IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 622 of 2021
With

CAN 1 of 2022

Lal Mohan Kulsi & Anr.
Vs
Sunil Ghosh & Ors.

For the Applicants/opposite parties	:	Mr. Tanmoy Mukherjee
	:	Mr. Souvik Das
	:	Mr. Rudranil Das
For the petitioners	:	Mr. Sujit Kumar Rath
	:	Mr. Sukumar Sarkar
Heard on	:	22.02.2023
Judgment on	:	13.03.2023

Ajoy Kumar Mukherjee, J.

1. This is an application for recalling the order dated 11th January, 2022 passed by this court in C.O. no. 622 of 2021. By the said order this court was pleased to set aside the impugned order dated 19.10.2020 passed by Civil Judge (Junior Division), Ghatal in Misc. Case No. 29 of 2020 and thereby disposed of the said application under Article 227 of the Constitution of India, by allowing the same. On the basis of affidavit of service upon opposite parties and as inspite of service, opposite parties were not represented, this court after hearing learned counsel for the petitioner, was pleased to dispose of the said application.

2. Learned Counsel appearing on behalf of the opposite parties who are petitioners herein have given explanation in the present application, as to why they could not appear before this court when the application being C.O. 622 of 2021 was taken up for hearing. He further submits that there is delay of 10 days in filing the present application for recalling, and prayed for condonation of delay. The delay in filing the application is hereby condoned. Both the parties are heard afresh on merit as well as recalling application, being CAN 1 of 2022.

3. On perusal of the order impugned it appears that the petitioners filed the aforesaid application under article 227 of constitution of India being aforesaid C.O. No. 622 of 2021, challenging the order dated 19.10.2022 passed by the court below, permitting deposit of deficit consideration money in the aforesaid Misc. Case.

4. The background of the case is that the opposite parties filed an application under section 8 of the West Bengal Land Reform Act 1955 (Act of 1955) seeking pre-emption of land, described in the schedule of the application, against the petitioner. Petitioner contended that the consideration price appearing in the impugned deed of sale dated 24.07.2020 is Rs. 5,00,000/-. The petitioner /pre-emptor made a prayer for deposit of 50% amount of Rs.2,75,000/- and learned civil judge (Junior Division) Ghatal by the impugned order dated 19.10.2020 allowed the prayer made by opposite party for making short deposit of Rs. 2,75,000/-

5. This court while disposing of the said application had relied upon the judgment passed by the Apex Court in ***Barasat Eye Hospital and others Vs. Kaustabh Mondal*** reported in **(2019) 19 SCC 767.** This court on the basis of petitioner's submission, came to the conclusion that the petitioners who have failed to deposit the entire amount as stipulated in section 8 of the Act, they cannot pray for extension of time for deposit to exercise the right of pre-emption. This court also taken into account that there was no prayer for causing enquiry with regard to the consideration money covered by the deed in question under section 9 of the said Act, nor there is any dispute regarding the payment of consideration amount mentioned in the deed of purchase, rather opposite parties admitted that the petitioner have purchased the said property at a consideration of Rs. 5,00,000/-.

6. Learned counsel appearing on behalf of the petitioner of the revisional application submits that the settled law is that pre-emptors intending to pre-empt a portion of land has to deposit total amount of consideration money along with 10% at the time of filing of the application. He accordingly submits that the recalling application as well as the pre-emption application is liable to be failed on the ground that the preemptors did not exercise their right of pre-emption over the property by depositing whole amount of consideration along with levied amount at a time. In this context he relied upon same judgment of **Barasat Eye Hospital and others (supra)** and also relied two other judgments passed by co-ordinate Bench of this court in **C.O. no. 4406 of 2015** and **C.O. no. 2072 of 2017.**

7. Learned counsel appearing on behalf of the opposite parties/pre-emptors of the revisional application submits that the impugned deed in respect of which the pre-emption application has been filed was executed on 24th July, 2020 and pre-emption application being J. Misc. Case No. 29 of 2020 was filed before the court below on 19th October, 2020. On 21st October 2020 an amount of Rs. 2,75,000/- was deposited by the pre-emptor/opposite party herein i.e. fifty percent of the total amount, which needs to be deposited as per Section 8(1) read with section 9 of the Act of 1955. On 25th January, 2021, rest amount of Rs. 2,75,000/- was deposited by the pre-emtors herein and duly complied the aforesaid provisions of the said Act of 1955. He accordingly submits that being a co-sharer he has every right to make the deposit within one year from the date of execution of the deed, as under the settled law a non-notified co-sharer is entitled to file a case of pre-emption within a period of one year from the date of execution of the deed.

8. It is not in dispute in the present case that the application for pre-emption has been filed by the pre-emptor/opposite party, who is a non notified co-sharer. Division Bench of this court in a judgment of ***Nurul Islam Vs. Esrathun Bibi*** reported in **2017 (3) Cal.L.J. (Cal) 241** have held that applying Article 97 of the Limitation Act of 1963, the period of limitation for filing pre-emption application by the non-notified co-sharer will be one year and the starting point of limitation will be different depending upon circumstances as prescribed in the third column of the schedule of Article 97. Now the third schedule provides time from which period begins to run:-

> *"when the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property, sold , or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered".*

9. In the present case the impugned deed under the pre-emption is of 24th July, 2020 and the said date of execution of deed and physical possession by purchaser is not in dispute. So according to the aforesaid Division Bench judgment the period of limitation available with the pre-emptor/opposite parties in exercising his right of pre-emption application, would be one year that is by 23 rd of July, 2021.

10. This court relying upon the judgment passed in **Barasat Eye Hospital (supra)** case came to the conclusion that no application for pre-emption would be maintainable unless the entire consideration amount along with 10% of that amount is deposited at the time of filing of application for pre-emption under section 8 of the Act of 1955 and as at the time of filing of application, pre-emptor had not deposited entire amount, the order impugned passed by Trial Court was set aside. Paragraph **35** of **Barasat Eye Hospital (supra)** case runs as follows:-

> ***"35.*** *As we have discussed above, once the time period to exercise a right is sacrosanct, then the deposit of the full amount within the time is also sacrosanct. The two go hand-in-hand. It is not a case where an application has been filed within time and the amount is deficient, but the balance amount has been deposited within the time meant for the exercise of the right. We are saying so as such an eventuality may arise, but in that case, the right under the application would be triggered off on deposit of the amount which, in turn, would be within the time stipulated for triggering the right. That not having happened, we are of the view that there cannot be any extension of time granted to the respondent now, to exercise such a right. This is, of course, apart from the fact that this*

speculative exercise on behalf of the respondent has continued for the last fourteen years, by deposit of 50% of the amount." (emphasis added)

11. Accordingly the spirit of the order is that the balance amount has to be deposited within time stipulated for triggering the right for the exercise of the right, of pre-emption. In the present case as the deed was executed on 24th July, 2020 and the pre-emptors being non-notified co-sharer, their right to exercise pre-emption would be till 23rd July, 2021, by which the petitioners coould have triggered their right of pre-emption on deposit of the consideration amount along with levied amount. In the present case the entire deposit has been made on 25th January, 2021, which is well before the expiry date for triggering of their right of pre-emption. As such the question of dismissal of the pre-emption application on the ground of initial short deposit does not arise, in the present context as this case relates to a non-notified co-sharer.

12. The judgment cited by the petitioner of the revisional application being C.O. 4406 of 2015 goes to show that in the said case, though pre-emptor was also a non-notified co-sharer but in the said case admittedly the property in question was sold on 05.11.2003 by registered deed of sale and suit for pre-emption was filed three years thereafter i.e. in the year of 2006 and accordingly said case is factually distinguishable from the present case . Similarly the judgment passed in C.O. 2072 of 2007 is also factually distinguishable with the present case because said case relates to an incident where even after finding by the Appellate court that the consideration price appearing on the deed is not inflated and represents correct market price, the petitioner did not deposit the balance amount. Moreover the question of transferring Bastu Land was involved in the said case and further question as to whether the right of pre-emption lies in a case where entire share of the property by a co-sharer has been transferred was also raised. Above all it was argued in that case that the petitioner was not a non-notified co-sharer, as an offer of sale was made by the vendor to the petitioner by letter dated 18th December, 2002, but the petitioner refused to such offer on the ground of financial inability.

13. For the reason as mentioned above the present revisional application challenging the order no.1 dated 19th October, 2020, have got no merit at all since the court below has exercised the jurisdiction vested in it, relying upon the judgment passed by Hon'ble Apex Court in **Barasat Eye Hospital (supra)** and the order impugned passed by the court below does not call for any interference.

14. In view of above the order dated 11.01.2022 passed by this court is hereby recalled.

15. C.O. 622 of 2021 is accordingly dismissed..

There will be no order as to costs.

16. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)