

**(1981) 08 CAL CK 0024**  
**In the Calcutta High Court**  
**Case No : C.R. No. 3673 of 1973**

Bharat Bhusan Ray

APPELLANT

Vs

Nirmal Kanti Chakrabarti and Others

RESPONDENT

**Date of Decision :** 12-08-1981

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11  
West Bengal Land Reforms Act, 1955 — Section 8(1)

**Citation :** AIR 1981 Cal 347

**Hon'ble Judges :** B.C. Chakrabarti, J; Anil K. Sen, J

**Bench :** Division Bench

**Advocate :** S.P. Mitter and S.P. Roy Chowdhury, for the Appellant; Abish Chandra Bhattacharyya and Sudhir Kr. Bhattacharya, for the Respondent

## **Judgement**

Anil K. Sen, J.—This Rule arising out of a proceeding for pre-emption u/s 8(1) of the West Bengal Land Reforms Act, has been referred to the Division Bench by a learned single Judge of this Court in view of a new point raised at the hearing of the Rule relying upon a Bench decision of this Court in the case of Sm. Rukmini Debi Vs. Sm. Mihir Bala Sarkar, . The two Courts below having allowed the application for pre-emption concurrently the pre-emptee is the petitioner before us.

2. The opposite party Nirmal Kanti Chakraborty, claiming himself to be a co-sharer by purchase of a holding comprised of 17 decimals of land in Plot No. 238/487 of Khatian No. 419 of Mouza Baruihuda, P. S. Krishnagar, filed an application for pre-emption u/s 8(1) of the Land Reforms Act for pre-empting a sale of 8 1/2 decimal of the aforesaid plot by his co-sharer, the opposite party No. 2 to the petitioner Bharat Bhusan Roy on Feb., 13, 1974. He claimed pre-emption on two-fold grounds of he being a co-sharer raiyat and also on the ground that he possesses land adjoining the land sold to the pre-emptee Bharat Bhusan Roy. In filing the aforesaid application for pre-emption the pre-emptor pleaded that he had not been served with a notice u/s 5(5) of the said Act as a

co-sharer but even then having come to know of the same he is filing the application for preemption.

3. It is not disputed that prior to riling of the aforesaid application u/s 8(1) of the Land Reforms Act. the pre-emptor had earlier initiated a proceeding u/s 24 of the West Bengal Non-Agricultural Tenancy Act for pre-empting the very same sale which was registered as Misc. Case No. 49 of 1974. That application, however, failed on contest by the present petitioner when the Court in upholding the objection then raised by the present petitioner found that the land sold constitutes a part of a raiyati holding and, as such, the claim for pre-emption can be entertained not u/s 24 of the West Bengal Non-Agricultural Tenancy Act but u/s 8(1) of the West Bengal Land Reforms Act.

4. In contesting the present application for pre-emption u/s 8(1) of the West Bengal Land Reforms Act, the petitioner raised three-fold defences, namely, (i) that the application is barred by limitation, (ii) that the pre-emptor ceased to be a co-sharer when the land sold lo him was split up from the original Jama and (iii) that the pre-emptor is not entitled to claim preemption because on the pre-emption being granted, the pre-emptor's land holding would exceed the ceiling prescribed u/s 14M of the West Bengal Land Reforms Act.

All these objections were concurrently overruled by the two Courts below when the application for pre-emption was allowed and the concurrent findings of the two Courts below in that regard have not been challenged before us in this revisional application.

5. Before us, a new point has been sought to be raised by Mr. Mitter appearing on behalf of the pre-emptee petitioner. He has contended that since the disputed plot was being used for non-agricultural purposes, for a long time, notwithstanding the fact that it once constituted a part of a raiyati holding at the time of initial settlement, it cannot be said that on the date of the sale it continued to remain so and as such an application u/s 8(1) of the West Bengal Land Reforms Act, could be entertained. Or in other words Mr. Mitter contended that whatever be the origin of the tenancy it ceased to remain a rayati holding but became non-agricultural by use. Necessarily Mr. Mitter suggested that the old rule that nature of the tenancy is governed by the purpose of settlement stands abrogated by the statutory provisions of the twin enactments, viz., the West Bengal Estates Acquisition Act and the West Bengal Land Reforms Act. Being conscious of the contrary decision rendered in Misc. Case No. 49 of 1974 (under Section 24 of the West Bengal Non-Agricultural Tenancy Act) which may be pleaded as a bar to the raising of such an objection, Mr. Mitter has contended that notwithstanding the said decision, he is entitled "o raise such an objection since it involves a question with reference to the jurisdiction of the Court to entertain an application for pre-emption as made by the pre-emptor. According to him there can be no estoppel on an issue as to Court's jurisdiction and reliance is placed on a Bench decision of this Court in the case of Sm. Rukmini Debi Vs. Sm. Mihir Bala Sarkar, . Our learned brother P. K. Banerjee, J., before

whom the Rule came up for hearing fell inclined to hold that since in the earlier proceeding for pre-emption it had been found as a fact that the disputed land is a part of the raiyati holding and such a finding is binding between the parties it can no longer be open to the pre-emptee now to contend that the disputed land is non-agricultural and, as such, is not a part of the raiyati holding. So far as the Bench decision relied on by Mr. Mitter is concerned, our learned brother took the view that the real issue involved is not one of estoppel touching the jurisdiction of the Court but is one of fact as to whether the land under pre-emption is raiyati or non-agricultural. In that view, he could not persuade himself to agree with the view so expressed in that decision and referred the matter to the Division Bench for consideration. This is how the matter has come up for hearing before us.

6. It should be pointed out at the outset that the plea now sought to be raised by Mr. Mitter on behalf of the pre-emptee was not raised in either of the two Courts below. Nonetheless it was contended by Mr. Mitter that when on the materials on record it can be well established that the disputed plot was being used for non-agricultural purposes and structures have been set up thereon, it ceased to be agricultural by the user and became non-agricultural land constituting a non-agricultural tenancy. Accordingly, it has been contended by Mr. Mitter that the mere fact that the disputed plot once appertained to raiyati holding does not mean that it continues to remain so and that a prayer for pre-emption u/s 8(1) of the West Bengal Land Reforms Act could still be entertained. Relying on the aforesaid decision in the case of Sm. Rukmini Debi Vs. Sm. Mihir Bala Sarkar, Mr. Mitter contended that it is still open to the pre-emptee to adduce evidence before the Court for determination of a controversy involving the jurisdiction of the Court. The point thus raised by Mr. Mitter has been strongly contested by Mr. Bhattacharya appearing for the pre-emptor.

7. We have carefully considered the point thus raised by Mr. Mitter. So far as the observations made in the case of Rukmini Debi (supra) on which reliance was placed by Mr. Mitter are concerned, it should be pointed out that those observations are purely obiter because in that case the character of the tenancy as found in the earlier proceeding was upheld by the learned Judges though by going into the merits and the claim to the contrary was ultimately overruled. That apart, we agree with our learned brother P. K. Banerjee. J., that the learned Judges in the said case did not advert to the more important aspect which require consideration, namely, whether the question regarding the character of the tenancy now sought to be raised is or is not concluded between the parties by the previous decision so that the previous decision precludes the Court from re-adjudicating the same question once more. In that case in making those observations, the learned Judges failed to take note of the difference between estoppel by record and estoppel by conduct or representation. Reviewing certain decisions, cited, the learned Judges held that when the jurisdiction of a Court or a Tribunal is made dependent by the statute on the existence of certain state of facts or position of law, any representation by one party to the other about the existence of such state of facts or position in law by itself will not confer

jurisdiction on the Court or the Tribunal and the Court or the Tribunal would still have to determine whether on proof of existence of such state of facts or position in law, it has the jurisdiction to adjudicate the dispute between the parties. In our view, there can be no dispute about the principle so enunciated when the estoppel pleaded is merely by representation or conduct of the party which does not constitute the, foundation of a decision by a Court or a tribunal or in other words so long as the estoppel pleaded is one by representation or conduct and not by the record. That principle, however, is not applicable where the estoppel pleaded is one by record or judgment. In the latter case, the representation or the conduct of the party being the foundation of the judgment becomes a part of it and such a judgment being final and binding between the parties, the party whose representation or conduct led to that judgment is precluded from pleading anything contrary to his representation or conduct not so much because of his earlier representation or conduct as because of the judgment which precludes the Court from adjudicating any issue to be raised by such contrary pleading. We would only refer to the observations of Lord Shaw in the case of *Hoysted v. The Commissioner of Taxation*, 1926 AC 155 in support of our view when he observed: "It is settled first that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact". That was also the view of this Court in the case of *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, which was cited before the learned Judges.

8. There is yet another aspect which needs to be considered. The point involved in cases like the present one is not relating to a question of jurisdiction in the abstract. Here, the jurisdiction of the Court was dependent on an issue of fact as to whether the land in respect of which pre-emption was claimed appertained to a non-agricultural tenancy or not. The parties were at variance between them when one of them claimed it to be non-agricultural while the other, namely, the petitioner now before us claimed to be raiyati or agricultural. An issue in that regard was accordingly raised and the Court on adjudication of that issue held that the tenancy being raiyati or agricultural no claim of pre-emption u/s 24 of the West Bengal Non-Agricultural Tenancy Act was maintainable. The finding on that issue is now binding between the parties. It is now well settled that where a Court would have jurisdiction over the subject-matter if certain facts existed, a decision rendered on the existence or non-existence of those facts by a Court in a case between the parties would be binding on them. It would be so binding on the principles of *res judicata*. Reference may be made to the decision of the Supreme Court in the case of *Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others*, . Such being the position and further there being no dispute that a judgment by a Court in a proceeding for pre-emption under a statutory provision like the one u/s 24 of the West Bengal Non-Agricultural Tenancy Act does constitute *res judicata* in respect of findings on material issues raised in such proceedings between the parties, we are unable to hold that it would still be open to the petitioner now before us to raise an objection as proposed by Mr.

Mitter. (Reference may be made to the decision of this Court in the case of Balai Chand Mondal Vs. Nibaran Chandra Dass and Others, and National Investment Co. Ltd. Vs. Mohendra Nath Kundu and Others, .

9. We find that unfortunately the attention of the learned Judges deciding the aforesaid case of Sm. Rukmini Debi Vs. Sm. Mihir Bala Sarkar, was not drawn to an earlier Bench decision of this Court considering a point of similar nature. In that case, the character of the tenancy was gone into and decided in a proceeding u/s 26-J (as it then stood) of the Bengal Tenancy Act and it was held that such a question was not merely incidental or ancillary or subsidiary to the main question but was a matter directly in question between the parties. A question being raised as to whether the finding of the Court as to the character of the tenancy in such a proceeding would be conclusive between the parties or not and it was held that it would be so and it was further held that on subsequent suit for a declaration to the contrary would be barred by principles of res judicata (See Krishna Chandra Mukherjee Vs. Manik Lal Mukherjee and Others, .

10. It had further been suggested by Mr. Mitter that in the earlier proceeding the Court never considered the point that though the land may appertain to a raiyati holding still it ceased to be agricultural by user and, as such, became non-agricultural and what was held there was that the holding as a result of the vesting became raiyati holding so that the point now proposed to be raised by him was not really gone into and decided in the earlier proceeding. We are, however, unable to accept this contention of Mr. Mitter for two reasons. In the first place if the point was not so raised in the earlier proceeding though it was required to be raised it must be deemed to have been concluded against the petitioner on the application of the principles of constructive res judicata. Secondly, in any event, in finally deciding the character of the tenancy it was necessary for the Court to consider the point from the aspect now sought to be raised by Mr. Mitter and if the court had failed to consider it in deciding the character of the tenancy there it was at the worst an error on the part of the court in coming to its decision, but an erroneous decision is as much binding between the parties as is the correct one.

11. In the result, we agree with our learned brother P. K. Banerjee, J., that the real point at issue is not as to whether the pre-emptor is estopped by his previous representation from raising such a plea as now sought to be raised on his behalf but that the issue sought to be raised on such a plea is concluded between the parties by the earlier decision which binds them. Hence, the only point raised in support of this Rule fails and is overruled. The Rule is discharged. There will be no order for costs.

B.C. Chakrabarti, J.

12. I agree.