APPELLATE CIVIL.

Before R. C. Mitter J.

GADA DHAR SARKHEL

1936

Feb. 3, 4, 17.

v.

GOPAL CHANDRA DAS.*

Bengal Tenancy—Pre-emption by co-sharer landlord from purchaser of occupancy holding—Rights of other co-sharers to pre-empt—Actus curiae neminem gravabit—*Bengal Tenancy Act (VIII of 1885), ss. 26C, 26F, sub-s.* (1)—*Indian Limitation Act (IX of 1908), s. 5.*

The application of a co-sharer landlord B of an occupancy holding, who had not been served with notice of transfer of that holding, to become a co-applicant in the application for pre-emption made by another co-sharer landlord A, who had been served with such a notice, is to be considered as an application for pre-emption under s. 26F, sub-s. (*1*) of the Bengal Tenancy Act. And upon the making of the said application by the co-sharer landlord B, the remaining co-sharer landlords are entitled to apply for being made co-applicants with him, if they apply for that purpose within one month of the co-sharer landlord B's application for pre-emption, although they ask for pre-emption beyond a month of the co-sharer landlord A's application for pre-emption.

The Court cannot invoke the aid of s. 5 of the Indian Limitation Act to applications for pre-emption made under s. 26F of the Bengal Tenancy Act.

Where rights of third parties have not intervened it is the duty of the Court to relieve a party of the injury done to him by reason of its mistakes and defaults or mistakes and defaults of its officers inadvertently committed.

CIVIL RULE on behalf of the pre-emptor.

The material facts of the case and the arguments in the Rule appear in the judgment.

Gopendra Nath Das for the petitioner.

Bankim Chandra Mukherji, Apoorba Chandra Mukherji, Narendra Nath Mitra, Kshetra Mohan Chatterji for *Kshiteendra Nath Mitra* and *Mukti Pada Chatterji* for the opposite parties.

Cur. adv. vult.

*Civil Revision, No. 1078 of 1935, against the order of Syed Allah Hafez, Second Munsif of Rampurhat, dated June 29, 1935.

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R. C. MITTER J. The petitioner and opposite parties Nos. 2 to 12 are the owners of a certain *patni tâluk*. There is an occupancy holding under the said *patni tâluk* held directly under the *patnidârs* at a rent of Rs. 7-12as. The opposite party No. 1 purchased three-fourths share of the same for Rs. 150. In the document of transfer opposite parties Nos. 2 to 11 and petitioner were named as the immediate superior landlords and the notice of the transfer was served on them on December 16, 1934. No such notice was served on opposite party No. 12.

On February 11, 1935, the petitioner who had a very small share in the *patni* filed his application for pre-emption. To the said application he made the opposite parties Nos. 2 to 12 parties on the footing that they were the remaining co-sharer landlords of the said holding. The said application which was accompanied by the requisite deposits was registered as Miscellaneous Case on February 25, 1935. Process-fees for the service of notice of the application on all the opposite parties to the application, that is, for service of the notice of the application on the purchaser and on the remaining co-sharer landlords, were filed along with the application, but the Court overlooked the said fact and was under the wrong impression that the said fees had not been deposited. Accordingly it did not direct the issue of the notices and recorded on March 30, 1935, the following order in the ordersheet:—

> It appears that process has not been filed. Petitioner to file the same at once failing which the petition will stand rejected. Fix April 6, 1935, for orders.

On April 6, 1935, the following order was passed:—

> Process-fee filed. Issue notice on the opposite party fixing May 4, 1935, for hearing.

The notices were issued on April 10, 1935, and served on the opposite parties Nos. 2 to 12 on April 27, 1935. Opposite parties Nos. 2 to 6 and

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No. 12 applied for being made co-applicants for pre-emption on May 4, 1935, and opposite parties Nos. 7 to 11 made similar applications on June 24, 1935. In his application opposite party No. 12 stated that no notice of transfer under s. 26 C of the Bengal Tenancy Act had been served on him and that he came to know of the transfer for the first time when notice of the application for pre-emption made by the petitioner was served on him through Court. He stated that if the notice under s. 26C had been served on him he would have applied for pre-emption under s. 26 F, sub-s. (*1*), and he wanted to pre-empt. This statement has been repeated in the counter-affidavit filed before me on his behalf. As no evidence was recorded in the lower Court and parties chose to proceed on questions of law only, I must accept his statements. He also asked the Court to intimate to him what money he should deposit under s. 26 F, sub-s. (*4*), cl. (*b*), but the Court not having passed any orders on his application he deposited Rs. 82-8, being half the amount which the petitioner had deposited with his application for pre-emption.

The purchaser did not oppose pre-emption and the contest was amongst the co-sharer landlords. The petitioner maintained and still maintains that he is entitled to pre-empt the whole, opposite party No. 12, that he and the petitioner are the only two persons entitled to pre-empt, and the other opposite parties, namely, Nos. 2 to 11, maintain that an order for pre-emption should be made in favour of all the co-sharer landlords. The learned Munsif has allowed all the *patnidârs* to pre-empt.

Before me Mr. Das, who appears for the petitioner, has contended that the order of the learned Munsif is wrong and that his client alone should have been allowed to pre-empt. He says that the learned Munsif had exceeded his jurisdiction in entertaining the application of his co-sharers to become co-applicants as those applications had been filed beyond the time

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mentioned in s. 26 F, sub-s. (*4*), cl. (*a*). This argument would have been unanswerable if opposite party No. 12, whose application must be considered not only as an application to become a co-applicant but an independent application for pre-emption under sub-s. (*1*) of s. 26 F, had been served with the notice of transfer. The matter is further complicated by the fact that, owing to a mistake committed by the Court, the notice of the petitioner's application for pre-emption was not issued on the opposite parties Nos. 2 to 12, the remaining co-sharer landlords, within one month of the filing of the said application.

To repel the contentions urged by Mr. Das the opposite parties have raised two points, namely,—

(a) that the time for joining as co-applicants as provided for in s. 26F, sub-s. (*4*), cl. (*a*), ought to be extended in this case on account of the aforesaid mistake of the Court, and

(b) that as opposite party No. 12's application, regarded as an application for pre-emption under sub-s. (*1*) of s. 26 F, is in order, he having come in within a reasonable time of acquiring knowledge of the transfer, as no notice under s. 26 C had been served on him, the other opposite parties have the right to become co-applicants in his, the opposite party No. 12's, application within one month from the date of the said application and some of them having applied to become co-applicants on the date when that application was filed and the rest also within a month thereof, the order made by the learned Munsif is correct.

I hold that both these contentions of the opposite parties Nos. 2 to 12 are sound and the Rule ought to be discharged.

So far as the second of the aforesaid contentions is concerned it is covered by authority. The point came

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up for consideration before my learned brother Lodge J. in *Tara Shankar Banerji* v. *Kishori Mohan Ray* (1). He held that, under the circumstances present in this case, that the application of a co-sharer landlord B, who had not been served with the notice of transfer, to become a co-applicant in the application for pre-emption made by another co-sharer landlord A who had been served with such a notice, is to be considered as an application for pre-emption under sub-s. (*1*) of s. 26F and as soon as such an application is made the remaining co-sharer landlords C and D would have right to become co-applicants, if they make an application for being made so within one month of B's application for pre-emption, although they ask for pre-emption beyond a month of A's application. This decision is supported by the language of the statute. A similar case can be conceived. Suppose there are three persons X, Y and Z who are the immediate landlords of the holding sold. The notice of transfer is served on the said three persons on three dates wide apart from each other. The notice of transfer is served on X on October 2, 1935, and Y on November 2, 1935, and on Z on December 2, 1935. Y makes the application for pre-emption under sub-s. (*1*) of s. 26F on January 2, 1936, *i. e.*, on the very last date, and Z makes an application for pre-emption under the same sub-s. on February 2, 1936. Although X cannot become a co-applicant in Y's application for pre-emption if he makes his aplication on February 4, 1936, because it would be beyond two months of the date of service of the notice of transfer on him and also beyond one month of Y's application for pre-emption, he would be within time to become a co-applicant to Z's application, for though his application is beyond two months of the service of the notice of transfer on him, it would be within one month of Z's application. A co-sharer landlord may not like to pre-empt the property from the purchaser; he may not have any personal objection to a particular co-sharer having the

(1) (1935) Civil Revision 130 of 1935, decided by Lodge J. on May 31.

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whole holding to himself by exercising the right of pre-emption, but he may have objection to another co-sharer of his having by pre-emption the whole of the holding transferred. It cannot, therefore, be held, either on the words of the statute or on general principles, that a co-sharer landlord must exercise his right to acquire a share of the holding by becoming a co-applicant at the *earliest* opportunity, that is as soon as the *first* application for pre-emption is made by one of his co-sharers. I accordingly uphold the second contention raised by the opposite parties. This is sufficient for the disposal of the Rule, but in deference to the arguments advanced before me on the first point raised by the opposite parties I express my views thereon. The said point has for its basis the fact that owing to a mistake of the Judge unwittingly committed the notice of the application for pre-emption made by the petitioner was not issued promptly but was issued after a month of the petitioner's application for pre-emption. The question is whether the Court should set right the injury caused to the rights of the co-sharer landlords opposite parties. On the facts of this case it cannot be said that the petitioner's application for pre-emption was not in order. He had filed the said application within time and had made the remaining co-sharer landlords parties. He had put in process-fees along with his application for pre-emption. It cannot be urged that he by his act had not given opportunity to his co-sharers to join as co-applicants, but if the Court had done what it was required to do, that is, to issue the notice of the application for pre-emption immediately after the process-fees were deposited, the notice of the petitioner's application for pre-emption would have been served within a month of the said application. The said notices were served late owing to the Court's mistake. The question is whether the Court has inherent power under these circumstances to do what justice requires. It is true that the Court cannot invoke the aid of s. 5 of the Limitation Act, as that section has not

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been extended to applications for pre-emption made under s. 26F. It is true that it has been laid down, though the decisions are not uniform in that respect, that questions of extension of time or exclusion of time ought to be answered solely by reference to the provisions contained in the Limitation Act. I have in mind the cases where suspension of time had been pleaded apart from the statute, of which the cases of *Swarnamayi* v. *Shashi Mukhi Barmani* (1) and *Sarat Kamini Dasi* v. *Nagendra Nath Pal* (2) are types. In the last-mentioned case, which has been followed by the Madras High Court in *Satyanarayana Brahmam* v. *Seethayya* (3), my learned brother Mukerji J., after an elaborate review of the case-law, repelled the claim for exclusion of time based not on the provisions of the Limitation Act but on *equitable* principles. But I do not consider that these decisions can be invoked in the case before me. It is an established principle that where rights of third parties have not intervened it is not only in the power but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes and defaults of its officers inadvertently committed. *Actus curiae neminem gravabit.* This principle, in my judgment, ought to be applied even when for relieving a party from such injury the Court has to consider the question of time.

I, accordingly, discharge this Rule with costs. Hearing-fee one gold mohur to be divided between the appearing opposite parties in equal shares.

Rule discharged.

A. K. D.

(1) (1868) 2 B.L. R. (P. C.) 10 ; 12 M. I. A. 244.
(2) (1925) 29 C. W. N. 973. (3) (1926) I. L. R.50 Mad. 417.