CIVIL REVISION.

Before R. C. Mitter J.

NABENDRAKISHORE RAY.

v.

ABDUL MAJID.*

1935

Feb. 11, 19.

*Landlord and Tenant—Pre-emption—*Benâmi *sale of occupancy holding—Purchaser, if can plead* benâmi *in favour of co-sharer in proceedings for pre-emption by the landlord—Non-joinder of beneficial owner, Effect of—Bengal Tenancy Act (VIII of 1885), ss. 26C, 26F.*

A transferee of an occupancy holding is not debarred from pleading in proceedings for pre-emption started by the landlord under section 26F of the Bengal Tenancy Act that, although his name appears in the notice and the conveyance, he is not the real purchaser but that the purchase was made *benâmi* in his name by a co-sharer of the vendor, and so defeating the landlord's application for pre-emption.

It is legitimate and proper for the court to go into and decide the question, in the proceeding for pre-emption, as to whether the case comes within the exceptions made in section 26F of the Bengal Tenancy Act on the principle that there cannot be estoppel against statute.

Satyendra Nath Rai Chaudhury v. *Fulsom Bibi* (1), *Barkatulla Pramanik* v. *Ashutosh Ghose* (2), *Troilokya Nath Ghose* v. *Jajneswar Pal* (3) and *Surendra Narayan Layek* v. *Notan Behary Mondal* (4) distinguished.

It is not an illegality or material irregularity for the court to allow the question of *benâmi* to be raised in the absence of the person set up as the beneficial owner.

Umed Mal v. *Chand Mal* (5) distinguished.

CIVIL RULE obtained by the landlord.

The facts of the case and arguments in the Rule are sufficiently stated in the judgment.

Ramaprasad Mukhopadhyaya, Pareshchandra Sen and *Bankimchandra Banerji* for the petitioner.

Nagendranath Basu for the opposite party.

Cur adv. vult.

*Civil Revision, No. 1224 of 1934, against the order of G. A. Chaudhuri, First Munsif of Lakshmipur, District Noakhali, dated July 23, 1934.

(1) (1931) 36 C. W. N. 486.
(2) (1932) 37 C. W. N. 89.
(3) (1934) 38 C. W. N. 1004.
(4) (1930) 35 C. W. N. 114.
(5) (1926) I. L. R. 53 Calc. 338; L. R. 53 I. A. 271.

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MITTER J. This Rule has been obtained by the landlord, whose application for pre-emption under section 26F of the Bengal Tenancy Act has been dismissed by the learned Munsif of Lakshmipur.

The subject matter of the application is an occupancy holding admittedly held under the petitioner. It formerly belonged to one Samar Ali Patwari, on whose death it devolved upon his heirs. Two of them, namely his sons Nana Miya and Nural Huq, who had inherited 5 annas 8 *gandâs* share therein, sold their interest to the opposite party No. 1, Abdul Majid Miya, by a registered conveyance dated the 5th October, 1933. Samar Ali Patwari also left him surviving a son, named Serajul Huq, who is admittedly a co-sharer of Nana Miya and Nural Huq.

The notice of transfer under section 26C being served on the petitioner, he applied for pre-emption on the 25th November, 1933. His application has been defeated on the ground that the purchase by Abdul Majid Miya is a *benâmi* purchase for the benefit of Serajul Huq, an admitted co-sharer of the vendors in the holding.

The question before me is whether Abdul Majid Miya is entitled to plead in these proceedings that the real purchaser is not he, but a co-sharer of the vendors and so defeat the application for pre-emption.

Section 26C requires a notice in the prescribed form to be filed with the registering officer. The form of the notice as prescribed contains a column where the name and address of the purchaser has to be given. In the notice, which was given in this case, the name of the purchaser is stated to be Abdul Majid Miya.

Mr. Mukherji, appearing on behalf of the petitioner, contends that the question of *benâmi* should not have been allowed to be raised in these proceedings. He put his contention in this way. He says, firstly, that, in proceedings under section 26F, the court has to proceed upon the document of transfer, and on the notice of transfer; the person shown as the transferee therein must be taken to be the transferee, and that

the purchaser should not be allowed to go back upon the statements made in the notice. He contends that the landlord making the application for pre-emption should not be required to go beyond the notice of transfer and to hunt for the real transferee, nor should the court allow the question of *benâmi* to be raised in the absence of the person set up as the beneficial owner.

In support of his contention that the court must proceed upon the terms of the notice of transfer and should not allow the purchaser to go back upon the terms of the notice or of the conveyance, Mr. Mukherji has cited before me the following cases, namely, *Surendra Narayan Layek* v. *Notan Behary Mondal* (1), *Troilokya Nath Ghose* v. *Jajneswar Pal* (2) and *Satyendra Nath Rai Chaudhury* v. *Fulsom Bibi* (3). For the proposition that it was a material irregularity to decide the question of *benâmi* in the absence of Serajul Huq, he cites the case of *Umed Mal* v. *Chand Mal* (4).

Mr. Nagendranath Basu, appearing on behalf of the opposite party, contends that the question raised in the case ought to be gone into and has been rightly gone into by the court below. He says *benâmi* purchases are lawful and common, and unless the question of *benâmi* be gone into the provisions of section 26F, sub-section (*1*), clause (*a*) would be defeated and the landlord would get a pre-emption order in his favour in a case where the legislature says that he will not have it. He further contends that the cases show that the purchaser has been allowed to plead and prove statements at variance with the contents of the notice of transfer or of the deed of transfer and thereby to defeat the claim for pre-emption and for that purpose he cites the cases of *Barkatulla Pramanik* v. *Ashutosh Ghose* (5), *Brajendra Kumar Banerji* v. *Symannessa Bibi* (6) and *Adhar Chandra Saha* v. *Gour Chandra Saha* (7).

(1) (1930) 35 C. W. N. 114.
(2) (1934) 38 C. W. N. 1004.
(3) (1931) 36 C. W. N. 486.
(4) (1926) I. L. R. 53 Calc. 338; L. R. 53 I. A. 271.
(5) (1932) 37 C. W. N. 89.
(6) (1934) 38 C. W. N. 1002.
(7) (1934) 38 C. W. N. 1098.

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Before dealing with the main question as to whether the purchaser shall be allowed to plead that he is the *benâmdar* for another person, who is a co-sharer in the tenancy, it would be convenient to deal with the point made by reason of the non-joinder of Serajul Huq. I do not see how that can be a material point at all. A *benâmdar* represents the beneficial owner. He can sue and be sued and the result of the adjudication would bind the beneficial owner. *Gur Narayan* v. *Sheolal Singh* (1). In the application under section 26F, there was, accordingly, complete representation of Serajul Huq and the decision of Viscount Haldane in *Umed Mal's* case (2) has no application. In that case it was held that the plaintiff ought to have, having regard to his claim, made his mortgagors parties to the suit, and as there was no person on the record who could represent the mortgagors it was held that a decree made in favour of the plaintiff in the absence of the mortgagors was a decree irregularly made within the meaning of section 115, clause (*c*) of the Code of Civil Procedure. In the case before me if Abdul Majid Miya is the *benâmdar* of Serajul Huq, the decision pronounced, or to be pronounced, on the application for pre-emption would bind the latter, especially as the case of Serajul Huq, who has appeared as a witness in the case, is that Abdul Majid Miya is his *benâmdar*.

Regarding the main point in the case, my judgment is that the question of *benâmi* can be raised and gone into. The position taken by the petitioner would have been a sound one, only if he had been able to invoke the doctrine of estoppel. If the principle of estoppel be out of the way, the statements made on the notice cannot have a greater value than of admissions. The case can be put by the petitioner, as has been put before me, in the following way. The notice showed that the purchaser was a stranger and not a co-sharer in the tenancy. On the faith of the said statement, the petitioner made the application for pre-emption

(1) (1918) I. L. R. 46 Calc. 566; L. R. 46 I. A. 1.

(2) (1926) I. L. R. 53 Calc. 338; L. R. 53 I. A. 271.

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and incurred expense. If the notice of transfer indicated that the purchaser was a co-sharer tenant, he would not have made the application for pre-emption and incurred expense. Assuming that the petitioner altered his position on the faith of the statements in the notice that Abdul Majid Miya was the purchaser, the question is whether the latter can go back upon his statement and say that he is a mere name-lender. I do not see how the principle of estoppel can be invoked. The statute says that there can be no pre-emption where the purchaser is a co-sharer tenant. To allow the petitioner to pre-empt would be to defeat a statutory provision. If by shutting out the defence an order for pre-emption be made in favour of the petitioners, I do not see by what further proceedings Serajul Huq would be able to set aside the said order. I hold, accordingly, that it is legitimate and proper for the court to go into and decide the question, in the proceedings for pre-emption, as to whether the case comes within the exceptions made in section 26F on the principle conveniently put, that there cannot be estoppel against statute.

The reported cases do not lay down the broad proposition that in no case will the purchaser be allowed to go back upon the statements made in the notice. In the case of *Brajendra Kumar Banerji* v. *Symannessa Bibi* (1) and *Adhar Chandra Saha* v. *Gour Chandra Saha* (2), the purchaser had mentioned in the notice of transfer certain persons as the landlords of the holding. Applications for pre-emption were made with those persons only as parties on the record. The purchaser turned round and said that other persons over and above the persons named as landlords in the notice were also landlords and the applications were not, accordingly, maintainable by reason of the provisions of section 188 of the Bengal Tenancy Act. It was held that such a plea could be raised by the purchaser and that he could adduce evidence to support his plea. In fact, in the last mentioned case, he could

(1) (1934) 38 C. W. N. 1002. (2) (1934) 38 C. W. N. 1098.

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successfully support it and the application for pre-emption was dismissed. Mr. Mukherji cited the case of *Satyendra Nath Rai Chaudhury* v. *Fulsom Bibi* (1) for showing that a defence that a deed of transfer was not acted upon was not allowed in a proceeding under section 26F on the ground that it would be against the tenor of the deed. An examination of the said case does not support his proposition. I have looked into the petition on which the rule was issued and the judgment of the lower court. In that case, Fulsom Bibi executed an instrument of *hibâ-bil-ewâz* in favour of Nazem Mallik, the consideration for the document being a promise by the latter to pay her maintenance. In fulfilment of the said promise, the latter executed an instrument on the same day by which he undertook to pay the lady maintenance at the rate of Rs. 5 per month. The two deeds were registered and the first deed was taken from the registration office by Nazem. It was proved, that after the registration, the lady took back the deed of exchange, and that possession of the property remained with the lady as before. It was contended that the transfer was not complete and title had not passed to Nazem, as there was no delivery of possession. This contention prevailed with the Munsif, who held that no title had passed from the donor to the donee. Mitter J. pointed out that in a *hibâ-bil-ewâz* delivery of possession is not essential and that with the registration of the deed title had passed to the donee. The defence was not that the instrument of *hibâ-bil-ewâz* was not intended to be acted upon and this Court did not hold that such a defence was not open after the service of the notice of the transfer on the landlord. I do also hold that the case of *Barkatulla Pramanik* v. *Ashutosh Ghose* (2) cited by the advocate for the opposite party is no authority for the proposition that a defence that a deed of transfer was not operative is open in such proceedings after the service of the notice of transfer. In that case, the lower court held that there could be no

(1) (1931) 36 C. W. N. 486. (2) (1932) 37 C. W. N. 89.

pre-emption of the 8 annas share in the holding purchased by the judgment-debtor's wife as there was really no transfer of the same, but inasmuch as the landlord did not move against the said part of the order, this Court had not to consider the said question. In the case of *Troilokya Nath Ghose* v. *Jajneswar Pal* (1) the occupancy *râiyat* granted a sub-lease to the opposite party, which was registered under section 48H of the Bengal Tenancy Act. On receipt of the notice, the landlord made an application for pre-emption under section 26F, his case being that the lease was a colourable transaction, the transaction being really an out and out sale. S. K. Ghose J. pointed out that as between the parties to the document it was a lease, *i.e.*, it was not open to them to show that it was not what it purported to be, and if that be so the grantor still continued to be a tenant of the applicant. In this view of the matter the application for pre-emption was refused.

It now remains to consider the case of *Surendra Narayan Layek* v. *Notan Behary Mondal* (2). In that case the conveyance purported to transfer an occupancy holding. In answer to the application for pre-emption the purchaser wanted to show that it was *mokarrari* holding. This Court held that the transferee was responsible for the initiation of the proceedings under section 26F, by depositing the landlord's transfer fee under section 26D, and that he could not be allowed to interrupt those proceedings by saying that he purchased a holding held at a fixed rate of rent. Suhrawardy and Costello JJ. expressly refrained from laying down any general rule of law.

In my judgment, none of the cases lay down any general principle of law which precludes me from taking the view I have taken.

The rule is, accordingly, discharged with costs, hearing fee 1 gold mohur.

Rule discharged.

A. A.

(1) (1934) 38 C. W. N. 1004. (2) (1930) 35 C. W. N. 114.