

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No. 785 of 2021

**Sk. Abdul Odud Ali
Vs.
Emanulla Khan and others**

For the petitioner	: Mr. Rabindranath Mahato, Mr. Aritra Shankar Ray
For the opposite party nos. 1 and 2	: Mr. Smim Ahammed, Mr. Arka Maiti, Ms. Saloni Bhattacharyya
Hearing concluded on	: 14.07.2021
Judgment on	: 16.07.2021

Sabyasachi Bhattacharyya, J:-

1. The short question which falls for consideration is, whether a pre-emption application under Section 8 of the West Bengal Land Reforms Act, 1955, on the ground of co-sharership, can be rejected at the outset as not maintainable if the application is accompanied by a deposit of an amount less than the consideration shown in the sale deed sought to be pre-empted, along with the statutory interest of 10%, on the allegations that the price shown in the deed was inflated and the actual consideration money paid according to the pre-emptor is the lesser amount deposited with the pre-emption application and

that no notice under Section 5 of the said Act was served on the co-sharer/pre-emptor.

2. Learned counsel for the petitioner submits that the trial court acted without jurisdiction in rejecting the application for pre-emption, filed on the ground of co-sharership, at the outset as not maintainable. In the application under Section 8 of the 1955 Act, the pre-emptor/petitioner had specifically challenged the amount shown as consideration in the sale deed-in-question on the ground that it was inflated and had deposited the actual amount of consideration according to his version, along with statutory interest of 10%, within the statutory period. The pre-emption application was also filed within limitation.
3. Learned counsel seeks to distinguish the ratio laid down by the Supreme Court in the recent judgment, *Barasat Eye Hospital and Others Vs. Kaustabh Mondal*, reported at (2019) 19 SCC 767, wherein it was held that the deposit of the full consideration money as shown in the sale deed, along with statutory interest of 10 %, has to be paid along with the pre-emption application within limitation, by laying stress on the observations made by the Supreme Court in paragraph no. 23 of the said report. In the said paragraph, it was observed, inter alia:

“... In fact, the effect of the right to pre-emption is that a private contract inter se the parties and that too, in respect of land, is sought to be interfered with, and substituted by a purchaser who fortuitously has land in the vicinity to the land being sold. It is not a case of a co-sharer, which would rest on a different ground.”

4. It is argued that such observation was the premise of the ratio next laid down by the Supreme Court in the following paragraphs and, thus, the ratio should be restricted to pre-emption applications filed on the ground of vicinage. The petitioner's application for pre-emption having been filed on the ground of co-sharership, which has been put on a different footing by the Supreme Court, the proposition laid down in the above report is not attracted to the present case.
5. As such, it is submitted by learned counsel for the petitioner, the trial court misinterpreted the proposition and erroneously applied it to the instant case, thereby vitiating the impugned order as bad in law and without jurisdiction, thus liable to be set aside.
6. Learned counsel for the pre-emptees/ opposite parties no. 1 and 2 counters such argument by contending that a stray sentence in paragraph no. 23 of *Barasat Eye Hospital (supra)* cannot be read in isolation and there were several other grounds for the Supreme Court to arrive at the proposition at issue. The conjoint effect of Sections 8 and 9 of the 1955 Act, construed in the backdrop of the history of the law of pre-emption in India, was discussed by the Supreme Court.
7. Learned counsel argues that the ratio in the said cited judgment of the Supreme Court has laid down the general law in respect of all applications for pre-emption under Section 8 of the 1955 Act and did not draw any distinction in that regard between such applications on the ground of co-sharership and of vicinage.

8. In this context, learned counsel for the opposite party nos. 1 and 2 cites two unreported co-ordinate Bench judgments of this Court in the following matters:

C.O. No. 2461 of 2007 (Smt. Kamala Rani Roy & Ors. vs. Sri Sambhu Sen & Ors.), rendered by Kausik Chanda, J. ; and

C.O. No. 2311 of 2006 (Golam Kibria Mallik vs. Sk. Amir Ali & Ors.), delivered by Biswajit Basu, J.

9. In both the aforesaid judgments, the respective learned Single Judges followed the ratio laid down in *Barasat Eye Hospital (supra)*.
10. In paragraph no. 25 of *Kamala Rani Roy (supra)*, the learned Single Judge recorded that a similar argument as that made in the instant revision, was advanced by learned counsel for the pre-emptor. However, in paragraph no. 26, the Hon'ble Justice Chanda observed that though His Lordship found the argument to be very attractive, His Lordship was unable to persuade himself to accept such contention, since it did not appear that the Supreme Court expressly made any such distinction between a co-sharer and a contiguous owner for the purpose of deposit to be made under Section 8 of the 1955 Act and that it was not permissible to construe otherwise by way of making any logical deduction from any observation made in the said judgment.
11. In *Golam Kibria Mallik (supra)*, the revision also arose, as in the present case, from a pre-emption application on the ground of co-sharership. The Hon'ble Justice Basu, without much ado, was pleased

to observe simpliciter that the Supreme Court had held in *Barasat Eye Hospital (supra)* that, to maintain an application under Section 8 of the said Act, the preemptor is required to deposit the entire consideration money, and that being the position, His Lordship did not find any reason to interfere with the order of the appellate court below, which had affirmed the trial court's order dismissing the pre-emption application.

12. Upon considering the judgments cited by counsel for both the contesting parties and the arguments advanced on Sections 8 and 9 of the 1955 Act by counsel, I arrive at the following decision:
13. A proposition laid down in a judgment of a superior forum, in this case the Supreme Court in *Barasat Eye Hospital (supra)*, has precedentiary and binding value only in the factual and legal context of the same and ought not to be followed blindly.
14. The very premise of the ratio of *Barasat Eye Hospital (supra)* necessary follows from the observations made by the Hon'ble Supreme Court in paragraph no. 23 thereof, which categorically distinguishes the respective footings of a co-sharer and a contiguous owner. The finding, that pre-emption is a secondary and "weak right", was the plinth of the proposition that such right curtails the superior rights of a lawful owner and hence ought to be strictly construed. The mandate of Sections 8 and 9 of the 1955 Act were interpreted in such light. Therefore paragraph no. 23 was an integral component of the ratio of the said report. The previous discussions by the Supreme Court on the historical background of the right of pre-emption is qualified in

the present case by the crystallization of such right as a statutory one under Section 8 of the West Bengal Land Reforms Act, 1955 and not merely an equitable right. Since the right of pre-emption has been conferred by the said Act, the provisions thereof ought to be looked into for a proper and meaningful interpretation of the nature of the right.

15. In paragraph no. 23 of *Barasat Eye Hospital (supra)*, the Supreme Court observed that the effect of the right to pre-emption is that a private contract inter se the parties and that too, in respect of land, is sought to be interfered with, and substituted by a purchaser who “fortuitously has land in the vicinity to the land being sold”. The next sentence in the said paragraph more explicitly expressed that “It is not a case of a co-sharer, which would rest on a different ground”. Such words are strong enough to convey the purport of the proposition laid down ultimately.
16. It is to be considered here that pre-emption under Section 8 of the 1955 Act is not a mere customary or secondary right in common law or equity but a specific statutory right conferred by a special statute governing the field. Section 3 of the 1955 Act, which was not considered either by the Supreme Court or any of the learned Single Judges, clearly provides that the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force “or in any custom or usage or **contract, express or implied, or agreement** or decree or order or decision or award of a court, tribunal or other authority. The said provision

specifically stipulates that the rights conferred under the 1955 Act (which includes the right of pre-emption under Section 8) shall override even contracts, express or implied, or agreements, amongst other things. Hence, the statutory right of pre-emption under Section 8 of the Act transcends the character of a weak or secondary right, as opposed to the general right of pre-emption under the Muhammedan Law, and even prevails over personal contracts, express or implied, and agreements.

17. Delving further into the discussions of the Supreme Court in *Barasat Eye Hospital (supra)*, two aspects catch the eye at first glance. *Bishan Singh's case*, which was relied on by the Supreme Court for a general exposition of the right of pre-emption, cannot be attracted to a specific statutory right with overriding effect over contracts, as in Section 8, read with Section 5, of the 1955 Act.
18. On the other hand, *Kedar Mishra v. State of Bihar*, another essential component of the Supreme Court's rationale, was rendered in the context of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. Section 16 (3), as quoted in paragraph no. 14 of *Barasat Eye Hospital (supra)*, has two major distinctions from Section 8 of the West Bengal Land Reforms Act, 1955.
19. First, the Bihar Act provision-in-question confers a right to apply for the transfer of the land to the pre-emptor "on the terms and conditions contained in the said deed", that is, the deed of sale, the pre-emption of which is sought. Such an expression is conspicuous by

its absence in the West Bengal Act, thereby lending an entirely different complexion to the right conferred under Sections 8 and 9 of the West Bengal Act of 1955. If the transfer sought by the pre-emptor has to be on the exact terms and conditions contained in the deed itself, then pre-emption can be granted only on such terms, which includes the purchase price as shown in the deed, whatever be the assessment of the actual consideration by the pre-emptor.

20. Secondly, the Supreme Court itself observed in paragraph no. 16 of *Barasat Eye Hospital (supra)* that it was conscious of the fact that the proviso to Section 16 (3) (i) of the Bihar Act begins with a negative connotation, that is, “no such application shall be entertained”. Section 8 and 9 of the West Bengal Land Reforms Act, 1955 is not couched in such negative language, which *prima facie* does not give rise to the presumption that such provision of deposit of consideration money is mandatory at the inception of the pre-emption application.
21. Thirdly, the relevant portions of the Bihar Act, quoted by the Supreme Court, do not have any provision for inquiry into the actual consideration money exchanged for the sale under pre-emption and subsequent opportunity to the pre-emptor to deposit the excess or to get refund of excess amount, if deposited.
22. Section 9 of the 1955 Act, however, specifically provides for an enquiry after the issuance of notice on the pre-emptees and envisages subsequent direction on the applicant to deposit such further sum, if any. Moreover, Section 9 also casts the initial obligation on the transferee (pre-emptee) or any person interested to appear within the

time specified in the notice and “prove the consideration money paid for the transfer”, followed by the suffix “and other sums”, if any, “properly paid by him in respect of the lands” which expression is merely followed by the corollary “including any sum “. Hence, the burden of proof of actual consideration money is on the transferee, and not the applicant, particularly when the applicant specifically challenges the veracity of the consideration appearing in the sale deed, as in the instant case.

23. Another remarkable distinction between the Bihar Act, which was considered by the Supreme Court in *Barasat Eye Hospital*, and the West Bengal Act is that the former contemplates that no such application “shall” be entertained unless the “purchase money” together with ten per cent thereof is deposited “within the said period”, whereas the latter Act of 1955, in Section 8 thereof, merely contemplates that the applicant shall apply to the Munsif having territorial Jurisdiction for transfer of the said portion or share of the plot of land to him, on deposit of the “consideration money” together with a further sum of ten per cent thereof.
24. The expression “purchase money”, read in conjunction with the rider that the transfer of the land applied for by the pre-emptor shall be “on the terms and conditions contained in the said deed” and the negative language in which Section 16 (3) (i) of the Bihar Act is couched, unerringly indicate that the purchase money to be deposited “within the prescribed period” is equivalent to the amount of consideration shown in the sale deed itself, since the final relief is restricted to

transfer to the pre-emptor “on the terms and conditions contained in the said deed”.

25. On the other hand, Section 8 of the 1955 Act of West Bengal contemplates mere “transfer”, not necessarily on the same terms and conditions as the sale deed. Moreover, Section 9 of the 1955 Act provides sufficient leverage for subsequent deposit of the actual consideration money, as ascertained upon enquiry, that too, only on the transferee or any other interested person proving the actual consideration amount. No time limit can, thus, be attached to the deposit of the consideration money before the actual price is ascertained upon such an enquiry.
26. Thus, the term “consideration” used in Section 8 of the 1955 Act is diluted by the provisions of Section 9, which envisages proof by the transferee of the actual consideration money and an ensuing enquiry to ascertain the actual consideration amount. This gives a leeway to the pre-emptor to dispute the consideration money paid and, if disclosed in the pre-emption application itself, such dispute justifies the deposit of an amount equivalent to the actual consideration as per the petitioner’s version, with statutory interest, subject to subsequent directions on the pre-emptor to deposit any further amount, if found necessary by the court.
27. Hence, the ratio laid down in *Barasat Eye Hospital (supra)*, upon a meaningful reading of the entire judgment, in particular paragraph no. 23 thereof, clearly distinguishes the strength of the respective

rights of pre-emption of a “fortuitous” raiyat holding land in the vicinity and that of an existing co-sharer of the property.

28. We cannot, in this context, lose sight of the initial phrase used in Section 8 as a pre-requisite for exercising the right of pre-emption, that the right of pre-emption only arises if a portion or share of a plot of land of a raiyat is transferred to “any person other than a co-sharer of a raiyat”, thus conferring a preferential right of purchase on the co-sharer which is not a mere “secondary right” as distinguished by the Supreme Court, but a primary right as well, which is not as weak as it appears at the first blush.
29. Such aspects did not fall for consideration before the Supreme Court in *Barasat Eye Hospital (supra)*; hence, the proposition laid down therein is not binding as precedent in case of a co-sharer/pre-emptor. It can at best be restricted to contiguous owners, labelled as “fortuitous” by the Supreme Court, having merely a secondary right of pre-emption, which is weak, as opposed to a prior right of purchase, which is inherent and primary, as contemplated in paragraph no. 11 of *Barasat Eye Hospital (supra)*.
30. The primacy of the right of a co-sharer is further bolstered by Section 5 (4) of the 1955 Act, which mandates a prior notice to be served on co-sharers of the transferred land as a pre-requisite of such transfer.
31. Since the petitioner in the present case has specifically pleaded absence of such notice in the pre-emption application, his right of pre-emption on the footing of a co-sharer gains primacy as opposed to the secondary right of a contiguous owner claiming pre-emption on the

basis of fortuitous vicinage, which has been construed as a “weak right” by the Hon’ble Supreme Court in *Barasat Eye Hospital (supra)*.

32. Hence, the ratio laid down by the Supreme Court in *Barasat Eye Hospital (supra)* has to be seen in proper perspective, in the context of the entire judgment and the ultimate proposition cannot be divorced from the reasoning given by the Supreme Court itself to arrive at such proposition in the said report.
33. An additional factor which ought to be considered is that the consistent view of this court, that Section 5 of the Limitation Act is not applicable to a pre-emption application, is on the basis of such proceeding being of an original nature and has the trappings of a suit. Since Section 5 of the Limitation Act is not applicable to suits, but to applications and appeals, it was held to be inapplicable to a pre-emption proceeding, which is akin to a suit.
34. However, the deposit contemplated under Sections 8 and 9 of the West Bengal Land Reforms Act, 1955 cannot be placed on an equal footing as the pre-emption application itself. Thus, hypothetically, if an application is filed for acceptance of late deposit of such consideration amount, the same is an “application” and not a “suit” within the contemplation of Section 5 of the Limitation Act. Although such deposit is a pre-requisite of issuance of notice, the expression “consideration” need not, in cases where a dispute is raised in the pre-emption application regarding the veracity of the price shown in the sale deed itself, be strictly construed as the “price shown in the sale deed” by introducing such words into the statute, which have been left

out by the Legislature in its wisdom, unlike the Bihar Act, which has mandated even the final relief to be restricted to the terms and conditions of the sale deed and is couched in negative language.

35. Hence, the question which has come up for consideration before this court, as to whether a pre-emption application under Section 8 of the West Bengal Land Reforms Act, 1955, on the ground of co-sharership, can be rejected at the outset as not maintainable if the application is accompanied by a deposit of an amount less than the consideration shown in the sale deed sought to be pre-empted, along with the statutory interest of 10%, on the allegation that the price shown in the deed was inflated and the actual consideration money paid according to the pre-emptor is the lesser amount deposited with the pre-emption application as well as that no notice under Section 5 of the said Act was served on the co-sharer/pre-emptor, is answered in the negative.
36. However, judicial decorum demands that I stop short of allowing the instant application under Article 227 of the Constitution of India, thereby setting aside the order impugned herein, since my view, with utmost humility, is contrary to the interpretation of *Barasat Eye Hospital (supra)* by two previous co-ordinate Benches, in *C.O. No. 2461 of 2007 (Smt. Kamala Rani Roy & Ors. vs. Sri Sambhu Sen & Ors.)*, and *C.O. No. 2311 of 2006 (Golam Kibria Mallik vs. Sk. Amir Ali & Ors.)*.
37. Hence I resort to the appropriate course of action according to me and refer the matter to the Hon'ble the Chief Justice (Acting) for assignment before a larger Bench of this Court to decide the following question:

“Whether a pre-emption application under Section 8 of the West Bengal Land Reforms Act, 1955, on the ground of co-sharership, can be rejected at the outset as not maintainable if the application is accompanied by a deposit of an amount less than the consideration shown in the sale deed sought to be pre-empted, along with the statutory interest of 10%, on the allegation that the price shown in the deed was inflated and the actual consideration money paid according to the pre-emptor is the lesser amount deposited with the pre-emption application and that no notice under Section 5 of the said Act was served on the co-sharer/pre-emptor”.

- 38.** Further judgment is reserved in the matter till resolution of such question by the proposed larger Bench.
- 39.** Both parties are restrained by an order of injunction from transferring, alienating, encumbering and/or creating any third party interest in respect of the property, which is the subject-matter of the sale deed sought to be pre-empted, till disposal of this revisional application.
- 40.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)