Supreme Court of India
Abdulla Kabir vs Md. Nasiruddin on 1 February, 1989
Equivalent citations: 1989 AIR 931, 1989 SCR (1) 396
Author: B Ray
Bench: Ray, B.C. (J)

PETITIONER:
ABDULLA KABIR

Vs.

RESPONDENT:
MD. NASIRUDDIN

DATE OF JUDGMENT01/02/1989

BENCH:
RAY, B.C. (J)
BENCH:
RAY, B.C. (J)
PANDIAN, S.R. (J)

CITATION:
1989 AIR 931 1989 SCR (1) 396
1989 SCC (2) 361 JT 1989 (1) 216
1989 SCALE (1)207

ACT:
West Bengal Land Reforms Act 1955 Sections 2(6), (7)3-A and 8.
West Bengal Non-Agricultural Tenancy Act 1949 Section 2(4)(a) and (24).
West Bengal Estates Acquisition Act 1953 Section 2(g). Application for pre-emption--Maintainability or--'Holding of raiyat'-Homestead of agriculturist even though not standing on agricultural land to be treated as agricultural land.

HEADNOTE:
An application for pre-emption was filed under the provisions of section 8 of the West Bengal Land Reforms Act, 1955 by the respondent to pre-empt a plot of land sold to the appellant by a Kobala dated May 16, 1974 by a co-sharer having 1/4 interest in the plot.

The land in question was owned by an agriculturist and he used to keep his agricultural implements in the said property. He also possessed other agricultural lands as agriculturists and in occupancy raiyati interest. The suit property was recorded in his name as 'Raiyat Sthitiban' and the classification of land was recorded as 'Bari' i.e. homestead of the said agriculturist. On September 20, 1967

the land was sold by a registered Kobala to 4 persons, and on October 28, 1968 one of the persons sold his share to the predecessor of the respondent. On the basis of this Kobala it was alleged that he was a co-sharer.

The respondent filed an application for pre-emption under section 8 of the West Bengal Land Reforms Act, 1955. The appellant contested the same contending in the written statement that the respondent was neither co-sharer of the holding nor an adjoining owner and that the disputed property is non-agriculture tenancy, that the petition was barred by limitation as the respondent was all along aware of the sale of the property and that the story of his coming to know only after taking copy of the sale deed was absolutely false.

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The Trial Court held that the respondent was a co-sharer and was entitled to pre-empt, the application of pre-emption was not barred by limitation as it was filed within a period of 3 years of the knowledge of the same as no notice of the sale was served on the respondent. The Trial Court further held that the land was non-agricultural land and as such the application for pre-emption under section 8 was not maintainable. The miscellaneous case was accordingly dismissed.

The respondent filed an appeal, and the Additional District Judge reversed the findings of the Trial Court, and held that the suit property was recorded as raiyati interest in the R.S. Record of Rights and being the homestead land of an agriculturist, the application for pre-emption under section 8 was maintainable. The appeal was allowed and the judgment of the trial court was set aside.

The appellant filed a revision petition in the High Court. During its pendency he made an application for amendment claiming alternative relief for pre-emption under section 24 of the West Bengal NonAgricultural Tenancy Act, 1949. The High Court held that even if the land was non-agricultural land, pre-emption could be granted under section 24 of the W.B. Non-Agricultural Tenancy Act, but dismissed the petition on the ground that there was no jurisdictional defect or error entitling the Court to interfere in revision.

In the appeal to this Court by special leave, it was contended on behalf of the appellant that the land has been recorded as in the R.S. Record of rights as non-agricultural land, and that the Trial Court had rightly held that Section 8 of the Land Reforms Act was not applicable to such a holding. The decision of the High Court to the effect that the finding recorded by the Appellate Court to the contrary suffered from no jurisdictional error was therefore wholly unwarranted. Relying on Eyachhin Ali Naskar v. Golap Gazi, [1979] 83 CWN 87 it was contended that nature of holding had to determined with reference to the user of land comprised in the holding.

Dismissing the appeal,

HELD: 1. The application for pre-emption under section 8 of West Bengal Land Reforms Act was properly allowed by the lower appellate court and the said order was maintained by High Court. There is no infirmity in this finding, and the same is upheld. [400G-H]

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2. The definition of land as given in section 2(7) of the West Bengal Land Reforms Act, 1955 means agricultural land, and includes homesteads. But, homestead land does not fail within the province of non-agricultural land both under the Non-Agricultural Tenancy Act as well as under the West Bengal Land Reforms Act, 1955. Eyachhin Ali Naskar and Anr. v. Golap Gazi, [1979] 83 C.W.N. 87 per incuriam & over ruled. [404E-F]

3. On a conspectus of the provisions contained in section 2(8) W.B. Estates Acquisition Act 1953 & section 2(4)(a) W.B. NonAgricultural Tenancy Act, 1974 it follows that 'Homestead' of an agriculturist even though the same is included in the holding of the raiyat but not on the agricultural land, still it is to be treated as agricultural land being the homestead of the agriculturist under the provisions of the West Bengal Land Reforms Act read with West Bengal Estates Acquisition Act and West Bengal Non-Agricultural Tenancy Act. [404G-H; 405A]

4. There is nothing to show that the non-agricultural land in the instant case has vested and the same has not been retained by the owner, nor is there anything to show that the original owner had in his possession non-agricultural land exceeding the ceiling limits, even assuming that the land is non-agricultural land. But the land being homestead of an agriculturist is agricultural land. Therefore, the amended provision of section 3A of the West Bengal Land Reforms Act does not require consideration in this matter. [406C-E]

Dwarka Nath Prasad Atal v. Ram Rati Devi, [1980] 1 SCC 17 and Luigi Ambrosini, Ltd. v. Bakara Tinko and Another, A.I.R. 1929(PC) 306, distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 525 of 1989.

From the Judgment and Order dated 11.12.1985 of the Calcutta High Court in Civil Rule No. 2716 of 1981 Shankar Ghosh and Rathin Das for the Appellant. D.P. Mukherjee, and G.S. Chaterjee for the Respondent. The Judgment of the Court was delivered by RAY, J. Special leave granted. Heard learned counsel for both the parties.

This appeal on special leave arises out of an applica- tion for preemption filed under the provisions of Section 8 of West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1956) by the respondent,

Md. Nasiruddin to pre-empt the land sold to the appellant, Abdulla Kabir by a Kobala dated May 16, 1974 by a co-sharer having 1/4th interest in plot No. 115/852 appertaining to Khatian No. 1944 on the ground of his being co-sharer in the said holding. The land in ques- tion i.e. plot No. 115/852 measuring 0.3 cents was owned by one Sarat Chandra Dutta, son of Amulaya Ratan. Sarat Chandra Dutta was an agriculturist and he used to keep his agricul- tural implements in the said property. He also possessed along with the said land other agricultural lands as agri- culturist and in occupancy raiyati interest. During R.S. operation also the said property was recorded in his name as 'Raiyat Sthitiban' and the classification of land was re- corded as 'Bari' i.e. homestead of the said agriculturist. On September 20, 1967, Sarat Chandra Dutta, owner of the said plot of land, sold the same by a registered Kobala to four persons namely Sisir Kumar Mondal, Naba Kumar Mondal, Madhusudan Mondal and Purmlakshmi Mondal. Thereafter on October 28, 1968 Sisir Kumar Mondal and Naba Kumar Mondal sold their shares to Nurunessa Khatun, predecessor of the respondent-petitioner. On the basis of this Kobala Nurunessa Khatun became co-sharer in respect of the said land. After the death of Nurunessa Khatun her heirs including the eldest son, the respondent-petitioner, inherited the right of occupancy as co-sharer. On May 16, 1974, Purnalakshmi sold her 1/4th interest to the appellant, Abdulla Kabir by Kobala (Exh. l(b). It is the case of the respondent-petitioner that as no notice of the said sale was served on his mother, Nurunessa Khatun, he could not know of the said sale earli- er. However, on taking certified copy of the said sale on May 3, 1977, the respondent-petitioner filed an application for pre-emption under Section 8 of the West Bengal Land Reforms Act after depositing the requisite sum as required to be deposited under the said Act. This application was registered as Misc. Case No. 36 of 1977 in the Court of Munsif, 2nd Court, Bolpur. The appellant contested the case by filing a written objection contending inter alia that the respondent-petitioner was neither co-sharer of the holding nor an adjoining land owner. The disputed property is non- agricultural tenancy. The petition for preemption is barred by limitation as the respondent-petitioner was all along aware of the said sale and the story of his coming to know of such sale after taking copy of sale deed on May 3, 1977 was absolutely false.

The distuted deed does not contain the recital that the respondentpetitioner was an adjoining land owner. The peti- tion for pre-emption in such circumstances was liable to be dismissed. Three issues were framed by the Trial Court i.e.: (1) Whether the case land is non-agricultural and whether section 8 of the West Bengal Land Reforms Act will be ap- plicable in this case;

(2) Whether the petitioner was a co-sharer in respect of case holding from before purchase of the disputed land; (3) Whether the case is barred by limitation?

The Trial Court held that the petitioner-respondent was a cosharer and was entitled to pre-empt; the application for pre-emption was not barred by limitation as it was filed within a period of three years of knowledge of the same as no notice of sale was served on the petitioner-respondent. The Trial Court further held that the subject matter of the sale was recorded as "Bastu" in the Kobala dated May 16, 1974 (Exh. l(b) and "Bari" in the R.S. Record of Right (Exh. 3(h) and though Sarat Chandra Dutta, the owner of the land was an agriculturist yet this homestead land being not included in the raiyat holding could not be treated as agricultural land according to the provisions of West Bengal Land Reforms Act because of the nonagricultural use as evident from the R.S. Record

of rights. The land is non- agricultural land and as such the application for pre-emp- tion under Section 8 of the said Act was not maintainable. The Misc. Case was, therefore, dismissed.

Against the said judgment and order, Misc. Appeal No. 84 of 1980 was filed by the respondent in the 2nd Court of the Addl. District Judge, Birbhum. The appellate court reversed the findings of the trial court and held that the suit property was recorded as of raiyati interest in the R.S. Record of rights and the suit land being the homestead of Sarat Chandra Dutta who was an agriculturist, it was agricultural land according to the provisions of the said Act and the application for pre-emption under Section 8 of the West Bengal Land Reforms Act was maintainable. The appellate court further upheld the findings of the trial court that the application was not barred by limitation and the appellant (respondent herein) was a co-sharer of the said land. The Misc. Appeal was, therefore, allowed and the judgment of the trial court was set aside.

Against this judgment and order of the appellate court, the appellant, Abdulla Kabir filed a petition in revision being C.R. No. 2716 of 1981 in the High Court at Calcutta. During the pendency of the said Revisional case the respond- ent-pre-emptor made an application for amendment of the relief claimed in the application for pre-emption by adding an alternative relief for pre-emption under Section 24 of the West Bengal Non-Agricultural Tenancy Act. After hearing both the parties, the amendment was allowed subject to the payment of costs quantified at Rs. 1,000. Thereafter, on December 11, 1985 the Civil Rule was discharged by holding that:

> " ..... I am not satisfied that the finding recorded by the appellate court based as it is on an assessment of evidence, suffers from any jurisdictional defect or error, so as to entitle this Court to interfere in revision. This Court cannot enter into evidence and come to its conclusion."

It has also been held that in view of the amendment of the petition even if it is held that the land was non-agri- cultural land, preemption could be granted under Section 24 of the Non-Agricultural Tenancy Act.

Against this judgment and order, the instant appeal on special leave has been preferred in this Court. Dr. Ghosh, learned counsel appearing on behalf of the appellant has contended in the first place that the land in question has been recorded as "Bari, teen khanna ghar" in the R.S. Record of rights i.e. it is not agricultural land. The land is used for non-agricultural purposes though the right of the owner of the land has been recorded as agricul- turist "raiyat sthitiban." He further contended that as the 'bari' or the homestead is not situated on the agricultural land in the holding held by a Raiyat, it cannot be treated as agricultural land. It is non-agricultural land used for non-agricultural purposes and the provisions of Section 8 of the Land Reforms Act are not applicable to such a holding as has been held by the trial court. The finding of the High Court to the effect that there was no error of jurisdiction is wholly unwarranted and as such the appeal should be allowed.

Dr. Ghosh next contended referring to the decision in Eyachhin Ali Naskar and Ant. v. Golap Gazi, [1979] 83 CWN 87 that the nature of the holding whether it is agricultural or non-agricultural has to be determined with reference to the user of the land comprised in the holding. The land in question

is used for nonagricultural purposes and it does not form a part of his raiyati holding comprising of Agricultural land. Therefore, it cannot be treated as agricultural land under the West Bengal Land Reforms Act. The land being recorded as "Bastu" in the R.S. Record of rights, it is to be treated as non- agricultural land.

Dr. Ghosh next submitted that the High Court did not give a definite finding whether Section 8 of the Land Re- forms Act or Section 24 of the West Bengal Non-Agricultural Tenancy Act was applicable in this case. Mr. Ghosh, there- fore, submitted that there has been an error of jurisdiction and the appeal should be allowed.

Dr. Ghosh has lastly contended that Section 3A was inserted by West Bengal Land Reforms (Amendment) Act, 1981 and assent of the President to the same was published in the Gazette on 24th March, 1986. Referring to this provision he submitted that the matter should be sent back and the appel- lant should be permitted to take such defences in view of the amended provisions as are available to him and the matter should be re-heard by the trial court. He drew the notice of the court to the decisions in Dwarka Nath Prasad Atal v. Ram Rati Devi, [1980] 1 SCC 17 and Luigi Ambrosini Ltd. v. Bakare Tinko and Another, A.I.R. 1929 PC 306. We are unable to accept the contentions made on behalf of the appellant for the reasons stated hereinbelow. The land in question which is 1/4th share of plot No. 115/852 has been recorded in the R.S. Record of rights as "Raiyat Sthitiban" i.e. the original owner of the said land Sarat Chandra Dutta was a raiyat and the classification of the land has been recorded as "bari". The entry in the record of right is presumed to be correct and this has not been challenged by any body. It, therefore, appears that the land in question is the homestead land of Sarat Chandra Dutta who is on agriculturist being recorded as raiyat. Section 2(6) of the West Bengal Land Reforms Act, 1955 defines holding as:

> "holding" means the land or lands held by a raiyat and treated as a unit for assessment of revenue."
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> Section 2(7) defines land as under:
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> "land" means agricultural land other than land comprised in a tea-garden which is retained under sub-section (3) of section 6 of the West Bengal Estates Acquisition Act, 1953, and includes homesteads but does not include tank. Explanation: "Homestead" shall have the same meaning as in the West Bengal Estates Acquisi- tion Act, 1953"

So according to the above provisions the homestead of an agriculturist is agricultural land. It has been found by the courts below that the land in question is a homestead land recorded as "Bari" in the R.S. record of rights. The owner of the said land Sarat Chandra Dutta is also recorded as a raiyat i.e. "raiyat sthitiban". In other words, it is the homestead of a raiyat i.e. an agriculturist. The trial court held that this R.S. record of right is not erroneous as the same has not been challenged by any body in the petition. Rather the respondentpetitioner supported the contention that "Sarat Chandra Dutta, the owner of plot No. 115/852 was mainly an agriculturist and his main source of living was agriculture." The learned Munsif however, held that since the said homestead is not included in the

holding of the raiyat i.e. the homestead does not stand on the agricultural land included in his holding, the homestead land cannot be treated as agricultural land relying on the decision in Eyachhin Ali Naskar and Anr. v. Golap Gazi (supra). This finding of the trial court has been negatived by the lower appellate court as well as by the High Court and it has been held that the said homestead land is agricultural land. This finding, in our view, is quite valid and legal. It has been observed by the Calcutta High Court in Eyachhin Ali Naskar and Anr. v. Golap Gazi that:

> " ..... 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 re- tained under subsection (3) of Section 6 of the West Bengal Estate Acquisition Act, 1953 and includes homesteads."
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> It has been further observed that:
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> " ..... 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."

This observation of the High Court has been made wrongly in as much as the High Court did not take notice of the amended provision of the West Bengal Non-Agricultural Tenan- cy Act, 1949 amended by Act 8 of 1974. Section 2(4)(a) defines non-agricultural land as land used for purposes not connected with agriculture or horticulture but does not include a homestead to which the provisions of the West Bengal Land Reforms Act, 1955 apply. Taking notice of this provision it is crystal clear that homestead land does not fall within the province of non-agricultural land both under the Non-Agricultural Tenancy Act as well as under the West Bengal Land Reforms Act, 1955. In that view of the matter the whole basis of the observation of the High Court to the effect "that where 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" is wrong. The judgment is per incuriam. As has been stated hereinbefore that the definition of land as given in the West Bengal Land Reforms Act, 1955 refers to agricultural land and includes homestead. Explanation to sub-section 7 of section 2 further provides that "Homestead shall have the same meaning as in the West Bengal Estates Acquisition Act, 1953." Section 2(g) of the West Bengal Estates Acquisition Act, 1953 defines;

> "Homestead" means a dwelling house together with--any court, yard, compound, garden, out- house, place of worship, family graveyard, library, office, guest-house, tanks, wells, privies, latrines, drains and boundary walls annexed to or appertaining to such dwelling house ;"

Therefore, on a conspectus of the aforesaid provisions, it obviously follows that homestead of an agriculturist even though the same is included in the holding of the raiyat but not on the agricultural land still it is to be treated as agricultural land being the homestead of the agriculturist under the provisions of the West Bengal Land Reforms Act read with West Bengal Estates Acquisition Act and West Bengal Non-Agricultural Tenancy Act. Therefore, the applica- tion under Section 8 of the West Bengal Land Reforms Act filed by the respondentpetitioner as a co-sharer of the said holding for pre-emption of the land purchased by a stranger i.e. the appellant is maintainable under law as has been rightly held by the lower appellate court as well as High Court. The application for pre-emption under Section 8 of West Bengal Land Reforms Act was properly allowed by lower appellate court and the said order was maintained by High Court. There is no infirmity in this finding and we uphold the same.

As regards the second contention it appears that by amendment an alternative relief under Section 24 of the West Bengal NonAgricultural Tenancy Act has been inserted in the application for preemption. It also appears that the said application for amendment was allowed after hearing both the parties and that no objection to the said application for amendment was taken at the time of hearing of the applica- tion for amendment nor at the final hearing of the Revision Case any objection was raised on this score. Moreover, we have already held that Section 8 of West Bengal Land Reforms Act is applicable to this case. The appellant therefore, cannot be permitted to raise this question anew in this Court.

The last submission advanced on behalf of the appellant is, also, in our considered opinion, of no substance. Sec- tion 3A which has been introduced by West Bengal Land Re- forms (Amendment) Act, 1981 is quoted hereinbelow:

> "3-A. Rights of all non-agricultural tenants and undertenants in non-agricultural land to vest in the State--(1) The rights of all non- agricultural tenants and undertenants under the West Bengal Non-Agricultural Tenancy Act, 1949 (West Bengal Act XX of 1949), shall vest in the State free from all encumbrances and the provisions of sections 4, 5 and 5A of Chapter II of the West Bengal Estates Acquisi- tion Act, 1953 (West Bengal Act I of 1954), shall, with such modification as may be neces- sary, apply mutates mutant to non-agricultural tenants and under-tenants within the meaning of the West Bengal Non-Agricultural Tenancy Act, 1949 as if such non-agricultural tenants and under-tenants were intermediaries and the land held by them were estates and a person holding under a nonagricultural tenant or under-tenant were a raiyat.
>
> (2) On the vesting of the estates and rights of intermediaries in any non-agricultural land under sub-section (1), the provisions of Chapter IIS of this Act shall apply. (3) Every intermediary whose estates or inter- ests have vested in the State under sub-sec- tion (1), shall be entitled to receive an amount to be determined in accordance with the provisions of section 14V of this Act."

The said section refers to the vesting of the interest of nonagricultural tenants by treating them as intermedi- aries and a right of retention of such non-agricultural lands within the ceiling limit has been provided therein. This provision has nothing to do with the questions involved in this appeal. There is nothing to show that the nonagri- cultural land in plot No. 115/852 has vested in the State and the same has not been retained by the owner nor there is any thing to show that the original owner, Sarat Chandra Dutta had in his possession non-agricultural land exceeding the ceiling limits even assuming for arguments sake that the land in question is non-agricultural land. But we have held hereinbefore that the land being homestead of an agricultur- ist is agricultural land. Therefore, the amended provision of Section 3-A of the said Act does not require considera- tion in the instant appeal in the background of the facts and circumstances of the case and the issues involved here- in. The submission made on behalf of the appellant that the matter should be sent back to the trial court for giving the defendant an opportunity to raise issues on the amended provision for hearing and deciding the same by the court, is not tenable. In the circumstances it is needless to consider the decision in Dwarka Nath Prasad Atal v. Ram Rati Devi (supra). In that case an application was filed under Section 24 of West Bengal NonAgricultural Tenancy Act asking for pre-emption in respect of the property mentioned in Schedule A of the application. The appellant resisted the respond- ent's claim for pre-emption on various grounds including the ground that the property involved in the proceedings being agricultural land civil court in which the respondent had filed her application for pre-emption had no jurisdiction to entertain the application for pre-emption by reason of the provisions of the West Bengal Land Reforms Act. The learned Subordinate Judge held that the property involved in the proceeding was agricultural land and so Section 24 of West Bengal Non-Agricultural Tenancy Act was not attracted and civil court had no jurisdiction to entertain the applica- tion. The application was dismissed. The order was set aside on appeal holding that the land was non-agricultural land and the Subordinate Judge had jurisdiction to entertain the application. The judgment having been confirmed in appeal by the High Court of Calcutta, the petitioner filed an appeal on special leave before this Court. It had been held that since the judgment was rendered only on the preliminary question whether the court had jurisdiction to entertain the application and the other issues raised therein were not decided by the trial court, the lower appellate court over-ruled the said finding but instead of remanding the matter to the trial court for decision on the other issues, disposed of the matter on merits whereas on the other issues the appellant might desire to lead evidence but that opportunity was denied to him. It was in the interest of justice that the appellant should be afforded an opportunity of being heard on the other issues. In that view of the matter the case was re- manded for disposal. The decision in Luigi Ambrosini, Ltd. v. Bakare Tinko and Another (supra) does not apply to this case as the facts of that case are different from the facts of the instant case.

As stated hereinbefore that this ruling has no applica- tion to the facts of this case inasmuch as the application was not decided on a preliminary issue but the same has been decided on all the issues raised. Therefore, there is no question for remanding the matter for decision on the other issues. We therefore, find no substance in this contention advanced by the learned counsel for the appellant. For the reasons aforesaid we do not find any infirmity nor any illegality in the findings arrived at by the High Court. We, therefore, dismiss this appeal and uphold the judgment and order of the High Court. In the facts and circumstances of the case, there will be no order as to costs.

N.V.K. Appeal dis-

missed.