
(2019) 07 CAL CK 0061

Calcutta High Court

Case No: Civil Order/Misc.Cas (CO) No. 2955, 2956 Of 1999, Civil Application (CAN) No.
4729, 4730 Of 2019

Bimal Das

APPELLANT

Vs

Minu Patra

RESPONDENT

Date of Decision: July 17, 2019

Acts Referred:

- Registration Act, 1908 - Section 61
- Limitation Act, 1963 - Section 3
- West Bengal Land Reforms Act, 1955 - Section 8, 9, 14
- Code Of Civil Procedure, 1908 - Order 41 Rule 27
- Constitution Of India, 1950 - Article 227

Citation: (2019) 07 CAL CK 0061

Hon'ble Judges: Biswajit Basu, J

Bench: Single Bench

Advocate: Sibasis Ghosh, Debjani Bandyopadhyay, Haradhan Banerjee, Saunak Bhattacharya

Final Decision: Allowed, Disposed Off

Judgement

Biswajit Basu, J

1. These two revisional applications under Article 227 of the Constitution of India is at the instance of the pre-emptee in a proceeding under Sections 8

and 9 of the West Bengal Land Reforms Act, 1955(hereinafter referred to as the *Act* in short).

2. The opposite party filed two applications under Section 8 of the said Act in the 1st Court of learned Civil Judge(Junior Division), Baruipur registered

as Misc. Case No. 39 of 1993 and Misc. Case No. 40 of 1993 to pre-empt two sale transactions whereby one Harendra Krishna Roy transferred suit

properties of the said two Misc. cases to the petitioner.

3. The common facts of both the Misc. cases are that the properties comprised in Dag Nos. 293/1271, 289, 288 appertaining to Khatian Nos. 78 and

516 and other properties originally belonged to Nanigopal, Jadugopal and Jamini Kumar Ghosh in equal shares. The said three persons effected

partition of their properties whereby Jadugopal got 14 $\tilde{\text{A}},\hat{\text{A}}^{\frac{1}{2}}$ decimal of land in the aforesaid plots. Jadugopal's son Debiprosad sold 14 $\tilde{\text{A}},\hat{\text{A}}^{\frac{1}{2}}$ decimal

of land to Harendra Krishna Roy and Saila Bala Purkait by a Kibala dated June 26, 1962. Thus, Harendra Kr. Roy and Saila Bala became co-

sharers to each other in respect of the said 14 $\tilde{\text{A}},\hat{\text{A}}^{\frac{1}{2}}$ decimal of land. The said Smt. Saila Bala Purkait and the pre-emptor/opposite party Smt. Minu

Patra executed by and between them a deed of exchange dated May 12, 1987 whereby the pre-emptor/opposite party transferred her $6\frac{2}{3}$ decimal of

land in Dag No. 59, Khatian nos. 26 and 27, mouza Salpur to said Saila Bala Purokait and she transferred her 7 $\tilde{\text{A}},\hat{\text{A}}^{\frac{1}{4}}$ decimal of land out of said 14 $\tilde{\text{A}},\hat{\text{A}}^{\frac{1}{2}}$

decimal of land in plot nos. 288, 289 of Khatian No. 516 and 293/1271 of Khatian No. 78 to the pre-emptor/opposite party by way of exchange. Thus,

the pre-emptor/opposite party became co-sharer raiyat of the said Harendra Kr. Roy, the vendor of the pre-emptee/petitioner in respect of the said 14

$\tilde{\text{A}},\hat{\text{A}}^{\frac{1}{2}}$ decimal of land. The said Harendra Kr. Roy by two deeds both dated August 16, 1988 transferred .02 $\tilde{\text{A}},\hat{\text{A}}^{\frac{3}{4}}$ decimal of land in plot nos. 288 and

289 of Khatian no. 516 and plot no. 293/1271 of Khatian No. 78 to Sri. Bimal Das the pre-emptee/petitioner herein. The pre-emptor/opposite party is

seeking pre-emption of the said two transfers by filing the aforementioned Misc. Cases on the ground of co-sharership and also on the ground of

vicinage.

4. The petitioner objected to the said prayer of pre-emption of the opposite party on the three fold grounds. Firstly, the application for pre-emption is

barred by law of limitation. Secondly, the opposite party has not acquired title over any portion of the suit property by dint of the said deed of exchange

executed by and between said Smt. Sailabala Purokait and the pre-emptor/opposite party inasmuch as property covered under the said deed of

exchange is completely different property which has no nexus with the said 14 $\tilde{\text{A}}$, $\hat{\text{A}}$ $\frac{1}{2}$ decimal of land. Thirdly, the said Sailabala Purokait was a party to

a suit for partition and her share in the 14 $\tilde{\text{A}}$, $\hat{\text{A}}$ $\frac{1}{2}$ decimal of land was one of the subject matters of the said suit wherein an order of injunction was

passed restraining said Sailabala Purokait from transferring her share in the properties involved in the said partition suit but the said deed of exchange

was executed by Smt. Sailabala violating the said order of injunction as such the said deed of exchange being void no title has passed through the said

deed in favour of the pre-emptor/opposite party.

5. The said two Misc. Cases were heard analogously and the learned Trial Judge by a common judgment and order being Order No. 72 dated August

13, 1998 dismissed both the said Misc. cases holding, inter alia, that in view of the definition of holding as defined under the provisions of the West

Bengal Land Holding Revenue Act, 1979 there cannot be any co-sharer in respect of any holding and in the absence of partition of the suit property

since it cannot be ascertained which portion of the suit property is in occupation of the per-emptor/opposite party the disputed sale cannot be pre-

empted on the ground of vicinage.

6. The opposite party being aggrieved by and dissatisfied with the said judgment and order of the learned Trial Judge preferred two separate Misc.

appeals being Misc. Appeal No. 437 of 1998 out of which CO No. 2955 of 1999 arises and Misc. Appeal No. 438 of 1998 out of which CO No. 2956

of 1991 arises.

7. The learned Additional District Judge, Fifth Court, Alipore by the orders impugned in the present revisional applications has allowed the said

applications for pre-emption holding that since no partition has been effected between the vendor of the petitioner and opposite party in terms of

Section 14 of the said Act they are co-sharer with each other in respect of the suit properties and as such the opposite party is entitled to pre-empt the disputed transfers on the ground of co-sharership.

8. Mr. Sibasis Ghosh, learned counsel appearing on behalf of the petitioner submits that the petitioner in his objection has taken a specific defence that

the application for pre-emption is not maintainable being barred by law of limitation. He submits that the petitioner filed the original impugned sale

deeds before the learned Trial Judge wherefrom it will appear that the disputed deeds were executed and registered on August 16, 1988 whereas the

application for pre-emption was filed on May 10, 1993. Therefore, according to him the applications for pre-emption are barred by limitation but both

the learned Courts below did not consider the said aspect of the matters at all. Mr. Ghosh, by referring to the provisions of Section 3 of the Limitation

Act, 1963 submits that irrespective of setting up limitation as the ground of defence it is incumbent upon the Courts below to make an inquiry whether

the said applications for pre-emption were filed after the prescribed period of limitation or not but in the present case such inquiry has not at all been

made. In support of his such contention he places reliance on the decision of the Hon'ble Apex Court in the case of STATE OF GUJRAT Vs.

KOTHARI AND ASSOCIATES reported in 2016 (2) CHN (SC) 303.

9. Mr. Ghosh, further submits that Sailabala Purokait since had never exchanged her share in the said 14 ½ decimal of land with the opposite party

no title has passed to the opposite party in respect of the suit property or any part of it by dint of the said deed of exchange, the opposite party,

therefore, cannot be a co-sharer of the vendor of the petitioner in respect of the suit property. He also argues that the said deed of exchange since

was executed by Sailabala in violation of an order of injunction passed by a competent Civil Court the said deed is void as such by virtue of the said

deed the pre-emptor/opposite party cannot claim any title over the suit property.

10. Mr. Haradhan Banerjee, learned counsel appearing on behalf of the opposite party responding to the argument of Mr. Ghosh submits that the

petitioner neither in his written objections to the applications for pre-emption nor in his evidence questioned the maintainability of the said Misc. cases

on the ground of limitation, therefore, according to him the learned Courts below had no obligation to make an inquiry as to the maintainability of the

said Misc. cases on the ground of limitation.

11. Mr. Banerjee, by referring to the properties conveyed under the deed dated June 26, 1962 vis-à-vis the properties exchanged under the deed of

exchange dated May 11, 1987 submits that a cursory comparison of the properties covered under the said two deeds would unmistakeably suggest

that Sailabala Purokait by the said deed of exchange of 1987 exchanged her share in the 14 ½ decimal of land with some other properties of the

opposite party. Therefore, the acquisition of title of the opposite party in respect of the suit property cannot be doubted.

12. Mr. Banerjee, further submits on October 12, 1974 an ad-interim order of injunction was passed in the partition suit amongst the co-sharers of said

Sailabala Purokait in respect of the properties involved in the said suit. The certified copy of the order of the said ad-interim injunction was marked as

Exhibit. A in the Misc. cases, wherefrom it will appear that the said order was an ad-interim order of injunction and was in force till the

disposal of the petition for temporary injunction. Therefore, in the absence of any materials on record that the said order of injunction was subsisting as

on May 11, 1987 when the said deed of exchange was executed, the validity of the said deed cannot be impeached on the ground that the same was

executed in violation of the said order of injunction.

13. Mr. Banerjee, further contends that the applications for pre-emption was filed when the registration of the impugned deeds of sale was not

completed in terms of Section 61 of the Registration Act, 1908 but such registration of the said deeds since was completed during the pendency of the

applications for pre-emption, the maintainability of the said applications would not be affected on the ground of limitation. He refers the decision of the

Hon'ble Division Bench of this Court in the case of KRISHNA CHANDRA PRAMANIK AND OTHERS Vs. HARI SADAN SAHANA

AND ANOTHER reported in 1981 (2) CHN 252 to give support to his said contention.

14. Mr. Banerjee, however, contends that the petitioner since had not taken any steps to prove the impugned deeds in course of the trial of the said

Misc. cases in accordance with law, he cannot refer the said deeds to contend that the applications for pre-emptions are barred by limitation.

15. In course of hearing of the revisional applications the petitioner has filed two applications being CAN 4729 of 2019 and CAN 4730 of 2019 for

reception of the impugned deeds of sale as additional evidences in the present revisional applications and marking of those documents as exhibits. Mr.

Ghosh in support of the said applications submits that those deeds although were produced before the learned Trial Judge but inadvertently were not

marked as exhibits as such those documents may be received as additional evidences in the present revisional applications and may be marked

exhibits.

16. Mr. Banerjee, refuting the submissions of Mr. Ghosh, submits that the said applications do not satisfy the requirement of Order 41 Rule 27 of the

Code of Civil Procedure and in the absence of strict fulfilment of the conditions of the said provision of the Code the impugned deeds cannot be

received as additional evidences in the present revisional applications. Mr. Banerjee, in support of his such contention places reliance on the following

decisions:-

(i) N. KAMALAM (DEAD) AND ANOTHER Vs. AYYASAMY AND ANOTHER reported in 2001 (7) SCC 503.

(ii) BAGAI CONSTRUCTION THROUGH ITS PROPRIETOR LALIT BAGAI Vs. GUPTA BUILDING MATERIAL STORE reported in

2013(14) SCC 1

(iii) LEKHRAJ BANSAL Vs. STATE OF RAJASTHAN AND ANOTHER reported in 2014(15) SCC 686

(iv) ARUN CHANDRA SINHA Vs. THE HON'BLE LT. SATYENDRA CHANDA GHOSE MOULICK reported in 39 C.W.N 322.

Heard learned counsel for the parties. Perused the materials on record.

17. The defence of the pre-emptee that the pre-emptor has not acquired any right, title and interest over the suit property or any part thereof by virtue

of the deed of exchange being Exhibit. 3 cannot stand as on perusal of the deed dated June 26, 1962 and the said deed of exchange dated May 11,

1987, Exhibit. 3 it appears that Sailabala Purokait by the said deed exchanged her share in the said 14 ½ decimal of land which she got by virtue of

the said deed of conveyance dated June 26, 1962 in lieu of some properties of the pre-emptor/opposite party.

18. The defence of the pre-emptee that the said deed of exchange was executed in violation of the order of injunction passed in the partition suit

where said Sailabala Purokait was a party is also subject to prove that the said order of injunction was subsisting as on the date of execution of the

said deed of exchange dated May 11, 1987 but from the Exhibit. 3 certified copy of the ad-interim order of injunction passed in the said suit

it appears that said order of injunction was in force till the disposal of the said application for temporary injunction. Therefore, in the absence of any

clinching evidence that the said deed of exchange was executed in violation of the order of injunction passed in the said suit. The validity of the said

deed cannot be impeached.

19. The argument of Mr. Ghosh that the learned Courts below are obliged to inquire as to the maintainability of the said Misc. cases on the ground of

limitation notwithstanding defence on such ground is being taken by the pre-emptee/petitioner deserves consideration.

20. The Hon'ble Apex Court in the decision referred by Mr. Ghosh reported in 2016 (2) CHN (SC) 303 (supra) has relied on its earlier

decision in the case of UNION OF INDIA Vs. BRITISH INDIA CORPORATION LTD. reported in (2003) 9 SC Cr 5 has held that Section 3

of the Limitation Act explicitly states that "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. It is thus incumbent upon the Court to satisfy itself that the suit is not barred by

limitation, regardless whether such a plea has been raised by the parties. The provision of Section 3 of the Limitation Act, 1963, therefore, casts a duty

upon the Court to dismiss suit, appeal and application filed beyond the prescribed period of limitation although limitation has not been set up as a

defence.

21. An application under Section 8 of the said Act to pre-empt a sale must be filed within the period of limitation prescribed under the said provision of

the said Act and period of limitation so prescribed since assumes a great importance in deciding the claim of the pre-emptor in such a proceeding, the

Court is obliged to make an inquiry whether the application for pre-emption under the said provision of the said Act is being filed within the prescribed

period of limitation or not. It appears from the judgments of both the Courts below that such an inquiry has not been carried out by both the Courts

below, thereby have failed to follow the statutory mandate envisaged under Section 3 of the Limitation Act, 1963. That being the position I am unable

to accept the contention of Mr. Banerjee that the pre-emptee/petitioner since has not questioned the maintainability of the said Misc. cases on the

ground of limitation he is precluded from raising the said point in revision.

22. The law is well settled that the application for pre-emption may be premature on the date of its filing for want of completion of the registration

of impugned deed of sale in terms of Section 61 of the Registration Act, 1908 but on subsequent completion of the registration of the said deed the

right of the pre-emptor matures, as has been held by the Hon'ble Division Bench of this Court in the decision relied on by Mr. Banerjee, reported

in 1981 (2) CHN 252 (supra). But in the present cases the registration of the impugned deeds when was completed is required to be investigated to

ascertain the maintainability of the said Misc. cases on the ground of limitation.

23. There is no dispute with regard to the proposition of law laid down by the Apex Court as well as by the learned Single Judge of this Court in the

decisions relied on by Mr. Banerjee reported in 2001 (7) SCC 503(supra), 2013 (14) SCC 1 (supra), 2014 (15) SCC 686(supra) and 39 CWN

322(supra) that the provisions of Order 41 Rule 27 of the Code cannot be resorted to for reception of additional evidence in appeal/revision unless

conditions thereof are fulfilled.

24. In the present case the petitioner is praying reception of the deeds of sale sought to be pre-empted by the opposite party as additional evidences

and marking of those documents as exhibits. The said deeds were filed by the petitioner before the learned Trial Judge but were not marked exhibits.

The pre-emptor obviously is not challenging the veracity of those deeds. The point of limitation is germane in deciding the rights of the parties to the

instant proceeding. The said point cannot be decided properly without the production of the original of the impugned deeds and proof of those deeds in

accordance with law forming those documents part of the records of the said Misc. cases and only thereupon the question when the registration of the

said deeds were completed in terms of Section 61 of the Registration Act, 1908 can be answered and the issue of maintainability of the said Misc.

cases on the ground of limitation can properly be addressed.

25. The pre-emptor/opposite party since is seeking pre-emption of the impugned transfers it is obvious that she is not impeaching the impugned deeds

of sale otherwise but the pre-emptor/opposite party is entitled to cross-examine the witness whom the pre-emptee/petitioner may cite to prove the said

documents. Therefore, instead of receiving the said documents in the present revisional application as additional evidences liberty is granted to the

petitioner to prove the impugned deeds of sale in the relevant Misc. cases in accordance with law with a further liberty to the pre-emptor/opposite

party to produce evidence in rebuttal on the point which the pre-emptee/petitioner may sought to prove by producing and proving those deeds.

26. Summing up the discussions made above I am of the considered opinion that the orders impugned in both the revisional applications are not

sustainable and both the Misc. cases are required to be decided afresh. The C.O. 2955 of 1999 and C.O. 2956 of 1999 are therefore allowed the

orders impugned in the said revisional applications are set aside with a direction upon the 1st Court of learned Civil Judge (Junior Division), Baruipur,

Dist.

24 Parganas (South), to decide the Misc. Case No. 39 of 1993 and Misc. Case No. 40 of 1993 afresh in the light of the observations made

hereinabove. In view of the age of the said Misc. cases the learned Trial Judge is requested to dispose of those Misc. cases expeditiously. The

connected applications being CAN 4729 of 2019 and CAN 4730 of 2019 are also disposed of accordingly.

Department is directed to send down the lower Court records immediately by a special messenger at costs of the petitioner and such costs be put in

within a week from date.

Urgent photostat certified copy of this judgement, if applied for, be supplied to the parties upon compliance with all requisite formalities.