IN THE HIGH COURT AT CALCUTTA

(Civil Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

C.O. 2184 of 2016

Tapan Kumar Chanda

Vs.

Gobinda Kumar Bhakat and another

For the Petitioner	: Mr. Swarup Banerjee, Advocate Mr. Arindam Chatterjee, Advocate
Heard on	: February 06, 2023
Judgment on	: February 24, 2023

Bibhas Ranjan De, J.

1. This revision application under Article 227 is directed against the order dated 5.04.2016 passed Ld. Additional District Court 1st Court, Serampore, Hooghly in Civil Revision no, 80 of 2015 arising out of an order dated 13.07.2015 passed by Ld. Civil Judge (Junior Division) 2nd Court, Serampore, in connection with pre-emption Misc. Case No. 258 of 2014.

2. In disposing an application under 7 rule 11 of the Civil Procedure Code, 1908 Ld. Judge returned a finding that the plot in question was well demarcated and defined by boundaries having its unique separate identity and therefore pre-emption application under Section 8 of the West Bengal Land Reforms Act, 1956 (hereinafter referred to as W.B.L.R Act) was turned down. The application under order 7 rule 11 of Civil Procedure Code, 1908 (hereinafter referred to as C.P.C) was allowed.

3. Being aggrieved by and dissatisfied with the said order revisional application was filed before the Learned Additional District Judge, 1st Court Serampore, challenging the order passed by Ld. Civil judge (junior division) on the score that the petitioner being a co-sharer as well as contiguous Rayat having longest boundary of the property mentioned in schedule 'A1' to the pre-emption petition, is entitle to pre-empt the said land under section 8 of the W.B.L.R Act, 1956.

4. Ld. Judge on revision returned his finding on the issue of applicability of Section 8 of the W.B.L.R Act, in respect of land in question, in the affirmative. But, with regard to identity of the land in question Ld. Judge also found the land having its unique separate identity and that is why Ld. Judge did not consider the petitioner/pre-emptor as co-sharer of the land in question. In the opinion of the Ld. Judge petitioner/ pre-emptor also failed to prove that he is contiguous rayat of the respondent in respect of the land in question. Thereby, Ld. Judge, on revision, affirmed the observation of Ld. Civil Judge (junior Division) in the order dated 13.07.2015.

5. Feeling aggrieved by the order dated 05.04.2016 passed by Ld. Additional District Judge in civil revision no. 80 of 2015 the instant revision application has been filed by the petitioner/ preemptor with a prayer for setting aside the order dated 05.04.2016 passed in civil revision no. 80 of 2015 on the following grounds:-

- That both the Ld. Trial Judge as well as Ld. Revisional Court erred in holding that property in question being a shop rooms was demarcated by boundaries and intervening a common boundary wall having a unique and separate identity.
- That both the Ld. Civil Judge as well as Revisional Court failed to take into consideration that there was no deed of partition or any decree of Court for partition in respect of the property in question which was also not partitioned by metes and bound.

6. Background fact of this case, in brief, is as follows:-

- The land in question mentioned in the 'A' schedule property originally belong to one Subdh Chandra Nandy (since deceased) who died intested living behind his four sons namely Sujit Nandy, Pradip Nandy, Biswanat Nandy and Jagabandhu Nandy alias Jagannath Nandy . All the four sons jointly inherited 1/4th share each of the 'A' schedule property.
- Sujit Nandy, one of the four sons, sold out his undivided share to one Shivananda Bhakat by virtue of register sale deed no. 5627 of 1981. Another son Pradip Nandi also sold out his undivided share to Smt. Malati Bhakat (wife of Shibanada Bhakat) by virtue of register sale deed bearing no. 5597 of 1981. After demise of Shibananda Bhakat his wife Malati Bhakat and his daughter Smt. Purnima Prasad and Indrajit Bhakat became the owner of undivided 1/3rd share of 'A'

schedule property, described in 'A1' schedule to the pre-emption application. Thereafter, Malati Bhakat and Purnima Prasad transferred their joint share of 'A1' schedule property to Indrajit Bhakat by a deed no. 6569 of 2009.

- Jagabandhu Nandy sold out his 1/4th undivided share to petitioner/ Tapan Kumar Chandra by virtue of a register sale deed no. 7647 in the year 2005 and thereby petitioner became co-sharer of 'A' schedule property. One Rajendra Prasad Vakat purchased 1/4th share of Biswananth Nandi by a register sale deed no. 5570 in the years 1989. Thereafter, petitioner further purchased 1/4th share of the property from one Rajendra Prasad Vakat by virtue of sale deed being no. 5698 in the year 2007. As such petitioner / Tapan Kumar Chandra became joint owner/co-sharer of half share of the schedule plot of land and also in possession of that property by paying tax and his name was included in the present settlement record.
- The shop room of petitioner is situated in the southern side of the scheduled plot of land and shop of Indrajit Vakat/proforma respondent is situated in the northern side of the schedule plot of land intervening a common boundary wall.
- The said Indrajit Vakat/proforma respondent transferred 'A1' schedule property to Gobinda Kumar Bhakat/ opposite party no. 1/ stranger to the property clandestinely without giving any information/notice to the petitioner, by a register sale deed no. 1145 of 2014 showing exorbitant consideration price of Rs. 13,00,000/-.

The said 'A1' schedule property is contiguous to the property of the petitioner and also within the longest common boundary of the petitioners property. The aforesaid fact came to the knowledge of the petitioner on 14.11.2014. Further case of the petitioner is that price of 'A1' schedule property was not more than 5,00,000/-.

- That is why, petitioner Tapan Kumar Chanda filed misc. case before Ld. Civil Judge (junior division), 2nd Court, serampore claiming right of pre-emption against the opposite party no. 1 in respect of 'A1' schedule property by depositing 5,50,000/- including 10% interest on Rs. 5,00,000/- only and under took to deposit the balance consideration price determined afterwards by the Ld. Court.
- Govinda Kumar Bhakat OP no. 1 filed an application under order 7 rule 11 of Civil Procedure Code, 1908 challenging the maintainability of the misc. petition under Section 8 of the W.B.L.R Act, 1956 along with written objection to the miscellaneous petition.

Argument advanced:-

7. Ld. Advocate, Mr. Swarup Banerjee appearing on behalf of the petitioner concentrated on the issue of partition in compliance with the requirements prescribed in Section 14 of the W.B.L.R Act. It is submitted by Mr. Banerjee that neither any partition deed was ever executed between the co-sharer of the 'A' schedule property nor any decree for partition was passed by any Court of law in respect of that property. Therefore, according to Mr. Banerjee only demarcation of the 'A1' schedule property by a common boundary wall can not be said to be a partition within the meaning of Section 14 of the West Bengal Land Reforms Act, 1956.

8. On a query by this Court in respect of deposit of consideration money along with 10% of that amount at the time of filing misc case under Section 8 of the W.B.L.R Act, Mr. Banerjee has submitted that petitioner deposited Rs. 5,50,000/- including 10% of 5,00,000/- out of total exorbitant consideration price of Rs. 13,00,000/-. The submission made by Mr. Banerjee has been corroborated by the contents of paragraph 5 & 6 of the misc petition under Section 8 of the W.B.L.R Act, filed by the petitioner initially before the Court of Ld. Civil Judge (junior division), 2nd Court, Serampore, District Hooghly.

9. With regard to short deposit, Mr. Banerjee, referring to the case of ***Barasat eye hospital and others Vs. Kaustabh Mandal*** reported in ***2019(14) SC ALE 90***, submitted that Hon'ble Apex Court passed the judgment on 17.10.2019 whereas the pre-emption application was filed in the year 2014 which disposed of on 13.07.2015 in pre-emption misc Case no. 258 of 2014. Mr. Banerjee has further stated that Revisional Court also passed judgment prior to 17.10.2019.

10. Mr. Banerjee has further contended that, if a judgment create a legislation as precedent the same would be applicable with prospective operation of law and not by way of retrospective operation. In support of his contention, he relied on a case of ***Susanta Yadav vs Raupchand Dhar*** reported in ***(2013) 2 Cal HCN 453*** wherein Hon'ble Court observed that short deposit with 10% is not fatal.

11. Mr. Banerjee also referred a case of ***Chitturi Subbanna Vs. Kudapa Subbnna and others*** reported in ***(1965) AIR (SC) 1325***, in support of his argument in respect of prospective or retrospective effect of legislation.

12. In ***Chitturi Subbanna*** (supra) Hon'ble Apex Court held as follows:-

> ***" 22. The law with respect to the decree for mesne profits had been changing from time to time, but all the same expressions in the decree about the period for which mesne profits were to be awarded have been considered to be matters of construction and had been construed in accordance with the law at the relevant time."***

13. In my humble opinion, the principle laid down by the Hon'ble Apex Court in ***Chitturi Subbnna*** (supra) has no application on the issue of non-compliance of mandatory provision by way of not depositing consideration money along with 10% of that amount envisaged in Section 8 (1) of the W.B.L.R Act, 1956 while we are not dealing with any application under Section 8 of the Act filed prior to the date when it came into force.

14. Mr. Banerjee further relied upon a case of ***Thirumalai Chemicals Limited and union of India and others*** reported in ***(2011) 6 SCC 739*** wherein Hon'ble Apex Court laid down the following principle:-

> ***"16. Therefore, unless the language used plainly manifests in express terms or by necessary***

implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective."

15. Before parting with his argument, Mr. Banerjee has submitted that the case of ***Barasat eye hospital*** (supra) has no application in the instant case as pre-deposit in pre-emption case is a procedural law in character however affects the vested right adversely to be construed as prospective in view of the judgment passed in ***Thirumalai Chemicals Ltd***. (supra).

16. But, according to principle laid down in ***Thirumalai Chemicals limited*** (supra), as I understand, a statute divesting the vested right is to be construed as prospective unless language of the statute manifests in express terms or by necessary implication a contrary intention. Therefore, principle is not applicable to the issue before us.

17. In our case, petitioner filed an application under Section 8 of the W.B.L.R Act. Before entering into the contentious issue it would be convenient to recapitulate the Provision of Section 8 (1) of the West Bengal Land Reforms Act,1956 which runs as follows:-

"8. Right of purchase by co-sharer or contiguous tenant.—(1) 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 in the plot of land], [the bargadar in the plot of land] may, within three months of the date of such transfer, or] any [co-sharer of a raiyat in the plot of land] may, within three months of the service of the notice given under sub-section (5) of section 5, or any raiyat possessing land [adjoining such plot of land] may, within four months of the date of such transfer, appiy to the [Munsif having territorial jurisdiction,] for transfer of the said portion or [share of the plot of land] to him, subject to the limit mentioned in [section 14M,] on deposit of the consideration money together with a further sum of ten per cent of that amount: [Provided that if the bargadar in the plot of land, a [co-sharer of raiyat in a plot of land] and a raiyat possessing land [adjoining such plot of land] apply for such transfer, the bargadar shall have the prior right to have such portion or [share of the plot of land] transferred to him, and in such a case, the deposit made by others shall be refunded to them:] [Provided further that where the bargadar does not apply for such transfer and] a [co-sharer of a raiyat in the plot of land] and a raiyat possessing land [adjoining such plot of land] both apply for such

transfer, the former shall have the prior right to have such portion or [share of the plot of land] transferred to him, and in such a case, the deposit made by the latter shall be refunded to him:

[Provided also] that as amongst raiyats possessing lands [adjoining such plot of land] preference shall be given to the raiyat having the longest common boundary with the land transferred."

18. Both the Ld. Trial Court as well as Ld. Revisional Court took the issue of maintainability from the co-sharer point of view but, missed the issue of deposit of consideration money along with the application for pre-emption being a *sine qua non* to file an application claiming a weak right of pre-emption.

19. One question may arise that whether this Court can take the issue of deposit of consideration money along with the application for pre-emption while particular issue of deposit of consideration money was not taken care of either by the Ld. Trial Court or by the Revisional Court. Answer is yes, when pre-emptee/respondent/opposite party remained un-representate and also for non-compliance of mandatory provision of law.

20. In this case admittedly, petitioner/pre-emptor claimed a right of pre-emption by filing an application under Section 8 of the W.B.L.R Act, 1956 with the deposit of Rs. 5,00,000/- with 10% of that amount out of total consideration money of Rs. 13,00,000/-. Now the question is whether a pre-emptor can seek a right of pre-emption by making 'short deposit' on an undertaking to deposit remaining amount after an inquiry by the Trial Court under Section 9 of the West Bengal Land Reforms Act, 1956. Hon'ble Apex Court answered the question by laying down the principle in ***Barasat eye Hospital*** (supra) followed by a case of ***Abdul Matin Mullick vs Subrata Bhattachjee*** (Banerjee and others) reported in ***(2022) 7 Supreme Court Cases 147*** .

21. ***Barasat eye hospital*** (supra) held in paragraph 28,31 & 34 as follows:-

> ***"28.We are, thus, firmly of the view that the pre-requisite to even endeavour to exercise this weakright is the deposit of the amount of sale consideration and the 10% levy on that consideration, as otherwise, Section 8(1) of the said Act will not be triggered off, apart from making even the beginning of Section 9(1) of the said Act otiose.***
>
> ***31. We also believe that to give such a discretion to the pre-emptor, without deposit of the full consideration, would give rise to speculative litigation, where the pre-emptor, by depositing small eramounts, can drag on the issue of the vendee exercising rights in pursuance of the valid sale deed executed. In the present case, there is a sale deed executed and registered, setting out the consideration.***

34. 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."

22. Therefore, Hon'ble Apex Court in ***Barasat eye hospital*** (supra) focused on mandatory duty of the pre-emptor to comply the provision of Section 8 (1) by way of depositing entire consideration money and 10% interest on that amount along with the application seeking right of pre-emption. Hon'ble Apex Court discouraged the speculative exercise on behalf of the pre-emptor by deposit 50% of amount even. Such principle has been followed by the Hon'ble Apex Court in ***Adbul Matin Mullick*** (supra) by enforcing the text and spirit of the mandatory provision of law in Para 27 onwards as follows:-

" 27. The question now is as to what would be the nature of inquiry which has been envisaged to be carried out by the Munsif. If Section 9, as it reads, is perused, then first, the amount as mentioned in the sale transaction is to be deposited, as per sub-section (1) of Section 8 of the said Act. Once that amount is deposited, the next stage is for the Munsif to give notice of the application to the transferee. The transferee thereafter, when enters appearance within the time specified, can prove the consideration money paid for the transfer "and other sums". Such other sums, if any, are as "properly paid by him in respect of the land including any sum paid for annulling encumbrances created prior to the day of transfer, and rent or revenue, cesses or taxes for any period". The inquiry, thus envisaged, is in respect of the amount sought to be claimed over and above the stated sale consideration in the document of sale because, in that eventuality further sums would have to be called for, from the pre-emptor. In that context, the additional amount would have to be deposited. Even in the event

that a pre-emptor raises doubts regarding the consideration amount, enquiry into the said aspect can be done only upon payment of the full amount, along with the application. In this aspect, the phrase "the remainder, if any, being refunded to the applicant" would include to mean the repayment of the initial deposit made along with the application, if considered to be excess. To give any other connotation to these sections would make both, the latter part of Section 8 of the said Act and the inception part of Section 9 of the said Act, otiose. We do not think such an interpretation can be countenanced.

28. In our view, when the inquiry is being made by the Munsif, whether in respect of the stated consideration, or in respect of any additional amounts which may be payable, the pre-requisite of deposit of the amount of the stated consideration under Section 8(1) of the said Act would be required to be fulfilled. The phraseology "the remainder, if any, being refunded to the applicant" would have to be understood in that context. The word "remainder" is in reference to any amount which, on inquiry about the stated consideration, may be found to have been deposited in excess, but it cannot be left at the own whim of the

applicant to deposit any amount, which is deemed proper, but the full amount has to be deposited, and if found in excess on inquiry, be refunded to the applicant.

29. We are, thus, firmly of the view that the pre-requisite to even endeavour to exercise this weak right is the deposit of the amount of sale consideration and the 10% levy on that consideration, as otherwise, Section 8(1) of the said Act will not be triggered off, apart from making even the beginning of Section 9(1) of the said Act otiose.

30. We are not inclined to construe the aforesaid provisions otherwise only on the ground that there are no so-called "penal provisions" included. The provisions of Sections 8 and 9 of the said Act must be read as they are. In fact, it is a settled rule of construction that legislative provisions should be read in their plain grammatical connotation, and only in the case of conflicts between different provisions would an endeavour have to be made to read them in a manner that they co-exist and no part of the rule is made superfluous. [British India General Insurance Co. Ltd. v. Itbar Singh, AIR 1959 SC 1331] The interpretation, as we have adopted, would show that

really speaking, no part of either Section 8, or Section 9 of the said Act is made otiose. Even if an inquiry takes place in the Abdul Matin Mallick vs Subrata Bhattacharjee on 5 May, 2022 Indian Kanoon - http://indiankanoon.org/doc/161868841/ 6 aspect of stated consideration, on a plea of some fraud or likewise, and if such a finding is reached, the amount can always be directed to be refunded, if deposited in excess. However, it cannot be said that a discretion can be left to the pre-emptor to deposit whatever amount, in his opinion, is the appropriate consideration, in order to exercise a right of pre-emption. The full amount has to be deposited.

31. We may also note that, as a matter of fact, the pre-emptor in the present case i.e. the respondent has not filed any material to substantiate even the plea on the basis of which, even if an inquiry was held, could a conclusion be reached that the stated consideration is not the market value of the land.

32. We also believe that to give such a discretion to the pre-emptor, without deposit of the full consideration, would give rise to speculative litigation, where the pre-emptor, by depositing smaller amounts, can drag on the issue of the vendee exercising rights in pursuance

of the valid sale deed executed. In the present case, there is a sale deed executed and registered, setting out the consideration.

33. We are of the view that the impugned order and the view adopted would make a weak right into a "speculative strong right", something which has neither historically, nor in judicial interpretation been envisaged." 6.3 Therefore, deposit of the entire sale consideration with additional 10% of the sale consideration along with the pre-emption application is a statutory and mandatory requirement and it is a pre-condition before any further enquiry as contemplated under Section 9 of the Act is held. In the present case, admittedly, the pre-emptors had not deposited the entire sale consideration with additional 10% of the sale consideration along with the pre-emption application. The aforesaid aspects have not been considered either by the First Appellate Court or even by the High Court in this case.

34. Now, so far as the submission on behalf of the pre-emptors that they bona fidely 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 Act, 1955. 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.

35. 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 Act, 1955, 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-fulfillment of the condition mentioned in Section 8 of the Act.

36. 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 the case of Barasat Eye Hospital and Ors. (supra) and in light of the observations made by us hereinabove that alongwith 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 Act, 1955 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 Act, 1955.

37. In view of the above and for the reasons stated above, present appeals succeed. The impugned judgments and orders passed by the High Court and that of the First Appellate Court are hereby quashed and set aside. Consequently, the pre-emption application submitted by the original pre-emptors – respondent Nos. 1 to 3 herein stands dismissed. Respondent Nos. 1 to 3 – original pre-emptors are permitted to withdraw the amount, which they might have deposited either alongwith the pre- emption application and/or any subsequent deposit pursuant to the orders passed by the High Court.

Present appeals are allowed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

Pending application(s), if any also stands disposed of."

23. In the premises set forth above pre-emption application filed by the petitioner/pre-emptor together with deposit of Rs. 5,00,000/- with 10% of that amount cannot be said to be maintainable and liable to be dismissed.

24. Accordingly, Co. No. 2184 of 2016 under Article 227 of the Constitution of India, stands dismissed. Petitioner/pre-emptor is permitted to withdraw, which he might have deposited, together with interest, in case of the amount kept in an interest bearing deposit.

25. Pending application, if any, stand disposed of as well.

26. Let a copy of this judgement along with Trial Court record be transmitted back immediately.

27. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

28. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]