

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

Present:

The Hon'ble Justice Sugato Majumdar

SA 146 of 2017

CAN/1/2010(Old No: CAN/8686/2010)

CAN/2/2011(Old No: CAN/10945/2011)

DILIP KUMAR DEBNATH & ORS.

VS

SMT. MALATI CHANDRA & ORS.

For the Plaintiffs : Mr. Pinaki Ranjan Mitra, Adv.
Mr. Sudhakar Biswas, Adv.

For the Defendants : Mr. Buddhadev Ghosal, Sr. Adv.
Mr. Udayan Datta, Adv.

Hearing concluded on : 19.05.2026

Judgment on : 21.05.2026

Sugato Majumdar, J :

The original suit was filed by one Smt. Malati Chanda on her behalf as well as on behalf of her two minor sons Tanmay Chanda and Mrinmay Chanda against one Dilip Kumar Debnath (Defendant No. 1) and Smt. Subhasini Das as Defendant No. 2.

Sum and substance of the plaint case is as follow:

One Gosai Kumar Chanda, since deceased and the defendant No. 2 were the recorded owners of the *Bastu* land with structures measuring about 2 Cottahs 14 Chittacks, described in Schedule-A of the suit. They became owners by way of

purchase in terms of court sale. Both of them had undivided 8 anna share in the schedule property. Gosai Kumar Chanda resided with his family members, namely, the present Plaintiffs in the Schedule-A property wherein they made constructions.

The aforesaid Gosai Kumar Chanda and the Defendant No. 2 were brother and sister.

It came to knowledge that one partition deed had been executed between Gosai Kumar Chanda and the Defendant No. 2. This deed of partition was purportedly executed on 22/11/1973. Challenging the partition deed as fraudulent, void and illegal, a suit was filed by the said Gosai Kumar Chanda against the Defendant No. 2 which was, however, dismissed. A consequent appeal filed by the said Gosai Kumar Chanda was also dismissed on 30/11/1992.

During pendency of the appeal, the Defendant No. 1 trespassed and illegally entered into the un-demarcated, undivided eastern portion of Schedule-A property on 17/11/1989. Gosai Kumar Chanda expired in the year 1991.

After dismissal of the said appeal, filed by Gosai Kumar Chanda, the Plaintiffs in exercise of their rights under the covenants offered to purchase Schedule-B property in terms of letter dated 23rd December, 1992 on actual price to be ascertained by the Government valuer. The letter was replied by the Learned Lawyer of the Defendant No. 2. It subsequently came to the knowledge that the Defendant No. 2 conveyed and/or transferred eastern portion of the Schedule-B property in favour of the Defendant No. 2 at an inflated price in violation of the original pre-emptive covenant contained in the deed of partition. After purchase of Schedule-B property, the Defendant No. 1 attempted to obstruct the user of privy, bath, well, court yard, passages and other accesses and also attempted to raise boundary wall.

In the circumstances stated above, the original suit was filed by the Plaintiffs, praying for decree of pre-emption in respect of Schedule-B property with further prayer of re-conveyance of the same in favour of the Plaintiff and permanent injunction in respect of Schedule-B property with other prayers.

Both the Defendants filed separate written statements.

Refuting all the allegations made in the plaint, the Defendant No.1 contended that he took delivery of possession of the property belonging exclusively to the Defendant No. 2 who had been in absolute possession as 16 anna owner thereof fully demarcated by boundary wall and separated by metes and bounds having no connection with the Plaintiffs. The Defendant No. 1 exercised all acts and possession of the same as of rights. It was also contended that the Defendant No. 2 send a letter under registered post asking the said Gosai Kumar Chanda to purchase her excessively allotted and separated property at the price settled with the Defendant No. 1 to which the said Gosai Kumar Chanda did not agree. Subsequently, the Defendant No. 1 on good faith purchased the property from Defendant No. 2 for valuable consideration. It was further contended that since partition, there was no joint or common privy, bath, well, court yard, passages or accesses or openings, in any manner, in the schedule property. There is a boundary wall demarcating and separating the original holding as per deed of partition. As such, the question of attempt by Defendant No. 1 to raise a boundary wall in between two portions does not arise at all. The two portions are already physically divided and separated. In nutshell, it is contended that the Defendant No. 1 has been enjoying exclusive possession and title which cannot be subjected to pre-emption.

The Defendant No. 2 filed separate written statement. Among others, and denying the allegations made in the plaint, it was pleaded that Schedule-A property

had been partitioned and separately demarcated on 22/11/1973 and the same was no longer and undivided property in which Gosai Kumar Chanda has 8 anna interest. It was also denied that Gosai Kumar Chanda had exclusive possession in Schedule-A property. The present Plaintiffs have right, title and interest from the year 1973, in the portion allotted to Gosai Kumar Chanda being the western side of the holding no. 21, Guitendal Lane. Gosai Kumar Chanda unsuccessfully tried to challenge the partition deed before the Trial Court as well as before the Appellate Court. It was contended that the Defendant No. 2 being disgusted with the conduct of Gosai Kumar Chanda offered to sell the property, allotted to him, during pendency of appeal at a price of Rs.1,70,000/- in terms of letter dated 25/07/1989 which was delivered to Gosai Kumar Chanda on 26/07/1989. The present Plaintiffs inherited the shares of Gosai Kumar Chanda in the western portion of the premises no. 21, Guitendal Lane. It was further contended that as no right accrued to the Plaintiffs, they took recourse to pre-emption under Section 8 of the Land Reforms Act, 1955. Denying all other allegations, it was prayed that suit may be dismissed.

On the basis of rival pleadings, the following issues were framed:

1. *Is the suit maintainable as formed?*
2. *Is the suit barred by Order II Rule 2 of C.P.C. and under the Specific Relief Act?*
3. *Have the Plaintiffs any cause of action or right to sue?*
4. *Are the Plaintiffs entitled to get a decree for pre-emption and injunction as prayed for?*
5. *To what other relief, if any, the Plaintiffs are entitled to?*

The Trial Judge dismissed the suit on context.

Being aggrieved by the Judgment of the Trial Court, an appeal was preferred. The First Appellate Court came to the conclusion that the Appellants had contractual right to pre-emption under the deed of partition and they were entitled to first offer. By sending blank sheet the contractual covenant of pre-emption had been flouted. The Respondents should make the first offer to the Appellants which they failed to do. Accordingly, the First Appellate Court set aside the Judgment of the Trial Court and allowed the decree of pre-emption. It was further observed that that the value of the appeal was Rs.1,70,000/-, the value of the original suit was Rs.30,010/- holding that the First Appellate Court had pecuniary jurisdiction to entertain the appeal. The said appellate judgment and decree dated 28/04/2010 has been sought to be assailed in the instant second appeal. The following substantial questions of law were framed by the Division Bench:

- I. Whether the Learned Judge in the Lower Appellate Court substantially erred in law in not considering that the appeal filed before him is not maintainable when the suit was valued at Rs.1,70,000/-?
- II. Whether the Learned Judge of the Lower Appellate Court substantially erred in law in not considering that the Plaintiffs/Respondents by relying upon the deed of partition which was unsuccessfully challenged by them up to this Hon'ble Court were trying to enforce one of the clauses of the said deed?
- III. Whether the Learned Judge in the Lower Appellate Court substantially erred on law not considering that the

Plaintiffs/Respondents waived their rights in respect of the property in suit when they were served with prior notice?

IV. Whether the Learned Judge in the Lower Appellate Court substantially erred in law in not considering the reasonings given by the Learned Trial Judge in dismissing the suit?

So far as the Point No. I is concerned, Section 21(1)(a) of the Bengal, Agra & Assam Civil Courts Act, 1887 clearly lays down that an appeal shall be to the District Judge, where the value of the original suit did not exceed one lakh and fifty thousand rupees. The original suit was valued at Rs.30,010/-. Therefore, the appeal from the judgment and decree of the Trial Court should lie before the Learned District Judge. There was no jurisdictional error on the part of the Learned First Appellate Court in entertaining the appeal.

The rest of the points should be considered together.

The Learned Counsel for the Respondent strenuously argued that the Respondent rightly relied upon the partition deed and the pre-emption clause. Once challenge to the partition deed failed, efficacy of the said deed stands untarnished and the pre-emption clause remains as it is. The Respondents flouted the pre-emption clause by not making the first offer to the Appellants and in transferring the suit property. Sending blank paper does not amount to any communication or offer. Therefore, according to the Learned Counsel, the impugned judgment passed by the First Appellate Court is correct and should not be interfered with.

Per contra, the principal limb of argument of the Learned Counsel for the Appellant was that by challenging the partition deed, the Respondents lost their right of pre-emption. One cannot approbate and reprobate at the same time. The Learned

Counsel referred to **Pt. Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd & Anr. [AIR 1968 SC 1355]; Rajasthan State Industrial Development and Investment Corporation & Anr. Vs. Diamond & Gem Development Corporation Ltd. & Anr. [(2013) 5 SCC 470].**

The Plaintiff case is based on the right of contractual pre-emption. In Para. 12 of the Plaintiff it was pleaded that the Plaintiff invoked the contractual pre-emption clause in terms of its letter dated 23/12/1992. The said letter is Ext. 3. In the said letter, the Plaintiff treated the property as undivided and invoked section 8 of the West Bengal Land Reforms Act.

The Learned Counsel for the Respondent argued that in the letter dated 23/12/1992, the section was referred to “loosely”. Referring to **Bishan Singh & Ors. Vs. Khazan Singh & Anr. [AIR 1958 SC 838]**, the Learned Counsel for the Respondent submitted that the right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold.

Bishan Singh’s Case was considered in the context of statutory pre-emption right. There cannot be any estoppels or waiver against a statute. But here we are confronted with contractual pre-emption right. The decision cited by the Learned Counsel for the Respondent, passed by a Single Bench of Madras High Court in **S. Sundaram & Anr. Vs. R. Damodaraswami & Anr. [AIR 1987 Mad 15]** is more relevant here. It was held that conduct of the plaintiffs themselves in dealing with their own properties acquired under partition lends support to the theory of waiver of the right of pre-emption.

The Respondents challenged the partition deed unsuccessfully. In terms of the letter dated 23/12/1992 [Ext. 3] they treated the property undivided. Whether section 8 of the West Bengal Land Reforms Act applies here is immaterial. The said

letter dated 23/12/1992 bears two connotations. Firstly, the pleading and proof are at variance as a result of which invocation of the contractual pre-emption has not been established. Secondly, by treating the property as undivided, the Respondent denied the partition deed as well as the pre-emption clause, effect of which is waiver of the right of pre-emption by conduct. In such circumstances whether the Appellant offered the sale or not is immaterial. Once the Respondent waived the right of pre-emption, they cannot invoke the same. They cannot approbate and reprobate at the same time. They are not entitled to any offer.

The Learned First Appellate Court committed error in coming to his conclusion, in ignoring the fact of waiver and in ignoring the purport of the letter dated 23/12/1992.

In view of discussions made above, this Court comes to the conclusion that the judgment and decree passed by the First Appellate Court is liable to be set aside.

In nutshell, the instant appeal is allowed.

The judgment and decree passed by the First Appellate Court in T.A. No. 45 of 2008, dated 06/06/2010 is set aside.

The judgment and decree passed by the Learned Trial Court dated 22/12/2000 in T.S. 33 of 1993 stands upheld.

The instant appeal is disposed of along with all the pending application, if any.

Trial Court Record be returned.

(Sugato Majumdar, J.)