CALCUTTA HIGH COURT

Eyachhin Ali Naskar

Vs.

Golap Gazi

Civil Rev. Case No. 2253 of 1976

(S.K. Datta, J.)

15.09.1978

JUDGMENT

S.K. Datta, J.

1. This Rule is directed against an appellate order allowing an application for preemption made under Section 8 of the West Bengal Land Reforms Act, 1955. The impugned order was in reversal of the order of the learned munsif dated November 15, 1975 dismissing the Misc. Case No. 42 of 1975 arising out of the said preemption proceedings.

2. The petitioners who are the pre-mptes, purchased the .4 decimal land of plot No. 249, khatian No. 29 of mouza Makrampur, P.S. Sonarpur, District-24-Parganas by a conveyance dated February 15, 1975. The pre-emptor opposite party became a co-sharer of the land in respect of .1-1/2 decimals of land by virtue of his purchase dated December 21, 1959. It may be mentioned here that the connected jama as recorded in R.S. Khatian No. 29 comprises only of dag No. 249 which is re corded as bastu having an area of .5 decimals. The application for preemption was rejected by the learned Munsif on the ground that in his evidence the pre-emptor stated that he did not purchase any part of the plot measuring .5 decimals obviously on a misunderstanding. Accordingly, it was held, he never became a co-sharer so that his application under section 8 was not maintainable in law.

3. Before the appellate court the main contention was about the genuineness of the kobala dated December 21, 1959 whereby the pre-emptor opposite party purchased a portion of the dag of the jama. It was held that by the kobala of December 21, 1959, the opposite party became a co-sharer of the holding and as such he was entitled to preempt, the disputed property. In this view the application was held maintainable and the preemption was accordingly allowed.

4. In this Rule Mr. Mandal, learned Advocate appearing for the petitioners submitted that the

application under section 8 of the Land Reforms Act, 1955 was not maintainable on the ground that the holding was not an agricultural holding. He referred to the revisional record of right wherein the tenancy has been recorded as raiyati dakhaisatta bisista and the nature of the land has been described as bastu in respect of the single dag of the jama with two huts standing thereon.
5. It must be stated that, though in the petition of objection to preemption there is a reference that the preemption is not available against bastu land, the trial in the courts below did not proceed on that basis. Even so, the question at issue involves a point of law on the basis of facts which are not really in dispute. I think the petitioner can be permitted to urge the point in the form raised in this Court.

6. Mr. Mondal referred to a decision in Ansurekha Dutta -versus- Diptimay Pal, MANU/WB/0371/1966 : 70 C.W.N. 1079, in which it was held that a dakhalhar is not, and cannot be, a raiyat and plainly he is a non-agricultural tenant. The position was considered in Misri Show -versus- Belur Nikunjamoyee Gadar Institution, 1978 (1) CLJ 532. It was noted in that case that a long series of decisions re-affirmed the principle that the nature of the original tenancy and not the character of the parcel included in the sub-tenancy would determine whether the sub-tenancy was to be governed by the Bengal Tenancy Act or by the Transfer of Property Act. This has been the position since the decision in *Baburam Roy v. Mohendra Nath Samanta*[1] and in effect reaffirmed in *Nirshi Dhobin v. Sudhir Kumar Muhherjee*[2], as stare decisis.

7. Under the West Bengal Estates Acquisition Act, 1953 as was also noted in the above decision, there was a change in the legal position. Under Section 2(b) the expression of the Act, "agricultural land" means land ordinarily used for purposes of agriculture or horticulture and includes such land, notwithstanding that it may be lying fallow for the time being. Under clause (j) the expression "non-agricultural land" means land other than agricultural land or other than land comprised in a forest. It is thus obvious that the nature of the holding has to be determined with reference to the user of its land or lands under the said Act. Section 2(6) of the West Bengal Land Reforms Act defines "holding" as the land or lands held by a raiyat and treated as a unit for assessment of revenue. Under clause (7) of Section 2 of the same Act "land" in the Act means agricultural land other than land comprised in a tea garden which is retained under subsection (3) of section 6 of the West Bengal Estates Acquisition Act, 1953 and includes homesteads. This definition of and was given retrospective effect by West Bengal Act 18 of 1965 in place of words "lands" means agricultural land and includes home steads and later on by West Bengal Act 12 of 1972 words "but does not included tank" were added thereto with effect from February 12, 1972. Explanations to clause (7) section 2 of the West Bengal Land Reforms Act provides that homestead shall have the same meaning as in the West Bengal Estates Acquisition Act, 1952 and under the West Bengal Estates Acquisition Act, 1953 homestead has also been defined as dwelling house together with courtyard, compound, garden etc. annexed to or appertaining to such dwelling house.

8. Relying on these provisions Mr. Panda, learned Advocate for the opposite party contended that

in view of the definition "agricultural land," the homestead is also to be deemed agricultural land and accordingly the application under Section 8 under the Land Reforms Act was maintainable in law.

9. Under section 2 clause (10) of the West Bengal Land Reforms Act, raiyat has been defined as a person who holds land for purpose of agriculture. When a raiyat, who holds land only for the purpose of agriculture, may also have homestead in, and, as a part of his

[1](1904) 8 C.W.N. 454

[2] AIR 1969 S.C. 864

holding, in such a case it seems a homestead will be included in such land. In a case where as here the holding is recorded as bastu and the non-agricultural user is also evident, as appearing from the revisional record of rights wherein it has been stated that there are two huts standing thereon, the land cannot be treated as land to which the provisions of the Land Reforms Act Will be applicable, as the Act applies to agricultural lands only. Under section 8 of the Land Reforms Act if a portion or share of a holding of a raiyat is transferred to any person other than a co-sharer in the holding, it is liable to be pre-empted under certain conditions by a co-sharer raiyat or by a raiyat possessing land adjoining such holding. The right of pre-emption is thus confined to portion or share of a holding of the raiyat and not to any other kind of holding. In this state of affairs it is obvious that the holding in question can not be said to be a holding held by a raiyat for which pre-emption under section 8 of the Land Reforms Act is available.

10. In the view I have taken the Rule succeeds and is made absolute. The orders of the Courts below are set aside and the case is sent back to the learned Munsif for disposal in accordance with law and the observations indicated above. There will be no order as to costs. Let the records be sent down at once.

Rule made absolute.