

(2012) 05 PAT CK 0113

In the Patna High Court

Case No : LPA No. 607 of 2007 in CWJC No. 6994 of 1989

Sayad Mashir Asharaf

APPELLANT

Vs

Sayad Jamal Ashraf and Others

RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act,
1961 — Section 16(3), 2(f)
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 92

Citation : (2012) 4 PLJR 392

Hon'ble Judges : T. Meena Kumari, J;Chakradhari Sharan Singh, J

Bench : Division Bench

Advocate : Ram Suresh Roy and Ajay K. Singh, for the Appellant; Md. Ahsan Shahbuddin, S.A Nasar Warsi, Raj Nandan Pd. and Janki Nandan Prasad, for the Respondent

Final Decision : Dismissed

Judgement

Chakradhari Sharan Singh

1. The present appeal under Clause 10 of the Letters Patent of Patna High Court arises from judgment and order dated 30.5.2007 passed in C.W.J.C. No. 6994 of 1989 whereby, the learned single Judge, while rejecting the claim of pre-emption of the appellant herein, has set aside the orders passed by the Deputy Collector Land Reforms, Saharsa (hereinafter referred to as the "D.C.L.R."), Additional Collector Land Ceiling, Saharsa and the Additional Member, Board of Revenue, by which the appellant's claim for pre-emption was allowed and subsequently affirmed in appeal and revision. Placing reliance on a Full Bench decision of this Court in Fakir Mohammad Vs. Salahuddin and Others, and another Division Bench decision of this Court reported in Md. Yusuf Vs. The Member, Board of Revenue and Others, as well as on the basis of documents and pleadings, learned single Judge upheld the contention made on behalf of purchaser that the lands in question being homestead piece of land and having no connection with

any kind of agricultural work, were not amenable to pre-emption.

2. The Appellant is the pre-emptor whereas the Respondent No. 1 is purchaser of the lands in question.

3. Briefly stated, undisputed facts of the case are that on 24.9.1981, two properties situate in two villages namely, Ashrafchak and Rampur under Bakhtiyarpur Police Station of the District of Saharsa were purchased by Respondent No. 1 from one Bibi Alima Khatoon (since deceased); being plot No. 77 measuring two kathas 15 Dhurs and old plot no. 952 (new 2387) measuring 2 kathas 11 dhurs, respectively. The said two villages are opposite each other, separated by a village road. The plots in question are just opposite each other, separated by the same village road.

4. It transpires from the record that the appellant raised claim of pre-emption with respect to the transferred lands on the ground of being adjoining Raiyat of the lands conveyed to respondent no. 1, by filing an application u/s 16(3) of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the "Act") before the D.C.L.R. The claim raised by the appellant was opposed by respondent no. 1 before the D.C.L.R. on the ground that the lands purchased by him were not "land" within the meaning of Section 2(f) of the Act and accordingly claim of pre-emption could not be maintained.

5. Vide order dated 9.5.1986, the D.C.L.R. allowed the pre-emption claim of the appellant, passed in case no. 582/18/84/5/85-86, directing the respondent No. 1 to convey the lands in favour of the appellant by executing and registering a document of transfer within a period of 15 days from the date of the order.

6. Respondent No. 1, thereafter, preferred appeal against the order of D.C.L.R. before the Additional Collector, Land Reforms, Saharsa vide case no. 10/35/86 87. Respondent No. 1 again took the plea that the lands in question were not amenable to Section 16(3) of the Act as the lands were not at all connected with any agricultural activities and purely homestead land not connected with such activity. The appeal was however dismissed by the Additional Collector (Ceiling), Saharsa vide his order dated 12.9.1986. The respondent no. 1, thereafter, moved revision application before the Board of Revenue vide revision case no. 599 of 1986. Learned Additional Member, Board of Revenue also dismissed the revision petition vide order dated 17.5.1989.

7. Respondent No. 1, thereafter, approached this Court under Article 226 of the Constitution of India against the order dated 17.5.1989 passed by Additional Member, Board of Revenue vide C.W.J.C. No. 6994 of 1989 which has been allowed by the impugned order dated 30.5.2007 passed by learned single Judge.

8. Mr. Ram Suresh Roy, learned Senior Counsel appearing on behalf of the appellant, assailing the order dated 30.5.2007 passed by learned single Judge, has contended that "land" includes homestead land within the meaning of

Section 2(f) of the Act which, according to him, is apparent from bare reading of the said provision. That being so, Mr. Roy submits that the judgment under challenge cannot be sustained as pre-emption claim of the appellant has been rejected on the sole ground that the lands in question were homestead land as per the description given in the sale deed as also the report of the Circle Officer.

9. Mr. Roy has further submitted, relying upon a judgment of the Apex Court reported in 1999 Supreme Appeals Reporter (Civil) page 4 in case of Balu Laxman Khatik (Dead) through LRs. & Ors. vs. Biru Ramchandra Kotmire that the learned single Judge committed error in interfering with three concurrent findings of fact recorded by D.C.L.R., the Additional Collector and the Additional Member, Board of Revenue; referring to para 6 of the judgment of the Apex Court, the relevant portion of which is being extracted hereinbelow:--

In the face of these findings based on appreciation of oral and documentary evidence on record, in our opinion, the High Court was not justified in interfering with the finding of fact recorded by the tenancy authorities.

10. Mr. Roy contended that the finding of fact arrived at by the Revenue Authorities were passed on the basis of oral and documentary evidence. He has also contended that in view of Section 92 of the Evidence Act, when the documents speak for themselves, there is no need to prove by further evidence that the appellant herein is the adjoining Raiyat.

11. Learned counsel appearing on behalf of respondent no. 1, on the other hand, referred to the description of the conveyed land as mentioned in the sale deed to show that while one of them was mainly homestead land, the other was five feet deep ditch situated in the centre of the village. The description of the properties occurring in the sale deeds have been mentioned in the impugned order at page 3 which reads thus:--

First Property:-

Mawazi 2 kathas 15 dhurs Arazi Belagan Din Maskan Mai Makan Eent Khapraposh Barukh Purab Mai Sahan Agaura Wa Pichuara Mai Darakhtaan Andar Shai Mowaiya Haza Az Hissa Khas Wake Mauza Ashraf Chak, Pargana Parkiya, Thana Bakhtiyarpur, Sub-Registry Sub-Division Wa Zila Saharsa, Andar Zamindari Bihar Sarkar, Anchal Karyalaya Bakhtiyarpur.

And Second Property:--

Mawazi 2 Kathas 11 dhurs Arazi Kaimi Az Hissa Khas, Wake Mauza Rampura, Pargana Parakiya, Thana Bakhtiyarpur, Sub-Registry Sadar Wa Zila Saharsa Andar Zamindari Bihar Sarkar, Anchal Bakhtiyarpur.

12. On a request made by this Court, so as to have better clarity over the contents of the land description, Mr. S.A. Nasar Warsi learned counsel for the respondent no. 1 has supplied to the Court English translation of the description of the properties as quoted above which are as follows:--

First Property:--

Total land two kathas fifteen Dhurs in Area, Revenue free. Deeh Maskan Mai Makan (residential land with housing structures) Inta Khaprapos (bricks walls and the roof is made of baked tiles called Khapra) in the east direction with floor back and front sides with trees as per the possession, Village-Ashraf Chak, pargana Farkia, Police Station-Bakhtiyarpur, Sub-registry Sadar, District-Saharsa under the Zamindari (Land ownership) State of Bihar, Block Office, Bakhtiyarpur, Tauji No. 2343, Police Station No. 67.

Second Property:--

Total land two kathas eleven dhurs in area is as such, own share in Village-Raipur, pargana Farkia, Police Station-Bakhtiyarpur, Sub-Registry Sadar, District-Saharsa, under the land ownership State of Bihar, Block Bakhtiyarpur, Tawji No. 526, Police Station No. 68, Mutation No. (Jamabandi No. 151 with trees the said property belongs to the seller and is under her possession.

13. It has been contended on behalf of respondent no. 1 that in the report of the Circle Officer the second property has been described as the piece of land which was found to be a ditch about five feet deep in which the sewage and drainage water of neighbouring houses was collected and it could be used only for dwelling purpose by filling it up. The piece of land was at the centre of the village and was close to the dwelling house of the appellant as well as dwelling house of the respondent no. 1,

14. Mr. Warsi has further contended that the findings of fact recorded by the Revenue Authorities at all the three levels are perverse and are the result of total misreading and misunderstanding of the report of the Circle Officer with respect to the nature and location of the land. He, therefore, submitted that it was well within the scope of judicial review, which the High Court exercise under Article 226 of the Constitution of India, to interfere when such findings recorded by quasi-judicial authorities are perverse and without any materials. He further submitted that the lands in question have not got into any agricultural activity as is evident from the description of properties in the sate deed and the report of the Circle Officer. Referring to a certificate granted by the Mukhiya of the Gram Panchayat, Bakhtiyarpur dated 15.2.1989, which is Annexure-3A to the writ application, Mr. Warsi has stated that the nature of the lands in question was homestead and vendor never engaged the lands in question for cultivation.

15. He has placed reliance on Full Bench judgment of this Court reported in 1975 Patna 119 as well as a decision of Division Bench judgment reported in 1973 P.L.J.R. to contend that the lands in question being purely homestead not connected with any kind of agriculture or horticulture was not amenable to provisions of Section 16(3) of the Act.

16. In order to appreciate rival contentions of the parties, more particularly the question raised by Mr. Ram Suresh Roy, learned Senior Counsel that even

homestead land is amenable to the provisions of Section 16(3) of the Act, it would be proper to refer and deal the statutory provisions in this regard in the background of the facts of the present case.

17. Section 16(3) of the Act provides that when a transfer of "land" is made to any person other than a co-sharer or Raiyat of adjoining land, any co-sharer of the transferor or any Raiyat holding land adjoining the land transferred shall be entitled, within 3 months from the date of registration of documents of transfer, to make application before the Collector for transfer of the land to him on terms and conditions contained in the order in the sale deed. Land has been defined in Section 2(f) of the Act which reads thus:--

2(f) "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 landholder;

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.]

18. The basic ingredients of the "land" within Section 2(f) is that it should either being used or capable of "being used for agriculture or horticulture". In other words, orchard, Kharhur or pasturage of forest land or land perennially submerged under water or homestead (and holding can come within the definition of "land" within the meaning of Section 2(f) only if it is in use or capable of being used for agriculture or horticulture. In the present case there is no material to substantiate that their two properties in question were being used or capable of being used for agriculture or horticulture. On the contrary, as the Circle Officer's report with respect to the second property as regards the use and location it cannot be said that it was in use or capable of being used for agriculture or horticulture.

19. The D.C.L.R. in his order dated 9.5.86 has himself mentioned that the land was not in the use for agriculture purpose but he has added that there was chance of the land being used for agricultural purpose. He has further added that, even if the applicant before it constructs a house thereon for dwelling purpose, his calling would be agriculture and not commercial. The finding and observation of the D.C.L.R., on the face of it is fanciful based on conjectures and surmises. The preferential right of pre-emption, though statutory, is a weak right and should not have been granted and allowed to be sustained by the Revenue Courts in the background of the facts of the case.

20. Pursuant to an order dated 5.12.2011 passed in this case, a counter affidavit has been filed on 26.4.2012 on behalf of the State of Bihar sworn by Mr. Shyam Kishore Yadav, the Circle Officer, Simri Block, Bakhtiyarpur (Saharsa) a copy of which was served on learned counsel for the appellant on 23.4.2012. No reply to the said counter affidavit has been filed nor was any prayer made for filing rejoinder to the said counter affidavit. In paragraph-10 of the counter affidavit, referring to report of the D.C.L.R., Simri, Bakhtiyarpur dated 25.1.2012 as contained in Annexure-"A", it has been stated that both the plots were adjacent. In the middle of both the plots, there is a village road and on other three sides of the said ditch/piot residential houses are existing and the disputed plots are homestead lands. I have perused Annexure-"A" to the counter affidavit alongwith which a map prepared on the basis of focal inspection has been annexed, from which it appears that the lands in question are purely homestead. I am not ready to accept the contention of learned Senior Counsel for the appellant and there being concurrent findings of fact by three revenue authorities, such findings could not have been disturbed in a writ proceeding by exercise of power of Judicial Review under Article 226 of the Constitution of India.

21. It is well settled principle of law that the High Court in exercise of power under Article 226 has a duty to look into the administrative and quasi-judicial decision or adjudication in order to certify whether such decisions is based on material facts which are relevant for the adjudication by the quasi-judicial authorities. The High Court under Article 226 is well within its jurisdiction to interfere with the concurrent finding of facts if the very basis of such finding is either non est or irrelevant rendering the administrative or quasi-judicial decision perverse. It is well-settled that writ in the nature of writ of certiorari will be issued to quash decisions, though made within jurisdiction, if such decision reveal error apparent on face of record. Power of Judicial Review is not restricted when illegality is writ large.

22. On perusal of the documents brought on record in the writ petition as well in the present memo of appeal, there remains no scintilla of doubt that the lands in question are purely "homestead lands" not connected with agriculture purpose, therefore, not amenable to the provisions of Section 16(3) of the Act.

23. The submission advanced on behalf of the appellant that the learned single Judge allowed the writ petition only on the ground that land in question was homestead cannot be accepted. There being no material on record to substantiate that the land was in fact in use for agriculture purpose and there being no denial to the pleading in the counter affidavit to the effect that the land was not being used for agriculture or horticulture purpose, this intra-court Appeal cannot succeed.

24. Learned counsel for the respondent no. 1 has rightly relied upon a judgment of this Court in *Md. Yusuf vs. The Member, Board of Revenue & Ors.* as reported in 1973 PLJR 44 wherein this Court held that the provisions of Section 16(3) of the Act can be placed into service only if the land transferred is the land as

defined in the Act, not otherwise. In view of the above, I find no merit in this appeal and the appeal is, accordingly, dismissed. No costs.