

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 187 OF 2003

Suresh Prasad Singh

... Appellant

Versus

Dulhin Phulkumari Devi & Ors.

... Respondents

J U D G M E N T

A. K. PATNAIK, J.

This is an appeal against the judgment and order dated 19.02.2001 of the Division Bench of the Patna High Court in L.P.A. No. 127 of 2000 (for short 'the impugned judgment').

2. The relevant facts briefly are that land measuring 1.30 acres comprising Revisional Survey Plot Nos.1501, 1512, 1513, 1514 and 1527 of Khata No.229 in village Paiga in District Bhojpur in Bihar was sold by Brij Bihari Singh and Rash Bihari Singh to respondent No.1 by a registered Sale Deed on 04.08.1980. Soon thereafter, the appellant filed an application before the Deputy Collector, Land

Reforms, Sadar, Arrah, under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (for short “the Act”) claiming that he was a co-sharer and a boundary raiyat in respect of the land and that the land be transferred to him. The appellant also deposited the purchase money together with 10% extra of the purchase money in accordance with the proviso to Section 16(3)(i) of the Act. The Deputy Collector, Land Reforms, however, rejected the application of the appellant by his order dated 10.02.1981. The appellant thereafter filed an appeal against the order of rejection before the Additional Collector, Bhojpur (Arrah) and by order dated 06.04.1993 the Additional Collector allowed the appeal. The Respondent No.1 challenged the order of the Additional Collector before the Board of Revenue in a revision and the Board of Revenue set aside the order passed by the Additional Collector. The appellant then filed a Writ Petition being C.W.J.C. No.13318 of 1993 and by order dated 06.03.1995, a learned Single Judge of the Patna

High Court set aside the order passed by the Board of Revenue and remitted the matter back to the Board of Revenue for reconsideration on the question whether there has been a partition between the appellant and Brij Bihari Singh and Rash Bihari Singh prior to 21.06.1980 and whether the appellant ceased to be a co-sharer in respect of the land. Thereafter, the Board of Revenue again held that the appellant was not entitled to pre-empt under Section 16(3) of the Act and set aside the order of the Additional Collector in the appeal and restored the order of the Deputy Collector dated 10.02.1981 rejecting the claim of pre-emption made by the appellant. Aggrieved, the appellant filed a fresh Writ Petition being C.W.J.C. No.7714 of 1997 before the Patna High Court and the learned Single Judge of the High Court dismissed the Writ Petition by order dated 17.11.1999. The appellant then filed L.P.A. No.127 of 2000 before the Division Bench of the High Court and by the impugned judgment, the Division Bench of the High Court dismissed the L.P.A. of the appellant.

3. Learned counsel for the appellant submitted that the Division Bench of the High Court, while dismissing the L.P.A., has held that the Court cannot ignore two important facts and these are: firstly, that the right of pre-emption is a weak right and secondly, that the vendee has remained in possession for more than twenty years and at this stage the Court was not inclined to interfere with the matter. He submitted that the Division Bench of the High Court failed to appreciate that the right of pre-emption under Section 16(3) of the Act was a statutory right and the appellant had filed an application under Section 16(3) of the Act within three months of the date of registration of the Sale Deed as provided in Section 16(3) of the Act. He cited the judgment of this Court in Shaym Sunder & Ors. v. Ram Kumar & Anr. [(2001) 8 SCC 24] in which it has been held that the right of pre-emption under statutory law is mandatory and not discretionary and submitted that the view taken by the High Court that the right of pre-emption is a weak right and should not be enforced so as to disturb the long

possession of the respondent No.1 in respect of the land is not correct.

4. Learned counsel for the appellant next submitted that the learned Single Judge while dismissing C.W.J.C. No.7714 of 1997 has held that there was a definite finding that the appellant was not a co-sharer in the revisional order of the Board of Revenue. He submitted that the finding of the Board of Revenue that the appellant was not a co-sharer was wholly erroneous as there was no partition in the branch of Deoki Singh and this is clear from the entries in the Revisional Survey Records of the year 1972-73 as well as the entries of the Chakbandi/Consolidation Khatiyani. He submitted that the Board of Revenue appears to have taken into consideration recitals in a sale deed dated 16.01.1981 made after 21.06.1980 in favour of respondent No.1, despite the fact that by the order dated 06.03.1995 of the learned Single Judge in C.W.J.C. No.13318/1993, the Board of Revenue was directed to exclude from consideration any document that might have come into

existence after 21.06.1980 on whether there has been a partition in respect of the land prior to 21.06.1980.

5. Learned counsel for the respondent No.1, on the other hand, submitted that a claim for pre-emption made by a co-sharer will not be available under Section 16(3) of the Act against the transferee who holds the land adjacent to the transferred land. In support of this submission, he relied on the decision of the Patna High Court in Ram Pravesh Singh v. Additional Member, Board of Revenue [1995 (1) Patna LJR 764]. He submitted that respondent No.1 had earlier purchased 1.33 acres of several plots in the same Khata No.229 by sale deed dated 11.01.1980 and was thus a boundary raiyat holding land adjacent to the transferred land and the appellant could not have a claim of pre-emption under Section 16(3) of the Act against the respondent No.1. He submitted that this is one of the reasons why the Deputy Collector dismissed the application of the appellant for pre-emption by his order dated 10.02.1981.

6. Learned counsel for the respondent No.1 next submitted that the Board of Revenue had come to a finding of fact that there was a prior partition in the family of the appellant and this finding of fact was not interfered with by the High Court in the impugned judgment. He cited a decision of this Court in Satya Gupta (Smt.) alias Madhu Gupta v. Brijesh Kumar [(1998) 6 SCC 423] wherein it has been held that where findings of fact of the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on re-appreciation of the evidence merely on the ground that another view was possible. He submitted that this Court should not for the same reasons interfere with the findings of fact recorded by the Board of Revenue.
7. Learned counsel for the respondent No.1 submitted that the learned Single Judge and the Division Bench of the High Court have held that considering the long possession of the respondent No.1 for 19 years, the claim of pre-emption of the appellant cannot be allowed. He submitted that this finding on equity should not be

disturbed and cited the decision of this Court in Radhakrishnan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi & Ors. [AIR 1960 SC 1368] for the proposition that there is no equity of a pre-emptor, whose sole object is to obstruct a valid transaction by virtue of the right created in him by statutes. Relying on Shaym. Sunder & Ors. v. Ram Kumar & Anr. (supra), Bhagwan. Das v. Chet Ram [(1971) 1 SCC 12 = 1971 (2) SCR 640] and Rikhi Ram v. Ram Kumar [(1975) 2 SCC 318], he submitted that the pre-emptor must have the right to pre-empt not only at the time of the date of sale, but also at the time of adjudication of the suit in which the claim for pre-emption has been made and if he loses that right any time before the adjudication of the suit, no decree for pre-emption can be granted by the Court even if he may have had such right on the date of filing the suit. He submitted that the sale deed dated 16.01.1981 would show that Raghu Bansh Singh son of Hirdaya Singh and the brother of Hari Nandai Singh, who was the father of the appellant, had executed a sale deed in favour of Smt.

Ramjaro Devi in respect of 1.21 Dec. of land from Plot Nos. 306 and 284 of Khata No. 229 after permission was obtained from the consolidation authority and this clearly shows that there had been partition between the two sons of Hirdaya Singh. He submitted that similarly sale deed dated 16.01.1981 shows that in the Southern Boundary of Plot No. 284, the name of the appellant has been shown and this shows that the appellant had exclusive share in the south of Plot No.284. He submitted that relying on these two sale deeds, the Board of Revenue has come to the conclusion that the appellant had ceased to be a co-sharer and therefore cannot claim the right of pre-emption under Section 16(3) of the Act.

8. Learned counsel for the respondent No.1 finally submitted that this Court has held in Bishan Singh v. Khazan Singh [AIR 1958 SC 838] and Radhakrishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi & Ors. (supra) that the right of pre-emption is a weak right. He submitted that considering the fact that the respondent No.1 has been in possession of the land since

last 19 years and the land is contiguous to her other land and had in fact merged with her other land, any order passed by this Court ordering transfer of the land to the appellant would result in fragmentation of the land holding of the respondent No.1, and will result in gross miscarriage of justice.

9. Section 16(3) of the Act is quoted herein below:

“16(3)(i) 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.

(ii) On such deposit being made, the co-sharer or the *raiyat* shall be entitled to be put in possession of the land irrespective of the fact that the application under clause (i) is pending for decision:

Provided that where the application is rejected, the co-sharer or the *raiyat* as the case may be, shall be evicted, from land and possession thereof shall

be restored to the transferee and the transferee shall be entitled to be paid a sum equal to ten percent of the purchase money out of the deposit made under clause (i).

(iii) If the application is allowed, the Collector shall by an order direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a period to be specified in the order and, if he neglects or refuses to comply with the direction, the procedure, prescribed in Order XXI, Rule 34 of the Code of Civil Procedure, 1908 (V of 1908), shall be, so far as may be, followed.”

A plain reading of Section 16(3)(i) of the Act would show that any “co-sharer of the transferor” is entitled to make an application for the transfer of the land to him. Hence, the expression “co-sharer of the transferor” would mean co-sharer in the land transferred.

10. Accordingly, the first question which has to be decided in this case is whether the appellant was a co-sharer of the transferor in the land which was transferred by way of sale to respondent No.1. The land transferred to the respondent No. 1 under the sale-deed executed by Brij Bihari Singh and Rash Bihari Singh, the transferors, was 1.30 acres comprising Revisional Survey Plot Nos.1501, 1512, 1513, 1514 and 1527

of Khata No.229 in village Paiga in District Bhojpur in Bihar. The Board of Revenue in para 5(a) of its order dated 21.09.1996 in case No. 301 of 1993, copy of which has been annexed in the paper book as Annexure P-4, has recorded the following findings with regard to Revisional Survey of Khata No.229 in village Paiga:

‘5(a) The revisional survey khatian of Mauja Paiga Khata no.229 shows that there are as many as 36 plots under this khata with a total area of 25.2 acres. The khata has been prepared in the following manner:

“Hirdaya Singh and Devi Dayal Singh and Chandreshwar Singh sons of Deoki Singh 9 shares equal, Raja Ram Singh and Rajendra Singh son of Yadunandan Singh 2 shares equal and Braj Bhan Singh son of Budh Ram Singh 1 share.”

It is thus clear that the shares of each co-parcener has been numerically defined and determined even in the R.S. Khatian. Not only the shares of Deoki Singh (9 shares), Yadunandan Singh (2 shares) and Budh Ram Singh (1 share) have been defined in the lands of khata no.229, but even the shares of the three sons of Deoki Singh, 2 sons of Yadunandan Singh and the only son of Budh Ram Singh have been ascertained and defined.’

The Board of Revenue has further found that Chakbandi Khatiyan has been prepared on the identical lines as the Revisional Survey Khatiyan.

11. It thus appears that the land in Khata No.229 has 36 plots and is of a total area of 25.2 acres and in this land in khata No.229 the family of Deoki Singh had 9 shares and in these 9 shares, the three sons of Deoki Singh, namely, Hirdaya Singh, Devi Dayal and Chandreshwar Singh had equal shares but the land had not been partitioned by metes and bounds. Consequently, it could not be ascertained which particular plot of land or part of plot of land in khata No.229 was owned by Hirdaya Singh, Devi Dayal or Chandreshwar Singh. In other words, all the three sons namely, Hirdaya Singh, Devi Dayal and Chandreshwar Singh were co-sharers in the 9 shares of the land in khata No.229. The appellant belongs to the sub-branch of Hirdaya Singh, whereas the transferors of the land, namely, Brij Bihari Singh and Rash Bihari Singh belong to the sub-branch of Chandreshwar Singh. The appellant and the transferors were, therefore, co-sharers in the land transferred to respondent No.1. The Board

of Revenue appears to have wrongly construed the Revisional Survey Khatian and Chakbandi Khatian in respect of khata No.229 and has arrived at an erroneous finding that the appellant and the transferors of the land were not co-sharers of the land. The Board of Revenue has also relied on the recitals in the sale-deeds dated 11.01.1980 and 16.01.1981 for recording a finding that the appellant and the transferors of the land transferred were not co-sharers. In our considered opinion the recitals in the two sale-deeds made by the parties to the sale deeds were not relevant rather the entries in the Revisional Survey Khatian and the Chakbandi Khatian made by public authorities were relevant for deciding whether the appellant and the transferors of land were co-sharers in respect of the land and we have found that as per the Revisional Survey Khatian of the land in khata No.229 and the Chakbandi Khatian, the appellant and the transferors were co-sharers of the land transferred to respondent No.1.

12. The appellant being a co-sharer of the transferor in the land transferred to respondent No.1 had a statutory right of pre-emption under Section 16(3) of the Act. As the language of

Section 16(3)(i) shows, any co-sharer “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 transfer deed. It is not disputed that the appellant in fact made such an application within three months of the date of registration of the sale deed executed by the transferors in favour of respondent No.1 and also deposited the purchase money together with sum equal to 10% thereof in the prescribed manner within the period of three months as provided in the proviso of Section 16(3)(i). The Deputy Collector, therefore, had no discretion but to allow the application considering the mandatory nature of the right of pre-emption conferred by Section 16(3) of the Act.

13. The learned Single Judge deciding the writ petition and the Division Bench of the High Court deciding the L.P.A. appear to have taken a view that the right of pre-emption is a weak right, presumably because the Division Bench of Patna High Court in *Sudama Devi v. Rajendra Singh* (AIR 1973 Patna 199) and learned Single Judge in *Ram Pravesh Singh v. The*

Additional Member, Board of Revenue and Others (supra), has taken this view. Whatever may have been the views of the Patna High Court and this Court in the earlier decisions cited by learned counsel for the respondent No.1, a five Judge Bench of this Court in *Shaym Sunder & Ors. v. Ram Kumar & Anr.* (supra) has now held that where a right of pre-emption is recognized by statute, it has to be treated as mandatory and not discretionary. The relevant passage from the judgment in *Shaym Sunder & Ors. v. Ram Kumar & Anr.* (supra) is quoted herein below:

“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 characterisd 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 recognized 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.

14. The respondent No.1, however, claims to be a boundary raiyat saying that she had purchased under an earlier sale-deed dated 11.01.1980 a plot of land adjoining to the land in respect of which appellant has applied for pre-emption under Section 16(3) of the Act. Learned counsel for the respondent No.1 has relied on the decision of the Patna High Court in Ram Pravesh Singh v. Additional Member, Board of Revenue (supra) for the proposition that the claim of pre-emption was not maintainable against a person who holds an adjacent plot of land. This view of the Patna High Court is based upon its earlier judgment in Ramachabila Singh v.

Ramsagar Singh (1969 BLJR 203 : 1968 PLJR 279) that if the transferee happens to be an adjacent raiyat in respect of some other plots, a co-sharer cannot claim any right of pre-emption under Section 16(3) of the Act. As a matter of fact, Section 16(3) confers the right of pre-emption not only on the co-sharer but also on the raiyat holding land adjoining to the land transferred. We are, however, of the considered opinion that a complete stranger who was not originally a raiyat holding land adjoining to the land transferred cannot be allowed to defeat the right of pre-emption of a co-sharer by first purchasing an adjoining plot of land and thereafter claiming to be a raiyat holding land adjoining to the land transferred. The decisions of the Patna High Court are cases of original boundary raiyats resisting the claim of pre-emption by a co-sharer of the transferred land. The object of Section 16(3) of the Act is to recognise the right of pre-emption of the co-sharer of the transferor or any raiyat holding land adjoining to the land transferred and this object would be frustrated if strangers are allowed to first buy one plot of land and then resist the claim right of pre-emption of a co-sharer or a

boundary raiyat on the basis of such first purchase of a plot of land.

15. For the aforesaid reasons, we set aside the impugned judgment of the Division Bench in L.P.A. No. 127 of 2000, the order of the learned Single Judge in C.W.J.C. No.7714 of 1997 and the order of the Board of Revenue and the Deputy Collector and direct the concerned Collector to direct respondent No.1 to convey the land in favour of the appellant by executing and registering a document of transfer and put the appellant in vacant possession of the land in accordance with the provisions of Section 16(3) of the Act.

The appeal is accordingly allowed with no order as to costs.

.....J.
(Dr. Mukundakam Sharma)

.....J.
(A. K. Patnaik)

New Delhi,
May 12, 2010.