

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 1705 of 2023

Swajit Sankar Mookherjee
Vs.
Sri Goutam Ghosh & Ors.

For the petitioner : Mr. Probal Kr. Mukherjee, Sr. Advocate,
Mr. Somnath Roy Chowdhury,
Mr. Kanak Kiran Bandyopadhyay

For the opposite parties : Mr. Partha Pratim Roy,
Mr. Dyutiman Banerjee

Hearing concluded on: 29.02.2024

Judgment on: 14.03.2024

Shampa Sarkar, J.:-

1. The present revisional application is directed against the judgment and order dated December 22, 2022, passed by the learned Additional District Judge, Fast Track, 2nd Court, Krishnagar, Nadia, in Misc. Appeal No.22 of 2021.

2. The learned appellate court allowed the appeal filed by the pre-emptees upon reversing the judgment and order dated September 10, 2021, passed by the learned Civil Judge (Junior Division), 2nd Court, Krishnagar, Nadia, in Misc. Pre-emption Case No.18 of 2016. The learned trial judge had allowed the pre-emption application and decreed the same in favour of the petitioner. The Misc. Appeal, challenging the said order of pre-emption was filed on the following grounds:-

(a) That the order passed by the learned court was erroneous, illegal, arbitrary and without jurisdiction.

(b) The order suffered from error of law and fact.

(c) The documentary evidence was not considered and the decision was based on surmise and conjecture. The order did not have any foundation in the eye of law. Bijay Sankar Mukherjee had sold his entire share to the opposite parties. The question of pre-emption would not arise as the co-sharership had ceased. As Bijay Sankar Mukherjee had given a series of letters, showing his intention to sell the property, the pre-emptor could not be treated as a non-notified co-sharer. The pre-emption application was barred by limitation as it was not filed within three months from completion of the sale.

3. The learned appellate court allowed the Misc. Appeal on the ground that the preemption case was not maintainable as the preemptor did not deposit the entire sale consideration along with 10% of the amount when the preemption application was filed. On the issue of co-sharership, the learned appellate court opined that as a part of the portion of land occupied by a co-sharer was sold, the pre-emptor was rightly held to be a non-notified co-sharer. The period of limitation would be one year from the date of completion of the sale. The learned appellate court also held that the letters which were issued by Bijay Sankar Mukherjee, to Supriyo Mukherjee, could not be treated as a notice as contemplated under Section 5(5) of the West Bengal Land Reforms Act, 1955 (hereinafter referred to as the said Act).

4. The learned appellate court however accepted the contention of the pre-emptees that the dictum of law declared by the Hon'ble Apex Court in ***Barasat Eye Hospital and Ors vs Kaustabh Mondal*** reported in **(2019) 19 SCC 767**, had not been followed by the learned trial judge. It was held that a point of law could be considered in the appeal. Even though the interlocutory order by which the balance consideration was allowed to be deposited had not been challenged, it was held that the appeal court could re-appreciate the maintainability of the preemption case in the appeal. According to the learned appellate court, an order contrary to the provisions of law did not have any legal sanctity. Therefore, the issue of non-compliance of the mandatory condition of depositing the entire consideration money in terms of Section 8 of the West Bengal Land Reforms Act with 10% of the amount along with the pre-emption application, was a question of law and not a question of fact. Such issue could be raised before the appellate court.

5. Interpreting the provision of Order 41 Rule 2 of the Code of Civil Procedure, it was held that the appellate court would not be confined to the grounds of objections set-forth in the memorandum of appeal. However, the party who would be affected by a decision in this regard should be given sufficient opportunity to contest such ground sought to be decided by the appellate court.

6. In the case in hand, the Misc. Appeal was contested by the pre-emptor and several decisions of the Calcutta High Court were cited. In those decisions the courts had held that there was no hard and fast rule as per Section 8 and Section 9 of the said Act, that the moment the consideration

money was assessed by the court, the pre-emptor had to deposit the same instantly. The amount could be paid later, even when the application for preemption was allowed. Reference was also made to the decision in *Sk Abdul Odud Ali vs Emanulla Khan and Ors.* Arguments were advanced.

7. Learned appellate court, upon considering the decisions in **Barasat Eye Hospital** (supra) and **Abdul Matin Mallick vs. Subrata Bhattacharjee and Ors**, reported in **(2022) 7 SCC 147**, arrived at the conclusion that in the case in hand, as the pre-emptor had not deposited the entire consideration money along with 10% as per the sale deed, but had proceeded with the case by depositing a part of the amount, the preemption application was not maintainable. The appeal was allowed upon interpretation of Section 8(1) and 9(1) of the said Act.

8. Aggrieved, the revisional application has been filed by the pre-emptor on the following grounds : (a) The application for pre-emption had been filed contending that the actual consideration of the impugned transfer was Rs.5 lakh, but an ostensible amount of Rs.12 lakh had been shown. (b) Rs.5 lakh towards consideration and Rs.50,000/- being 10% of the amount was rightly deposited on September 6, 2016 along with the application. (c) On the basis of the application, the learned trial judge proceeded with the hearing and when it was detected that the balance consideration money had not been paid in terms of the decision in **Barasat Eye Hospital (supra)**, by an interlocutory order dated March 12, 2020, the pre-emptor/petitioner was directed to deposit the balance consideration along with the 10% of the amount. (d) The pre-emptor deposited the sum of Rs.7,70,000/- by a challan dated February 20, 2021, in terms of the interlocutory order. The said order

was not challenged by the pre-emptees by initiating appropriate proceeding, meaning thereby, the pre-emptees had waived their right to challenge the said order. The matter had attained finality and the issue of short deposit could not be raised before the appellate court.

9. After deposit of the balance amount, the learned Civil Judge (Junior Division) 2nd Court, Krishnagar, Nadia, allowed the pre-emption application on contest and declared that the right, title and interest of the preemptees acquired by virtue of the deed of sale no.2581 of 2016, registered on March 26, 2016, in the office of DSR, Nadia, would vest in the petitioner/pre-emptor. The preemptees were granted liberty to withdraw the consideration amount along with 10%, amounting to Rs. 13,20,000/-.

10. Mr. Probal Kr. Mukherjee, learned Senior Advocate appearing on behalf of the petitioner submitted that the learned appellate court could not have gone beyond the grounds taken in the appeal, thereby making out a third case of non-maintainability of the pre-emption application. Reliance placed by the appellate court on the decision of the Hon'ble Apex Court in **Gopal Sardar v. Karuna Sardar**, reported in (2004) 4 SCC 252, **Barasat Eye Hospital** (supra) **Abdul Matin Mallick** (supra), was on an incorrect appreciation of law and facts.

11. It was submitted by Mr. Mukherjee that the defect in the pre-emption application and question of non-maintainability of the pre-emption case could not be raised as a new ground in the appeal. In the cases before the Hon'ble Apex Court, that is, **Barasat Eye Hospital** (supra) and **Abdul Matin Mallick** (supra), the orders by which the balance consideration money were allowed to be deposited by the courts, had been challenged. As

such, there was no waiver in those cases. In the instant case, after the short deposit was made good long before the decree was passed, and the order remained unchallenged, the appellate court could not have gone beyond the grounds taken in the appeal and decided the question of maintainability of the pre-emption application.

12. Referring to Section 148 of the Code of Civil Procedure, Mr. Mukherjee urged that the court always had the power to enlarge the period of deposit of money. As the said Act mandated that the pre-deposit would have to be made within a certain period, the same could be enlarged by the learned court in exercise of powers under Section 148 of the Code of Civil Procedure. The defect in the maintainability of the pre-emption application had been cured by the learned trial judge by passing the interlocutory order allowing the petitioner to deposit the balance consideration before the proceedings were disposed of. Once such balance payment was made, the payment related back to the date of the filing of the application and the illegality in the pre-emption application was cured from its date of filing.

13. Mr. Mukherjee next submitted that in the absence of any specific ground questioning the defect or irregularity in the order dated March 12, 2020, with regard to the payment of short deposit, the preemptees were debarred from challenging the said pre-emption proceedings on such ground. The interlocutory order had attained finality. Such proposition of law was supported by the decision in ***P.K. Palani Swami vs. A Dhrumukham***, reported in **2009 (9) SCC 173**.

14. Mr. Mukherjee drew an analogy with the provisions of Section 4 of the Court Fees Act, 1870, and the decision of the Apex Court, that deficit court

fees could be deposited upon the court granting extension of time and the delayed deposit of court fees would not result in outright rejection of the plaint. In terms of Section 149 of the Code of Civil Procedure, when deficit court fees were paid by the order of court, the same would be deemed to have been paid in the first instance. Similarly, when the consideration money was paid on the basis of the interim order passed by the learned trial court during the hearing of the pre-emption application, the deposit should be deemed to be treated as a payment made in the first instance, that is, at the time of filing of the pre-emption application. Such being the legal proposition, the decision of the learned appellate court that the pre-emption application was not maintainable as the same was not accompanied by full consideration money along with the 10% levy, was unjustified and contrary to the provisions of law, especially Section 149 of the Code of Civil Procedure.

15. In support of his contention that an order passed by a court of competent jurisdiction became final and remained valid until it was set aside, Mr. Mukherjee relied on the decision of **State of Kerala vs. M. K. Kunhikannan Nambiar Manjeri Manikoth**, reported in **(1996) 1 SCC 435**.

16. Referring to Halsbury's Laws of England , 4th Edition, Vol-1(1), Paragraph 26, Page-31, Mr. Mukherjee submitted that even if an act was wrong or lacking in jurisdiction, the same subsisted and remained fully effective unless and until set aside by a court of competent jurisdiction. Until its validity was challenged, its legality was preserved. Similarly, in this case the sanctity of the interlocutory order allowing deposit of the balance consideration was preserved.

17. Further reference was made to ***Judicial Review of Administrative Action, de Smith, Woolf and Jowell, 1995 Edn., at Pages 259 to 260.***

The law discussed by the said authority was that all decisions were presumed to be correct, until set aside or otherwise held invalid by a court of competent jurisdiction.

18. Similar reference was made in ***Wade and Forsyth in Administrative Law, 7th Edn. 1994 at Pages. 341-42.*** A proposition was relied upon by Mr. Mukherjee, to substantiate his claim that every unlawful administrative action, however invalid, was merely voidable, but it was no more than truism that in most situations only way to resist unlawful acts, was by recourse to law. Even an order not made in good faith, would still be an act capable of legal consequences. It bore no brand of invalidity upon its forehead, unless necessary proceedings were taken out as per law, to establish the law of invalidity to get it quashed or otherwise upset.

19. Relying on the matter of ***Sahid Ali vs. Abdul Kasem***, reported in ***(1994) 1 CHN 202***, Mr. Mukherjee submitted that Section 8 and 9 of the said Act, read together, did not require simultaneous deposit of consideration money with the application for pre-emption.

20. Further reliance was placed on ***Mahant Ram Das vs. Ganga Das*** reported in ***1961 SCR (3) 763***, in support of the contention that procedural orders though preemptory in nature were in essence passed *in terrorem*, so that dilatory litigants might put themselves in order and avoid delay. They did not, however, completely estop a court from taking note of events and circumstances which happened within the time fixed and consequently extend the time for compliance. For example, if the preemptor had started

with the full consideration money to deposit in court, but was robbed on the way, he could ask for extension of the time. The court was not powerless to extend it. Section 148 deserved to be read down in this case to mean that if sufficient causes existed or events were found to be beyond control of the party, the court would have the inherent power to extend the time to pay up the deficit amount.

21. The decision in ***Barasat Eye Hospital (supra)*** and ***Abdul Matin Mallick (supra)***, according to Mr. Mukherjee, were delivered under completely different factual contexts.

22. It was submitted by Mr. Mukherjee that the revisional application should be allowed on the aforementioned contentions and grounds.

23. Mr. Partha Pratim Roy, learned advocate for the opposite parties/pre-emptees submitted that in the memorandum of appeal, grounds were taken with regard to error of law and lack of jurisdiction of the learned court in allowing the present case. Further grounds that the cases of the respective parties were not considered in their true perspective, and the order did not have any foundation in the eye of law were taken. The ground of erroneous exercise of jurisdiction would cover the ground of non-maintainability and non-compliance of the orders of the Apex Court.

24. It was further contended by Mr. Roy, that the Code of Civil Procedure allowed the learned appellate court to decide all points of law, even if the same were not urged in the suit. That the learned appellate court could decide matters, as if, it was the court of original jurisdiction. In this case, short deposit was evident from the records and also from the order of the learned trial judge. The learned trial judge did not have any authority under

the law to disregard the ratio of the Hon'ble Apex Court in the case of **Barasat Eye Hospital (supra)** and direct payment of the balance consideration. Such order itself was a misreading of the judgment in **Barasat Eye Hospital (supra)** and contrary thereto.

25. Mr. Roy further submitted that the reference made by the learned coordinate bench in the matter of **Sk. Abdul Odud Ali vs. Emanulla Khan and Others decided in C.O. No. 785 of 2021**, would not be required to be answered at all. In **Abdul Matin Mallick (supra)** the Apex Court followed the decision of **Barasat Eye Hospital (supra)** and held that deposit of entire sale consideration with the additional 10% of the actual consideration along with pre-emption application, was a mandatory statutory requirement. It was a pre-condition which required strict compliance. Before any further query as contemplated under Section 9 of the Act was held, the deposit had to be made. The decision of **Abdul Matin Mallick (supra)** was rendered in a pre-emption case filed by a non-notified co-sharer. The reference in **Abdul Odud Ali (Supra)**, stood answered. In terms of the ratio in **Barasat Eye Hospital (supra)** and **Abdul Matin Mallick (supra)**, the pre-emptor was mandated to deposit the entire consideration and additional 10% and only thereafter, further enquiry could be completed under Section 9 in order to decide whether the consideration money as set forth in the deed of sale was inflated or not. Unless the pre-condition of deposit of sale consideration with additional 10% was complied with, the pre-emption application would not be maintainable and the right of the preemption would not be triggered off.

26. In the instant case, the pre-emption application was filed in 2016 and the consideration money was deposited in sometime in 2021. Thus, the right

of pre-emption would not be triggered off before such deposit was made. By the time the deposit was made, the right of preemption on the ground of non-notified co-sharership, had become barred by limitation.

27. Mr. Roy relied on ***Barasat Eye Hospital (supra)*** and submitted that when an enquiry was made by the court whether in respect of the stated consideration or in respect of any additional amount which would be payable, the pre-requisite of deposit of the consideration amount as per the sale deed was to be fulfilled. The phraseology, the remainder, if any, be refunded to the applicant would have to be understood in that contest. The word 'remainder' would mean that if it was found that excess amount had been deposited, the excess amount would be refunded. It was not the whim of the preemptor to deposit any amount which he deemed to be the actual consideration.

28. Mr. Roy relied on the decision of this court passed in **C.O. No. 451 of 2023** in the matter of ***Chitta Ranjan Mishra vs. Subrata Majhi and ors.*** This court was of the view that the law declared by the Hon'ble Apex Court in ***Barasat Eye Hospital (supra)*** would have retrospective effect. It was a binding precedent under Article 141 of the Constitution of India.

29. Having considered the rival contentions of the parties, this court is required to decide whether the learned appellate court had rightly rejected the pre-emption application upon setting aside the order of the learned trial judge.

30. An appeal is a continuation of a suit. Thus, an appellate court is empowered to appreciate points of law, events of facts and also the evidence, before arriving at a conclusion.

31. In the matter of ***Malluru Mallappa(D) Thr. L.R.S vs Kuruvathappa*** reported in ***AIR 2020 SC 925***, the Hon'ble Apex Court held as follows:-

“11. Section 96 of the CPC provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court lies to the High Court. The expression ‘appeal’ has not been defined in the CPC. Black’s Law Dictionary (7th Edn.) defines an appeal as “a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority.” It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors.

12. In *Hari Shankar v. Rao Girdhari Lal Chowdhury* 1 it was held that a right of appeal carries with it a right of re-hearing on law as well as on fact, unless the statute conferring a right of appeal limits the re-hearing in some way as has been done in second appeal arising under the CPC.

13. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*2 it was held thus:

5. In the well known work of Story on Constitution (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may AIR 1963 SC 698 1969 (2) SCC 74 choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial.....”

14. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings

only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions.”

32. 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.”

33. In ***Bharat Kala Bhandar (P) Ltd. Vs Municipal Committee*** reported in **AIR 1966 SC 249**, while dealing with a contention which had not been raised in the suit or in the grounds of appeal before the High Court, and was advanced before the Apex Court for the first time, the Hon’ble Apex Court held that the scope of the appeal could not be broadened at the instance of the parties, but if the plea raised a question of law, which was of considerable importance, the Apex court could entertain the same.

34. In the matter of ***Vasant Kumar Radhakishan Vora vs Board of trustees of the port of Bombay*** reported in **(1991) 1 SCC 761**, the Hon’ble Apex Court held that pure questions of law which went to the root of the

question of jurisdiction could be raised for the first time in an appeal under Article 136 of the Constitution of India.

35. Sub-Section (2) of Section 107 of the Code of Civil Procedure provides that the appellate court shall have the powers and shall perform as nearly as may be the same duties as conferred and imposed by the Code on courts of original jurisdiction in respect of suits instituted therein. Thus, a duty was cast upon the trial court to consider the point of limitation, maintainability etc., even if the same were not taken up or set forth as a ground of defence. As the trial court had failed in such duty, the appellate court was required to decide the issues.

36. In this context, the question of limitation would arise because the Hon'ble Apex Court held in ***Barasat Eye Hospital (supra)*** that the right of preemption under Section 8(1) of the West Bengal Land Reforms Act would not be triggered off until the entire consideration money along with 10% thereof was deposited. In this case, the court allowed short deposit to be made good, four years after the preemption application was filed and the said deposit was made after a considerable period of time from the date of the order. The right of preemption did not trigger off before the deposit in 2021. By then, the preemption application was barred by law. Moreover, the order by which the learned trial judge allowed the preemptor to deposit the balance consideration was also a misreading of the decisions in ***Barasat (supra)*** and ***Abdul Matin Mallik (supra)***. Even in pending proceedings, the Hon'ble Apex Court held that the courts could not direct deposit of balance consideration.

37. As such, the learned trial judge was required to decide the question of limitation and maintainability of the pre-emption application at the final hearing of the suit, even if, the payment was permitted.

38. Under such circumstances, Section 3(1) of the Limitation Act would enjoin a duty upon the courts to decide the issue. Section 3(1) of the Limitation Act is quoted below:-

“3. Bar of limitation.—(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.”

39. It was incumbent on the learned trial Judge to decide the question of limitation. Order 41 Rule 2 of the Code of Civil Procedure provides that the appellate court, while deciding an appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of court under this Rule, provided that the party who may be affected thereby had sufficient opportunity to contest the case on that ground. Thus, the code empowers the appellate court to consider even grounds and objections which may not have been set forth in the memorandum of appeal, with the duty to allow the preemptor to contest such point. The order impugned records that the law laid down by the **Barasat Eye Hospital (supra)** and **Abdul Matin (supra)** were argued by the appellants therein/opposite parties and the preemptor was given sufficient opportunity to counter such arguments. The decisions which were relied upon by the preemptor was also discussed in the order impugned. Order 41 Rule 2 of the Code is quoted below:-

“Order XLI Rule 2. Grounds which may be taken in appeal.—The appellant shall not, except by leave of the Court, urge or be heard in

support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule: Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

40. In the instant case, maintainability and limitation could be adjudicated in the appeal. Such adjudication could be accomplished without additional evidence. They were purely questions of law. The order to make good such short deposit passed sometime in 2020 and the deposit made in 2021, are all matters of record. The appeal was a rehearing of the suit and the provision of Section 107(2) of the Code would justify the decision of the appellate court on maintainability. Article 141 of the Constitution lays down that the law declared by the Supreme Court is a binding precedent and absolute. Such law was disregarded by the learned trial judge. The reference to the authorities on administrative law made by Mr. Mukherjee, would not save the order.

41. The submissions of Mr. Mukherjee with regard to the case laws on enlargement of time and power of the court to allow payment of deficit court fees even after 30 days, would not be applicable in view of the law laid down by the Hon'ble Apex Court. Non deposit of proper court fees is a curable defect unlike Section 8 of the said Act. Payment of deficit court fee cannot be equated with the fulfillment of a precondition for triggering off a weak right of preemption. Secondly, the doctrine of relation back would not apply in this case as it has been categorically held by the Hon'ble Apex that the right of preemption would not be triggered off until the entire consideration

money along with 10% levy was deposited with the application or at least within the period of limitation.

42. Reference is made to paragraph 28 of the said decision, which is quoted below.

“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.”

43. In paragraph 29 of the said decision, the Hon’ble Apex Court held that the pre-requisite to even endeavour to exercise the weak right of pre-emption was to deposit the sale consideration and 10% levy on such consideration, otherwise, Section 8(1) of the Act, would not be triggered off, apart from making even the beginning of Section 9 (1) of the Act, otiose.

44. The legislative provision should be read in its plain and grammatical connotation and only in case of conflict between different provisions, would the court make an endeavour to read down the provision in a manner that the legal provisions could co-exist and no part of the rule would be made superfluous. The interpretation of Sections 8 and 9 of the said Act, would be that when an enquiry takes place on the allegation of providing an inflated, sale consideration and if a finding is reached with regard to ostensible depiction of the sale consideration, the excess would be refunded to the

preemptor. The question of reading down Section 148 of the Code of Civil Procedure would not arise.

45. Sections 8 and 9 should be read in a way that they could co-exist and no part would be made superfluous. It was not a discretion left to the pre-emptor to put whatever amount in his opinion was the appropriate consideration. The full amount had to be deposited along with 10%. If the pre-emptor was allowed to deposit his own value and take a plea that the consideration money was inflated, it would amount to transformation of a weak right to a speculative strong right. Something, which neither historically nor in judicial interpretation had been envisaged.

46. In paragraph 34 of the decision in **Barasat Eye Hospital (supra)** the Hon'ble Apex Court also considered whether an extension of time could be given and held that if the application for pre-emption was filed within the period of limitation with a deficit amount and the balance amount had also been deposited within the period of limitation, the situation could have been different. But, extension of time to deposit the amount beyond the period stipulated by law, was not permissible and no extension could be granted. The right of pre-emption would be triggered off only upon deposit of the balance consideration, but the balance consideration could not be allowed to be deposited beyond the period of limitation. Section 5 of the Limitation Act, was not applicable in a proceeding under Section 8 of the West Bengal Land Reforms Act. The court was not left with any discretion to extend the time to deposit the consideration amount. Section 149 of the Code of Civil Procedure would not apply in this case. Relevant paragraphs of **Barasat Eye Hospital (supra)** are quoted below:-

“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.”

47. The reliance on ***Mahand Ramdas (Supra)*** is also misconceived. No event envisaged as special circumstances was pleaded to justify the short deposit. According to the Hon’ble Apex Court, the courts did not have any power to enlarge the time in allowing deposit of the balance consideration as the same would be contrary to the mandatory requirement of the statute under Section 8, otherwise the opening lines of Section 9 would be rendered otiose. The relevant paragraphs in ***Barasat Eye Hospital (supra)*** are quoted below:-

“26. Now turning to Section 9 of the said Act, from which, apparently, some judgments of the Calcutta High Court have sought to derive a conclusion that an inquiry into the stated consideration is envisaged. However, the commencement of sub-section (1) of Section 9 is with “on the deposit mentioned in sub-section (1) of Section 8 being made...” Thus, for anything further to happen under Section 9 of the said Act, the deposit as envisaged under Section 8 of the said Act has

to be made. It is only then that the remaining portion of Section 9 of the said Act would come into play.

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 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.”

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

49. **Abdul Matin Mallick (Supra)** 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/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.

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.

50. In the decision of **Chitta Ranjan Mishra (supra)**, 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."

51. In the present case as well, the trial judge without considering ***Barasat Eye Hospital (supra)*** tried to save the preemption proceedings by allowing short deposit after four years from filing of the application which was clearly beyond the period of limitation. In ***Barasat (supra)*** the Apex Court held that even the Apex Court could not direct deposit of balance consideration money. Such order of the learned trial judge was a nullity. The preemption application was not maintainable. The learned appellate court did not commit any error of law.

- 52. Hence, the revisional application is dismissed.
- 53. The order impugned is upheld.
- 54. There shall be no order as to costs.
- 55. Parties are to act on the basis of the sever copy of this order.

(Shampa Sarkar, J.)