11.03.2024
Item No.24
Ct. No.19
Suman/S.A.

CO 4201 of 2023

Lipika Naskar & Anr.
-vs-
Ajoy Naskar & Ors.

Mr. Pinaki Ranjan Mitra
Mr. Sugata Mukhopadhyay
…for the petitioners
Mr. Sanjib Seth
…for the opposite party

The revisional application arises out of an order dated October 4, 2023 passed in LR Miscellaneous Case No.16 of 2019 by the learned Civil Judge (Junior Division), 6th Court at Howrah.

By the order impugned, the learned court rejected an application under Section 151 of the Code of Civil Procedure filed by the petitioners/pre-emptees. The application was filed, challenging the procedure adopted by the learned court in allowing the pre-emption application to continue although the full consideration of the sale, including 10% of the sale amount had not been deposited at the time of filing of the pre-emption application.

By the same order, the learned court allowed the application filed by the pre-emptor under Section 151 of the Code of Civil Procedure praying for permission to deposit the balance consideration money along with 10% interest thereon.

The learned court was of the view that the application filed by the pre-emptees should be rejected, as the pre-emptor was allowed to continue with the suit upon deposit of Rs.99,000/-. Such order was not challenged by the pre-emptees.

Subsequently, the pre-emptees filed an application for permission to deposit the balance consideration money along with 10% levy, which the learned court allowed. Such order was challenged before the Hon'ble High Court and the Hon'ble High court set aside the order and remanded the matter, for fresh hearing of such application along with the application filed by the preemptees.

Upon remand, the court heard the matter once again and held that as payment had already been made in terms of the order dated January 15, 2022 pursuant to the application dated December 14, 2021, the deposit should be accepted. Further, as the allegation was that an inflated amount had been quoted in the sale deed only to avoid pre-emption, the money already deposited should be taken as valid deposit. The pre-emption application could continue upon payment of the balance consideration money. The application filed by the pre-emptees was thus rejected on the ground of justice and equity.

Mr. Mitra, learned advocate appearing for the pre-emptees/petitioners submits that the learned court acted beyond jurisdiction in accepting the pre-emption application with the short deposit. Further, the learned court misconstrued the order of the Hon'ble High Court by holding that as the deposit was already made, equity demanded that the pre-emptor should be allowed to contest the suit on merits.

Mr. Mitra further submits that when the Hon'ble High Court had remanded the matter with observations on the maintainability of the pre-emption application with special reference to **Barasat Eye Hospital vs. Kaustabh Mondal** reported in **(2019) 9 SCC 767** and **Abdul Matin Mallick vs. Subrata Bhattacharjee** reported in **2022(3) ICC(S.C.) 641**, the learned court was bound to decide the matter upon considering the ratio of those judgements instead of proceeding on the principles of equity. Pre-emption was not an equitable relief but a weak right and such right would not be triggered off until the entire consideration money along with 10% of the said amount was deposited with the application under Section 8(1) of the West Bengal Land Reforms Act, 1955 (hereinafter referred to as the said Act).

Mr. Seth, learned advocate appearing for the pre-emptor/opposite party submits that the moment the court allowed filing of the application with the short deposit and directed the challan to be produced, it meant that the court had condoned the default on the part of the pre-emptor. Mr. Seth has relied on a decision of a Coordinate Bench of this court passed in **Maya Debnath vs. Uttam Sarkar and anr. reported in 2023 (2) ICC 203 (Cal).**

The point for consideration before this case is whether there can be any waiver against the statute. The Hon'ble Apex Court in **Barasat Eye Hospital** (supra) held that right of pre-emption would not be triggered off until entire consideration was paid, along with 10% levy. The pre-emption application was filed with short deposit and the balance consideration was deposited in 2022 upon opportunity granted by the court. The said order was set aside by the High Court and a remand was made for hearing of the application for permission to make good the short deposit as also the application with regard to the maintainability taken out by the pre-emptor dated April 5, 2021. Thus, the first point of Mr. Seth that when the application was accepted upon payment of Rs.99,000/-, the pre-emptees had waived their right to challenge the proceeding on the ground of short deposit, is not accepted. Mere deposit of Rs.99,000/- with pre-emption application and direction of the trial court to produce the challan upon registration of the pre-emption case, would not amount to an order allowing permission to proceed with the preemption case. The Hon'ble Apex Court held that courts could not permit belated deposit of the consideration money. The coordinate Bench set aside the order by which balance consideration was allowed to be deposited as the said order was passed without hearing the maintainability application. The Coordinate Bench recorded that it would be prudent for the trial court to dispose of the application for delayed deposit and the objection/application on maintainability of the proceedings, in the spirit of the decisions of the **Barasat Eye Hospital** (supra) and **Abdul Matin Mallick** (supra).

It is well settled that the mandate of payment of the entire consideration money with 10% levy is a pre-condition for initiation of proceedings under Section 8(1) of the said Act. Such statutory mandate has been recognised by the Hon'ble Apex Court in **Barasat Eye Hospital** (supra). There cannot be any estoppel or waiver against a statute. Moreover the preemptees raised the point of maintainability of the proceedings, before the permission to deposit the balance consideration was granted. The relevant paragraphs are 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.

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."

Pre-emption is a weak right according to the Hon'ble Apex Court and a right to pre-emption would only be triggered off with the deposit of the entire amount. Thus, deposit of consideration money in 2022 would render the pre-emption application barred by the law of limitation. Secondly, even if an objection that an inflated rate had been quoted by the pre-emptor was taken, the Hon'ble Apex Court held that the entire amount would have to be deposited as per Section 8(1) and the remaining, if any, would be refunded if upon enquiry under Section 9 it was found that an excess amount had been paid. Thus, the pre-emptor could not put a random amount as per his whim as the actual sale consideration. If such practice was allowed, then a weak right would be transformed into a speculative strong right. The following paragraphs from **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.
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> **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."

It has been also well settled that Section 5 of the Limitation Act would not have any application in a proceeding under Section 8 of the Land Reforms Act.

The relevant paragraphs of the said decision in **Barasat Eye Hospital** (supra) are quoted below:-

"32. We also believe that to give such a discretion to the pre-emptor, without deposit of the full consideration, would give rise to speculative litigation, where the pre-emptor, by depositing smaller amounts, can drag on the issue of the vendee exercising rights in pursuance of the valid sale deed executed. In the present case, there is a sale deed executed and registered, setting out the consideration

33. We are of the view that the impugned order and the view adopted would make a weak right into a "speculative strong right", something which has neither historically, nor in judicial interpretation been envisaged.

34. The last question which arises is whether the respondent can now be granted time to deposit the balance amount. When the direction was so passed, in pursuance of the order of the appellate court, the respondent still assailed the same. The requirement of exercising the right within the stipulated time, in respect of the very provision has been held to be sacrosanct i.e. that there can be no extension of time granted even by recourse to Section 5 of the Limitation Act. [Gopal Sardar v. Karuna Sardar, (2004) 4 SCC 252]

35. As we have discussed above, once the time period to exercise a right is sacrosanct, then the deposit of the full amount within the time is also sacrosanct. The two go hand-in-hand. It is not a case where an application has been filed within time and the amount is deficient, but the balance amount has been deposited within the time meant for the exercise of the right. We are saying so as such an eventuality may arise, but in that case, the right under the application would be triggered off on deposit of the amount which, in turn, would be within the time stipulated for triggering the right. That not having happened, we are of the view that there cannot be any extension of time granted to the respondent now, to exercise such a right. This is, of course, apart from the fact that this speculative exercise on behalf of the respondent has continued for the last fourteen years, by deposit of 50% of the amount."

Even in **Abdul Matin Mallick** (supra) the Hon'ble Apex Court reiterated the ratio laid down in **Barasat Eye Hospital** (supra). In such a case of pre-emption on the ground of co-sharership, where an allegation that an inflated amount had been quoted in the sale deed was made, the Hon'ble Apex Court again followed the decision in **Barasat Eye Hospital (supra**). The relevant paragraphs are quoted below:-

> "**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.
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> **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."

In 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 held that the decision of the Hon'ble Apex Court in **Barasat Eye Hospital** (supra) was a binding precedent and the same would have a retrospective effect. The following paragraphs 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 consideration as stated in sale deed 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.

The decision cited by Mr. Seth in **Maya Debnath** (supra) was rendered in special circumstances of the said case on the ground that the court had initially allowed the proceeding to continue. As the proceeding had been filed before the decision in **Barasat Eye Hospital** (supra), a lenient attitude was taken in favour of the pre-emptor. Said order is distinguishable on the facts. No ratio was laid down by His Lordship. The order was passed specially recording that the pre-emption application was filed before the decision in **Barasat Eye Hospital** (supra). In this case, the decision in **Barasat Eye Hospital** (supra) was rendered on October 17, 2019 and the certified copy of the order no.1 records that the present pre-emption case was filed on November 20, 2019. On this ground alone, decision in **Maya Debnath** (supra) will not apply. Moreover, the law declared by the Apex Court will have retrospective effect irrespective of the date of filing of the preemption application. His Lordship, who decided Maya Debnath (supra), has subsequently held in ***Smt. Santana Sengupta (Gupta) vs. Bidyasagar Mondal & Ors. decided in C.O. 1014*** of 2018 as follows:-

> 24. In view of the aforesaid decision and in the context of retrospectivity of the law laid down by the Apex court while interpreting section 8 and 9 of the Act of 1995, I find that the petitioners' application for preemption is not maintainable as he has not complied the prerequisites for enforcing his weak right by depositing the sale consideration price appearing in the impugned deed and the 10% levy on that consideration, which is clear violation of mandatory provision laid down under section 8(1) read with section 9(1) of the Act of 1955. Even allowing the pre-emptor to deposit the consideration amount after the period of limitation by the court cannot make the said deposit valid as the right to initiate the right of pre-emption starts from the date when the entire deposit is made by pre-emptor."

Under such circumstances, the order impugned is set aside.

Accordingly, CO 4201 of 2023 is disposed of.

Urgent photostat certified copy, if applied for, be supplied to the learned advocates for the parties on usual undertakings.

(Shampa Sarkar, *J.*)