

(2014) 08 CAL CK 0058

Calcutta High Court

Case No: CO 2159 of 2008

Satish Chandra Mondal

APPELLANT

Vs

Sourav Mondal

RESPONDENT

Date of Decision: Aug. 29, 2014

Acts Referred:

- Constitution of India, 1950 - Article 227
- West Bengal Land Reforms Act, 1955 - Section 2(vi), 8, 8(1), 9

Citation: (2015) 2 CHN 616

Hon'ble Judges: Subrata Talukdar, J

Bench: Single Bench

Advocate: Ashis Bagchi, Learned Senior Counsel and Gobindalal Ghosh, Learned Counsel, Advocate for the Appellant; Bidyut Banerjee, A.K. Bera, Rabindranath Mahato and Joyita Chakraborty, Learned Counsels, Advocate for the Respondent

Judgement

Subrata Talukdar, J.

This petition under Article 227 of the Constitution of India being CO 2159 of 2008 challenges the judgment and order dated 15th May, 2008 passed in Misc. Appeal No. 44 of 2007 by the Learned 2nd Additional District Court, West Midnapore dismissing the appeal and thereby affirming the judgment and order dated 9th April, 2007 passed in Misc. Case No. 10 of 2004 by the Learned 3rd Civil Court (Junior Division), Midnapore rejecting the claim of the petitioner for pre-emption u/s 8 of the West Bengal Land Reforms Act, 1955 (for short the WBLR Act).

2. The pre-emptor is the petitioner before this Court. Pursuant to the order dated 22nd March, 2012 passed by the Learned Registrar (Administration), on the death of the sole pre-emptor-petitioner his legal heirs have been substituted as petitioners in the present CO 2159 of 2008.

3. The opposite party No. 1 is the Purchaser of the suit plot and the Opposite Party (for short OP) No. 2 is the Vendor of the suit plot.

4. The case of the pre-emptor, in short is as follows:-

a) That the petitioner-pre-emptor filed J. Misc. Case No. 10 of 2004 claiming pre-emption under Sections 8 and 9 of the WBLR Act in respect of the suit plot No. 134;

b) In the pre-emption petition it is contended that the suit plot No. 134 measuring 3.90 acres of Mouza-Foolgeria in L.R. Khatian No.-103 originally belonged to one Rashbehari Adhikary, father of the OP2-Vendor. The said Rashbehari Adhikary gifted 0.93 acres on the North-East corner of the said plot out of 3.90 acres to his son, the OP2-Vendor;

c) Thereafter the OP2-Vendor sold out the suit plot to the OP1-Purchaser for a consideration of Rs. 55,000 and a Registered Sale Deed was executed on 30th January, 2004. Registration of the suit plot was completed on 10th February, 2004;

d) The OPs contested the pre-emption matter by filing separate written objection. The OPs have contended that in the aforesaid Sale Deed 0.1 decimals of land having a common boundary wall with the suit plot was not found. In such view of the matter the OPs contend that no application for preemption can be maintained.

5. By judgment and order dated 9th April, 2007 in J. Misc. Case No. 10 of 2004 the Learned 3rd Civil Court (Junior Division) at Midnapore has recorded that the petitioner/pre-emptor and his brother are the owners of and in possession of plot No. 146 adjacent to the suit plot. On the basis of amicable arrangement between them the petitioner/pre-emptor has constructed a room on the eastern portion of plot No. 146 being adjacent to the suit plot. In the Sale Deed the OPs have mentioned the boundary of the property sold excepting 1 decimal of land in the northeastern portion of the suit plot so that the petitioner/pre-emptor may not claim preemption. The petitioner, however claims pre-emption on the ground of being an adjoining raiyat.

6. The Learned Trial Court also recorded that the OPs have contended that a Surveyor was appointed and it was detected on the basis of such survey that the petitioner/pre-emptor has encroached on the land of the OP2/Vendor. The suit plot was sold by the OP2/Vendor to the OP1-Purchaser barring 1 decimal of land inasmuch the said 1 decimal of land was in possession of the petitioner/pre-emptor.

7. Upon consideration of the rival submissions the Learned Trial Court was of the view that the point that needs consideration is whether the petitioner/pre-emptor has valid title over 1 decimal of the suit plot No. 134. The Learned Trial Court found that in the facts of the present case the OP2/Vendor did not have any possession over 1 decimal of the suit plot No. 134. However, the OP2 is the real owner in respect of the said land and the petitioner did not have any valid title to the same. In the opinion of the Learned Trial Court although the petitioner/pre-emptor has denied that he is an encroacher in the suit plot No. 134, the Learned Court found

from the evidence of OP1 that OPW2/petitioner/pre-emptor encroached 1 decimal of land belonging to OP2 in the suit plot and such encroachment is evident from the cross-examination of OPW1 and OPW2. The Learned Trial Court was of the further opinion that on careful scrutiny of the Sale Deed and the evidence on record it can be concluded that an encroacher cannot have valid title to any portion of the land belonging to the OP2/Vendor. Considering the above position, the Learned Trial Court was pleased to dismiss the claim to pre-emption by rejecting J. Misc. Case No. 10 of 2004.

8. The judgment and order dated 9th April, 2007 passed by the Learned Trial Court was carried in appeal by the petitioner/pre-emptor before the Learned 2nd Additional District Court, West Midnapore in Misc. Appeal No. 44 of 2007. The Learned Appellate Court upon consideration of the rival submission was pleased to come to the following view:-

i) That it is undisputed that the suit plot No. 134 measuring 3.90 acres of agricultural land originally belonged to one Rashbehari Adhikary, father of the OP2/Vendor. The said Rashbehari Adhikary gifted 93 1/2 decimals on the northeast corner of the suit plot to the OP2/Vendor who in turn transferred the disputed plot in favour of the OP1/Purchaser for valuable consideration.

ii) The petitioner-pre-emptor-appellant has deposited Rs. 60,500, i.e. consideration money along with 10 percent compensation in Court as required by law. The registration of Sale Deed was undisputedly completed on the 10th February, 2004 and the application for pre-emption was made within the period of limitation prescribed under the law.

iii) The Learned Appellate Court did not agree with the finding of the Learned Trial Court on the score that the Learned Trial Court did not have jurisdiction to determine whether the petitioner/pre-emptor-appellant is an encroacher or not as also the question whether the petitioner possesses valid title. In the opinion of the Learned Appellate Court the Learned Trial Court did not come to any conclusion on the aspect of tenancy of the petitioner in the suit plot.

iv) Recognising its own jurisdiction to take a complete view of the matter upon examination of both oral and documentary evidence the Learned Appellate Court undertook the exercise of examining whether the petitioner/pre-emptor/appellant was an adjacent land owner.

v) From the Schedule of the registered Sale Deed dated 10th February, 2004 marked Exbt. 1 and from the oral evidence, the Learned Appellate Court found that the plot No. 146, belonging to the pre-emptor is situated adjoining to the northeast of the suit plot No. 134. Upon completion of sale as aforesaid by the OP2 in favour of the OP1, OP2 kept 1 decimal of the suit plot adjoining the land of the petitioner-appellant with the purpose of defeating any claim to preemption.

vi) Therefore, it is an admitted position that the plot No. 146 and the suit plot No. 134 is intervened by 1 decimal of land. In view of such intervening strip of land measuring 1 decimal, according to the Learned Appellate Court the suit plot transferred in favour of OP1 with definite boundaries cannot be held to be adjoining to the plot No. 146. In such view of the matter no claim to pre-emption being an adjoining land owner can be put forth by the petitioner/pre-emptor particularly in the light of the clear demarcated boundaries of the respective plots.

vii) Upon consideration of the cited authorities on the subject the Learned Appellate Court was pleased to come to the view that after the amendment of the WBLR Act in the year 2000 the definition of "holding" cannot attract the claim to being an adjoining owner by the petitioner/pre-emptor/appellant. Accordingly, the Learned Appellate Court was pleased to reject the claim to pre-emption and affirmed the judgment and order dated 9th April, 2007 passed by the Learned Trial Court.

9. Sri Ashis Bagchi, Learned Senior Counsel appearing on behalf of the petitioner-pre-emptor submits that the existence of a small strip of land measuring 1 decimal as discussed by the Learned Appellate Court does not stand in the way of claiming pre-emption since the petitioner-pre-emptor is admittedly co-owner of a contiguous plot No. 146. According to Sri Bagchi, the existence of a strip of land which was not sold by the OP2 to the OP1 cannot be a bar to exercise the statutory right to pre-emption.

10. Sri Bagchi has further submitted that it is not the case of the OPs that a formal partition has been effected in the suit plot. In the absence of a formal partition the right to pre-emption must be considered to be a continuing right and cannot be denied to a contiguous land holder.

11. Sri Bagchi has also argued that the law on pre-emption is intended to operate with a view to prevent fragmentation of land holding among co-sharers. Such law is an enabling law for facilitating the claim of adjoining land owners to claim pre-emption upon proper transfer.

12. It is also the case of Sri Bagchi that the OP2/Vendor cannot be considered to have any locus to contest the pre-emption proceedings after the sale of the suit plot has been completed. According to him, the right of pre-emption runs with the land and is attached to the suit plot. Such right is enforceable only against the present owner of the land, viz. the OP1/Purchaser. Sri Bagchi points out that the OP2/Vendor had recognized this position by not taking part in the appeal proceedings.

13. Sri Bagchi finally asserts that the petitioner being the owner of plot No. 146 must be considered to be owner of each portion of the said plot. The petitioner being the co-owner of every inch of the adjoining plot No. 146 and such co-ownership coupled with possession in the adjoining plot No. 146 being never disputed, must be considered to be an adjoining raiyat in terms of the mandate of Section 8 of the 1955 Act. It is not necessary that the petitioner/pre-emptor needs to be the only

raiyat since the language of Section 8(1) of the WBLR Act is unambiguous in affirming the right of pre-emption in respect of any (emphasis applied) raiyat possessing land adjoining the suit plot.

14. In support of his above noted contentions Sri Bagchi relies upon the following decisions:-

[Ashima Dutta and Another Vs. Chandra Nath Bhattacharya, Ishan Chandra Ghatak Vs. Sasadhar Maity, Biswanath Sarkar and Another Vs. Sunit Kumar Saha, Bhadreswar Bera Vs. Mathura Mohan Shaw and Others,](#)

Per contra, Sri Bidyut Banerjee, Learned Counsel appearing for the OP1/Purchaser has argued that the decisions cited by Sri Bagchi (supra) relate to the provisions of pre-amended WBLR Act. According to Sri Banerjee, in the pre-amended WBLR Act, i.e. prior to its amendment in the year 2000 the concept of "holding" was defined u/s 2(vi). However, the concept of "holding" under the WBLR Act post amendment in the year 2000 has specified that the pre-emptor must have a common boundary and the meaning of a contiguous owner has undergone a change. Sri Banerjee points out that the proviso to Section 8 of the WBLR Act provides for contiguous ownership. In respect of the joint ownership of plot No. 146 of the petitioner-pre-emptor and his brother, the common boundary of plot No. 146 with the suit plot No. 134 has not been determined.

15. It is the further case of Sri Banerjee that unless partition is effected between the co-owners of plot No. 146, the holder of a common boundary, if any, cannot be determined. Unless the holder of a common boundary is determined no pre-emption can lie.

16. Relying on a decision reported in [Amal Kumar Giri and Others Vs. Nani Gopal Paira and Others,](#) in the matter of Amal Kumar Giri & Ors. Vs. Nonigopal Paira & Ors. Sri Banerjee submits that partition is a sine qua non for claiming pre-emption on the basis of a common boundary.

17. Appearing for the OP2/Vendor of the suit plot No. 134 Sri Mahato, Learned Counsel submits that prior to the transfer in favour of OP1/Purchaser the OP2 proposed to transfer the suit plot in favour of the present petitioner. Such proposal was refused. The proposal and its refusal are both recorded on affidavit. Sri Mahato therefore submits that the petitioner has waived his right to seek pre-emption.

18. The second limb of Sri Mahato's submission is that both the pre-emptor and the pre-emptee possess adjoining lands to the suit plot. He therefore argues that the petitioner is not entitled to claim pre-emption. Sri Mahato also points out that in the event of a dispute between the parties with regard to the extent of the length of their respective adjoining land holding, the Learned Trial Court must be left to decide this issue on remand.

19. Sri Mahato also argues that since the petitioner refused to purchase the suit plot the father of the OP1, who was then minor, ultimately purchased the suit plot from the OP2. The Sale Deed was registered on 30th January, 2000 and the pre-emption application was filed by the petitioner in 2004. Sri Mahato reiterates his submission that upon the petitioner refusing to pay the market value of the suit plot the OP2 sold the same in favour of OP1. The petitioner cannot therefore have any subsisting right to claim pre-emption.

20. Arguing that the law of pre-emption is primarily intended to prevent strangers from acquiring the suit plot, Sri Mahato points out that the OP1 is the grandson of one Jugal Kishore Mondal, who is the co-sharer/brother of the present petitioner, Satish Chandra Mondal. In such view of the matter since the suit plot is not transferred to a stranger, the right of pre-emption u/s 8 of the WBLR Act cannot apply.

21. Another limb of Sri Mahato's submission is that since the petitioner and the grandfather of the OP1 are co-sharers in the adjoining plot No. 146, it must be noticed that in a previous Title Suit No. 257 of 1998 by judgment and decree dated 31st January, 2007 a preliminary decree has been passed declaring the shares of the petitioner and the grandfather of the OP1 in the adjoining plot No. 146. Sri Mahato labours on the point that following the rule of preference laid down in the second proviso to Section 8 of the WBLR Act it must be construed that the co-sharer raiyat will have a preceding right to claim pre-emption over the adjoining land holding raiyat.

22. Also putting a construction to the third proviso of Section 8 of the WBLR Act, Sri Mahato argues against its restrictive application and contends that the rule of preference amongst competing raiyats must be strictly applied. On this score Sri Mahato argues that the claim to pre-emption is not maintainable.

23. In support of his above noted submissions Sri Mahato relies upon the decisions reported in [Hiru Sepai Vs. Sultan Sepai](#), in the matter of Hiru Sepai vs. Sultan Sepai & Saranan Mondal v. Bijoy Bhushan Ghosh respectively.

24. Heard the parties. Considered the materials on record.

25. This Court notices the judgment reported in [Smt. Bula Kundu Vs. Sri Nirmal Kumar Kundu and Another](#), in the matter of [Ashima Dutta and Another Vs. Chandra Nath Bhattacharya](#), in the matter of Ashima Dutta & Anr. Vs. Chandra Nath Bhattacharjee which adequately clarify the present dispute between the parties. In both the decisions it has been affirmed that it is not necessary for the pre-emptor to have land adjoining the portion of the land which has been actually transferred. The Hon'ble Court held in Ashima Dutta's case (supra) that it will be sufficient if the pre-emptor is the owner of the plot adjoining the plot in respect of the part of which the transaction has taken place.

26. In Bula Kundu's case (supra) this Hon'ble Court was pleased to hold that for claiming pre-emption it is not necessary that the pre-emptor is required to be the sole owner of the adjoining property. Even in his capacity as a co-sharer, pre-emption can be claimed. In Bula Kundu's case (supra) noticing the judgment of a [Ishan Chandra Ghatak Vs. Sasadhar Maity](#), it was held that in Section 8 of the WBLR Act there is no qualifying word to "holding" and thus it is not necessary that the pre-emptor must be holding land adjoining the actual land sold by the transaction. In order to maintain pre-emption it must only be necessary for the applicant to be a raiyat possessing land adjoining the holding, a portion or share whereof is transferred.

27. Bula Kundu's case (supra) judgment was favourably noticed in Ashima Dutta's case (supra) where the Court held that existence of a strip of land cannot stand in the way of applying for pre-emption on the ground of adjoining ownership.

28. In the facts of the present case admittedly the suit plot No. 134 comprised 931/2 decimals of land out of which 16 decimals of land was sold to the OP1. Remaining portion of the suit plot was held by the OP2 including the strip of 1 decimal of land between the suit plot and plot No. 146 belonging jointly to the pre-emptor and his brother, Jugal Mondal.

29. This Court is therefore persuaded to find that as a co-owner/co-sharer of the adjoining plot No. 146, following the ratio of the decisions in Bula Kundu (supra) and Ashima Dutta (supra), the petitioner is entitled to claim pre-emption both on the ground of co-sharership and on the ground of being an adjoining owner.

30. This Court is of the further view that the opinion of the Learned 1st Appellate Court denying pre-emption on the ground that plot No. 146 is not situated adjoining to the suit plot cannot be sustained for the above reasons. Admittedly, the plot No. 146 is adjoining to the suit plot No. 134 and the Learned Appellate Court has also come to clear finding that from Exbt. 1 and from Exbt. 3, being the Deeds of Transfer it is undisputed that plot No. 146 is situated to the north of the adjoining suit plot No. 134. This Court is also required to notice the fact that recognizing the status of the petitioner as a possible pre-emptor, the OP2 made the initial offer of transfer in favour of the petitioner.

31. With regard to Sri Mahato's submission that on refusing the offer of transfer the petitioner has waived his right to pre-emption, this Court is not inclined to accept the same for the reason that such right is embedded in the statute, viz. the WBLR Act and, such statute does not speak of waiver of the kind argued by Sri Mahato. On a plain reading of Sections 8 and 9 of the WBLR Act, it is evident that the conditions to apply for pre-emption are stated in favour of a bargadar, a co-sharer and an adjoining raiyat. On satisfaction of the conditions under both the sections stated above, a person may apply for pre-emption.

32. This Court is therefore inclined to accept the locus of Sri Bagchi's client to claim pre-emption on the ground that no estoppel against statute can be argued.

33. On the point urged by Sri Mahato that the suit plot is sold in favour of a relation of the pre-emptor and not a stranger and, preemption therefore shall not lie, this Court notices the language of Section 8 of the WBLR Act. Section 8 of the WBLR Act (as amended) makes it clear that the right to claim pre-emption by a bargadar or a co-sharer or an adjoining raiyat arises if the plot in question "is transferred to any person other than" (emphasis supplied) the person claiming pre-emption.

34. In the backdrop of the above discussion the order impugned of the Learned Appellate Court dated 15th May, 2008 in Misc. Appeal No. 10 of 2004 passed by the Learned 2nd Additional District Court, Paschim Medinipur affirming the order dated 9th April, 2007 passed in J. Misc. Case No. 10 of 2004 by the Learned 3rd Civil Court (Junior Division), Paschim Medinipur is set aside.

35. CO 2159 of 2008 is accordingly allowed.

36. There will be, however, no order as to costs.

37. Urgent Photostat copies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.