as raised in their respective pre-emption applications and the orders passed by the learned Additional Member, Board of Revenue, which are impugned in the present proceedings.

16. As has been noticed above, the petitioner of CWJC No. 10728 of 1992 had purchased from the vendor, plots appertaining to Keshra Nos. 480,57,9. From the pre-emption application filed by the pre-emptor, it will appear that he claimed to be raiyat of Plot No. 49 (Area.38 decimal) and 481 (Area.23 decimals). He did not claim that he was the raiyat of Plot No. 84. The Deputy Collector, Land Reforms rejected his claim on the ground that the pre-emptor could not prove that he was raiyat of land adjoining Plot No. 9 (0.51 decimal). Further, it was specific case of the vendee that he himself was an adjoining raiyat of the vended land of Plot No. 57, being owner of Plot No. 55. This fact has not been disputed. The first Court, i.e. the Court of the Deputy Collector, Land Reforms accepted the plea that the vendee himself was the adjoining raiyat of the vended land which he had acquired on the basis of a "Bajidawa", on 25.04.1979 itself, much before institution of a pre-emption case. In the appeal, the pre-emptor appears to have for the first time taken a plea of being raiyat of land appertaining to Plot No. 84 which according to him was adjacent to the vended land of Plot No. 9.

17. The learned Additional Member, Board of Revenue appears to have gone to decide the title of the pre-emptor over Plot No. 84 in support of his claim that the said plot was adjacent to vended plot No. 9. Learned Additional Member, Board of Revenue completely failed to appreciate the fact that it was not the claim of the pre-emptor at the time of filing of the per-emption application that he was adjoining raiyat of Plot No. 9 on the basis of his ownership over the land appertaining to Plot No. 84. The finding recorded by the learned Additional Member, Board of Revenue holding the pre-emptor to be adjoining raiyat of the vended land of Plot No. 9 on the ground of him being the owner of the land of Plot No. 84 is, therefore, perverse and not sustainable at all. It was not permissible for learned Additional Member, Board of Revenue to have gone beyond what was claimed by the pre-emptor in his application under Section 16(3) of the Act, which was the foundation for adjudication over his claim of pre-emptor right.

18. From the impugned order I find that the learned Additional Member Board of Revenue has wrongly mentioned in his order that the original Court, i.e. the

Court of Deputy Collector, Land Reforms had dismissed the pre-emption application as not maintainable on the ground that the pre-emptor had not mentioned in Schedule I of the pre-emption application, nature of the land transferred as required under Rule 19 of the Rules framed under the Act and Form LC-13. From the impugned order I find that he has considered this aspect in detail referring to decisions of High Court and Supreme Court that preemption application could not have been rejected by the Deputy Collector, Land Reforms on such technical grounds. I have perused the orders passed by the Deputy Collector, Land Reforms. I find that there is absolutely no mention of non-compliance of Rule 19 of the Rules framed under the Act and Form LC-13, for the purpose of rejecting pre-emption application as not maintainable. The manner in which learned Additional Member Board of Revenue has passed the impugned order is indicative of the fact that he did not even peruse the order of the Deputy Collector, Land Reforms and took into account certain aspects which were absolutely not there in the order passed by the original Court. The order shows lack of application of a judicial mind and is suggestive of the fact that the impugned order is based on irrelevant considerations.

19. In view of the aforesaid discussion, I am of the considered view that the impugned order, dated 03.10.1992 passed by Shri B.K. Singh, Learned Additional Member, Board of Revenue, Patna in Revision Case No. 325 of 1991 cannot be sustained and is, accordingly, set aside.

20. In CWJC No. 10728 of 1992, as already noticed, the vended lands relate to Plot No. 32 (1.36 acre) Plot No. 43 (.33 decimal) and Plot No. 484 (.73 decimal) of Khata No. 19. The petitioner in this case claimed to be adjoining raiyat of the vended land on the ground of his ownership over the lands of Plot Nos. 33,485 and 483 of Katha No. 54. The vendee took specific plea that the pre-emptor was not adjacent raiyat of all the vended lands. He further took a plea that there was a path-way/road between the vended lands of Plot Nos. 32 and 43. The vendee also took a plea that land of Plot No. 33 did not belong to the pre-emptor, rather, belonged to a Budhiya who died in the year 1978 whereafter, her heirs inherited the said property. The pre-emptor, on the other hand, took a plea that he was the successor of land of Plot No. 33 belonging to Budhiya, who had died issueless, which was adjacent to vended Plot No. 32. The Deputy Collector, Land Reforms dismissed the pre-emption application on the ground that the pre-emptor could not prove that the said Plot No. 33 belonged to him. Neither the said land was mutated in the name of the pre-emptor nor there was any entry in the consolidation register to this effect. He accordingly, held the pre-emptor not to be adjoining raiyat in order to claim successfully, right of pre-emption under Section 16(3) of the Act. From the order passed by the Deputy Collector, it appears that the vendee of this case had taken specific plea that there existed a street between the lands of Plot Nos. 32 and 43. Therefore, even if, on the basis that the pre-emptor was the owner of land of Plot No. 33, he could not prove that he was adjoining raiyat of vended land of Plot No. 43 also.

21. In this case also, the learned Additional Member Board of Revenue in the order under appeal passed in Revision Case No. 326 of 1991 mechanically recorded that the Deputy Collector, Land Reforms had rejected the pre-emption application on technical grounds of violation of provisions of Rule 19 of the Rules and non-compliance of filling of Form under LC-13 of the Rules framed under the Act. On comparison of two orders under challenge in the present cases, I find that paragraphs 5 and 6 of both the orders are identical. He has considered something which was not there in the order of the Deputy Collector, Land Reforms at all. Further, learned Additional Member, Board of Revenue, in the impugned order has acknowledged that lands of plot Nos. 32 and 43 are separated by a kacha village pathway, but still held the pre-emptor to an adjoining raiyat of both the plots on the ground that the said pathway is not held by any raiyat for any agricultural purpose and is meant to be utilized by the public. The reasoning of learned Additional Member Board of Revenue is not tenable at all. As has been discussed above, adjoining lands would mean that the land are joined to each other. Lands would be said to be joined only if the boundaries of the two lands touch each other. The order under challenge, passed by the learned Additional Member Board of Revenue cannot be sustained.

22. The manner in which the learned Additional Member, Board of Revenue has passed the order exercising revisional jurisdiction is deplorable, to say the least. He has consistently referred in the two orders impugned in the present application to the ground on which the Deputy Collector, Land Reforms is said to have rejected the pre-emption application as not maintainable, which is factually incorrect. There has been complete non-application of mind by the learned Additional Member, Board of Revenue. Further, he has wrongly held Plot Nos. 32 and 43 of the vended land adjacent to each other despite the fact that admittedly the two plots are intervened by a village path way.

23. The order dated 03.10.1992 passed in Revision Case No. 326 of 1991 therefore, cannot be sustained and is accordingly, set aside.

24. In the results, the orders dated 03.10.1992 passed in Revision Case No. 325 of 1991 and Revision Case No. 326 of 1991 are quashed.

25. Both the applications thus, stand allowed.

