

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

S.A. 36 of 2001

Bijoy Ram Sinha

Vs.

Shib Nath Bhaduri

For the Appellant	:	Mr. Gopal Chandra Ghosh Mr. Subhasish Pachhal Ms. Priyanka Santra
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For the Respondent	:	Mr. Probal Mukherjee, Sr. Adv. Mr. Shourjya Mukherjee Mr. Vishwarup Acharyya Mr. Akash Dutta
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Heard on	:	05.12.2024
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Judgment on	:	03.04.2025
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Dr. Ajoy Kumar Mukherjee , J.:

1. This appeal emanates from the judgment and decree passed by the court below in Title Appeal no. 98 of 1996, dated 25.09.2000, by which the Court below reversed the Trial Court's Judgement and decree, dated 2nd April 1996, passed by learned Assistant District Judge, 2nd court, Howrah in Title Suit no. 85 of 1982 . The Trial Court by that judgment

dismissed plaintiff's suit for specific performance of contract /decree of preemption.

2. Before going to further details, let me state the case framed by both plaintiff and defendant before the courts below. The plaintiffs' case is that one Bamandas Bhaduri was the original owner of the properties of holding no. 50, Sree Ram Dhang Road and he died leaving behind his four sons namely Haripada, Haridas, Haribilash and Haricharan as his legal heirs long before 1935. At the time of their father's death, aforesaid four sons of Bamandas used to own and possess the property in ejmali in equal share and thereafter the said four brothers got the properties partitioned amicably by a registered deed of partition on 01.04.1935 and accordingly the said property left by their father split into four parts and the same was renumbered as holding no. 50,50/1,50/2 and 50/3, Sri Ram Dahang Road. By the aforesaid partition deed Haripada, father of the plaintiff became exclusive owner of holding no. 50/3 Sri Ram Dahang Road and Haridas, the father of defendant no. 2,3 and 4 became exclusive owner of the holding no. 50/2 Sri Ram Dahang Road.

3. After the death of Haridas in the year 1945, defendant no. 2, 3 and 4 being the only heirs of deceased Haridas, used to own and possess their property of holding no. 50/2 by inducting tenants therein. Thereafter said defendant no. 2,3 and 4 sold their entire property being holding no. 50/2 to the defendant no. 1 by a registered sale deed on 18.11.1981 for a consideration of Rs. 35,000/-, in contravention of the express condition of the aforesaid registered deed of partition dated 01.04.1935. Plaintiff's specific case is that a notice in writing expressing desire for sale of any

portion of the land allotted to each of the aforesaid four brothers by the aforesaid registered deed of partition, was required to be given to all the owners of the holding numbers 50, 50/1, 50/2 and 50/3 or there successor by any person of the aforesaid holding, intending to sell any portion of his holding to any other person, other than any of the owners of the aforesaid holding, for enabling the desirous allottee to purchase the property intended for sale at the prevailing market price prior to selling of the same to any other person, other than the allottees of the aforesaid holding as per terms and condition of the aforesaid deed of partition. However defendant no. 2,3 and 4 did not comply with the aforesaid condition of the registered deed of partition dated 01.04.1935, prior to selling of the suit property to the defendant no. 1 on 18.11.1981. The said defendant no. 2,3 and 4 never expressed their desire in writing for sale of the suit property to any of the co-allottees of the aforesaid holding, prior to the selling of the same to defendant no. 1 and for which the plaintiff acquired the right to purchase the property of the impugned sale deed, which has been executed in favour of defendant no. 1, dated 18.11.1981 and he is entitled to get a decree of preemption in respect of suit property against the defendants.

4. The defendant no. 1,2,3 and 4 contested the suit by filing written statements contending *inter alia* that defendant no.4 published a notice in the form of an advertisement in a Bengali daily namely 'Ananda Bazar Patrika' on 16th January, 1977, expressing her desire for sale of the suit property but neither the plaintiff nor any other allottee of the aforesaid holding contacted the defendant no. 2 to 4 for purchase of the suit

property at the prevailing market price after such publication. It is further case of the defendants that thereafter they entered into written agreement for sale of the suit property with the wife of defendant no.1 on 19.07.1981 and it was mentioned in the agreement for sale that such agreement will be liable to be treated as cancelled in the event, of any of the allottees of the aforesaid holding expressed their willingness to purchase the suit property at the then market price. Even thereafter defendant no.2 to 4 gave notice in writing to all other allottees of the aforesaid holdings on 24.08.1981 'under certificate of posting' through their lawyer, expressing their desire for sale of the suit property at the market price, but even then neither the plaintiff nor any other allottees of the aforesaid holding contacted the defendant no. 2 to 4 for purchase of the suit property at the prevailing market price. Accordingly defendant no. 2 to 4 thereafter sold the suit property to defendant no.1 by the aforesaid sale deed on 18.11.1981. Defendant's specific case therefore is that plaintiff lost his right of purchase of the suit property as per the terms of partition deed for his willful failure to communicate his desire for purchase of the suit property to the defendant no. 2 to 4, after the notice given through paper advertisement and also through certificate of posting and therefore, plaintiff is not entitled to pre-empt suit land nor he is entitled to get any decree as prayed for.

5. Learned Trial Court framed as many as ten issues and while discussed about the issue as to whether notice for intending sale was served upon the plaintiff or not, came to a finding that the notice sent through certificate of posting to the other allottees of the properties were

properly addressed and as such the denial of the plaintiff that he did not receive the notice has got no substance. Trial court also held that PW1 to 3 are found to be closely related and as such their statements that they did not use to read the Bengali daily 'Ananda Bazar Patrika' at the relevant point of time, cannot be believed and considering the evidence adduced by the parties and the documents marked as exhibit G and H with other materials on record, the trial court came to a finding that the notice to intending sale was duly served upon the plaintiffs.

6. So far as plaintiffs prayer for pre-emption is concerned the trial court held that in the instant case the entire property of the suit holding is found to have been transferred to the defendant no.1 and the plaintiff never deposited the consideration money of the impugned sale deed together with 10% of the said amount in compliance with section 8 of the West Bengal Land Reforms Act, 1955 though admittedly he came to know the fact of transfer of suit holding from the defendant no.1 on 07.05.1982 after obtaining certified copy of the same. Since the suit with prayer for preemption was filed after 5 months from the date of transfer of the suit holding and since the consideration money along with 10% amount had not been deposited, the trial Court held that the plaintiff is not entitled to get any degree of preemption.

7. Being aggrieved by the said judgment of dismissal, plaintiff preferred first appeal before the court below, being aforesaid Title Appeal no. 98 of 1996. Ld. Court below while disposing the appeal came to a finding that the suit was originally filed for specific performance of contract in terms of the condition laid down in the aforesaid partition deed dated 01.04.1935,

however, plaintiff by way of amendment subsequently inserted a prayer for exercising right of pre-emption under section 8 and 9 of the Act of 1955. Learned Court below while discussed the issues clearly came to a finding that plaintiff's suits for preemption is not maintainable for want of jurisdiction of the trial court and as such trial court rightly refused the plaintiffs prayer for exercising right of preemption.

8. However, while dealt with plaintiffs original prayer for specific performance of contract made in the plaint in terms of condition laid down in the aforesaid partition deed, the court below held that there is nothing to show in record that the notice of intending sale was ever served upon the plaintiff or other allottees.

9. Relying upon a judgment reported in **AIR 1994 SC 678**, the court below held that the certificate of positing is easy to procure and does not inspire confidence. Therefore, the notice which was allegedly sent through certificate of posting cannot be said to have been served upon the co-allottees including the plaintiff and so far as the publication of notice in the daily newspaper is concerned, it cannot be accepted as the compliance of the terms, embodied in the aforesaid partition deed. In this context he also relied upon the judgment reported in **AIR 1971 Cal 53** and contended that the statements of fact contained in newspaper is merely hearsay and therefore inadmissible in evidence. Mere presumption under section 81 of the Evidence Act cannot be treated as proof of facts contained in newspaper and accordingly the court below declined to accept the contention of the appellants herein that the notice published in 'Ananda Bazar Patrika' is sufficient compliance of the terms of the

partition deed. He therefore declined to accept defendant/Respondents' contention that the sale dated 18.11.1981 was completed with the contractual obligation of the parties of the partition deed and that the condition runs with the person and not with the land and in this context he also relied upon judgement reported in **AIR 1987 SC 744**.

10. Accordingly considering the facts and circumstances of the case, the court below allowed the appeal after setting aside the trial courts order of dismissal and thereby passed a decree for specific performance of contract in favour of plaintiff directing the defendants to execute a deed of sale in respect of aforesaid suit holding 50/2, in favour of plaintiff, on receipt of Rs. 35,000/- from the plaintiff, within a period of 90 days from the date of the judgment

11. Being aggrieved by the said judgment and decree passed by the first appellate court, the defendant/appellant herein argued that the court below took up the issue of specific performance on the basis of preferential right/ pre-emption in terms of the clause of the partition deed of 1935, which the plaintiff appellant totally abandoned in the trial court and without considering the conduct of the parties, as appearing from the pleadings and evidence on record, which clearly reveals that such right given in the partition deed, has been waived long back in 1945 and repeatedly thereafter and infact such preferential clause have never been given effect to by the parties, allowed the Appeal. When admittedly one of the allottees transferred his allotment to strangers in 1945 and when entire allotment to appellants herein was let out to tenants long back before their sell and neither of remaining allottees ever exercised their

right, the clause in the partition deed was not acted upon. Lastly during the pendency of the present appeal, the plaintiffs/respondents have also transferred their allotment to Developer for construction of a multi-storeyed building as appeared from connected Application being CAN 10 of 2023. Therefore, the respondents herein have lost their rights, if at all by their conduct and it is no longer open for the respondents to maintain such right which is clearly barred by principles of waiver and estoppel. Moreover, the plaintiff before the trial court amended the plaint and made out a case of pre-emption on the ground of vicinage claiming longest common boundary and thereby plaintiff during the trial did not press for the case of specific performance, rather abandoned such claim, as recorded by the trial court in his judgment but unfortunately the appellate court below without considering the said aspect of the matter, took up the case of specific performance and allowed the appeal without any reason.

12. Appellant further contended that the notice was duly sent to the co-allottees including the plaintiff in their correct address and the respondents have failed to rebut the presumption about service of notice as required under law and the court below totally misdirected himself by holding that notices were not proper, nor it was served upon the plaintiff. The court below erred in not holding that the suit for specific performance of contract is not maintainable in as much as there was never any agreement for sale of the suit property in between the plaintiff/appellant and the defendants/respondent.

13. The court below also ignored the recital of exhibit "B" being the agreement for sale dated 19.07.1981 which shows the *bonafide* of the

vendor/appellants herein in disseminating information regarding sale of their property and thereby a clause was inserted by the vendor therein that the said agreement for sale would be treated as cancelled, if upon service of notice on the other allottees, all or any of such persons decides to purchase the property and the stranger purchaser would be bound to accept refund of the earnest money, which the court below failed to consider. Accordingly he prayed for setting aside the judgment impugned.

14. Mr. Probal Mukherjee learned counsel appearing on behalf of the respondent argued that there is nothing on record to reflect that any notice was served by the successors in interest of Haridas Bhaduri on the other allottees in terms of the covenant of the registered deed of partition dated 01.04.1935. The trial Court was justified in observing that a certificate of posting is easy to procure relying upon the ratio laid down by the supreme Court in the judgment reported in **AIR 1994 SC 678**. He further contended that on perusal of evidence of PW 2 and 3, it is evident that all of them have stated that they did not receive any such notice. Accordingly notice, even if sent under certificate of posting, cannot be regarded as a valid notice. That apart the spirit of the terms of the partition deed was not fulfilled by the notice published in any daily newspaper and it is not sufficient to discharge the obligation of defendant no. 2,3 and 4 before selling the property and furthermore the newspaper advertisement dated 16.1.1977 was not proved, nor marked as an exhibit. He further contended that the trial court failed to consider that the covenant created right of preferential purchase on the basis of kinship and as such the right is limited to the executants of the deed and their

legal heirs and as such any obligation arising out of contract can be imputed to stranger purchaser/defendant no.1. A pre-emption by contract or contractual pre-emption is well recognized in law and such clause is enforceable as contract to be specifically performed. In the context of sending letter under certificate of posting instead of registered post, more particularly when each of the addresses/other allottees have denied receipt of any such letters, the court below was justified in decreeing the suit and this court does not require to interfere with the judgment impugned. Accordingly Mr. Mukherjee has prayed for dismissal of the appeal.

15. A division bench of this court, while admitted the appeal by its order dated 3rd January, 2001 have held that the appeal will be heard on the following substantial questions of law:-

(i) Whether the learned appellate court below was correct in holding that in the absence of notice in terms of deed of partition dated 1st April, 1935, the suit was liable to be decreed on contest.

(ii) Whether the appellate court below acted illegally and erred in not holding that the plaintiff/respondents refused to purchase the suit property inspite of being requested by the defendant no. 2 3 and 4 and inspite of notice being published in daily newspaper.

(iii) Whether the court below erred in not holding that the suit for specific performance of contract is not maintainable in as much as there was no agreement for sale of the suit property in between the plaintiffs/respondent and defendant no.1/appellant.

Decision with Reasons

16. It is apparent from the partition deed of 1935, that the preferential right was included to maintain the family integrity and may be for the reasons of the maintenance of deity and seva puja of family deity in turn. Accordingly the first question that arises is whether notice before transfer was given to the co allottees including the plaintiff or not. It is the specific

case of the appellant/defendants that for abundant caution, they gave notice by three modes namely (i) verbally (ii) by publication in a daily Bengali News Paper namely 'Ananda Bazar Patrika' (iii) by notice under certificate of posting.

17. Though the trial court relying upon the service through paper publication and also by serving the same in the mode of certificate of posting, satisfied about the service of notice upon the plaintiff but the appellate court while dealt with the appeal came to a finding that PW2 and 3 who are also the co allottees have stated that they did not receive any such notice and for which he held that notice allegedly sent under certificate of posting has not been duly served and in this context the court below relied upon the judgment reported in **AIR 1994 SC 678**, wherein it was held that certificate of posting is easy to procure and does not inspire confidence. So far as publication of notice in the 'Ananda Bazaar Patrika' is concerned the court below held that it was not sufficient to discharge the obligation of the defendant no. 2,3 and 4, since the publication of the newspaper is merely hearsay and does not inspire confidence and in this context he also relied upon the judgment reported in **AIR 1971 Cal 53**.

18. Needless to say that the trial court specifically observed in his judgment that plaintiff as PW1 admitted that the notice dated 24.08.1981 was correctly addressed and posted though at the same time said PW-1 denied that it was served upon him. Plaintiff nowhere alleged that the postal certificate has been procured by the defendants/appellants herein. This court in the judgment of **Ridkaran Sharma &anr. Vs. Prodigip**

Kumar Jana delivered on 06.09.2023 in **S.A. 85 of 2015** held that if a letter is properly directed containing notice to quit and is proved to have been put into the post office, the presumption would be that the letter reached its destination at the proper time according to regular course of business of post office and was received by the persons to whom it was addressed and such presumption under section 114 (f) of the Evidence Act would also extend to certificate of posting, though such presumption is certainly rebuttable. In the present context the plaintiff did not make minimum effort to rebut the said presumption.

19. It is true that in **Gadakh Yashwant Rao Kankarrao Vs. E.V. @ Balasaheb Vikhe Patil and others** reported in **(1994) 1 SCC 682** the supreme Court in para 61 did not believe Gadakh's Version that he sent the letter dated 16th May, 1991 under certificate of posting and in this context observed that a certificate of posting is easy to procure and does not inspire confidence. In the present case no allegations has been made that the certificate of posting marked exhibit has been procured by the defendants/appellants and as such I failed to understand what prompted the court below to rely upon the said observation made by the supreme Court which is merely an *obiter dicta* and not the ratio laid down in the said judgement. *Ratio decidendi* is the core legal principle or rule that the court uses to reach its decisions in a case i.e. the reason for deciding.

20. A divisions of this High Court in a judgment of **Ramesh Kumar Mittal Vs. Prabal Kumar Ghoshal**, reported in **1998 3 ICC 167** where also **Gadakh's Cas (Supra)** was cited but the court held in Para 12 as follows:-

“12. In Gadakh (Supra) AIR 1994 SC 678, the Apex Court was dealing with a case under representation of the people Act. In the fact situation of that case and keeping in view the conduct of the petitioner the supreme Court observed that a notice under registered cover ought to have been sent and it is in that context, an observation was made that the purported sending of notice under Certificate of posting does not inspite confidence.

The Apex Court held: “Godakh’s version that he sent the letter dated 16th May, 1991(Exh. Q) under certificate of posting is unbelievable. A certificate of posting is easy to procure and does not inspite confidence. Moreover, the circumstances believe his version. With his considerable means and past experience of elections, he would have sent such a letter by registered post to ensure its delivery and create cogent evidence of its despatch. Moreover, he would not merely send such a letter but have his denial published in newspapers because of its significance during elections. We have no doubt that Gadakh’s conduct belies his belated denial at the trial.”

21. Infact in the case of **Samittri Devi and another Vs. Sampuran Singh and another**, reported in **(2011) 3 SCC 556**, a similar question arose before the supreme Court, where for execution of sale, notice was sent on 08.04.1987 under ‘certificate of posting’ and the appellant in that case produced copy of the notice along with postal certificate in evidence. In that case also there was no allegations that the postal certificate was procured. In the above backdrop the Apex Court held that though it will depend on the fact of each case, whether the presumption of service of a notice sent under postal certificate should be drawn or not but it is true as observed by the Privy Council in its judgment in **Harihar Banerji Vs. Ramsashi Ray** reported in **AIR 1918 PC 102**, the presumption would apply with greater force to letters which are sent by registered post, yet, when such facts so justify, such a presumption is expected to be drawn even in the case of a letter sent under postal certificate.

22. Privy council in **Harihar Banerji’s Case (supra)** held that if a letter is properly directed containing notice to quit is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post

office and was received by the persons to whom it was addressed. That presumption would appear to Their Lordships to apply with still greater force to letters which the sender has taken the precaution to register and is not rebutted, but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself. In the fact and circumstances of the said case and keeping in view the conduct of Gadakh Yaswant Rao, the Supreme Court observed that a notice under registered cover ought to have been sent and it is in that context, the observation was made. But in the present context, there is no stipulation in the partition deed that notice is to be served through registered post only, nor there is any reason to believe that defendants procured said certificate of posting from post office, and as such above mentioned decision in **Gadakh Yaswant's Case (Supra)** cannot be said to be applicable in the present case.

23. So far as notice sent under postal certificate is concerned supreme Court in **LMS Ummu Saleema Vs. BB Gujaral and another** reported in **(1981) 3 SCC 317** held in para 6 as follows:-

"6... The certificate of posting might lead to a presumption that a letter addressed to the Assistant Collector of Customs was posted on August 14, 1980 and in due course reached the addressee. But, that is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compels the court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever despatched as claimed. After all, there have been cases in the past, though rare, where postal certificates and even postal seals have been manufactured. In the circumstances of the present case, circumstances to which we have already referred, we are satisfied that no such letter of retraction was posted as claimed by the detenu.

24. In view of the aforesaid proposition of law it is no doubt true that in case of certificate of posting neither section 16 nor section 114 of the Evidence Act compels the court to draw a presumption and the court may even refuse to draw the presumption on the facts and circumstances of the case but the presumption may be drawn initially and after considering the evidence the court may held that the presumption has been rebutted and may reach to the conclusion that the addressee did not receive the letter. At the cost of repetition I must say that in the present case plaintiff admitted that the address mentioned in the certificate is correct and it was posted and no case has been made out that the certificate was procured nor it is the case of the plaintiff that the letter was not handed over to the accepting or receiving authority of the post office and in the absence of such allegation it is the official duty of the postal authorities to make delivery of it to the addressee and the presumption that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was correctly addressed shall be drawn. In ***Samittri Devi's Case (supra)*** the supreme Court also held that in the absence of any allegations that the postal certificate was procured it could certainly be presumed that the notice was duly served upon the addressee.

25. In fact when the certificate of posting has been proved by the defendant, the burden of proof shifts to the addressee to rebut the aforesaid presumption by providing evidence that the document was not received. In the instant case there is no allegation that the certificate of postal department was obtained through illegal means and/or

fraudulently. There is mere rebuttal by plaintiff regarding service on him, which is not sufficient. Though plaintiffs' other witnesses who are his close relatives and who admitted to have been asked by the plaintiff to depose might have stated that they have also not received the notice, but by no stretch of imagination such evidence adduced by the other allottees can rebut the presumption, which has been drawn on the basis of certificate of posting.

26. This Calcutta High Court also in the judgment reported in **90 CWN 413** held that the certificate of posting also carries with it presumption of due service of notice unless rebutted. There can be no scope for presumption that the party would simply obtain a certificate from the post office for displaying it to the court without actually posting the envelop containing the notice, because there would absolutely be no motive for such suppression. In such a situation direct evidence regarding the fact of actual posting of the letter may be dispensed with because the strongest presumption would be in favour of the actual posting and there can be no presumption of suppression which would not be in his interest.

27. Now so far as appellants case of publishing notice in the newspaper it appears that said publication in newspaper has not been marked as exhibit but filed before the court for identification. The publication of the said notice in the newspaper is again not in dispute and the only allegation as stated by plaintiff No.1 in his evidence is "now I read 'Ananda Bazar Patrika' but at the relevant time, I did not read the same."

28. In ***Sunil poddar and others Vs. Union Bank of India and others*** reported in **(2008) 2 SCC 326** supreme Court held that it is immaterial

whether the appellants were subscribers of the said newspaper and whether they were reading it. Once a summon is published in a newspaper having wide circulation in the locality, it does not lie in the mouth of the persons sought to be served that he was not aware of such publication as he was not reading the said newspaper.

29. Ld. Court below while discarding publication of notice in a newspaper held that such publication of notice is hearsay in nature and in this context he relied upon judgment of this court reported in **AIR 1971 Cal 53**, but said observation was made in a different context over the news item. Infact when a news published in a newspaper is based on information gathered by a reporter that may or may not be true and cannot be verified by the public at large. But when a public notice is published, it can be easily verified from the details given in the notice itself. In that view of the matter also the court below was not justified in discarding service of notice because it is not in dispute that the notice was published in widely circulated local newspaper and in the absence of any contrary document against such publication, it can be presumed to be served on the intended persons as constructive notices.

30. Moreover, their further case is that in the agreement for sale the defendants/appellants have mentioned a clause of refunding the earnest money in case any member of the family wants to purchase the said property, which shows the *bonafide* intention of the defendants and that the defendants never had the intention to bypass the service of notice upon the family members. Accordingly under section 27 of the General Clauses Act and under section 114 of the evidence Act, though the pre-

emption in such cases is rebuttable in nature but in absences of proof to the contrary and also in absence of any allegation or proof of animosity with postal peon, the presumption of proper service or effective service on the addressee, would arise and therefore the court below is totally wrong in holding that the plaintiff was not informed in terms of the condition imposed in the partition deed. Infact the court below failed to take note that when there is a presumption in favour of service at the initial stage, the onus of proof lies upon the addressee that he has not received the notice or constructive notice by cogent evidence and not by mere denial of receipt.

31. Now so far as the question of maintainability of respondent's claim regarding specific performance of contract, as allowed by the court below, it is admitted position that initially plaintiff filed the suit for specific performance of contract and thereafter he made amendment of plaint and thereby incorporated the plea of pre-emption which the court below has turned down. Form the judgment passed by the trial court it appears that the court clearly held that it is admitted by the learned lawyer for the plaintiff that the plaintiff cannot be said to be entitled to get a decree for specific performance of contract in respect of the suit property for transfer of the same to defendant no. 1 by the defendant no. 2 to 4 by a registered sale deed dated 18.11.1981, as the condition for prior notice of sell of the suit property in the partition deed cannot be said to be a term of agreement for sale of the suit property for the purpose of enabling the plaintiff to get a decree for specific performance of contract in the event of violation of the said terms. Apprehending such observation, learned

lawyer for the plaintiff amended the plaint and incorporated prayer for pre-emption as reflected in the judgment.

32. So far as plaintiffs claim for pre-emption is concerned I will come to that point later on. Presently the question is when the plaintiff before the trial court has abandoned his claim for specific performance of contract on the ground that there was no such agreement for contract, then whether the appellate court can grant decree for specific performance of contract which has been abandoned by plaintiff.

33. A division of this high court in ***Premchand Manickchand Vs. Fort Gloster Jute Manufacturing Co. Ltd.*** reported in **(1958) SCC online Cal 61** held that when a party abandoned the ground and the learned judge expressly placed that fact on record, the appellate court must be limited to the ground which it was urged before the trial court and must succeed or fail depending upon whether that point is established or not. Here also when the plaintiff has abandoned his claim of specific performance of contract before the trial court, which has been recorded in the judgment, the court below was not justified in passing a decree for specific performance of contract in favour of plaintiff /respondent. Moreover, the defendant no.1 being a transferee of title to the suit property from the defendant no. 2 to 4 did not have any privity of contract with the plaintiff and as such any obligation arising out of any contract, no cause of action for specific performance of contract can arise in favour of plaintiff against defendant no.1.

34. Now so far as the plaintiffs claim for pre-emption is concerned, the Trial Court has recorded that plaintiff urged to get a decree for pre-

emption in respect of the suit property being adjoining owner of the holding having longest common boundary of the suit property. Accordingly from the payer, it is clear that the claim of pre-emption if any, was made under section 8 of the West Bengal Land Reforms Act 1955. This is also because the cause of action to claim pre-emption under the Partition Act arises only when the purchaser filed a suit for partition against the co-sharer after purchase, which is not the case in present context.

35. In the present case if the pre-emption claimed under section 8 of the act without depositing the consideration price along with statutory amount the application for pre-emption is not maintainable in view of the judgement of the Apex Court passed in ***Barasat Eye Hospital case, AIR Online 2019 SC 2075***, which interpretation by the Apex court is effective retrospectively. Admittedly the entire share of defendant no.2,3 and 4 was transferred to defendant no. 1 and accordingly pre-emption under section 8 have no application in the present case.

36. However, during course of hearing Mr. Mukherjee Id. Counsel for the petitioner demonstrated that a right of pre-emption in terms of partition deed and a pre-emption under the statute is different. The pre-emption claimed on the basis of recital in the deed is a contractual pre-emption and such pre-emption is not guided by section 8 of the Act of 1955.

37. The case of contractual pre-emption has been taken by the plaintiff/respondent for the first time before the Appellate Court but fact remains that the admitted position in the present case is that although the right provided to the executants of the deed of partition by way of a right of pre-

employee purchase on the basis of kinship is given but it reveals from the cross examination of PW1 that the PWs/plaintiff had been served with a notice of the intending sale of holding no. 50/1 Shri Ram Dhang Road prior to sale of the suit holding but the plaintiff did not show any inclination of purchasing the same and thereby waived his right, though he has filed the present suit against the defendants after the said sale on the ground of pre-emption. Since I have already stated that the recital in the partition deed was introduced to prevent any third party stranger to intervene and to become a cause of disturbance to the privacy and the seva puja of deity according to the turn as specified to be followed by the allottees and also to protect the family privacy, therefore, there is no scope to interpret the said clause mechanically. It has been strenuously argued before me that in 1945 when the allotment of 50/1 holding was sold to one third party outsider namely Smt. Binapani Dutta, the very foundation of pre-emption is waived and the entire gamut of the pre-emption clause frustrated.

38. In this context reliance has been placed upon the judgment of Supreme Court in ***Raghunath (D) by Lrs Vs. Radha Mohan***, reported in **AIR 2020 SC 5026** and contended that such a right is available only once and it is not an open right available for all times to come to that persons. Accordingly in view of aforesaid waiver by plaintiff during previous sale it would be an impediment in exercise of a right of pre-emption in a subsequent transaction. It was further argued that once a person waves his right of pre-emption he is essentially surrendering his claim to purchase the property and if subsequently tries to assert his right

of pre-emption the court will not entertain his claim as he has already voluntarily given up that right. I find force in the appellants above argument. From the evidence of record it transpires that the allotment of aforesaid Haricharan in connection with premises no. 50/1 was sold in 1945 to a stranger but neither of the allottees took any steps for implementation of the said clause of pre-emption. The PW1 in his evidence also stated that during pendency of suit the allotment of Haribilas has also been transferred by his heirs to stranger purchasers and inspite of that before such transfer, the plaintiff did not offer for purchasing such allotments. In such view of the matter the plaintiffs case of contractual pre-emption also does not find any leg to stand, in the aforesaid facts and circumstances of the case.

39. In view of aforesaid discussion I am constrained to conclude that the judgment and decree passed by the court below is not sustainable in the eye of law

40. SA 36 of 2001 is allowed.

41. The impugned judgment and decree dated 25th September, 2000 passed by the learned District Judge Howrah in T.A no. 98 of 1996 is hereby set aside and the judgment and decree dated 2nd April, 1996 passed by learned Assistant District Judge, 2nd Court Howrah, in T.S. 85 of 1982 dated 31.05.1996 is affirmed.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)