CIVIL REVISION.

Before Costello J.

1934

March 22.

BAIKUNTHACHANDRA SHAHA

v.

SHAMSUL HUQ.*

Bengal Tenancy—Pre-emption—Application for pre-emption by a co-sharer landlord, when maintainable—Bengal Tenancy Act (VIII of 1885), ss. 26F, 188.

Not only co-sharers landlords, upon whom notices under section 26C or 26E of the Bengal Tenancy Act are issued, but also persons who claim to be co-sharers landlords of the occupancy holding, can exercise the right of pre-emption under section 26F—the right to be exercised within a reasonable time of such landlords having knowledge of the transfer.

Surjyakumar Mitra v. *Noabali* (1) followed.

There is an apparent inconsistency between section 26F(*4*) (*a*) and section 188 of the Bengal Tenancy Act, but the governing section is the latter one. An application under section 26F for pre-emption by a co-sharer landlord will fail unless other co-sharers are made parties defendant to the proceeding.

Barkatulla Pramanik v. *Ashutosh Ghose* (2) followed.

CIVIL REVISION, on an application by the purchasers.

The material facts of the case and the arguments appear from the judgment.

Phanibhooshan Chakrabarti and *Kalipada Chakrabarti* for the petitioner.

Abdul Hossain for the opposite party.

COSTELLO J. Although the amount at issue in this matter is very small, the case raises one or two points of considerable interest and indeed of public importance.

The Rule was directed against an order of the Munsif, Fourth Court of Narayanganj, dated the 19th

*Civil Revision, No. 1369 of 1933, against the orders of P. C. Ghosh, Fourth Munsif of Narayanganj, dated June 19, 1933 and July 5, 1933.

(1) (1931) I. L. R. 59 Calc. 15. (2) (1932) 37 C. W. N. 89.

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of June, 1933, whereby he allowed an application made under section 26F of the Bengal Tenancy Act. That application was made by three persons, Shamsul Huq (also known as Arman Mirza), Kurchhia Akhtar Bibi and Khosa Akhtar Khatun. The first two were the son and daughter of a man named Sahebdi Sarkar and the third was one of his widows. It appears that he also left another widow named Ahladi. As respondents to the application or, to use the expression which appears in section 188, Bengal Tenancy Act, as parties defendant to the application, a number of other persons were described as the representatives in law of the two brothers of Sahebdi Sarkar, who had been co-sharers with him in respect of the holding with which the application was concerned. The present petitioners Baikunthachandra Shaha and Prasannachandra Shaha were also respondents to the application, as being the transferees of the holding in question, they having purchased that holding at a sale held in execution of a decree in the Second Court of the Subordinate Judge of Dacca. The price paid was Rs. 110 and the two Shahas as transferees had duly deposited on the 5th of July, 1932, the landlord's fee of Rs. 33-1, the transmission fee of Rs. 3-6 and the process fee Re. 1 for serving notices, making in all a sum of Rs. 37-7. That was done in accordance with the provisions of section 26C, Bengal Tenancy Act. As the sale had taken place in execution of a decree, the matter fell within the purview of section 26E, Bengal Tenancy Act, and the application was, therefore, made subject to the provisions of sub-section (*1*) of section 26F, as regards the time within which such an application ought to be made. The Shahas, as the transferees of the holding, contended, at the hearing, that the application was out of time, in that it had not been made within two months of the service of notice as mentioned in that sub-section. They also contended that the application was not in order by reason of the provisions of section 188, Bengal

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Tenancy Act, on the ground that, although it was an application for pre-emption made by co-sharer landlords, the whole of the landlord's interest was not fully represented by the persons who were parties to the proceedings either as applicants or as parties defendant.

Mr. Phanibhooshan Chakrabarti, who appeared in support of this Rule, put before me a very able and cogent argument on both these points, but, as regards the first point, he accepted the interpretation which I was disposed to put upon section 26F and ultimately conceded that my opinion was confirmed by a decision of Mr. Justice Mitter in the case of *Surjyakumar Mitra* v. *Noabali* (1). It should be observed that the application was filed on the 7th March, 1933, by three applicants, who were described by the Munsif as "minors and females". No notice, such as is referred to in section 26F, had been served on these co-sharer landlords at all, but in some manner or other the fact that a transfer had taken place evidently came to their knowledge and they made this application within about six months from the time when notices had been served on some of the other co-sharer landlords. Mr. Chakrabarti was first disposed to argue—and of course rightly from the point of view of his clients—either that unless a notice was served the landlords could not make an application at all or that if a notice was served on some co-sharer landlords the other co-sharer landlords would be out of time after the lapse of the two months prescribed by section 26F. Mr. Chakrabarti agrees, however, that there is a lacuna in the provisions of section 26F in that the section does not in terms indicate what is to be the position of co-sharer landlords in circumstances such as the present where they receive no formal notice as required by the Act, but happen to hear of the transfer from some other source.

I took the view and, as I have stated, my opinion is supported by that of Mr. Justice Mitter in his

(1) (1931) I. L. R. 59 Calc. 15.

judgment in the case to which I have just referred that the only reasonable and equitable construction to be put upon the section is that where no notices are served, the landlord can exercise his right to make an application for pre-emption within a reasonable time of the fact of the transfer coming to his knowledge. I pointed out to Mr. Chakrabarti, that the real purpose of section 26F is to give to a landlord the right to apply for what is usually called pre-emption. It is to be noticed that the provision with regard to time within which such an application is to be made is interpolated between two portions of the sentence which confers a right to apply, the language being in these terms:

> The immediate landlord of the holding or the transferred portion or share may, within two months of the service of notice issued under section 26C or 26E, apply to the court that the holding or portion or share thereof shall be transferred to himself.

It would of course have been much clearer if the section had read something like this: "The immediate "landlord of the holding or the transferred portion or "share may apply to the court that the holding or "portion or share thereof shall be transferred to "himself" and a proviso added to some such effect as this: "provided always that such an application shall "be made within two months of the service of notice "issued under section 26C or 26E or within a "reasonable time of the immediate landlord having "knowledge of the transfer". Mr. Justice Mitter in the course of his judgment in the case of *Surjyakumar Mitra* v. *Noabali* (1) said:

> The Act does not make any provision with regard to cases where no notice has been issued on persons who claim to be the landlords of the occupancy holding which has been sold as comtemplated by section 26C or 26E. In such a state of things, I think it would be right to construe the section as giving the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under section 26C or 26E, but who claimed to be the landlord of the occupancy holding—the right to be exercised within a reasonable time of the knowledge of the sale.

With the view stated in that passage I entirely agree.

(1) (1931) I. L. R. 59 Calc. 15, 17.

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As regards the second point raised by Mr. Chakrabarti, it would indeed appear, from the plain language of section 188, Bengal Tenancy Act, that if one or more of a number of co-sharers desire to make an application under section 26F, Bengal Tenancy Act, they must make all the other co-sharers parties defendant to the proceedings. Sub-section (*1*) of that section runs thus:

> Subject to the provisions of section 148A, where two or more persons are co-sharer landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together or by an agent authorized to act on behalf of both or all of them:
>
> Provided that one or more co-sharer landlords, if all the other co-sharer landlords are made parties defendant to the suit or proceedings in manner provided in sub-sections (*1*) and (*2*) of section 148A and are given the opportunity of joining in the suit or proceeding as co-plaintiffs or co-applicants, may—
>
> (*i*) file an application under sub-section (*1*) of section 26F or under section 26J.

Had that section stood entirely alone or had there been no other provision in the Act dealing with a point of this kind the matter would be beyond question. Mr. Justice Mukerji and Mr. Justice Guha in the case of *Barkatulla Pramanik* v. *Ashutosh Ghose* (1) held that where an application for pre-emption under section 26F had been made by one co-sharer landlord without making the other co-sharers parties defendant to the proceeding and without framing the application in such a way as to give them an opportunity to join in the application, even though the names of the other co-sharers had been stated and their shares had been specified in the body of the petition, the application was not competent and was barred by reason of the provisions of section 188, Bengal Tenancy Act.

Some difficulty, however, is created by reason of the provisions of sub-clause (*a*) of sub-section (*4*) of section 26F, which says that—

> When an application has been made by a co-sharer immediate landlord under sub-section (*1*), any of the remaining co-sharer landlords, including the transferee, if one of them, may within the period of two months referred

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to in that sub-section, or within one month of the application whichever is later, apply to join in the application of the co-sharer immediate landlord aforesaid, and any co-sharer landlord who has not applied under sub-section (*1*) or has not applied to join under this sub-section shall not have any further power of purchase under this section.

Sub-clause (*b*) of sub-section (*4*) says :—

The application to join as a co-applicant shall be granted, if within such period as the court may fix not exceeding beyond the period referred to in sub-section (*4*) (*a*) the applicant deposits in court, for payment to the co-sharer landlord who has made the application under sub-section (*1*), such sum as the court shall determine as the share to be paid by him for the purposes of sub-section (*2*).

Then sub-section (*5*) deals with the situation that arises if the deposits are made.

It seems to me that the expression in sub-section (*4*) (*a*) "apply to join in the application of the co-"sharer immediate landlord" scarcely accords with the provisions of section 188. The original application could only have been made if the co-sharer landlords were made parties defendant. The phrase "apply to join in the application" scarcely seems to indicate that the co-sharer landlords have already been made parties in the proceeding as defendants or, as I should prefer to say, respondents to the application. It looks very much as if this is another instance of the many inconsistencies and indeed contradictions to be found in the Bengal Tenancy Act. Both the points raised in these proceedings might very well receive the attention of the legislature if a remedy is contemplated by way of amending or redrafting any of the provisions of the Bengal Tenancy Act. It is not necessary for the purpose of these proceedings that I should attempt to reconcile definitely the apparent inconsistencies between section 26F(*4*) (*a*) and the provisions of section 188. I think, however, that I must take it that the governing section is section 188 as there the provisions are precise and clear.

It does not appear that in the case to which I have just referred, *Barkatulla Pramanik* v. *Ashutosh Ghose* (1), the attention of the Court was particularly

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directed to the provisions of section 26F (*4*) (*a*). In the present instance, I should have been prepared to hold that, at any rate, it is necessary that all the co-sharer landlords should be in the proceeding either as applicants or as parties defendant. Mr. Chakrabarti has argued that it is upon that footing that the present proceedings were not in order or, to use the words employed by Mr. Justice Mukerji and Mr. Justice Guha, "the application as framed was not fit "to be entertained at the time of the trial". If that in fact had been the position, it might have been reasonable that I should have held that the learned Munsif was not competent to deal with the application at all, unless and until the applicants had put the proceeding in proper shape and fully complied with the provisions of section 188. But upon a careful and indeed searching consideration of the judgment given by the Munsif and having heard all that Mr. Chakarbarti on one side and Mr. Abdul Hossain on the other had to say as regards the facts of the case, I am disposed to come to the conclusion that the learned Munsif was satisfied that the whole of the landlord's interest in the holding transferred was represented by the persons who are parties in the proceeding.

The position was this: The holding originally vested in Sahebdi Sarkar, Mahammad Abu Sarkar and Asamadi Sarkar, three brothers. The applicants, as I have stated, were the representatives of Sahebdi Sarkar and the parties defendant other than the two transferees were Mahammad Abu Sarkar himself and the heirs and representatives of Asamadi Sarkar. On the face of it, it would appear that the whole of the interest of the three brothers was represented in the proceedings. It is contended on behalf of the present petitioners Baikunthachandra Shaha and Prasannachandra Shaha, as the transferees of the holding, that there was an outstanding interest which was originally held by Ahladi as one of the widows of the first brother Sahebdi Sarkar. The applicants' case was first of all that this widow had died and that

her heir was a man named Mahammad Abu—a nephew. They also seem to have made a case at some stage of the trial that even if Ahladi's interest had not passed to Mahammad Abu she had made a gift of it by a deed to a man named Sarafat who was one of the respondents in the proceedings. As regards this matter, the learned Munsif said:

> It is true that one of the widows of Sahebdi was Ahladi and that she was an heir. But she is dead and the opposite parties say that one Mahammad Abu is her heir. Petitioner's case is that she made a gift of her share to Sarafat and a copy of a registered deed of gift was filed, but could not be proved owing to absence of attesting witness. There is no convincing evidence that Mahammad Abu is Ahladi's heir and the opposite parties also did not cause any notice to be served upon him. Actually he said they had not caused any notice to be served upon him or Nabin Shaha. I am not concerned with Nabin Shaha at all. That would show to some extent that they could not be believed to be co-sharers though had they been co-sharers it would have been incumbent to make them parties, notices or no notices.

Then he said:

> Thus I hold that the application is not barred under section 188 of the Bengal Tenancy Act.

Now, endeavouring to look into the mind of the learned Munsif, as far as one can do anything of the kind, and having regard to what has been said by the learned advocates respectively, I have come to the conclusion that what the learned Munsif really meant was this: It had been contended that the interest of Ahladi, which was a very small share indeed amounting only to 1/48th, had either passed to the person who, the applicants said, was her heir or it had been transferred by her to Sarafat. The Munsif then took the view that the applicants themselves could not base their case upon Mahammad Abu being an heir and as they had not attempted to suggest that the lady had any other heir he could only come to the conclusion that she in fact had no heir. He disposed of the suggestion that there had been a gift to Sarafat by saying that it had not been proved. In any case, that is of small importance, because if it had been proved that there had been a gift to Sarafat he undoubtedly was one of the persons who were on the record. He seems to have been of opinion that if

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in fact the lady had had any heir other than Mahammad Abu the applicants would undoubtedly have raised the point. The Munsif, in my judgment, must have come to the conclusion that the lady died without heirs and that therefore her interest in the holding had fallen back into the family, if I may so put it, and had become vested in the other representatives of her late husband Sahebdi. In these circumstances, the learned Munsif held that all the representatives of the interest originally vested in the three brothers were on the record and that, therefore, the proceedings were in order.

In the result, having regard to the view I have expressed with regard to section 188 as well as section 26F, concerning the time-limit the matter is really concluded by the findings at which the learned Munsif arrived.

This Rule must, therefore, be discharged with costs, hearing fee one gold mohur.

Rule discharged.

A. C. R. C.