IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 2303 of 2022

Apurba Kumar Khan and others
Vs.
Rabindranath Khyara & Ors.

For the petitioners : Mr. Samir Kumar Adhikari.

For the opposite party Nos. 1 to 4 : Mr. Siddhartha Sankar Mandal
Ms. Arunima Das Sharma,

Hearing concluded on: 25.07.2023
Judgment on: 10.10.2023

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated July 18, 2022 passed in Misc. Appeal No.01 of 2020 by which the Judgment and Order dated December 21, 2019, passed by the Learned Civil Judge (Junior Division), 2nd Court, Khatra in J. Mis Case No.-01 of 2023, was affirmed. The order in the Misc. Appeal was passed by the learned Additional District Judge, Khatra.

2. The petitioners are the pre-emptees/stranger purchasers. The opposite party nos.1 to 4 are the heirs of the deceased preemptor (Ramkinkar). The opposite party no.5 Satyakinkar, sold the property to the petitioners.

3. According to the petitioners, both the learned courts below, acted illegally and with material irregularity in allowing the pre-emption application. The grounds for challenge are as follows :-

(a) The fact that the predecessor-in-interest of the pre-emptor and proforma opposite party no.5, died prior to the RS settlement and the pre-emptor and the proforma opposite party no.5 were in khas possession of their distinct, separate and respective shares, by recording their name in the respective RS khatian, was totally ignored by the learned court.

(b) The heirs of late Rajanikanta Khyara, i.e. the petitioner and the opposite party no.5, were possessing their individual plots on the basis of a mutual oral partition, on the death of their father. Such oral partition was acted upon.

(c) The respective RS khatians prepared in 1962 clearly indicated the factum of separate shares of the pre-emptor and the opposite party no.5.

(d) That the provisions of Section 14 of the West Bengal Land Reforms Act, 1955 was wrongly applied in the case, as partition between the heirs of late Rajanikanta Khyara was admitted and such partition was reflected in the RS record.

4. Learned counsel for the petitioner submitted that after the RS settlement, separate khatians were prepared in respect of Ramkinkar khyara and Satyakinkar khyara. The learned court below ought to have considered such factum of partition of the property of late Rajanikanta

Khyara, amongst the two sons by metes and bounds. Once the entire share of the plot enjoyed by Satyakinkar was sold, pre-emption would not lie.

5. Counsel urged that the finding of the learned courts that the parties were co-sharers and Ramkinkar khyara had a right of pre-emption on the ground of co-sharership, was erroneous. Each of the brothers were in possession of their demarcated land on the basis of an oral partition and such oral partition was reflected in the RS record of right and separate khatians bearing no. 1317 and 1318 had been prepared in respect of each of the sons of late Rajanikanta. That the land had been classified as a homestead land.

6. Learned counsel referred to the decision in ***Barasat Eye Hospital and ors. Vs Kaustabh Mondal*** reported in ***(2019) 19 SCC 767,*** and submitted that the Hon'ble Apex Court had held that pre-emption was a weak right and the court should not be liberal while adjudicating the application under Section 8 of the West Bengal land Reforms Act, 1965 (hereinafter referred to as the Said Act). Further argument was that the evidence on record, mainly the RS khatian and the record of rights ought to have been considered in greater detail in order to appreciate that the partition between the two brothers had become final and conclusive. Once the partition had taken place and the respective shares had been demarcated, the other heir of the original owner, since deceased, could not be a co-sharer of the plot sold by his brother, even if, the parties had inherited the entire plot from their father. It was also submitted that the pre-emption application was barred by the law of limitation as the same was not filed within three months from service of notice of the sale.

7. Learned counsel for the opposite parties nos.1 to 4 submitted that both the learned courts had come to factual findings on the basis of oral and documentary evidence that the pre-emptor and opposite party no. 5 were co-sharers in respect of the plot sold. Such finding of co-sharership which were accepted by two fact finding courts, could not be re-appreciated in this revisional application. The pre-emptees were not in a position to show that the learned courts below had either misconstrued the evidence or travelled beyond the evidence available.

8. Further contention was that the point with regard to the sale of Bastu land, was not raised before the learned court below by the petitioners. Such factual issue could not be raised for the first time in this revisional application.

9. The question to be decided by this court is whether the learned courts acted illegality and with material irregularity, in allowing the pre-emption case. The order of the learned trial Judge is discussed first. From the judgement dated December 21, 2019, it appears that the learned trial Judge discussed the provisions of Section 8 of the said Act in great detail. The definition of "co-sharer of a raiyat in a plot of land" as per Section 2(6) of the said Act was also considered. The definition of "Raiyat" under Section 2(10) of the said Act was also discussed. The trial Judge came to a finding that a raiyat was the person holding land for any purpose, whereas, a co-sharer was a person other than the raiyat, having an un-demarcated interest in a plot of land along with the raiyat.

10. Upon consideration of the language of Section 8 of the said Act and the definition, the learned Judge came to a finding that if a portion or a

share of land of a raiyat was transferred to any person other than a co-sharer of the raiyat, a co-sharer of the raiyat could avail of the relief of pre-emption upon satisfaction of the pre-conditions laid down in Section 8 of the said Act.

11. The learned trial Judge discussed the law relating to pre-emption and the legislative intent behind such law. The legislative intent was to prevent fragmentation of land. The learned Court held that the issue whether pre-emption would lie in cases where a portion or share of a plot of land was transferred by a raiyat to any person other than the co-sharer raiyat, was no longer res-integra. The said issue had been set to rest by a judgment of the Hon'ble High Court in the case of ***Dilip Kumar Dhara and others vs Ranjit Kr. Mondal reported in (2019) (2) ICC 370(Cal).*** It was held that the expression 'or' in Section 8 (1) should be interpreted as 'of' and not as 'or'. Such decision in ***Dilip Kumar Dhara (Supra)*** was rendered in the light of the decision of the Hon'ble Apex Court in ***Chhana Rani Saha vs. Mani Pal @ Katu Pal*** decided in ***Civil Appeal No. 5905 of 2009***. The Hon'ble Apex Court held that where a portion or share of land of any raiyat was transferred to any person other than the co-sharer of a raiyat, that is to say, if the land was held by two co-sharers and one of the co-sharers sought to transfer his portion or share belonging to him to another person, the other co-sharer could claim a right of pre-emption.

12. The learned trial judge discussed the relevant decisions of the Hon'ble Apex Court and of this court, on the issue and upon appreciating the well settled principles of law governing pre-emption, proceeded to adjudicate the dispute.

13. The facts of the case were traversed by the learned trial court on the basis of the legal principles and the legislative intent behind the law, i.e., the right of pre-emption was incorporated only to prevent fragmentation of land.

14. The trial court observed that in the event the entire plot was transferred, the allegation of transfer to any person other than a co-sharer, lost its efficacy. The trial court restricted its adjudication to the question whether a portion or share of a plot of a raiyat had been transferred or not.

15. The pre-emptor's case was that the original owner of the Schedule property (plot no.239) was one Rajanikanta Khyara. Rajanikanta Khyara died prior to the RS settlement. After demise of Rajanikanta Khyara, the property devolved upon his two sons namely the pre-emptor Ramkinkar khyara (predecessor in interest of the opposite party nos.1 to 4) and the pro-forma opposite party no.5. Each of the sons inherited eight annas shares and their names were recorded in the R.S. Khatian no.1317 and 1318 respectively. Pre-emptor's further case was that the opposite party no.5 was also an adjoining raiyat. The opposite party no.5, in connivance with the pre-emptee/petitioners, by virtue of a registered deed of sale being no.1850 dated July 31, 2002 transferred a portion of the share in the disputed plot. According to the pre-emptor, the pre-emptees/petitioners were complete strangers to the suit plot. The pre-emptor as a co-sharer, had a better right to the schedule property. Hence, an application under Section 8 of the said Act was filed by the pre-emptor. Considering the evidence on record with regard to the "Ka" schedule property, namely, plot no.239, the issues were decided.

16. According to the pre-emptees, the pre-emptor was neither a co-sharer nor an adjoining raiyat. The total "Ka" schedule property, being plot no.239, measured about 93 decimals. The opposite party no.5 was the absolute owner of the 47 decimals out of 93 decimals and his name has been duly recorded in the R.S. Khatian No.1317. The remaining 46 decimals had been duly recorded in the name of pre-emptor in R.S. Khatian No.1318. The opposite party no.5 was an independent raiyat in respect of his own land under the State of West Bengal and he did not have any co-sharership with the pre-emptor. The learned trial judge recorded and appreciated the case of the pre-emptees.

17. The preemptor examined three witnesses i.e. PW.1 Ramkinkar Khyara, PW 2 Manik Mondal and PW 3 Tapan Kumar Khyara. The pre-emptor exhibited three documents, namely, Exhibit 1 - the impugned sale deed being no.1850 for the year 2002, Exhibit 2 - the challan for payment of Rs.88,000/- Exhibit – 3, the L.R. Khatian no.1561, Mouza Rudra. The pre-emptees examined two witnesses, OPW1 Gurupada Kha and OPW2 Kinkar Chandra Mahato. They exhibited document, namely, Exhibit A - original deed being no.1850 of 2002, Exhibit B - certified copy of LR Khatian no.2455, 2456 and 431 of Mouza Rudra, Exhibit C (series), Panchayat rent receipts, Exhibit D (series) - four original rent receipts, Exhibit E - certified copy of RS ROR Khatian no.1317 of Mouza Rudra.

18. The learned trial judge, upon appreciation of the provisions of Section 8 and the mandatory pre-condition of depositing entire consideration money with the further compensation of 10% arrived at the conclusion that Exhibit 2 (challan) clearly proved that the entire consideration money along with

10% levy had been deposited and there was no short deposit. Thereafter, the learned trial judge went on to decide the question of limitation. The preemptor's case was that the notice of the sale which was executed on July 31, 2002, had not been given to the preemptor. Registration was completed on July, 31, 2002. The pre-emption case was filed on January 02, 2003. On the ratio laid down in ***Nurul Islam vs. Esratun Bibi*** reported in ***(2017) 4 ICC 235***, the learned trial judge held that the period of limitation for filing an application by a non-notified sharer was one year. Under such circumstances, the court was of the opinion that the pre-emption application was not barred by limitation. The next point that was decided by the learned trial judge was whether the petitioner was a co-sharer in respect of the property sold or whether the co-sharership had ceased on the basis of an oral partition as contended by the pre-emptees/petitioners.

19. According to the learned trial judge, there was no partition in terms of Section 14 of the said Act amongst the co-sharers in respect of the disputed plot. An amicable partition by way of mutual arrangement in the matter of possession, could not be treated as a partition under Section 14 of the said Act. The pre-emptor and the opposite party no.5 may have been possessing separate parts of the undivided plot on the basis of such mutual arrangement, but in the absence of a proper deed of partition, the parties were to be treated as co-sharers. The court found that the disputed plot was still undivided and un-partitioned. No evidence with regard to any partition in respect of plot no.239 had been adduced by the pre-emptees. Neither any deed of partition nor any decree of court, were exhibited in support of the

contention of the petitioners that plot no.239 had been partitioned according to the applicable law.

20. Reference was made to the ratio of the decision in ***Bhadreswar Bera Vs. Mathura Mohan Shaw*** reported in ***2004 SCC online Cal 532***, wherein it was held that even if co-sharers remained in occupation of a particular demarcated portion in terms of a mutual arrangement, the un-demarcated interest of the co-sharers in the property was not extinguished. In the eye of law, they remained as co-sharers so long as there was no registered deed of partition, notwithstanding the fact that each of the co-sharers were in occupation of a particular demarcated portion. The relevant portion of the said judgment was quoted by the learned trial judge.

21. Reliance was further placed on the decision of ***Sk. Sajhan Ali and others vs Sk Saber Ali and Anr.*** reported in ***(2016) (1) ICC 362 (CAL),*** which laid down a similar principle. The statute prohibited partition of a class of property, except by way of a registered document. Unless the property was partitioned by a registered deed, the parties would remain co-sharers. The concept of oral partition was not recognized by the said Act, even if such partition was otherwise permissible in other cases by way of custom, usage or contract. The non-obstante nature of Section 3 of the said Act, was discussed.

22. Further reliance was placed on the decision of ***Biswanath Dolui vs Tinkari Dolui*** reported in ***(2015) 4 ICC 954 (CAL),*** wherein it was held that as long as there was no partition in accordance with the provisions contained in Section 14 of the said Act, the parties remained co-sharers of the plot of land and had un-demarcated interest in the entire plot in

question. Based on the aforementioned decisions, the learned trial judge came to a finding that the concept of oral partition was alien to the said Act.

23. Admittedly, the property of the father devolved upon Rajanikanta Khyara and Satyakinkar khyara. The court was of the view that no partition in respect of the property had been effected as the pre-emptee failed to produce any document in support of such partition in terms of Section 14 of the said Act. Upon considering the recitals in the deeds no.1850 of 2002, the court found that the opposite party no.5 had 47 decimals of land, out of which 21 decimals was sold to the pre-emptees (7 decimals of land to each of the pre--emptees). After demise of Rajanikanta, the pre-emptor and the vendor of the pre-emptees inherited 8 anna share each. Accordingly, their names were recorded in R.S. Khatian no.1317 and 1318 in respect of their share. The entire share i.e., 47 decimals of land of the opposite party no.5 was not sold. Hence, a share of the opposite party no.5 in the undivided plot no.239 had been sold to strangers. The court also arrived at a conclusion that the pre-emptees could not produce any document to show that they were co-sharers. The LR Khatian no.1561 (Exhibit 3) was considered and the learned court found that the preemptor was a co-sharer in respect of the property sold by the impugned deed. Thus, the pre-emption application was allowed.

24. The pre-emptees filed Misc. Appeal no.01 of 2020 being aggrieved by the trial court's order. The lower appellate court considered the facts, the grounds of appeal and the submissions of the respective parties. The deposition of OPW1 in his cross-examination was appreciated by the learned lower appellate court. There was an admission that notice as per Section 5

of the said Act had not been served upon the pre-emptor. The lower appellate court came to the finding that the pre-emptor was a non-notified co-sharer and upheld the finding of the learned trial judge. The plea of the pre-emptees that the pre-emption application was barred by law was rejected by the learned lower appellate court and it was held that as the pre-emptor was a non-notified co-sharer, the period of limitation would be one year from the date of transfer.

25. The decision in ***Gosto Behari Das Vs. Rajobala*** reported in ***1960 CWN 57*** was discussed and the learned lower appellate court held that the accrual of the right of the pre-emption would be the date when the deed of sale was registered and the title passed. The deed of sale was registered on July 31, 2002 and the pre-emption application was filed on July 02, 2003, i.e, well within one year from transfer.

26. The next question with regard to oral partition was also discussed by the learned lower appellate court and the learned lower appellate court, upon appreciation of the findings of the learned trial judge and on the evidence on record, came to the finding that the OPW No.1 in his cross-examination had deposed that he could not file any document to show that any partition between Ramkinkar khyara and Satyakinkar khyara had taken place and sub-plots had been created out of plot no.239. Exhibit 3 revealed that there was no formal partition. Section 14 of the said Act recognized partition of a joint property only by two means i.e. registered partition deed or by decree of a court. Oral partition was not recognized by the statute. Hence, the factum of partition in this case was disbelieved. Both the learned courts discussed the laws applicable and came to the finding

that the preemptor and the opposite party no.5 were co-sharers. 21 decimals out of 47 decimals of land which was in the share of Satyakinkar khyara in respect of plot no. 239, was sold.

27. The orders impugned before this court and the findings of the learned courts below, were based on appreciation of law, evidence and the principles settled by the decisions of Hon'ble Apex Court and the High Court. This court does not find that the orders impugned suffer from any perversity.

28. The scope of interference under Article 227 is limited.

29. In the decision of ***Sadhana Lodh v. National Insurance Co. Ltd.,*** reported in ***(2003) 3 SCC 524***, the Hon'ble Apex Court held as follows:-

> " **7.** The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal had proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision."

30. In the decision of ***M/s. Puri Investments v. M/s. Young Friends and Co. and Others***, reported in ***2022 SCC OnLine SC 283,*** the Hon'ble Apex Court held as follows:-

> **"14.**
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> We have considered the submissions of the respective counsel and also gone through the decisions of the fact-finding fora and also that of the High Court. At this stage, we cannot revisit the factual aspects of the dispute. Nor can we re-appreciate evidence to assess the quality thereof, which has been considered by the two fact-finding fora. The view of the forum of first instance was reversed by the

Appellate Tribunal. The High Court was conscious of the restrictive nature of jurisdiction under Article 227 of the Constitution of India. In the judgment under appeal, it has been recorded that it could not subject the decision of the appellate forum in a manner which would project as if it was sitting in appeal. It proceeded, on such observation being made, to opine that it was the duty of the supervisory Court to interdict if it was found that findings of the appellate forum were perverse. Three situations were spelt out in the judgment under appeal as to when a finding on facts or questions of law would be perverse. These are:—

(i) Erroneous on account of non-consideration of material evidence, or

(ii) Being conclusions which are contrary to the evidence, or

(iii) Based on inferences that are impermissible in law.

15. We are in agreement with the High Court's enunciation of the principles of law on scope of interference by the supervisory Court on decisions of the fact-finding forum. But having gone through the decisions of the two stages of fact-finding by the statutory fora, we are of the view that there was overstepping of this boundary by the supervisory Court. In its exercise of scrutinizing the evidence to find out if any of the three aforesaid conditions were breached, there was re-appreciation of evidence itself by the supervisory Court.

16. In our opinion, the High Court in exercise of its jurisdiction under Article 227 of the Constitution of India in the judgment under appeal had gone deep into the factual arena to disagree with the final fact-finding forum."

31. The revisional application is dismissed.

32. There shall be no order as costs.

33. Parties are to act on the server copy of this judgment.

(Shampa Sarkar, J.)