

(2004) 07 CAL CK 0046
In the Calcutta High Court
Case No : C.O. No. 2429 of 2000

Tapan Krishna Das

APPELLANT

Vs

Hazi Sajjad Ali Khan and Others

RESPONDENT

Date of Decision : 23-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Evidence Act, 1872 — Section 91
West Bengal Land Reforms Act, 1955 — Section 8

Citation : AIR 2005 Cal 60 : (2004) 4 CHN 511

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Rabindra Nath Mahato and P.B. Mahato, for the Appellant; Pijush Kanti Dutta and Siddique Rahaman, for the Respondent

Judgement

Amitava Lala, J.—This is an application for revision u/s 115 of the CPC challenging the judgment and order passed by the learned Additional Judge, 6th Court, Midnapore in Misc. Appeal No. 70 of 1999 dated 31st August, 2000 reversing the judgment and order passed by the learned Civil Judge (Junior Division), 2nd Court, Midnapore in J. Misc. Case No. 32 of 1992 dated 21st May, 1999.

2. The opposite party filed the pre-emption case against the petitioner herein in respect of .05? Decimals of land in plot No. 308 under Khatian No. 540 of Mouza-Inda, which was sold by the opposite party No. 2 in favour of the appellant. The opposite party No. 1 is owner of plot No. 310 measuring 21 decimals which is exclusively got by a strength of partition amongst the co-sharers dated 6th June, 1990 and the said plot No. 310 is adjacent to the suit land.

3. The opposite party No. 1 contended that the property was not sold or transferred by the opposite party No. 2 by a sale deed dated 28th July, 1989. But it was an outcome of loan transaction. The opposite party No. 2 received the loan by mortgaging the suit property to the opposite party No. 1 against the interest

and the suit property was kept as security with opposite party No. 1. Thus, pre-emption is not maintainable. The Civil Judge (Junior Division) dismissed the case of the opposite party No. 1 herein. Being aggrieved by and or dissatisfied with the judgment and order the petitioner preferred an appeal, order of which is impugned hereunder. The Appellate Court found from the map of the case land annexed with "kobala" that the plot Nos. 308 and 310 are adjacent. The plea of the petitioner herein is that the impugned sale was a loan transaction which has not been proved by adducing any cogent evidence. So, it was held that the alleged transfer cannot be said to be a loan transaction in substance. The other point, as discussed therein, whether the opposite party No. 1 is entitled to pre-empt the land without any partition by metes and bounds amongst the co-sharers in respect of plot No. 310. The Court accepted the ratio of the judgment delivered by a Bench of this Court reported in Smt. Bula Kundu Vs. Sri Nirmal Kumar Kundu and Another, , and held that although prior position of law was that the pre-emptors who were holding adjoining land were transferred are not entitled to pre-empt unless and until the possession of this specific portion of this adjoining land is demarcated. But by virtue of such judgment, having binding effect on it, an application for pre-emption can be made on the ground of "adjoining ownership. It is not necessary that the applicant must be the holder of adjoining holding. If a co-sharer of adjoining holding may apply for pre-emption the Court ultimately held that the opposite party herein is entitled to get an order of pre-emption and in such a position the partition amongst the co-sharers whether took place after the transfer of the suit land is immaterial, It is also immaterial whether the partition deed was legal or valid. Considering all the aspects the Court ultimately held that the opposite party No. 1 has been able to show that he has adjoining land to the suit holding and as a result he is entitled to pre-empt the suit property. The learned Court below, thus, has come to an erroneous decision. It has felt to consider that the opposite party No. 1 is not the owner of the plot No. 310. Accordingly such order was set aside.

4. Upon going through such judgment and order I find that the Appellate Court was very much keen to consider whether the adjoining co-owner is entitled to have a right of pre-emption in view of the judgment reported in Smt. Bula Kundu Vs. Sri Nirmal Kumar Kundu and Another, . But no thought has been given in respect of the maintainability of the application beyond the period of limitation or at a premature stage. Therefore, such part cannot be said to be an ignorable point as alleged or at all. Admittedly the land was sold on 28th July, 1989. The registration was completed on 22nd June, 1992 (wrongly stated as 6th November, 1992). The application for pre-emption was filed on 18th June, 1992. Therefore, it is apparent that the application was not made by the opposite party No. 1 within the period of four months from the date of such transfer u/s 8 of the West Bengal Land Reforms Act. It is to be remembered that the date of registration cannot be necessarily a date of transfer. Transfer of Property Act cannot be governed and/or controlled by the Registration Act, 1908. The deed of transfer being dated 28th July, 1989 itself is a documentary evidence of such

transfer by virtue of Section 91 of Indian Evidence Act, 1872. The Registration Act only says that some of the documents are compulsorily registrable when some are not. It does not necessarily mean that the date of registration will be couched as a date of transfer. Section 47 of the Registration Act, 1908 says that a registered document shall be operated from the time which it would have commenced to operate if no registration thereof had been required or made, and nor from the time of its registration. Therefore, if any registration is done on 22nd June, 1992 it will relate back to the date of transfer as on 28th July, 1989. Side by side if Section 8 of the West Bengal Land Reforms Act is read it would be seen that application for pre-emption is to be made within four months from the date of the original transfer i.e. 28th July, 1989. Alternatively if it held that the registration of deed of transfer is compulsory and applicable from the date of registration then the application being dated 18th June, 1992 is premature because the registration of such transfer yet to born then and actually born on 22nd June, 1992. This crucial part of the matter has been totally ignored by the First Appellate Court and came to a wrong conclusion only on the basis of the right of the owner of the adjacent land.

5. It is to be remembered that the law of pre-emption is applicable universally to a stranger. Section 8 of the West Bengal Land Reforms Act says who will get the priority over such stranger. Firstly, the co-sharer of the plot of land (holding). Secondly, the bargadar of the plot of the land (holding). Thirdly, the adjacent raiyat of the plot of the land (holding). First two cases are not subject-matter herein. Therefore, the last case i.e. the claim of the raiyat of the adjoining plot of land (holding) is the question herein. The period of four months from the transfer, while considering I have given specific thought on this point why legislature intended to incorporate the period of four months in such Act. My interpretation is that beyond the period of four months one cannot be said to be stranger. In other words, right to dislodge one treating him stranger diminishes. One cannot hold his right of action against stranger indefinitely. Thus, I cannot held it good to say that the period prescribed under the section is either a handmade of justice or directory as in nature but mandatory. If the right of the adjacent plot holder as a matter of priority continues forever right of the lawful purchaser will be interfered with. That is not the intention of the legislature. Four months period is a scope to adjoining plot holder having priority to purchase. If the time is exhausted or not availed of, a new right cannot accrue after such period. Factually, also no case has been made out by the opposite party No. 1 in the Court below that the seller of the portion of the land to the opposite party No. 1 was absolute owner of such land or a co-sharer of such plot of land unless the same is established beyond doubt, the operation of Section 8 of the Act cannot be made effective. This is the specific case of the petitioner. Disputed land and the plot No. 310 are not adjacent and the plot No. 308 was purchased by 12 or 13 persons. There is no information of partition amongst themselves. There is no analysis of evidence on that score by the First Appellate Court.

6. So far as the amendment of Section 8 of the West Bengal Land Reforms Act

from the words "plot of land of a raiyat" to the words "holding of a raiyat" with retrospective effect from 7th August, 1969 is concerned, it appears to be academic. The amendment was pre-existing at the time of hearing of the appeal and it appears that the Appellate Court passed an order in respect of "suit holding" but not in respect of "suit land".

7. Hence, totality says, the order of the First Appellate Court disposing the matter is finally proceeded in a wrong premises, therefore, the same cannot be sustained. Hence the order impugned stands set aside. No order is passed as to costs.

8. Let an urgent xeroxed certified copy of this judgment, if applied for, be given to the learned Advocates for the parties within two weeks from the date of putting the requisites.