

(2005) 03 CAL CK 0047**Calcutta High Court****Case No:** C.O. No. 1212 of 1996

Ratipati Bandopadhyay and
Another

APPELLANT

Vs

Mrinalini Debi and Others

RESPONDENT

Date of Decision: March 24, 2005**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Section 17, 5, 5(5)
- Registration Act, 1908 - Section 61
- West Bengal Land Reforms Act, 1955 - Section 8

Citation: (2006) 4 CHN 440**Hon'ble Judges:** Jyotirmay Bhattacharya, J**Bench:** Single Bench**Advocate:** Hari Narayan Mukherjee, Sabyasachi Mukhopadhyay and Amit De, for the
Appellant; Kishore Mukherjee, for the Respondent**Final Decision:** Dismissed**Judgement**

Jyotirmay Bhattacharya, J.

This application under Article 227 of the Constitution of India is directed against an order and/or judgment passed by the learned Additional District Judge, Birbhum at Rampurhat in Misc. Appeal No. 32 of 1993 affirming the Order No. 66 dated 18th September, 1993 passed by the learned Munsif, 1st Court at Rampurhat in Misc. Case No. 16 of 1985.

2. The pre-emptors are the petitioners in this revisional application before this Court.
3. The application for pre-emption was filed on the grounds of co-sharership as well as vicinage.

4. The petitioners claim that Sarat Chandra Mukhopadhyay, the original owner of the case plot gifted 02 satak of land out of 04 satak of land in the case holding in favour of the petitioners herein by a registered deed of gift dated 4th December, 1961. Thus, the petitioners became the co-sharers in respect of the said case plot with the said Sarat Chandra Mukhopadhyay.

5. On the death of Sarat Chandra Mukhopadhyay, his son Gopal Chandra Mukhopadhyay inherited the share of his father in the case plot.

6. The vendor of the opposite party No. 1 who is the only heir of Gopal Chandra Mukhopadhyay inherited the share of his father in the case land upon the death of Gopal. Thus, the vendor of the opposite party No. 1 who inherited the remaining 02 satak of land became a co-sharer with the petitioners in respect of the said case land.

7. Subsequently, the vendor of the opposite party No. 1 by a deed of sale dated 29th June, 1981 registered on 10th July, 1981 sold and transferred his right, title and interest in respect of his 02 satak of land to the predecessors-in-interest of the opposite party No. 1.

8. Though, the pre-emptor/petitioner was a co-sharer but no notice of such transfer was served upon the pre-emptor prior to such sale. The vendor of the opposite party No. 1, in fact, transferred his share in the case plot by suppressing such notice. As such, the pre-emptor/petitioner could not know about such transfer at the time of such sale. The pre-emptor/petitioner came to know about the said transfer subsequently and thereafter, the instant application for pre-emption was filed on 16th May, 1985.

9. Registration of the said sale was completed u/s 61 of the Registration Act on 5th January, 1984. Thus, there was delay of about 16 months in filing this application for pre-emption after the date of registration of the said sale deed.

10. Since pre-emptee the opposite party was a stranger purchaser, the pre-emptor/petitioner applied for pre-emption u/s 8 of the West Bengal Land Reforms Act (hereinafter referred to as the said Act).

11. The said application for pre-emption was contested by the pre-emptee/ opposite party on the ground that the sale which was sought to be preempted was, in fact, not an out and out sale but was a loan transaction. The pre-emptee claimed that since the said transfer was not a sale in substance, the right of pre-emption cannot be exercised in respect of such transfer.

12. The learned Trial Judge, after a contested hearing dismissed the said application for pre-emption by holding, inter alia, that in view of the decision of Hon'ble High Court in the case of Damayanti Maiti v. Aswini Kumar Jana reported in 1990(2) CLJ 378, the pre-emptor is not a co-sharer of the holding of the raiyat.

13. The learned Munsif, however, found that the claim of the pre-emptor/ petitioner is not barred by the laws of limitation, as the application for pre-emption was filed within three years from the date of completion of sale. The learned Munsif by relying upon a decision of this Hon'ble Court in the case of *Prasanna Giri v. Gangadhar Raut* reported in 81 CWN 580, held that the period of limitation for filing such an application by the non-notified co-sharer is 3 years from the date of completion of such sale as per the provisions of Section 137 of the Limitation Act. The learned Munsif, however, held that the claim of pre-emption on the ground of vicinage is barred by limitation. Accordingly, the said claim of the pre-emptor/petitioner was ignored. Though, the learned Munsif disbelieved the claim of the pre-emptee to the effect that the transfer was loan in substance and not a sale out and out but still then, the claim for pre-emption was rejected on the ground that the pre-emptor is not a co-sharer of the holding.

14. The learned First Appellate Court also affirmed the said findings of the learned Munsif and thus dismissed the appeal which was filed by the pre-emptor challenging the said order of the learned Munsif.

15. This revisional application is directed against such an appellate order in connection with the said pre-emption proceeding.

16. Mr. Hari Narayan Mukherjee, learned Advocate, appearing for the petitioners, submitted by drawing my attention to the changes introduced in the laws of pre-emption by way of amendment of the provisions u/s 8 of the said Act. Mr. Mukherjee submitted that after such amendment, the concept of "co-sharer of a holding" has been given a go-by by introduction of "co-sharer of a plot of land" in the place of "co-sharer of the holding" in Section 8 of the said Act. Thus, Mr. Mukherjee contended that if the pre-emptor can establish that the pre-emptor is a co-sharer of the plot of the case land then he is entitled to exercise his right of pre-emption on the ground of co-sharership.

17. Mr. Mukherjee further contended that it is an undisputed fact that the pre-emptor/petitioner is a co-sharer of the case land. Accordingly, his prayer for pre-emption cannot be rejected in view of the amended provisions of Section 8 of the said Act, particularly when the effect of such amendment was given from 1969 retrospectively.

18. Mr. Kishore Mukherjee, learned Advocate, appearing for the pre-emptee/opposite party, submitted that the application for pre-emption is barred by the laws of limitation. Mr. Mukherjee pointed out that admittedly the application for pre-emption was filed 16 months after completion of registration of sale. Mr. Mukherjee further submitted that Section 8 of the said Act prescribes the period of limitation for exercising his right of pre-emption on the ground of co-sharership. Mr. Mukherjee contended that under the said Act the right of pre-emption can be exercised by the co-sharer within three months of the service of notice under

Sub-section (5) of Section 5 of the said Act.

19. By relying upon a decision of the Hon'ble Supreme Court in the case of [Gopal Sardar Vs. Karuna Sardar](#), submitted that even in case of a non-notified co-sharer, the period of limitation is one year from the date of completion of registration of the sale deed. Mr. Mukherjee further contended that in view of the said decision of the Hon'ble Supreme Court even the said period of limitation cannot be extended u/s 5 of the Limitation Act, as Section 5 of the Limitation Act cannot be applied in case of presentation of a pre-emption proceeding which is as good as a plaint by which a suit is instituted.

20. Thus, Mr. Mukherjee submitted that the application for pre-emption is hopelessly barred by laws of limitation and accordingly no interference is necessary with the order impugned.

21. In reply, Mr. Hari Narayan Mukherjee submitted that the decision which was cited by Mr. Kishore Mukherjee has no application in the facts of the instant case, as the petitioners have not prayed for extension of time for filing the said application for pre-emption u/s 5 of the Limitation Act. Mr. Mukherjee submitted that the Hon'ble Supreme Court in the said decision considered the applicability of Section 5 of the Limitation Act in case of a pre-emption proceeding and ultimately held that Section 5 of the Limitation Act is not available to the proceeding u/s 8 of the said Act.

22. Mr. Hari Narayan Mukherjee further contended that the Hon'ble Supreme Court had no occasion to consider the applicability of Section 17 of the Limitation Act in a proceeding for pre-emption under the said Act. Mr. Mukherjee further contended that here in the instant case the service of notice was fraudulently suppressed and thereby the sale was concealed only to avoid pre-emption. Accordingly, in the instant case, the starting point of limitation will be from the date of discovery of such concealment and/or fraud. Thus, in view of Section 17 of the Limitation Act, the application for pre-emption is well within the prescribed period of limitation.

23. In support of his said submission Mr. Hari Narayan Mukherjee also relied upon a decision of this Hon'ble Court in the case of Aparna Ghosh and Anr. v. Sarupchand Roychowdhury reported in 2004(2) WLR 905, wherein it was held that "it is preposterous to suggest that in the Act there are indications implying that the Section 17 of the Limitation Act should be excluded from its operation in the proceedings u/s 8 of the Act". It was further held therein that "the law is now settled that if a particular right of a person is infringed by another by taking aid of fraud, and the fact of infringement of such right is concealed from that person, in such a case, so long fraud is not discovered, the delay in approaching the Court cannot stand in the way of the Court in granting appropriate relief to the person upon whom fraud has been practised.

24. Accordingly, Mr. Hari Narayan Mukherjee submitted that the application for pre-emption cannot be rejected as barred by the laws of limitation.

25. Let me now consider the effect of the submissions of the respective parties.

26. It is no doubt true that the Hon"ble Supreme Court in the case of Gopal Sardar (supra) did not consider as to whether Section 17 of the Limitation Act was excluded from its operation in the proceeding u/s 8 of the said Act or not. In the said decision the Hon"ble Supreme Court considered the applicability of Section 5 of the Limitation Act in case of a pre-emption proceeding and held that Section 5 of the said Act is not applicable in case of a pre-emption proceeding.

27. On consideration of the decision of this Hon"ble Court in the case of Aparna Ghosh (supra) I fully agree with the view expressed by His Lordship in the said decision that the application of Section 17 of the Limitation Act cannot be excluded in case of a pre-emption proceeding.

28. But here in the instant case, the exact date of discovery of fraud is missing. Unless the date when such fraud was discovered is disclosed in the pleadings and is also proved in evidence, the Court cannot fix the starting point of limitation even if Section 17 of the Limitation Act is applicable in a pre-emption proceeding.

29. Be that as it may, let me consider as to whether the right to apply for pre-emption at all accrued in favour of the pre-emptor/petitioner, in the facts of the instant case."

30. It appears that the original raiyat Sarat Chandra Mukhopadhyay was the owner of 04 satak of land in plot No. 2330. The said Sarat Chandra Mukhopadhyay gifted 02 satak of land to the pre-emptor/petitioner in 1961. Thus, after such gift, Sarat had only interest in respect of 02 satak of land in the said plot which the successive heirs of Sarat transferred by way of sale unto the pre-emptee/opposite party who was also a co-sharer in respect of the case land along with Sarat and Nalinaksha.

31. The said finding of the learned Munsif has not been challenged by the pre-emptor/petitioner either before the learned First Appellate Court or before this Court in this application.

32. Thus, in view of the fact that the entire interest of the raiyat in the particular plot of land having been sold by the raiyat in favour of another co-sharer of the particular plot of land, right of pre-emption did not accrue in favour of the pre-emptor/petitioner u/s 8 of the said Act.

33. Accordingly, I hold that no interference is necessary with the order impugned, particularly when the ultimate conclusion which was arrived at by both the learned Courts below is correct.

34. Thus, I find no merit in this application. The application, thus, stands rejected.

35. Urgent xerox certified copy of this judgement, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.