S/L 8
22.12.2022
Court No.652
SD

CO 4406 of 2015

Debasish Bandyopadhyay
Vs.
Subhash Saha & Ors.

Mr. Probal Mukherjee
Mr. Sounak Bhattacharyya
Mr. Dipanjan Chatterjee
... for the Petitioner.

Mr. Partha Pratim Roy
Mr. Dyutiman Banerjee
... for the Opposite Parties.

Being aggrieved and dissatisfied with the judgment and order dated 08.10.2015 passed by the learned Additional District Judge, 3rd Court at Berhampore in Misc. Appeal No.61 of 2010 reversing the judgment and order dated 10.5.2010 passed by learned Civil Judge (Junior Division), Additional Court, Berhampore in Misc. Case No.10 of 2009, present revisional application has been preferred.

Petitioner contended that the opposite parties as preemptors have filed an application under Section 8 of the West Bengal Land Reforms Act on the ground of co-sharership which was originally registered as Misc. Case No.9 of 2006 and it was subsequently transferred before Additional Court at Berhampore and renumbered as Misc. Case No.10 of 2009.

The petitioner herein is contesting the same by filing written objection. The learned trial court was pleased to dismiss the said misc. case vide order dated 10.5.2010. The opposite parties herein preferred a misc. appeal being Misc.

Appeal No.61 of 2010 before the learned District Judge, Murshidabad which was subsequently transferred to learned Additional District Judge, 3rd Court, Berhampore and learned Appellate Court was pleased to allow the appeal thereby setting aside the judgment and order passed by the learned Trial Judge, vide impugned judgment dated 08.12.2015.

Mr. Sounak Bhattacharyya, learned counsel appearing on behalf of the petitioner submits that the predecessor-in-interest of the preemptors was a lessee under the Government and learned Appellate Court ought to have held that the predecessor-in-interest of the preemptors cannot be considered as raiyat.

He further submits that since the impugned deed is not a sale deed, but a deed of lease, the appellate court ought to have held that the application for preemption is not maintainable. Since the Government gifted 0.17 acres of land to Jatindranath Saha, Gopal Chandra Saha, Ramala Rani Saha and Satish Chandra Saha by a registered deed of gift dated 29.7.1987, the court below ought to have held that Gopal Chandra Saha became a tenant under the State and an independent raiyat and not a cosharer with any of the other three persons.

Mr. Bhattacharyya further submits when the predecessor-in-interest of preemptor transferred his entire share and interest in the plot in question, the court below ought to have held that the application for preemption is not maintainable.

He further submits that preemptor did not deposit the entire consideration money together with 10% thereof at the time of filing of the said Misc. case and as such, learned court below ought to have dismissed the Misc. appeal.

Mr. Dyutiman Banerjee, learned counsel appearing on behalf of the opposite party relying upon a judgment of this court passed in CO 785 of 2021, contended that the short deposit of the consideration price at the time of filing preemption application cannot be a ground for dismissal of the preemption application and accordingly, he submits that the court below has rightly passed the order which does not call for any interference.

Having considered the facts and circumstances of the case, it appears that the petitioner herein has taken a specific plea that admittedly the property in question was sold on 05.11.2003 by a registered deed of sale and the suit for preemption was filed in the year 2006.

This court in *Nurul Islam vs. Esratun Bibi reported in 2017 (3) CHN 678* had held as follows:-

> ***"40.*** *we thus conclude by holding that Article 97 of the Limitation Act, 1963 is the appropriate provision which will govern the period of limitation for filing application for pre-emption by the non-notified co-sharer. We also hold that as per the provision contained in Article 97 of the Limitation Act, the period of limitation will begin to run from the date when the purchaser takes under the sale sought to be impeached physical possession of the whole or part of the property sold. We also hold that where the property sold is of such nature which does not admit of physical possession either of the whole or part thereof the period of ,limitation will begin to run when the instrument of sale is registered meaning thereby when the registration is complete as per Section 61 of the Registration Act and in both cases the period of limitation is one year."*

Accordingly, the period of limitation for non-notified co-sharer is for one year under Article 97 of the Limitation

Act but unfortunately, the court below has not at all considered the question of limitation though specific plea has been taken by the petitioner herein in the appeal.

Secondly, it is not in dispute in the present case that the opposite parties herein while filing the application for preemption has deposited only Rs.1100/- while the consideration price as appearing in the deed is Rs.80,000/-.

In *Barasat Eye Hospital & Ors. vs. Kaustabh Mondal reported in (2019) 19 SCC 767*, it has been specifically held by the Apex Court that the pre-requisite to exercise a right of preemption is the deposit of amount of sale consideration and the 10% levy on that consideration and if it is not followed Section 8(1) of the West Bengal Land Reforms Act will not be triggered off.

In paragraph 34 of the said judgment, the Apex Court was also pleased to held that Section 5 of the Limitation Act is also not applicable in such cases with the following observations:-

> ***"34.*** *The last question which arises is whether the respondent can now be granted time to deposit the balance amount. When the direction was so passed, in pursuance of the order of the appellate court, the respondent still assailed the same. The requirement of exercising the right within the stipulated time, in respect of the very provision has been held to be sacrosanct i.e. that there can be no extension of time granted even by recourse to Section 5 of the Limitation Act."*

Subsequently, in another judgment Apex Court passed the same view in *Abdul Matin Mallick vs. Subrata Bhattacharjee (Banerjee) & Ors. reported in (2022) 7 SCC 147* as follows:-

> ***"7.*** *Now, so far as the submission on behalf of the pre-emptors that they bona fide believed that the sale*

consideration mentioned in the sale deed is in favour of the vendee, who is an outsider (outside the family) was higher than the actual sale consideration and therefore, they did not deposit the entire sale consideration with additional 10% of the sale consideration along with the pre-emption application is concerned, it is to be noted that the aforesaid cannot be a ground not to comply with the condition of deposit as required under Section 8 of the 1955 Act. At the most, such a dispute can be the subject-matter of an enquiry provided under Section 9 of the Act. As observed hereinabove, the enquiry under Section 9 with respect to the sale consideration in the sale deed would be only after the condition of deposit of entire sale consideration with additional 10% as provided under Section 8 of the Act has been complied with."

***"8.** Now, so far as the submission on behalf of the pre-emptors that the contention of non-deposit of the entire sale consideration with additional 10% of the sale consideration by the pre-emptors was not raised before the courts below and has been raised for the first time before this Court, and therefore the same be not considered/permitted to be raised now, is concerned, it is to be noted that the said contention would go to the root of the matter on maintainability of the pre-emption application as without complying with the statutory requirements as mentioned under Section 8 of the 1955 Act, the same is not maintainable. It is an admitted position that the pre-emptors had not deposited the entire sale consideration with additional 10% of the sale consideration along with the pre-emption application as required under Section 8 of the Act in the instant case. In view of the aforesaid admitted position, we have considered the submission on behalf of the appellant on non-fulfilment of the condition mentioned in Section 8 of the Act."*

***"9.** At this stage, it is required to be noted that even the High Court in the impugned judgment and order has permitted the pre-emptors to deposit the balance sale consideration. However, faced with the decision of this Court in Barasat Eye Hospital [Barasat Eye Hospital v. Kaustabh Mondal, (2019) 19 SCC 767 : (2020) 4 SCC (Civ) 810] and in light of the observations made by us hereinabove that along with the pre-emption application, the pre-emptors have to deposit the entire sale consideration with additional 10% and only thereafter the further enquiry can be conducted as per Section 9 of the 1955 Act and therefore, unless and until the same is complied with, the pre-emption application would not be maintainable, the High Court is not justified in permitting the pre-emptors to now deposit the balance sale consideration with additional 10% while deciding the revision application. Such a direction/permission/liberty would go against the intent of Section 8 of the 1955 Act."*

In view of the aforesaid facts and circumstances of the case and that admittedly the opposite parties herein have not deposited full amount of consideration price at the time of filing of the application and that the question of limitation has not been satisfactorily explained in the present case, the impugned judgment and order passed by the court below is liable to be set aside.

In view of the above, the impugned judgment and order dated 08.10.2015 passed by the learned Additional District Judge, 3rd Court, Berhampore in Misc. Appeal No.61 of 2010 is hereby set aside and the judgment and order passed by the learned Civil Judge (Junior Division), Additional Court, Berhampore in Misc. Case No.10 of 2009 is hereby affirmed.

Accordingly, CO 4406 of 2015 is allowed.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)