**CALCUTTA HIGH COURT**

Promode Ranjan

Vs.

Nirapada Mondal

C.R. No. 3784 of 1978

(B.N. Maitra, J.)

30.11.1979

**ORDER**

**B.N. Maitra, J.**

1. The petitioner-appellant filed an application for pre-emption. The allegation is that the petitioner is a co-sharer. The land appertaining to the Plot No. 3310 measuring .74 cents constitutes a holding. Satish Chandra Pramanick was the owner of another holding having an area of .94 decimals. Satish Chandra Pramanick sold his property to one Lutfar Rahaman on 5-8-1970 for Rs. 1,500/-. There was an agreement for reconveyance of the property. The right of reconveyance was transferred to the opposite party, who instituted a suit against Lutfar Rahaman for specific performance of contract and he obtained a decree. The petitioner had no knowledge of the transfer. On 22-9-1972, he became aware of such transfer. He filed an application for pre-emption on the footing that he was a co-sharer. Subsequently, he made a prayer for preemption on the ground of vicinage. That prayer was turned down and hence, that application was not proceeded with and it was dismissed for default. Thereafter he again applied for pre-emption according to the provisions of Section 8 of the West Bengal Land Reforms Act X of 1956 on the ground of vicinage. He also put in an application under Section 5 of Limitation Act for condonation of delay.

2. The opposite party filed an objection.

3. The learned Munsif allowed the prayer for pre-emption.

4. An appeal was preferred by the opposite party and the same was allowed on the only ground that the entire holding had been transferred. Since a portion of the holding was not transferred, the application for preemption was not maintainable. The learned Additional District Judge dismissed the application for pre-emption. Hence this revisional application by the petitioner.

5. Mr. M.N. Ghosh has contended on behalf of the petitioner that the application under Section 5 of the Limitation Act was rightly filed because in the previous application for pre-emption, he made an attempt to ask for pre- emption on the ground that he was the owner of the contiguous

holding. That prayer was turned down by the Court and hence, that application, for pre- emption was dismissed on non-prosecution. Thus, there is sufficient ground for filling such second application for pre-emption. The learned Additional District Judge did not deal with the question of condoning the delay under Section 5 of the Limitation Act. The wordings of Section 8(1) of the Act "..... ...or any raiyat possessing land adjoining such holding....." clearly show that when a pre-emption is asked for on the ground of vicinage, it is not necessary that there was a transfer of only a portion or share of the holding. Even if the entire holding is transferred and the petitioner happens to be the owner of the contiguous holding, he has a right to ask for preemption. It has thus, been contended that this revisional application should be allowed. If the Court thinks fit, the matter may be remitted to the Additional District Judge for deciding the merits of the application under Section 5 of the Limitation Act.

6. The learned Advocate, appearing on behalf of the opposite party, has referred to the decision of *Krishnapada v. Usha Rani in*[1] and contended that in view of that decision, an application under Section 8 of the Act by the owner of the contiguous land is not maintainable, when the entire land is transferred. The question of limitation stares the petitioner in the face because the petitioner's version is that he came to know of the proceedings on the 22nd Sept., 1972, whereas the present prayer for preemption was made in Jan., 1976. He has also referred to the Bench decision of *Ashalata v. Gopal Chandra in*[2] to show that when an application for pre-emption is filed by a contiguous tenant, the period of limitation is only four months. Moreover, the previous case for pre-emption was dismissed. Hence, in view of the provisions of Section 11 of the Civil Procedure Code , the application is barred by *res judicata* because Expln. VIII thereof shows that any issue heard and finally decided by a Court of limited jurisdiction shall operate as *res judicata* in a subsequent suit, though such Court was not competent to try the subsequent suit in which such issue has been subsequently raised.

7. Let us first deal with the question of res judicata. Section 11, Explanation VIII of the Civil Procedure Code speaks of any issue heard and finally decided by a Court of limited jurisdiction. The previous case was dismissed for default in the Court of the learned Munsif and that Court was not a Court of limited jurisdiction, as argued on behalf of the opposite party. In the Bench case of *Nabin Majhi v. Tela Majhi in*[3] this question came up for our consideration. It has been stated that the expression, "Courts of limited jurisdiction" means Revenue Courts, Land Acquisition Courts, Administrative Courts and not ordinary Civil Courts. So this submission is without any substance.

8. Further, in the Bench case of *Biswanath v. Smt. Subala in*[4] a Bench of our Court has stated that when an application is dismissed for default, it does not involve any decision on the merits and so, filling of a second objection is not barred even if it is similar or dissimilar. In the case of *Sheodhan Singh v. D. Kunwar in*[5] Mr. Justice Wanchoo has stated that when there is no decision on the merits, that is, when the matter is not heard and finally decided because of want of jurisdiction, default, non-joinder, misjoinder, multifariousness, defective framing of the suit, technical mistake, failure to produce probate or succession certificate, failure to deposit the security for costs, for improper valuation, for non- payment of Court-fee, for want of cause of action or the suit being premature, there is no question of res

[1](1974) 78 Cal WN 779
[2](1975) 1 Cal LJ 494
[3] AIR 1978 Cal440
[4] AIR 1962 Cal272
[5] AIR 1966 SC 1332

judicata. Here, the previous case was dismissed for non-prosecution. So, the matter was not at all

heard and finally decided within the meaning of the provisions of Section 11 of the Civil Procedure Code There was no decision on the merits and hence, it must be held that the bar of *res judicata* is out of the way.

9. Then about the limitation. Of course, the decision of the Bench case of *Ashalata v. Gopal Chandra in*[6] is in favour of the opposite party. But in the latest Bench decision of *Debabrata v. Smt. Nani Bala in*[7] a Bench of our High Court has stated that where the petition for pre-emption is asked for on the footing that the applicant is a co-sharer and subsequently, an amendment is asked for on the ground of vicinage, it has been held that there in no new cause of action and so, there is no limitation. The views expressed in the latest Division Bench decision of *Debabrata v. Smt. Nani Bala* will be followed. I, therefore, hold that here there is no limitation of four months. But there is a snag in this case because the learned Additional District Judge did not go into the question of the merits of the petition filed under Section 5 of the Limitation Act.

10. Lastly about the question of maintainability of the present application. Section 8(1) clearly shows that the right of pre-emption is available to a person, who is a contiguous tenant, if only a portion or share of a holding is transferred and not when the entire holding is transferred. The words

> ".....or any raiyat possessing land adjoining such holding may within four months of the date of such transfer, apply..... for transfer of the said portion or share of the holding" appearing in Sub-section(1) of Section 8 of the Act have reference to the words "portion or share" appearing in the earlier part of that Sub-Section. That is also clear from the words ".....apply..... for transfer of the said portion or share of the holding" appearing in the later portion of that Sub-Section. If the interpretation put by Mr. Ghosh is to be accepted, then one shall have to import some new words into that Section which are absent and the same will run counter to the established principles of interpretation of statutes.

11. Section 2(6) of the Act shows that holding means the land or lands held by a raiyat and treated as a unit for assessment of revenue. The decision arrived at in the Full Bench case of *Madan Mohan v. Sishu Bala in*[8] is Clear. It has been grated in that case that after 14-4-1956, it co-shares of a holding become to be a co-sharer and each raiyat of a holding becomes a direct tenant under the State. So after that date, no preemption can be asked for on the ground that a person is a co-sharer. It has been pointed out by the opposite arty that the pre-emption was asked for recording the Plot No. 3310 having an area of .74 cents, appertaining to Khatian No. 1130. That plot has been recorded in the Khatian, Ext. 3(b), in the names of Satish's coup. They have 4 annas share in the entire jama. There are only three plots in that jama and they are separately possessed the separate groups. Hence, the submission a made on behalf of the petitioner in this respect are not accepted. It is, therefore, held that the land in question constitutes a separate holding and since the entire holding was transferred, the application for pre-emption is not maintainable. Hence, this revisional application must fail.

[6](1975) 1 Cal LJ 494
[7](1979) 83 Cal WN 62
[8](1972) 76 Cal WN 1058

12. The Rule is, therefore, discharged.

13. There will be no order as to costs.

Application dismissed.