PATNA HIGH COURT

Fakir Mohammad

Vs

Salahuddin

Civil Writ Jurisdiction Case Nos. 429, 440 and 441 of 1967

(N.L. Untwalia, C.J., K.B.N. Singh and S.K. Jha, JJ.)

29.08.1974

JUDGEMENT

N.L. Untwalia, C.J.

1.These three writ applications arising out of the one and the same proceeding under Section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, hereinafter called the Act, have been heard together and are being disposed of by this common judgment. Unless otherwise indicated, the facts will be stated with reference to C. W. J. C. 429 of 1967.

2. Syed Mohammad Muslim, respondent No. 2, was owner of 0.06 acre of land comprised in plot No. 3307, Khata No. 517, with his dwelling house standing thereon, in village Rangpura, Police station Dhamdaha, district Purnea. By a registered sale deed dated 27-2-1965, he transferred the said land to Sheikh Salahuddin, respondent No. 1, for Rs. 100/-. The petitioner is brother of respondent No. 2. In order to claim pre-emption under Section 16 (3) of the Act, he made a deposit of Rs. 110/- on 13-3-1965 in accordance with the Act and the Rules framed thereunder. The application under Section 16 (3) of the Act along with duly filled up form L. C. 13 prescribed under the Rules and a certified copy of the Kebala was filed on 15-3-1965; the application was filed against respondents 1 and 2. On service of notice, respondent No. 2 appeared on 29-4-1965 and filed his objection, a copy of which is annexure 1, to resist the application of the petitioner filed under Section 16 (3) of the Act. In his objection, he disclosed that respondent No. 1 had committed fraud on him and had taken the sale deed on 27-2-1965 for a sum of Rs. 100/- only although the agreement was to transfer the land with the house standing thereon for a sum of Rs. 600/-. Respondent No. 2, therefore, claimed to have cancelled the sale deed by executing a deed of cancellation on 9-4-1965. The claim of the petitioner was that he was either a co-sharer or an adjacent raiyat to the land transferred and the transfer was to a person who was neither. The first authority by its order dated 18-6-1965 (annexure 2) held that the purported cancellation brought about by respondent No. 2 was an afterthought - not effective; pre-emption was ordered. Respondents 1 and 2 preferred two appeals before the Commissioner. The appeals were dismissed by order dated 6-1-1966 (Annexure 3). The two revisions filed by the said two respondents were allowed by the Additional Member, Board of Revenue, by order dated 24-6-1966 (Annexure 4), because before the Board it was asserted that not only the sale

deed dated 27-2-1965 had been cancelled by the deed of cancellation dated 9-4-1965 but also another sale deed had been executed on the same date, i.e., 9-4-1965 in favour of Syed Wahizul Haque alias Waizul Haque, respondent No. 3, for a sum of Rs. 900/-. The Board, in view of the assertion of new fact, thought it proper to remand the case in order to add respondent No. 3 as a party to the proceeding under Section 16 (3) of the Act and to decide the matter afresh in his presence.

3. Respondent No. 3 on being added endeavoured to resist the application of the petitioner for pre-emption on several grounds. The Additional Collector who decided the matter in the first instance after the remand order of the Board held, by his order dated 31-10-1966 (annexure 5), that the cancellation and the second sale deed were fraudulent; title had completely passed to respondent No. 1 under the first sale deed on 27-2-1965. In that view of the matter, pre-emption was again allowed. This time three separate appeals were filed by each of respondents 1 to 3 and they were dismissed by a common order of the Commissioner on 3-1-1967 (annexure 6). Three revisions were taken to the Board and this time the Board of Revenue has taken the view that title did not pass by the first sale deed dated 27-2-1965 to respondent No. 1 and the sale deed in favor of respondent No. 3 was effective and valid. A copy of the order of the Board of Revenue dated 17-5-1967 is annexure 7.

4. When these writ applications came up for hearing before a Division Bench of this Court, it was conceded on behalf of respondents 1 to 3 - and the concession was not retraced before us as it had rightly been made - that the view of the Member, Board of Revenue, that title had not passed by the first sale deed was erroneous in law. But then a point was taken on the basis of certain statement made in the counter-affidavits filed in the three writ applications that the land transferred was not a homestead within the meaning of the Act and, therefore, was not a land in respect of which an order of pre-emption could be made under Section 16 (3). Two Bench decisions in the case of *Ganesh Prasad v. Jugeshwar Tewari*[1], and *Phulena Prasad v. Jagdish Chaudhary*[2], were placed before the Division, Bench, which, in its opinion, had apparently some conflict and, therefore, the case was directed to be referred to a larger Bench. That's how these three writ applications have come before us for disposal.

5. In all the cases, some of which will be presently referred to in this judgment, it has been pointed out that in order to attract the provision of Section 16 (3) the land must be land as defined in clause (f) of Section 2 of the Act, which says-

> " 'land' means land which is used or capable of being used for agriculture or horticulture and includes land which is an orchard, kharhar or pasturage or the homestead of a land-holder;
> Explanation.- '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 outbuilding and includes any outbuilding for the purpose connected with agriculture or horticulture and any tank, library and
> place of worship appertaining to such dwelling house." It has further been laid
> down in several authorities that the homestead as mentioned in the Explanation appended to clause (f) must be a homestead of a land-holder, as clause (f) requires. The term 'land-

holder' has been defined in clause (g) to say-

" 'land-holder' means a person who holds land as a raiyat or as an under-raiyat and includes a mortgagee of land with possession;".

The consensus of opinion - and, as I shall presently show, there is no conflict in any of the decisions - is that a parti piece of land belonging to a raiyat, an agriculturist, which is his homestead on which there is no dwelling house or any of the things as mentioned in the Explanation, is not a land covered by the Act. It has been further pointed out that a land fit for building purposes not connected with agriculture situated ordinarily and generally in town or bazaar areas, to which are applicable the provisions of the Transfer of Property Act, is not the homestead of a land-holder to make it a land within the meaning of Section 2 (f). In this background of the law, in certain cases it has been held that the land transferred was covered by Section 16 (3); in certain cases it was opined that it was not so. After briefly referring to those cases, I shall presently show that, on the facts and in the circumstances of the case and on the materials and evidence as they were placed before the authorities of the courts below, there is no escape from the position that the land transferred by the sale deed dated 27-2-1965 was homestead of a land-holder. But before I do so, I may briefly refer to the concession made on behalf of respondents 1 to 3, in regard to the question of passing of title by the sale deed aforesaid. There was a clear recital in the sale deed that, if the consideration was not paid, the vendor will be entitled to get the amount with interest. In face of catena of decisions of this Court, there was no scope for arguing that the intention on such a recital was not to pass title on execution of the sale deed or that the passing of the title was deferred till the entire consideration money mentioned in it was paid. In my opinion, therefore, Mr. Jugal Kishore Prasad, learned Counsel for respondents 1 to 3, had rightly conceded that the view of the Board that title did not pass by the first sale deed was erroneous and could not be sustained. In that view of the matter, it could not be and was not contended that the deed of cancellation or the second sale deed had, in any way, affected the transfer completely made by respondent No. 2 to respondent No. 1.

6. In *Mohammad Yasin v. Abdul Rauf*[3], on considering the smallness of the area of the land transferred, its situation being adjacent to a public road, and that portions of the same plot were actually in use for non-agricultural purposes and on a portion of the disputed land a building was standing, it was held that the Commissioner was justified in holding that the land was outside the scope of the Act, because the provisions of the Act had no application to urban sites which are used for purely non-agricultural purposes. It would thus be seen that the facts of that case were over-whelmingly against the character of land being land as defined in Section 2 (f) of the Act. I sitting with Kanhaiyaji J., was dealing with a similar question in the case of Ganesh Prasad (1969 Patna Law Journal Reports 284). In paragraph 5 of the judgment I said that the application filed by respondent No. 1 under Section 16 (3) of the Act had got to fail on its face. The copy of the kebala attached which the application showed that the
land transferred measuring 10 dhurs was merely gharari meaning thereby homestead in the sense of land fit for building purposes and the kebala did not show that any dwelling house stood upon the land or it was transferred along with the land. In that connection, on consideration of the definitions, I stated at page 287 (column 1)-

"This seems to be clear from the definition of the 'land' itself as it must be a land which is either used or capable of being used for agricultural or horticultural purposes, and even if

> it is a homestead as described in the explanation appended to clause (f) of Section 2, it must be a homestead of a land-holder as defined in clause (g). That would bring about the distinction that if the land is not the homestead of a land-holder, that means of a raiyat engaged in agriculture, it will not be a land within the Act and hence provision of Section 16 (3) will not be applicable to it."

Then I referred to the facts of that case and said that the transferred land was in Kesaria Bazar and it was not dear as to how it was connected with any agricultural purpose except the statement of respondent No. 1 that it was the homestead of a raiyat. In paragraph 7, however, I stated –

> "I would, however, mainly rest this judgment in favour of the petitioner on the ground that I have indicated and that is this : In the second column in Schedule 1 appended to Form LC 13, in which schedule description of the land transferred has to be given, the words are 'Description of the land whether held for agriculture or horticulture or homestead'. Comparing the word 'held' in the Form with the definition of the 'land' in Section 2 (f), it would be noticed that 'held' there would mean that the description of the land should be given as to whether it is used or capable of being used for agricultural or horticultural purposes. No such statement with regard to the piece of land in question was made by respondent No. 1 in his application. He merely said that it was homestead. But this description did not fulfil the description given in the Explanation to Clause (f) of Section 2 of the Act as on the face of the Kebala the land was merely a piece of homestead land and not a land which fulfilled the description of 'homestead' in the Explanation."

Ultimately, I again said in paragraph 10 that the point was fit to be raised for the first time in this Court on the face of the record which included the petition filed by respondent No. 1 under Section 16 (3) of the Act and the petitioner was entitled to show that, reading the petition with the statement in the Kebala which was appended to the petition, it was manifest that the transferred land did not fulfil the description of homestead as required under the Act. Nowhere did I mean to say that, if the description given in form LC 13 is merely 'homestead' then the application under Section 16 (3) must fail on that ground alone. It would be tantamount to saying that description given of the land as homestead would make the application so very defective as not to permit the court to look to any other fact or material. It may well be that the mere description in one of the columns of the form as 'homestead' is not a complete description. In order to make it a complete description, it should be stated - 'homestead of a land-holder' - and if it is so stated then the Explanation appended to clause (f) of Section 2 will be attracted within its ambit; so will be clause (g). But merely because of the insufficiency of the description the application under Section 16 (3) cannot be thrown out. The matter has to be examined with reference to other facts and circumstances of the case.

7. In the case of Phulena Prasad, (1969 Patna Law Journal Reports 418) my learned Brother K. B. N. Singh, J., sitting with B. N. Jha, J., did not say anything to the contrary on the question of law. In paragraph 11 the same definitions incorporated in clauses (f) and (g) of Section 2 of the Act were referred to as they mere bound to be. And, on the facts of that case, it was held that the land was not recorded as makan but had been recorded as bhith and along with the other

circumstances, it was held that it was not a homestead of the kind which was covered by Mohammad Yasin's case (1967 Bihar Law Journal Reports 49).

8. Mr. Jugal Kishore Prasad drew our attention to two other Bench decisions of this Court in *Kamlakant Goswami v. Balgobind Sah*[4] and *Md. Yusuf v. Member Board of Revenue*[5] to which I was a party. I don't think in either of these two decisions anything contradictory to what has been said in the earlier decisions which I have reiterated today, has been said.

9. Coming to the facts of the instant case, it would be noticed that along with form LC 13 and a copy of the kebala the petitioner had filed his written application, a copy of which is annexure C to the counter-affidavit of the contesting respondents. In paragraph 1 of this application it was clearly stated-

> "That the applicant and his full brothers Syed Md. Muslim Opposite 2nd Party along with their other agnates own and possess a homestead raiyati holding recorded in their names under R. S. Khata 517 of Mouza Rangpura, Thana No. 131, P. S. Dhamdaha, comprising R. S. Plots 3305, 3306 and 3307 and various other R. S. plots on annual rental of Re. /11/3 pies they being co-sharers." A copy of the rejoinder filed by respondent No. 2 is annexure 1 to the writ application. With reference to the statement in paragraph 1, it is stated in paragraph 2 of the rejoinder that the said respondent had his house standing on his own land appertaining to revisional survey plot No. 3307. In one of the columns of form LC 13 it was stated, as it had to be, that the transferor, namely, respondent No. 2, was a raiyat. Nowhere in the objection nor at any stage of the proceeding, although the case had a chequered history, it was asserted either by the vendor or by the vendee that the land transferred was not a homestead of a land-holder within the meaning of the Act; it was not asserted that the homestead upon which admittedly the dwelling bouse of the transferor stood was not connected with agriculture. On the materials as they were, it was clear that the homestead was connected with agricultural operations and, therefore, no dispute in that regard was raised at any stage of the proceeding before the authorities below. For the first time, the point was taken in this Court. In the counter-affidavit it was asserted that the transferor (respondent No. 2) had no other agricultural land, the land transferred with the house standing thereon was his only land and, therefore, it was not a homestead of a land-holder. We did not think it justifiable in law to act upon
> the statement of fact for the first time made in this Court to order any investigation in regard to its correctness or to hold upon the ipse dixit of the deponent of the counter-affidavit that the land transferred was not the homestead of a landlord. In my opinion, on the materials in the records of this case and in view of the lack of stand taken on behalf of the respondents before any of the authorities below in regard to the nature of the land transferred, there is no escape from the position that, in the eye of law, on the basis of the facts found in the records of the case, the land transferred was land within the meaning of the Act."

10. For the reasons stated above, I allow these writ applications and set aside the order of the

Board of Revenue (annexure 7). There will be no order as to cost in any of the writ applications.

K. B. N. Singh, J.

11. I agree.

S.K. Jha, J.

12. I agree.

Petitions allowed.

Cases Referred.

[1]1969 Pat LJR 284
[2](1969 Pat LJR 418)
[3](1967 BLJR 49)
[4](1971 BLJR 974)
[5](AIR 1973 Pat 97)