

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. No. 986 of 2022
Sainul Haque & Ors.
Vs.
Ismail Sk. & Ors.

For the Petitioners : Mr. B.N. Ray,
Ms. Shetparna Ray.

For the Opposite Parties : Mr. Partha Pratim Roy.

Hearing concluded on : 2.04.2024
Judgment on : 13.05.2024

Shampa Sarkar, J.:-

1. This revisional application arises out of an order dated March 8, 2022, passed by the Learned Additional District Judge, 1st Court, Lalbagh, Murshidabad in Miss Appeal No. 06 of 2021. The learned Appellate Court allowed the appeal filed by the preemptee/opposite party No.1. By the order impugned, the learned Court reversed the judgment and order dated January 29, 2021, passed by the Learned Civil Judge (Junior Division) Additional Court, Lalbagh, Murshidabad in Misc. Pre Case No. 36 of 2014.

2. The learned Appellate Court was of the view that the learned trial judge had wrongly allowed the pre-emption application by allowing the petitioner to deposit the remaining consideration amount along with 10% thereof, contrary to the decision of the Hon'ble Apex Court in the matter of ***Barasat Eye Hospital and ors. vs. Kaustabh Mondal*** reported in **(2019) 19 SCC 767**, The Appellate Court held that it was a settled position of law

that the pre-emptor was supposed to deposit full amount of consideration with 10% of the amount, within the specified time as per the statute. Such provision was sacrosanct. The right of pre-emption under Section 8 of the West Bengal Land Reforms Act, 1955 (hereafter referred to the said Act), had not been triggered off in favour of the petitioner in view of the short deposit. The statute mandated such deposit within the period of limitation prescribed in the section itself. The operative portion of the judgment and order passed by the learned Civil Judge, Junior Division indicated that the pre-emption application was filed without depositing the entire consideration with 10% of the amount. By the said judgment, the pre-emption case was allowed and the short deposit was permitted to be made good. After the decision of the Hon'ble Apex Court in ***Barasat Eye Hospital (supra)***, the other decisions of the Calcutta High Court which were relied upon by the pre-emptors, would not hold good. The ratio in ***Barasat Eye Hospital (supra)*** was not restricted to the facts of the case alone, but the same was a law laid down on the mandatory nature of Section 8 of the said Act with regard to the deposit of the entire amount along with 10% thereof.

3. The Appellate Court held that right of pre-emption was a weak right and the provision relating to enforcement of such right, must be strictly construed. The said Court further held that the decision of ***Barasat Eye Hospital (supra)*** would apply also to pending proceedings, as it was a law declared.

4. Mr. B.N. Ray, learned Advocate appearing on behalf of the petitioners submitted that the appeal was not maintainable at the instance of the opposite party No.1. The opposite party No.1, during the pendency of the

pre-emption application, had sold out the property to the opposite party Nos.2 to 6. As the opposite party No. 1 did not have any right, title and interest in the property, the order allowing the appeal at the instance of such a person who had lost his right to the property, was illegal and perverse.

5. His next contention was that in the matter of ***Abdul Odud Ali vs Emanulla Khan and ors.*** decided in ***C.O. No.785 of 2021***, a coordinate Bench had referred the question whether the ratio in ***Barasat Eye Hospital (supra)***, would apply in case of pre-emption by a non-notified co-sharer, to a larger Bench.

6. Mr. Partha Pratim Roy, learned Advocate appearing on behalf of the opposite party No.1/pre-emptee submitted that the opposite party No.1 was a party to the proceedings. Being aggrieved by the order passed by the learned Judge, he had preferred the appeal. Mere addition of the lis pendens transferees, would not denude the original transferee from protecting his title which passed to the subsequent purchasers. The sale which was made in his favour, would determine the fate of the sale in favour of the opposite party Nos. 2 to 6. He had every right to protect the sale.

7. The plaintiff was under no obligation to proceed against the lis pendens transferees as they would be automatically bound by the decision of the court in the pre-emption proceeding. Order 22 Rule 10 of the Code of Civil Procedure, did not require the plaintiff to implead lis pendens transferees. The law provided that the judgment rendered in a proceeding would bind also the lis pendens transferees. The natural corollary of such settled principle of law would be that the original transferee could always

protect his right and defend the proceedings for himself and also on behalf of those purchasers.

8. Here, the pre-emption was allowed. The decision affected both the pre-emptee and the subsequent purchasers. The decision in the pre-emption could well be challenged by any aggrieved party. Addition of the lis pendens transferees in the proceedings would not amount to their substitution in place of the pre-emptee i.e., opposite party No.1. All along the opposite party No.1 contested the proceeding and the pre-emption application was allowed against all the opposite parties, including the opposite party No.1.

9. Relying on a decision of a Division Bench of this Court in ***Gayatri Pal vs Netai Nandi @ Netia Nandi & Ors.*** decided in ***F.A. 113 of 2009***, Mr. Roy submitted that Order 22 Rule 10 was an additional right of a transferee to be added in the suit. The same did not take away the right of the original defendant to contest the proceedings. The appeal was a continuation of the suit and the opposite party No.1 was well within his right to prefer the appeal.

10. The next contention of Mr. Roy was that the learned appellate court had followed the decision of in ***Barasat Eye Hospital (supra)*** and arrived at the conclusion that the right of pre-emption had not been triggered off at any stage during the proceeding. Subsequent deposit of the balance consideration amount along with 10% of the said amount, as directed by the Court, was illegal. The decision of the trial court amounted to allowing a time barred claim. The non-notified co-sharer ought to have filed the pre-emption application within a year from the registration of the sale and such application could be entertained only if the precondition of depositing the

entire consideration amount with 10 percent thereof, had been fulfilled within the period of limitation.

11. Heard the learned Advocates for the respective parties.

12. Admittedly, the pre-emption application was filed against the opposite party No.1 and the transfer in favour of the opposite party No.1 was sought to be pre-empted. During the pendency of the pre-emption application, the opposite party No.1 sold the property in favour of the opposite party Nos.2 to 6. By an application on the Order 1 Rule 10 of the Code of Civil Procedure, the subsequent purchasers had been added in the proceeding, but the opposite party No.1 continued to contest the proceedings.

13. The addition of the subsequent purchasers who were lis pendens transferees, would not denude the opposite party No.1 from challenging the judgment of the trial court, by filing an appeal. The opposite party No.1 was an aggrieved party and had the right to prefer an appeal for protection his own sale and title derived from such sale. The decision in the pre-emption case would also determine the fate of the sale made by him in favour of the opposite party Nos.2 to 6.

14. The right of pre-emption had two concomitants. First, the right to offer of the thing sold as a primary and inherent right. Second was the secondary or remedial right to follow the thing sold. Thus, even if the lis pendens transferees had not preferred the appeal, the result of the suit would be binding on the lis pendens transferees. Even without their addition, the pre-emptor would be entitled to follow the land sold to the lis pendens transferees.

15. In the matter of *Raghunath (Dead) by LRS v. Radha Mohan (Dead) by LRS and Ors.*, reported in **(2021) 12 SCC 501**, the Hon'ble Apex Court held as follows:-

"11. In view of the aforesaid elucidation, it was opined that the pre-emptor has two rights : first, the inherent or primary right i.e. right for the offer of a thing about to be sold; and second, the secondary or remedial right to follow the thing sold. The secondary right of pre-emption is simply a right of substitution, in place of an original vendee and the pre-emptor is bound to show not only that his right is as good as that of that vendee, but that it is superior to that of the vendee. Such superior right has to subsist at the time when the pre-emptor exercises his right. The position is thereafter summarised in the following terms : (Bishan Singh case [Bishan Singh v. Khazan Singh, AIR 1958 SC 838] , AIR p. 841, para 11)

'11. ... (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e. the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.'"

16. In order to stop such eventuality, the statutory right of appeal was availed of by the original transferee/opposite party No.1/pre-emptee. Moreover, pre-emption was a right of substitution, but not a right of repurchase, that is, the pre-emptor would take the entire bargain and step into the shoes of the original vendee i.e., the opposite party No.1. It was a right to acquire the whole of the property sold. The right of the pre-emptor would have to be a superior right than that of the vendee or the person substituted in place of the vendee.

17. Under such circumstances, the original vendee could always protect his right derived from the sale and such protection would also enure to the benefit of the subsequent purchasers who stepped into the shoes of the original vendee.

18. The transferees could be brought on record either under the provision of Order 22 Rule 10 or under Order 1 Rule 10. Here, they were added under the provisions of Order 1 Rule 10. Had they not been added, the proceedings would continue against the opposite party No.1 and the decision would be binding on the opposite party Nos. 2 to 6. The transferees pendente lite were the representatives in interest of the opposite party No.1. They had acquired their interest from the opposite party No.1.

19. Order 41 Rule 33 provides that even if all parties aggrieved by an appeal do not prefer an appeal, the aggrieved parties could also support the appellant. Thus, the appeal at the instance of the opposite party number 1, i.e., the original vendee was maintainable. Any person aggrieved by a decision of court could prefer an appeal. A non-party to the proceeding, had to obtain leave of the court to prefer the appeal.

20. In ***Amit Kumar Shaw and another vs. Farida Khatoon and another***, reported in ***AIR 2005 SC 2209***, the Apex Court held that the application under Order 22 Rule 10 could be made also before the appellate Court, even though the devolution of interest occurred when the case was pending in the trial court. It was further held that under Order 22 Rule 10, no detailed enquiry at the stage of granting leave to proceed against such transferees, was contemplated. An alienee pendente lite was bound by the final decree that may be passed in the suit. Such an alienee could be

brought on record both under this rule as also under Order 1 Rule 10. Pending the suit, the transferees were not entitled as of right to be made parties to the suit, though the Court had a discretion to add them.

21. The Apex Court in the case of ***Dhurandhar Prasad Singh vs. Jai Prakash University and others***, reported in ***AIR 2001 SC 2552*** held that Order 22 Rule 10 C.P.C. applied in cases of assignment, creation and devolution of interest during the pendency of a suit and was based on the principle that the trial of a suit could not be brought to an end merely because the interest of a party in the subject matter of suit had devolved upon another, during its pendency. Such a suit could be continued with the leave of the Court by or against the person upon whom such interest had devolved. However, if no such step was taken under the provision, the suit could be continued against the original party and the person upon whom the interest had devolved would be bound by or would have the benefit of the decree, as the case may be. The legislature, while enacting Rules 3, 4 and 10 of the Order 22, has made clear-cut distinctions. In cases covered by Rules 3 and 4, if right to sue survived and no application for bringing legal representatives of a deceased party was filed within the time prescribed, there was automatic abatement of the suit and a procedure had been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the legislature has not prescribed any such procedure in the event of failure to apply for leave of the Court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit. This shows that the legislature was conscious of such eventuality and yet had not prescribed

that failure to implead subsequent transferees would entail dismissal of the suit. It was intended that the proceeding would continue by or against the original party, although he ceased to have any interest in the subject of the dispute.

22. The sum and substance of the above discussion is that the preemption case could continue against the opposite party No.1 even without adding the transferees. The result would be binding on the opposite party Nos.2 to 6. Had the preemption case been dismissed, an appeal from the decision in the preemption case being a continuation of the suit, could be filed against the opposite party No.1 even if he lost interest in the subject matter of the proceeding. On the same logic, the opposite party No.1 too, could prefer the appeal which was the continuation of the suit, as he was an aggrieved party.

23. In *M/s Ramnath Exports Pvt. Ltd vs Vinita Mehta and Anr.* reported in **(2022) 7 SCC 678**, the Hon'ble Apex Court held as follows:-

“8. After having heard learned counsel for parties and on perusal of the material available, we have read the provision of Section 96 of CPC, which provides for filing of an appeal from the decree by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Courts. It is also settled that an appeal is a continuation of the proceedings of the original court. Ordinarily, in the first appeal, the appellate jurisdiction involves a re-hearing on law as well as on fact as invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law are open for consideration by reappreciating the material and evidence. Therefore, the first appellate court is required to address on all the issues and decide the appeal assigning valid reasons either in support or against by reappraisal. The court of first appeal must record its findings dealing all the issues, considering oral as well as documentary evidence led by the parties.”

24. The law is otherwise. Had the pre-emptors transferred their share during the pendency of the pre-emption application, and ceased to be a co-

sharers or a contiguous owners, the pre-emption case could not be continued by them. Thus, the appeal at the instance of the opposite party No.1 was maintainable.

25. Now, the propriety of the decisions of the respective courts are discussed. In this case, admittedly, the pre-emption application was filed without deposit of the entire consideration money with 10% of the amount. The pre-emption application proceeded and was allowed in favour of the pre-emptor. The learned Trial Judge held as follows:-

“that the instant Misc. case filed under section 8 and 9 of the West Bengal Land Reforms Act, 1955 be and same is considered and allowed on contest against the opposite parties but without any order of cost.

The right, title and interest of the opposite party no.1 by virtue of registered deed of sale bearing no.3531/14 registered in book No.1, CD Vol No.8 page 1287 to 1294 of A.D.S.R., Bhagwangola, Murshidabad do vest in favour of the petitioners subject to deposit of remaining

Contd... Order dtd. 29.01.21 (19) Misc. Pre Case No. 36 of 2014 consideration amount within stipulated time.

The petitioner is directed to deposit remaining consideration amount along with statutory interest i.e. Rs.(6,06,812/-+10% of 6,06,812/-) 33,000/- Rs 6,34,493/- in the credit of opposite parties within 15 days from the date of pronouncement of this order.

The opposite parties are at liberty to withdraw the consideration money together with compensation money which is to be deposited in their credit within given time along with the amount so deposited at the time of institution of this case through challan dated 15/09/2014.

Copy of this order be sent to the concerned A.D.S.R., Bhagwangola, Murshidabad for his information and to make necessary endorsement in the Volume Book of the impugned deed.”

26. Aggrieved, the pre-emptee/original vendee preferred an appeal. The subsequent purchasers were also parties to the proceeding in the appeal. The learned appellate court held that the order passed in the Misc. Pre-

emption Case suffered from material irregularity and illegality as the same was contrary to the law laid down by the Hon'ble Apex Court.

27. The pre-emption application had been filed on the ground of co-sharership. There was a short deposit at the time of filing of the application. The full consideration money along with 10%, had not been deposited for the entire period, from filing of the application sometime in 2014 till the disposal of the same on January 29, 2021. The learned trial court permitted the deposit to be made while allowing the preemption application.

28. In **Barasat Eye Hospital (supra)** the scheme of Section 8 and the law relating to pre-emption was interpreted. The Hon'ble Apex Court declared the law, inter alia, holding that once the time period to exercise a right was sacrosanct, the deposit of the full amount within such time period was also sacrosanct. The two went hand-in-hand. The Hon'ble Apex Court was of the firm view that the pre-requisite to exercise this weak right was the deposit of the amount of sale consideration and the 10% levy on that consideration, or else, the right under Section 8 of the said Act would not be triggered. The concluding paragraph of the said judgment indicates the purpose behind the decision and the discussion which led to the ratio laid down by the Hon'ble Apex Court. The conclusion read as follows:-

“39. We hope that our view should put the controversy in respect of this ‘weak right’ of pre-emption to rest.”

29. In paragraphs 1 and 2 of the said judgment, the Hon'ble Apex Court traced the law relating to pre-emption in general. It was observed that the right of pre-emption had its origin in the Mohammedan rule, based on customs which came to be accepted in various courts, primarily located in

the north of India. The law was largely absent in the south of India. The law came to be incorporated in various statutes, both, prior to coming into force of the Constitution of India and even thereafter. The constitutional validity of such laws of pre-emption came to be debated before the Constitutional Bench of the Hon'ble Supreme Court in **Bhau Ram v. Baij Nath Singh** reported in **AIR 1962 SC 1476**. Even though there were views expressed that the right of pre-emption was opposed to the principles of justice, equity and good conscience, it was felt that the reasonableness of those statutes had to be appreciated in the context of a society where there were certain privileged classes holding land and, thus, there could be some utility in preventing a stranger from acquiring property in an area which had been populated by a particular fraternity or class of people. This aspect was sought to be balanced with the constitutional scheme, prohibiting discrimination against citizens on the grounds of religion, race, caste, sex, place of birth or any of them, under Article 15 of the Constitution.

30. With the passage of time, such laws of pre-emption, which existed in many states were abrogated, and it was only within a limited jurisdiction that the said law prevailed.

31. One such enactment still in existence is the West Bengal Land Reforms Act, 1955. The Apex Court held that it was the said enactment with which the court was concerned and the very right of pre-emption and the manner of its application under the said Act were debated before the Court in the said case. The definitions of raiyat and bargadar which were relevant for the interpretation of the law were set out, considered and discussed. The provisions of Sections 8 and 9 were also set out, considered and discussed.

In paragraph 10 of the said judgment, the decision of the Hon'ble Apex Court in ***Bishan Singh vs. Khazan Singh***, reported in ***AIR 1958 SC 838***, a four Judges Bench was relied upon. It was opined that a pre-emptor had two rights, first, the inherent or primary right, i.e., right for the offer of a thing about to be sold, and second, the secondary or remedial right to follow the thing sold. The secondary right of pre-emption was simply a right of substitution, in place of the original vendee and the pre-emptor was bound to show not only that he had the right as good as the of that vendee, but superior to that of the vendee. The superior right had to subsist at the time when the pre-emptor exercised the right. The relevant portion of the said decision in ***Bishan Singh (Supra)*** was quoted and accepted by the Hon'ble Apex Court. From the elucidation of the legal history and the legal position with regard to the right of pre-emption, the Apex Court held that the right of pre-emption was "a very weak right". That being the character of the right, any provision to enforce such a right was to be strictly construed. Relying on the decision in ***Gopal Sardar v. Karuna Sardar***, reported in ***(2004) 4 SCC 252***, the Hon'ble Apex Court held that just like Section 5 of the Limitation Act, 1963 could not be pressed into service in aid of a belated application made under Section 8 of the said Act seeking condonation of delay, similarly, the right of pre-emption being a statutory right, was to be strictly exercised in terms of the said section, with no place for consideration of equity.

32. The decision, in ***Kedar Mishra v. State of Bihar*** reported in ***(2016) 7 SCC 478*** was also relied upon. In paragraph 17, the Court concluded that in order to trigger off the right of pre-emption, deposit of the entire amount

stated as the consideration plus 10% of such consideration, was a mandatory pre-condition. The question of recourse to Section 9 would not arise till the amount was deposited. Paragraph 22 of the judgment dealt with the discussions. The Apex Court had consciously decided to set forth the entire history of the law of pre-emption. The Hon'ble Apex Court observed that the decision would have larger ramifications than mere adjudication of the lis before it, especially because the Apex Court was informed that there were other similar cases, pending consideration before the Calcutta High Court.

33. The historical perspective set forth by the Constitution Bench as far back as in 1962 in **Bhau Ram (supra)** was relied upon. The elucidation of the law laid down in **Bishan Singh (supra)** were set out in great detail. The Hon'ble Apex Court interpreted the law of preemption in West Bengal and held that preemption was not a right in respect of which equitable consideration would gain ground. The decision in **Gopal Sardar (Supra)** was read in its true enunciation and spirit. It was held that sanctity was attached to both the amount and the time frame. Sanctity could not only be attached to the time frame within which the application had to be filed and not to the amount to be deposited. The Apex Court held as the commencement of Section 9 was with the statement "on the deposit mentioned in sub-section (1) of section 8 being made" even in order to hold an enquiry under Section 9, the first requirement was deposit of the amount as mentioned in the sale deed along with the 10% thereof. Once such deposit was made, the next stage was for the learned trial court to give

notice of the application to the transferee. The Hon'ble Court concluded thus:-

“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 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.

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. [Gopal Sardar v. Karuna Sardar, (2004) 4 SCC 252]

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.”

34. Upon a meaningful reading of the decision, it is evident that the object of the said decision was to put to rest the controversy in respect of exercise of such a weak right, especially in the matter of short deposits. The Apex court took note of the fact that the decision would have a far larger ramification, as many cases were pending before this High Court on this point. Secondly, the law was in existence since 1955, but the interpretation of the same in respect of the requirement to deposit the consideration amount was finally put to rest in the decision of **Barasat Eye Hospital (supra)**. It is a law declared on the point and will have a retrospective effect. The Hon'ble Apex Court was of the view that if short deposits were allowed, a weak right would give rise to speculative suits.

35. The reference to **Abdul Odud Ali (supra)** and the contention that a reference was pending, will not reverse the fate of this case.

36. Abdul Matin Mallick vs. Subrata Bhattacharjee (Banerjee) reported in **AIR 2022 SC 2175** was also dealing with the issue of short deposit by a non-notified co-sharer, and the objection was with regard to inflated amount quoted in the sale deed. The Hon'ble Apex Court applied the law declared by **Barasat Eye Hospital (supra)** in the said case as well. The relevant portions are quoted below:-

"2.1. That the disputed property in question, which was the subject-matter of application for pre-emption before the Appropriate Authority under the West Bengal Land Reforms Act, 1955 (hereinafter referred to as "the 1955 Act") belonged to one Khudiram Bhattacharya, who died on 17-4-2001 leaving behind him, surviving his widow Purnima Bhattacharya who also died on 14-8-2001 and three sons, namely, Subrata, Debabrata and Ratan (the pre-emptors herein) and two daughters Kalyani and Alpana, the vendors of the pre-emptee (appellant herein). On the death of Khudiram Bhattacharya and his widow, the aforesaid three sons and two daughters inherited the property in question each having undivided 1/5th share therein. The

daughters of the original owner — Khudiram Bhattacharya sold their undivided 2/5th share in the property in question to the appellant herein — pre-emptee, Abdul Matin Mallick vide registered sale deed dated 23-11-2011. The sale in favour of the appellant by the daughters of the said Khudiram Bhattacharya was sought to be pre-empted by the sons of said Khudiram Bhattacharya on the ground that their sisters have transferred their undivided share in the property in question to the appellant, a stranger to the said property without serving statutory notice under sub-section (5) of Section 5 of the 1955 Act. The said application under Section 8 of the 1955 Act was registered as Misc. Pre-emption Case No. 8 of 2012 before the learned trial court.

6.1. Thus, as observed and held by this Court in the aforesaid judgment in Bishan Singh [Bishan Singh v. Khazan Singh, AIR 1958 SC 838] , the right of pre-emption is “a very weak right”. That being the character of the right, any provision to enforce such a right must, thus, be strictly construed. [Barasat Eye Hospital [Barasat Eye Hospital v. Kaustabh Mondal, (2019) 19 SCC 767 : (2020) 4 SCC (Civ) 810]]

6.2. The submission/contention on behalf of the pre-emptee that, as in the present case, along with the pre-emption application, the pre-emptors did not deposit the entire sale consideration with 10% additional sale consideration, and therefore their pre-emption application was not required to be further considered and no further enquiry as contemplated under Section 9 of the 1955 Act would be maintainable is concerned, identical question came to be considered by this Court in Barasat Eye Hospital [Barasat Eye Hospital v. Kaustabh Mondal, (2019) 19 SCC 767 : (2020) 4 SCC (Civ) 810] wherein at paras 23 to 33, it is observed and held as under : (SCC pp. 779-81)

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 precondition 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.

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/permited 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.

10. In view of the above and for the reasons stated above, the present appeals succeed. The impugned judgments and orders passed by the High Court [Abdul Matin Mallick v. Subrata Bhattacharjee (Banerjee), 2019 SCC OnLine Cal 3853], [Subrata Bhattacharjee (Banerjee) v. Abdul Matin Mallick, 2021 SCC OnLine Cal 3548] and that of the first appellate court are hereby quashed and set aside. Consequently, the pre-emption application submitted by the original pre-emptors — Respondents 1 to 3 herein stands dismissed. Respondents 1 to 3 — original pre-emptors are permitted to withdraw the amount, which they might have deposited either along with the pre-emption application and/or any subsequent deposit pursuant to the orders passed by the High Court.

37. In the decision of **Abdul Matin (supra)**, a similar view was taken by the Hon'ble Apex Court upon relying on the decision in **Barasat Eye Hospital (supra)**. The Hon'ble Apex Court was dealing with Misc. Preemption Case No.8 of 2012 which had been filed before the trial court. The Misc. preemption case was dismissed by the trial court. Misc. Appeal No.7 of 2014 was preferred. The Misc. Appeal was allowed and the order of the learned trial court was set aside. The application for pre-emption was allowed on the ground of co-sharership. The first appellate court allowed deposit of the balance consideration money. Aggrieved, the pre-emptee approached the High Court. The High Court dismissed the revisional application by upholding the order of the first appellate court and also upholding the decision of the first appellate to allow a belated deposit of the balance consideration money. Such order was challenged in Civil Appeal No.3500 of 2022. In such a pending proceeding, the decision of **Barasat Eye Hospital (supra)** was referred to and it was held that the learned lower appellate court was not justified in permitting the preemptor to deposit the balance consideration money with additional 10% and the High Court was also not justified in upholding such decision.

38. Thus the Apex Court applied the decision of **Barasat Eye Hospital (supra)** even in a pending pre-emption case of 2012 filed on the ground of co-sharership, and set aside the order of the High Court passed in C.O.4266 of 2016. The decision of **Barasat Eye Hospital (supra)** was rendered in 2019.

39. In the decision of ***Chitta Ranjan Mishra vs. Subrata Majhi and ors***, decided in **C.O. No. 451 of 2023**, this Court discussed the scope and the effect of the decision in ***Barasat Eye Hospital (supra)***. The said application for preemption in the case decided by this Court was also on the ground of non-notified co-sharership. This Court held that the law laid down in ***Barasat Eye Hospital (supra)*** was a law declared and it had a retrospective effect. The relevant portions are quoted below:-

“Upon a meaningful reading of the decision, it is evident that the object of the said decision was to put to rest the controversy in respect of exercise of such a weak right, especially in the matter of short deposits. The Apex court took note of the fact that the decision would have a far larger ramification, as many cases were pending before this High Court on this point. Secondly, the law was in existence since 1955, but the interpretation of the same in respect of the requirement to deposit the consideration amount was finally put to rest in the decision of ***Barasat Eye Hospital (supra)***. It was a law declared on the point and will have a retrospective effect. The Hon’ble Apex Court was of the view that if short deposits were allowed, a weak right would give rise to speculative suits.

In the decision of ***Abdul Matin (supra)***, a similar view was taken by the Hon’ble Apex Court upon relying on the decision in ***Barasat Eye Hospital (supra)***. The Hon’ble Apex Court was dealing with Misc. Preemption Case No.8 of 2012 which had been filed before the trial court. The Misc. preemption case was dismissed by the trial court. Misc. Appeal No.7 of 2014 was preferred. The Misc. Appeal was allowed and the order of the learned trial court was set aside. The application for pre-emption was allowed on the ground of co-sharership. The first appellate court allowed deposit of the balance consideration money. Aggrieved, the pre-emptee approached the High Court. The High Court dismissed the revisional application by upholding the order of the first appellate court and also upholding the decision of the first appellate to allow a belated deposit of the balance consideration money. Such order was challenged in Civil Appeal No.3500 of 2022. In such a pending proceeding, the decision of *Barasat Eye Hospital (supra)* was referred to and it was held that the learned lower appellate court was not justified in permitting the preemptor to deposit the balance consideration money with additional 10% and the High Court was also not justified in upholding such decision.

Thus the Apex Court applied the decision of ***Barasat Eye Hospital (supra)*** even in a pending preemption case of 2012, and set aside the

order of the High Court passed in C.O.4266 of 2016. The decision of Barasat Eye Hospital (*supra*) was rendered in 2019.

In the decision of ***Assistant Commissioner, Income Tax Rajkot v. Saurashtra Kutch Stock Exchange Ltd., reported (2008) 14 SCC 171***, the Hon'ble Apex Court held as follows:-

'35. In our judgment, it is also well settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the court to pronounce a "new rule" but to maintain and expound the "old one". In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.'

In the decision of ***P.V. George and Others v. State of Kerala and others, reported in (2007) 3 SCC 557***, the Hon'ble Apex Court held that the law declared by a court will have retrospective effect if not otherwise stated to be so specifically.

The decision of the Hon'ble Apex Court was a law declared on the point that deposit of the full amount stated as the sale consideration together with further deposit of 10% was a precondition to filing an application under Section 8(1) of the West Bengal Land and Land Reforms Act, 1995. The conflicting legal position was clarified, interpreted, rectified and altered. The decision has a retrospective effect and will apply to pending proceedings."

40. Thus, the decision of the Hon'ble Apex Court is a law declared on the point that deposit of the full amount stated as the sale consideration together with further deposit of 10% of such consideration was a precondition to filing an application under Section 8(1) of the West Bengal Land and Land Reforms Act, 1995. The conflicting legal position was clarified, interpreted, rectified and altered. The decision will apply to all pending proceedings. The learned appellate court did not commit any error of law. The order if the learned trial Judge was in violation of the decisions of the Hon'ble Apex Court in ***Barasat (supra)*** and ***Abdul Matin Mullick (supra)***.

- 41.** The revisional application is dismissed.
- 42.** The order of the learned appellate court is upheld.
- 43.** There shall be no order as to costs.
- 44.** Parties are to act on the basis of the server copy of this judgment.

(Shampa Sarkar, J.)