

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3130 of 2018

**Ajit Kumar Paria & Anr.
Vs
Jagadish Prasad Khandelwal & Anr.**

For the Petitioners : Mr. Suman Sengupta
Mr. Tapas Maity

For the Opposite Parties : Mr. Rabindranath Mahato
Mr. A.S. Roy

Heard on : 05.03.2024

Judgment on : 21.05.2024

Ajoy Kumar Mukherjee, J.

1. Petitioners herein filed pre-emption case under section 8 & 9 of West Bengal Land Reforms Act, 1955 contending that 02 decimal of land in plot no. 391/587 of Mouza Mohammadpur as described in schedule A to the Application was sold by one Narayan Prasad Tiwari, who was owner of entire plot No. 391/587 having an area of 09 decimal by executing a registered deed of sale which was presented for registration on 30.10.1992 and registration was completed on 05.09.1994

2. Petitioners further case is that they are joint owners of adjacent plot no. 391 and 427 which has the longest common boundary with the suit

property and accordingly they filed the aforesaid case, seeking pre-emption on the ground of vicinage. In the said case initially an *ex parte* order was passed which was subsequently set aside by this court in C.O. 1777 of 2009. Thereafter the pre-emptee/opposite parties herein filed written objection contending that the vendor had sold his entire interest in the property and as such the petitioner have no legal right to claim pre-emption and they have also denied that the petitioners are owner of contiguous plots. Learned Trial court after considering the evidence and the submissions made by the parties, rejected the pre-emption case being J Misc. case 2 of 1995, observing that the petitioners are not the raiyat of contiguous plots of the suit land.

3. Being aggrieved and dissatisfied with the said judgment dated 03.01.2013, the petitioners/pre-emptors preferred Miscellaneous Appeal being Misc. Appeal no. 38 of 2013. Learned Appellate Court after hearing the submissions made by the parties, was pleased to dismiss the Appeal holding *inter alia* that findings of the the learned Trial Judge in support of dismissal, holding that the petitioners are not the raiyats of contiguous plots of the suit land, is not sustainable but held that the vendor Narayan Prasad Tiwary has no co-sharers over the said plot no. 391/571 and he further held, since precondition in succeeding the claim of pre-emption of said plot in question on the ground of vicinage, such land must be under the joint ownership and not under the ownership of a single individual in terms of section 8 (1) of Act of 1955, so the petitioners despite being the raiyat of the contiguous land of the suit plot are not entitled to any relief in the present case and as such he

affirmed the judgment and order dated 03.01.2013 passed by the Trial Court, on a different footing.

4. Being aggrieved by that order Mr. Sengupta learned counsel appearing on behalf of the petitioner submits that according to Mouza Map as well as schedule of the deeds, admittedly the petitioners are raiyat of adjoining land, having longest boundary to the suit plot. There is no dispute that the petitioners approached before the court within statutory period and deposited the statutory amount for filing the pre-emption case. Pre-emption application was filed on 04.01.1995 while the registration of the deed was completed on 05.09.1994. He further submits that Mouza Map clearly depicts that the plot no. 391 and 427 owned by petitioners/pre-emptors are adjacent to the suit property in dag no. 391/587.

5. Mr. Sengupta further submits that the Appellate Court though did not accept the Trial Courts view that the land owned by pre-emptor is not contiguous to the suit plot, however he affirmed the judgment passed by the Trial Court on an erroneous finding that as there is no co-sharer in Dag No. 391/587 and as it is owned by a single owner, therefore, pre-emption application is not maintainable. To contradict said observation made by court below petitioner herein relied upon Judgment of ***Chhana Rani Saha Vs. Mani Pal*** reported in ***(2017) 11 SCC 0032*** and ***Naimul Haque Vs. Alauddin Sheikh*** reported in ***2017 (4) ICC 600 (cal)*** and also the judgment of ***Dilip Kumar Dhara Vs. Ranjit Kuamr Mondal*** reported in ***AIR 2019 Cal 67*** and contended that application under section 8 lies only if a portion or share of a plot of land of a raiyat and not the entire plot is transferred. He further submits in consideration of ratio of the judgment of Dilip Kumar

Dhara (supra), present pre-emptor also entitled to get relief in the light of said judgment because the vendor of the present case sold a portion of his 9 decimal land. Moreover, the petitioners are contiguous raiyat having longest common boundary to the suit plot and in view of aforesaid judgment it can be said that existence of co-sharer in the plot is not pre-condition to invoke the right of pre-emption. Accordingly observation of the court below is no longer a good law in view of **Naimul Haque Case (supra)**.

6. Mr. Mahato learned counsel appearing on behalf of the opposite parties submits that the petitioners claimed that they are joint owners of adjacent plot no. 391 and 427 as also other non-suit plots, however from boundary described in the deeds being exhibit-4 and 5, it is clear that the land of the petitioner over plot no. 427 is not adjacent to the suit plot no. 391/587. Considering the schedule, mentioned in the deed marked exhibit-5, the Trial Judge has rightly held that the land of the petitioner no. 1 is not adjacent to the suit land. Considering the schedule of exhibit-4 the court below has erroneously held that the land of the petitioner no.2 as mentioned in the exhibit-4 is adjacent to the suit property without considering that the schedule of the land described in exhibit-4 is not matching with pleading made in para 3 of the pre-emption application. It appears from the pleading that petitioner no.1 has land on the extreme eastern side of plot no. 391 and the petitioners are adjoining land owners in respect of plot no. 391 are not matching with the schedule of the land of exhibit-4, as land of Achintya has been mentioned on the western side of the land of the petitioner no.2. There is no pleading or evidence to the effect that Narayan Prasad, whose name has been mentioned in the schedule of Exhibit-4 and Narayan Prasad

Tiwary the vendor of opposite party no. 1 and 2 are the same person. In the schedule of the impugned deed dated October, 30, 1992 marked as exhibit-6, it has been mentioned that land in plot no. 391 is at the western side of the suit land in plot no. 391/587. According to the pleading, in plot no. 391 the petitioner no. 1, 2 and one Achintya have their land. So, the finding of the learned judges that the land of the petitioner no.2 is adjacent to the suit land in plot no. 391/587 is perverse and based on surmises and conjecture.

7. Mr. Mahato further contended, since the petitioners have jointly filed the application for pre-emption and since it has been established that one of them i.e. the petitioner no.1 is not the adjoining land owner, relief cannot be granted to the petitioner no. 2 by splitting the claim when the cause of action is joint one. Accordingly Mr. Mahato has prayed for dismissal of the present application.

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

9. On perusal of the judgment impugned passed by the Trial Court, it appears that the trial court while discussing as to whether pre-emptors have any adjacent land to the suit property or not came to a finding that in the deed marked as exhibit-4, it has been mentioned that on the eastern side there is property of Narayan Prasad i.e. vendor of Opposite party no.1. and according to the description given in the said deed, on the northern side there is plot no. 391. He further held that in the same way the Exhibit-5 speaks about the properties which the petitioner no.1 got from his father, wherein it has been stated that on the eastern side of the portion transferred to him there is property of other person and not of Narayan Prasad. Accordingly Trial Court held, so far as property lying and situated in plot no.

391 is concerned, petitioner no.1 is not the owner of the contiguous land. He further held that the petitioners have stated that they own the property jointly but they got the specific portion by the said deed and accordingly petitioner no.2 owns specific portion which is contiguous to plot no. 391/587, but claim regarding plot no. 427 has not been substantiated by document. In conclusion Trial Court finds that though the other factors are in favour of petitioners/pre-emptors but there is confusion regarding claim of the petitioners about being the owner of the contiguous land. According to the Trial Court though it can be inferred that the petitioner no.2 holds contiguous plot in respect of plot no. 391/587 but according to him there is probability that when the deeds were executed the bata plot was not in existence at all and accordingly Trial court finds that it cannot be declared that the petitioner no. 2 is the owner of the contiguous plot, ignoring the claim of the petitioner no.1 as they have failed to prove that they have joint ownership of the contiguous land and it has also not brought on record, whose property has the common longest boundary. On the basis of said observation the Trial Court dismissed the case ex-parte.

10. In my opinion the Trial court was not at all justified in coming to his ultimate conclusion only on the basis of the descriptions given in exhibit-4 and 5 and other exhibited documents. He ought to have investigated the matter from the Government documents like map and also could have directed for local investigation to remove the confusion that arose in his mind but simply because some confusion appeared in his mind from the description of the property given in the deed regarding claim of the petitioners about adjacent land ownership, he ought not to have come to a

conclusion, regarding petitioners' claim of owning land adjacent to the suit plot. Order itself also says that no oral evidence was adduced by the opposite parties inspite of getting opportunities.

11. In such view of the matter without making proper enquiry and/or investigation the Trial court was erred in coming to a conclusion about the issue in controversy and thereby dismissed application for pre-emption.

12. Similarly when the matter came up before the appellate court, Appellate court took the opposite stand and held that the pre-emptors in the present case being the joint owners of plot of 391 and 427 which are adjoining to suit plot no.391/587, the subject matter of the transaction sought to be pre-empted, is entitled to maintain application for pre-emption on the ground of vicinage. The court below held that the correctness of rough sketch map annexed with the pre-emption application and that the claim of the vicinage of the pre-emptor have not been denied by adducing evidence by the contesting pre-emptees. In this context, the court below also held that both Exhibit-4 and 5 read with oral testimony indicates that the pre-emptors have share appertaining to plot no. 427 and 391 which fact has been corroborated by the entry in Record of Rights and the schedule of impugned deed marked Exhibit-6, shows that plot no. 427 and 391 are situated respectively on the eastern and western side of suit plot no. 391/587 and in the absence of evidence to the contrary to the above facts the court below held on the basis of preponderance of probabilities and possibilities that the pre-emptors have proved that they have share in and over plot no. 427 and 391 and furthermore both plots no. 427 and 391 are adjacent to suit plot no. 391/527.

13. From the aforesaid contradictory observations of the courts below on the question as to whether the petitioners are contiguous owner in respect of the property in question, they have not gone into the merits of the case and merely on the basis of surmises and conjecture reached their respective ultimate finding, which in my opinion is not sustainable in the eye of law.

14. There is another aspect of the matter. The court below affirmed the judgment of dismissal passed by the Trial Court but on a different finding that if a portion or share of plot of land owned by a single or sole rayat, then the transfer of the said plot of land to any other co-sharer of the said plot of land does not arise as the transferor is the sole rayat of the subject land in question and in this context he quoted section 8 (1) of the West Bengal Land Reforms Act 1955 and indicated that the said plot of land must be held under the joint ownership and not under the ownership of a single individual, because in the case of transfer by sole rayat of a plot of land there is no need of any notice interms of section 5(4) of the Act of 1955 and the said plot of land of rayat is exempted from the purview of pre-emption. In the present case since pre-emptor did not produce any document during the trial in establishing that save and except Narayan Prasad Tewary, any other co-sharer exists in respect of the plot in question, which is precondition in succeeding the claim of pre-emption, that the said plot of land must be held under the joint ownership and not under the ownership of a single individual, in terms of section 8, so he affirmed the dismissal order of the Trial Court though on different footing.

15. However, from the facts and circumstances of the case it appears that the learned counsel for the petitioner during the course of argument placed

mouza map before me in order to establish that the petitioner are rayat in adjoining land having longest common boundary to the suit plot. It also appears while court below came to the conclusion that since there is no co-sharer in dag no. 391/587 therefore, pre-emption application is not maintainable did not consider the ratio laid down by the Apex court in ***chanarani saha Vs. Mani pal, (supra)*** nor the observation of the Division Bench of this court in this context, in ***Naimul Haque Vs. Alauddin Seikh (supra)*** which was passed relying upon the view taken by the Apex Court in Channa Rani's Case.

16. In such view of the matter while invoking jurisdiction under Article 227 of the Constitution of India, I am constrained to conclude that the judgment passed by both the courts below are not sustainable in the eye of law, since the findings for reaching the conclusion suffers from impropriety for the reasons stated above. It has also caused jurisdictional error in not exercising the jurisdiction properly that has been vested upon them.

17. The impugned judgment and orders passed by both the courts below dated 31.05.2018 and 03.01.2013 are hereby set aside. The case is remanded to the Trial Court for making fresh adjudication of the matter after giving opportunity to both the parties to contest and thereafter to write a judgment afresh without being influenced by any observation made herein, preferably within a period of 12 weeks from the date of communication of the order. It is made clear that during such fresh hearing all the points of law and fact shall be kept open for adjudication by the Trial court.

18. C.O. 3130 of 2018 is thus accordingly disposed of.

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

(AJOY KUMAR MUKHERJEE, J.)