

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 2516 of 2016

**Barun Kanti Majumdar & Ors.
Vs
Bijoy Kumar Marothi & Ors.**

For the Petitioners : Mr. Subir Sanyal
Mr. Sourojit Mukherjee

For the Opposite Party : Mr. Sounak Bhattacharyya
Mr. Sounak Mondal
Mr. Anirban Saha Roy
Mr. Abhirup Halder

Heard on : 11.03.2024

Judgment on : 05.04.2024

Ajoy Kumar Mukherjee, J.

1. The pre-emptors/opposite parties herein made an application under section 8 & 9 of the West Bengal Land Reforms Act 1955 *inter alia* seeking for pre-emption in respect of properties described in the schedule to the said application, being Misc. Case no. 18 of 2009.

2. In the said application pre-emptor /opposite parties pleaded that the property described in schedule “ka” to the application originally belonged to one Khuman Chand Marothi and his name was also recorded in RS Record of Rights. Said Khuman Chand transferred the “ka” schedule property along

with the other properties to his six sons and delivered possession. Khimraj Marothi, predecessor of petitioners being one of the legal heirs became owner of “ka” schedule property to the extent of 1/6th share. It is further pleaded that while they were possessing the same, they effected partition in between the co-sharers through a solenama in a suit before Civil Judge (Junior Division), Berhampore and thereby each of them were allotted specific share by way of said partition. It is further case of pre-emptors that the adjoining land owner of the “kha” schedule property has right to pre-empt the case property which was transferred to the pre-emptees/ opposite parties and accordingly prayed for pre-emption in respect of “kha” schedule property.

3. The petitioners herein contested the said Application by filing written objection and their specific case is that plot no. 23 originally belonged to Jayanta Mohan Saha and Mohini Mohan Saha and while they were in possession they transferred their 1/3rd share to one Sachidulal Dhar and while the parties were in possession in plot no. 23, one suit being T.S. No. 53 of 2004 was filed, which was decreed in compromise. Subsequently said Jayanta and Mohini transferred a portion specifically allotted to them by means of said solenama to the petitioners for a valuable consideration. His further case is opposite parties herein are not the adjoining owner of plot no.23 and the plot no. 2269 and 2271 are not adjoining to the land transferred to the opposite parties, and that plot no. 2268 is situated in between plot no. 23 and 2269 and that entire share of Jayanta and Mohini in plot no. 23 has been transferred to the opposite parties and in such circumstances the predecessor in interest of the opposite parties are not

entitled to pre-empt the disputed land and the predecessor in interest of the opposite parties was not exclusive owner of plot no. 2269 and 2271.

4. Both the parties adduced evidence in support of their respective cases and upon hearing the submissions made by the parties, learned Trial Court by an order dated 20th August, 2009 allowed the said Misc. Case *inter alia* holding that right title and interest, that has accrued by the opposite parties by deed dated 11th May, 2004, do vest in the petitioner/pre-emptor subject to fulfilment of the conditions that the pre-emptor, shall deposit balance consideration money along with 10% interest within two months from the order.

5. Petitioners herein thereafter preferred an appeal being Misc. Appeal No. 65 of 2009 and learned Court below by the Judgment and order dated 30th November, 2015 dismissed the said appeal, observing that the application for pre-emption filed by the original pre-emptor is maintainable and there is no reason to differ with the findings of the Trial Court.

6. Petitioner herein by filing Application contended that immediately after passing of the judgment by the Trial Court, the pre-emptor deposited the balance consideration amount along with 10% statutory amount before the Trial Court below. It is submitted that petitioner preferred aforesaid Misc. Appeal 65 of 2009 on the ground that land sought to be pre-empted is a Bastu land and that vendors have transferred their entire share to the pre-emptees and for which pre-emption does not lie. They never raised the point of short-deposit during the course of hearing of aforesaid Misc. Appeal. However during course of hearing The petitioner/pre-emptees had raised herein the sole argument as to whether the pre-emptors are entitled to pre-

emption, when the pre-emptors had not deposited the entire consideration amount along with 10% amount at the time of filing of the pre-emption application i.e. within the time stipulated for triggering the right.

7. Learned counsel for the pre-emptee/petitioners heavily relied upon ***Barasat Eye Hospital and others Vs. Kaustav Mondal*** reported in (2019) 19 SCC 767 and ***Abdul Matin Mallick Vs. Subrata Bhattacharjee (Banerjee) & others***, reported in (2022) 7 SCC 147. Accordingly petitioner has prayed for setting aside the judgments of both the courts below on the ground of short deposit at the time of filing pre-emption application.

8. Countering the submissions advanced by the learned Advocate for the pre-emptee/petitioner, Mr. Sounak Bhattacharyya learned Advocate appearing on behalf of the petitioners argued that the petitioner/pre-emptee has not offered any explanation as to why the present Application has been filed on 8th July, 2016 i.e. at a belated stage when the court below passed the judgment on 30th November, 2015 and for that reason the Revisional Application is liable to be dismissed. In this context he relied upon judgment of ***Ananda Mohan Khara Vs. Jaladhar Mondal*** reported in 1998 WBLR page 369.

9. While dealing with the point regarding short deposit i.e. whether the pre-emptors are entitle to pre-emption when they admittedly had not deposited the consideration amount along with 10% sum at the time of filing of the pre-emption application, Mr. Bhattacharya argued that the application for pre-emption is governed by the ordinary rules of procedure applicable to suits and appeals. In this context he relied upon ***Tarapada Som Vs. Parbati Charan Sarkar*** reported in (1983) 2 CHN 7 (para-20).

Referring another judgment of this Court passed in ***Shyama Prasad Mondal and others Vs. Susanta Kumar Saha and others*** in **C.O. 808 of 2017** read with **C.O. 402 of 2018**, he contended that an order of pre-emption has to be executed in terms of the provisions of order XXI of the Code of Civil Procedure and all rules applicable for execution of a decree are also applicable in case of pre-emption application. Therefore, on a conjoint reading of the aforesaid judgments, it can be said that the provisions of order XX rule 14 is applicable, while executing an order for pre-emption. Order XX Rule 14 (a) lays down that the court shall specify a day on or before which the purchase money shall be paid.

10. Mr. Bhattacharya further argued that in the instant case the Trial judge while passing the judgment had directed the pre-emptors to deposit the balance consideration amount within two months from the date of order. Therefore, the Trial judge had rightly followed the provisions of order XX rule 14 (a) of the Code. Order XX Rule 14(b) lays down that on payment into court of such money together with the cost (if any) decreed against the plaintiff on or before the day referred to in clause (a), the defendants shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have been accrued from the date of such payment, but if the purchase money and the costs (if any) are not so paid the suit shall be dismissed with cost. Here in the present case the pre-emptors/opposite parties had deposited the balance amount along with 10% levy within the time as stipulated by the Trial Court in his judgment.

11. Mr. Bhattacharya argued therefore, the only provision for dismissal of a pre-emption application is laid down in the provision of order XX Rule 14

of the Code and there is no other clause in section 8 or section 9 of the Act for dismissal of the application for pre-emption for non-deposit of entire consideration amount at the time of filing of the pre-emption application. In this context he relied upon a judgment of three Judges Bench of the Apex Court in ***Naguba Appa Vs. Namdev and others*** reported in **(1950) SCC 726. (Para 3 to 5).**

12. Mr. Bhattacharya further submits that the pre-emptee neither before the Trial Court nor before the Court below had pleaded the point regarding short deposit and as such they deemed to have waived their known right. In this context he relied upon ***Bharat Singh and others Vs. State of Haryana and others*** reported in **(1988) 4 SCC 534.**

13. Mr. Bhattacharya further argued the case also from a different angle contending that not only in the West Bengal Land Reforms Act 1955, the provision for pre-emption is also embodied in West Bengal non-agricultural Tenancy Act. 1949 and Bengal Tenancy Act, 1885. Now section 26 (F) of the Bengal Tenancy Act 1885 lays down that an application for pre-emption shall be dismissed unless the applicant at the time of filing the application, deposit in court the amount of consideration money or the value of the transferred portion or share of the holding in the said notice together with compensation at the rate of 10% of such amount. Similarly, section 24(2) of the West Bengal Non-agricultural Act, 1949 also lays down that an application for pre-emption shall be dismissed unless the applicant at the time of filing the application deposit in court, the amount of consideration money or the value of transferred portion or share of the holding, in the said notice together with compensation at the rate of 10% of such amount.

14. However, in section 8 or 9 of the West Bengal Land Reforms Act, there is no such penal provision which gives power to the court to dismiss the said application in case of non-deposit of the full consideration amount along with 10% compensation amount, at the time of filing the application for pre-emption. The only consequence which is given in section 9 of the Act (Act of 1955) is that notice of the pre-emption application shall not be issued upon the pre-emptees.

15. Referring a judgment passed by a Division Bench of this court in ***Arindam Pal Vs. Anupam Pal*** in **FMA 1070 of 2022** he submits that this court vide its order dated 03.11.2022 had taken the same view that where there is no penal clause, then the provision of the statute is to be considered as directory and not mandatory. Accordingly it can be said that under the relevant provision of the Act of 1955, in case of short deposit, only consequence would be that notice shall not be issued to the pre-emptee

16. Mr. Bhattacharya strenuously argued referring ***Barasat Eye Hospital (supra)*** and ***Abdul Matin Mallick (Supra)*** that it was held therein that when the enquiry has been made by the Munsif whether in respect of the stated consideration or in respect of any additional amount which may be payable, the pre-requisite of deposit of the amount, of the stated consideration under section 8(1) of the Act of 1955 would be required to be fulfilled. The phraseology “the reminder” if any, being refunded to the applicant would have to be considered in that context. He further submits that this aspect has not been taken care of in the judgment passed by the Apex Court while passing the aforesaid judgments and in this context he relied upon ***Good year India Limited Gedor (India) Pvt. Ltd. Kelvinator***

and the food corporation of India and another Vs. State of Haryana and another reported in **(1990) 2 SCC 71 (para-33)**.

17. According to Mr. Bhattacharya **Barasat Eye Hospital (Supra)**, and **Abdul Matin Mallick (supra)** are not authority with regard to short deposit or on the point whether the consideration amount as stated in the deed has to be deposited along with 10% statutory sum within the limitation period of pre-emption. He further submits that ordinarily in terms of Article 141 of the Constitution of India all judgments of Supreme Court are law of the land and binding upon all courts and Tribunal but there is an exception i.e. doctrine of *sub silentio* . He further contended that a decision is not authority for what it had not decided on a point which has not been argued. He further submitted that a judgment must be read as a whole and the observation from the judgment have to be considered in the light of questions which were argued before the court. In this context he relied upon judgment in the case of **Municipal Corporation of Delhi Vs. Gurnam Kaur** reported in **(1989) 1 SCC 101 (para 11)** and another judgment of this court in **Debendra Nath Mondal Vs. Ratan Kumar Das and others** reported in **(2008) 1 CLJ 912 (para 26 and 27)** and **Harish K.M. and others Vs. Jahfar and others** reported in **2020 SCC Online Kerala 4009**.

18. In support of his aforesaid contention Mr. Bhattacharya further argued that at the time of hearing of the case of **Barasat Eye Hospital (supra)** and **Abdul Matin Mallick (supra)**, no argument was raised by the learned counsel before the Apex Court regarding the effect of the provisions of order XX Rule 14 of the Code while deciding an application under Section

8 of the Act of 1955. As such no finding was given by the Apex Court in the aforesaid judgments.

19. He further argued that section 9 makes provision for the proof of actual amount of consideration paid by the transferee for the transfer in their favour along with other sums and also for an enquiry into the truth and correctness of such assertion by the learned Munsif, culminating with a direction by him for deposit of further sum, if any, within the time specified by him. There is no provision for repayment or refund of excess consideration as may be found after enquiry by the learned Munsif but only provision for deposit of such further sum. Requirement of proof would arise in case of pre-emptors disputing consideration amount. Section 9 refers to the word "*transferee*" and not "*pre-emptor*" and places onus of providing the actual amount of consideration on him and there is no scope for the court to exempt the pre-emptor from depositing the entire amount of consideration as per transfer deed, simultaneously with the application for pre-emption which cannot fit in with the language of the statute, in such a case the court has to import the power of directing refund or repayment in the language of section 9 itself. The user of the word "*transferee*" does not militate against the aforesaid construction as further deposit cannot be determined without determination of the actual amount of consideration and other statutory amounts recoverable by the transfers, thus, requiring the representation by the transferee in case of enquiry by the court concerned. Accordingly Mr. Bhattacharya concluded that even if it is assumed that such sum is to be compulsorily deposited at the time of filing the pre-emption application under section 8, then non deposit of the same does not give power to the

court to dismiss the application under the Act of 1955 since there is no penal clause given in the statute and only effect in case of such default would be that no notice shall be issued to the pre-emptee.

20. Mr. Sanyal learned Counsel appearing on behalf of the petitioner/pre-emptee submits that the issue of short deposit as involved in the present case is wholly governed by the law laid down by the Apex Court in **Barasat Eye Hospital Case (supra)** where it has been clearly held that the deposit of the entire amount of sale consideration and the 10% levy is the pre-requisite to even endeavour to exercise this weak right of pre-emption, 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 Act otiose. He further submits that the issue in regard to “short deposit” while filing application under section 8 and 9 under West Bengal Land Reforms Act., 1955 again came up for consideration before the Hon’ble Supreme Court in the matter of **Abdul Matin Mallick (supra)** and the court reiterated its earlier view. While negating all the contentions of the pre-emptors, court held that deposit of the entire sale consideration with additional 10% along with the pre-emption application is a statutory and mandatory requirement and is a precondition before any further enquiry as contemplated under section 9 of the Act and it was further held that High Court was not justified in permitting the pre-emptor to deposit the balance sale consideration with additional 10% while deciding the review application.

21. As regards the contention of the pre-emptor/opposite parties as to delay in filing the present application under article 227 of the Constitution of India after 90 days from the date of the order, Mr. Sanyal submitted that

the pre-emptor /opposite parties did not take any exception while this application was heard before this High Court on 8th February, 2021 and upon hearing both the parties, this court was pleased to admit the revisional application for hearing and pass an order of status quo with regard to nature character and possession of the suit property. Having not raised the point of delay in filing the present Revisional Application beyond 90 days at the threshold, the pre-emptor/opposite party cannot raise such point at the final hearing of the present application. Moreover, the power and jurisdiction of the High Court under Article 227 being supervisory in nature over all courts, is wide enough to go into the issue irrespective of any delay in approaching this Court and such delay cannot stand in the way of exercising superintending power by this court under the Constitution over the courts below.

22. Mr. Sanyal further submits that it is incorrect to submit that the pre-emptee petitioner nowhere had pleaded the point regarding short deposit. The issue of short deposit was raised heard and decided by both the courts below. Considering all these the petitioners submits that instant revisional application is required to be allowed, by quashing the judgment of both the courts below.

23. I have considered submissions made by both the parties.

24. The petitioner/pre-emptee has raised the sole argument in the present context as to whether the pre-emptor is entitled to pre-emption when the pre-emptor had not deposited the entire consideration amount, along with 10% at the time of filing of the pre-emption application or within the time stipulated for triggering the right of pre-emption. Admittedly in the present

case at the time of filing pre-emption application pre-emptor had not deposited the entire consideration money along with 10% levy. The issue of non-deposit or short deposit of the consideration price along with levy at the time of filing the pre-emption application is governed by ***Barasat Eye Hospital & others (supra)***. While considering that the right of pre-emption is a weak right the statutory period of limitation to file a pre-emption case as also the statutory deposit of the entire consideration money along with 10% levy, were both declared as mandatory by the Apex Court and the concept of equity would not come into play in such cases. The court held even in case of an enquiry in regard to whether the amount shown in the deed is an inflated one or not under Section 9 of the Act, the consideration amount shown in the deed along with the 10% levy has to be deposited with the application under Section 8 and 9 of the Act and in case of any finding as to inflated amount if reached by the court, the excess amount deposited can always be refunded. While dealt with the question as to whether pre-emptor/ opposite parties can be granted time subsequently to deposit the balance amount by the courts while dealing with the application under Section 8 and 9 of the said Act, the court answered in negative by holding that the requirement of exercising of right within the stipulated time under the provision is sacrosanct and there cannot be any extension of time in any manner whatsoever.

25. A review application was filed by the Pre-emptor in respect of the judgment passed in the ***Barasat Eye Hospital (supra)*** before the Apex Court but the said review application was also dismissed by the court on March, 3rd 2020 holding that there is no error apparent on the face of the

record calling for intervention in review jurisdiction. Pre-emptor thereafter filed a curative petition before the Apex Court and the Court vide order dated 17th August, 2022 was pleased to dismiss the curative petition.

26. Thereafter the issue with regard to short deposit while filing application under section 8 and 9 of the West Bengal Land Reforms Act 1955 again came up for consideration before the Supreme Court in the matter of ***Abdul Matin Mallick Vs. Subrata Bhattacharjee (Banerjee) & Ors.*** reported in **(2022) 7 SCC 147**. In the said case the issue raised by the pre-emptor is that the issue of short deposit was not raised before the courts below or even before the High Court on revision and therefore, said issue should not be allowed to be raised before the Supreme Court, more particularly when the entire sale consideration amount with additional 10 % has already been deposited by the pre-emptor pursuant to the order passed by the High Court. However, Supreme Court has turned down all such contentions of the pre-emptor and specifically held that deposit of the entire sale consideration with additional 10% levy along with the pre-emption application is a statutory and mandatory requirement and therefore a precondition before any further enquiry can be made as contemplated under section 9 of the Act. Accordingly Apex Court held that the High Court was not justified in permitting the pre-emptor to deposit the balance consideration with additional 10% while deciding the Review Application.

27. It is a settled principle of law that the law declared by the Supreme Court under Article 141 of the Constitution of India shall be binding on all courts within the territory of India and as such High Court cannot question the correctness of the decision of the Hon'ble Supreme Court. I am agreeable

with Mr. Sanyal that it is impermissible for the High Court to overrule the decisions of the Apex Court on the ground that the Supreme Court laid down the position of law without considering any other point. Reference on this point can be taken from the judgment of ***Suganthi Suresh Kumar Vs. Jagdeeshan*** reported in **(2002) 2 SCC 420 (para-9)** and ***Anil Kumar Neotia and others Vs. Union of India and others***, reported in **(1988) 2 SCC 587 (para 17 & 18)**.

28. In view of above it is not open to the pre-emptor/opposite parties to contend that certain provisions like order XX rule 14 of the Code of Civil Procedure or section 27(F) of the Bengal Tenancy Act 1885 or Section 24 (2) of West Bengal non-agricultural Tenancy Act, 1949 had not been urged and therefore, the law laid down by the Apex Court in ***Barasat Eye Hospital (supra)*** and ***Abdul Matin Mallick (Supra)*** can be questioned and collaterally challenged by the pre-emptor/opposite parties before the High Court.

29. I am also of the view that the judgment of the Apex Court in the aforesaid matters are mere reiteration of law enacted by the legislation and the judgment passed by the Supreme Court in ***Barasat Eye Hospital (supra)*** cannot be said to be *sub silentio* for the purported non consideration of the provision of order XX rule 14 of the Code or the concerned provisions of Bengal Tenancy Act or West Bengal non-agricultural Tenancy Act, specially in the context of dismissal of the Review Application and Curative Petition as stated above.

30. On perusal of the judgment passed in ***Barasat Eye Hospital (supra)*** it is clear that the Apex Court at the very outset taken into consideration the

larger ramifications of the Order. The historical perspective of the pre-emptive right was duly considered and after considering the previous judgments, the Court discussed the phraseology “the remainder, if any, being refunded to the applicant “and viewed that the word “remainder” is in the reference to any amount which on enquiry about the stated consideration may be found to have deposited in excess but it cannot be left at the whim of the applicant to deposit any amount which he deems proper. Accordingly in para 29, Hon’ble court have taken firm 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 Act of 1955 will not be triggered off apart from making even the beginning of section 9(1) of the said Act otiose.

31. The argument raised by Mr. Bhattacharya about absence of penal provisions in the said Act of 1955 has also been dealt with in paragraph 30 of the judgment and court concluded that a discretion cannot be left to pre-emptor to deposit whatever amount in his opinion is the appropriate consideration in order to exercise a right of pre-emption. This was also judged from another angle that if such discretion is given to the pre-emptor without deposit of the full consideration, it would give rise to speculative litigation where the pre-emptor by depositing smaller amount can dragg on the issue of the vendee exercising rights in pursuant of the valid sale deed executed and the Court also observed if such discretion of pre-emptor is adopted then it would make a weak right into a “speculative strong right” which has neither historically nor in judicial interpretation being envisaged. Accordingly the court concluded, once the time period to exercise a right is

sacrocent, then the deposit of the full amount within the time is also sacrocent, and since the requirement of exercising the right by making the deposit within the stipulated time is sacrocent, there cannot be any extension of time.

32. In view of above I find merit in the present application. C.O. 2516 of 2016 is accordingly allowed. The judgment and order dated 30th November, 2015 passed by learned Additional District Judge, 4th Court in Misc. Appeal No 65 of 2009 and the judgment and order dated 20th August, 2009 passed by the learned Civil Judge (Junior Division) Additional court Berhampore in Misc. Judicial Case no. 18 of 2009 are hereby set aside. Trial Court may be approached for withdrawal of deposited money, if any.

There will be no order as to costs.

33. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJAY KUMAR MUKHERJEE, J.)