

CIVIL REVISION.

Before R. C. Mitter J.

SHARF UDDIN AHMAD

1936
Jan. 10, 13.

v.

JAGADEESH NATH RAY.*

Occupancy holding—Transfer—Landlord's transfer fee—Transferee's liability to pay, if dependent on the transfer passing title—Bengal Tenancy Act (VIII of 1885), ss. 26C, 26J.

Where there has been *in fact* a transfer of an occupancy holding, though *in law* no title passes to the transferee, the landlord is entitled to recover his transfer fee from the transferee under s. 26J of the Bengal Tenancy Act.

During the subsistence of an attachment on an occupancy holding, the petitioner purported to purchase the holding from the tenant by a registered conveyance which described the holding as *mokarrari*.

Held that the transferee was liable to pay the landlord's transfer fee as soon as he accepted the conveyance.

CIVIL RULE obtained by the purchaser.

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

Sir Saadulla and *Seraj Uddin Ahmad* for the petitioner.

Girija Prasanna Sanyal and *Sourendra Narayan Ghosh* for the opposite party.

Cur. adv. vult.

R. C. MITTER J. An occupancy holding belonged to one Abdul Kader, which he held under the opposite parties, who obtained a rent decree against him and in execution thereof, in Rent Execution Case No. 226 of 1932, attached the holding on March 2, 1932. While the attachment was subsisting, the petitioner

*Civil Revision, No. 1068 of 1935, against the order of Jagadeesh Chandra Majumdar, Munsif of Raiganj, dated June 10, 1935.

purchased the same from Abdul Kader by a registered conveyance dated June 30, 1932. In the conveyance the property was described as a *mokarrari mouráshi* holding and at the time of the registration the sum of Re. 1 only was deposited with the Sub-Registrar as the landlord's fee. The consideration recited in the conveyance is Rs. 849. Out of the consideration the purchaser undertook to discharge the rent decree and to discharge a mortgage on the holding. It is the case of the petitioner that no consideration passed as he did not accept the conveyance on finding that the property was under attachment at the time, but this part of the case has not been adjudicated upon, as the learned Munsif has held that he is not entitled to go into the said question. In Rent Execution Case No. 226 of 1932 the holding was ultimately sold on August 3, 1932, and purchased by the petitioner. Thereafter the opposite parties made an application against the petitioner under s. 26J of the Bengal Tenancy Act for recovery of the transfer fee payable under s. 26C, after deducting the sum of Re. 1 already paid, together with compensation. In the said application they also prayed for the determination of the nature of the tenancy under the provisions of s. 158, sub-s. (c) of the Bengal Tenancy Act. The basis of their claim made under s. 26J is that the holding is an occupancy holding, but has been falsely described as a *mokarrari* holding, in the aforesaid conveyance of June 30, 1932.

Although the question of status of the tenant has been gone into fully by the learned Munsif, the order only gives the opposite party a decree for the recovery of Rs. 168-12-9, the balance of the landlord's transfer fee payable under s. 26C and Re. 1 as compensation. In the order there is no declaration given that the tenancy is an occupancy holding.

A preliminary objection is raised on behalf of the opposite parties that no revision lies as the said order is appealable, being an order passed not only on an

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application made under s. 26J, but also under s. 158, an order under the last mentioned section being appealable. I cannot give effect to this preliminary objection.

The relief under s. 158, sub-s. (c) must, in substance, be in the form of a declaration, and that under s. 26J, in the form of a decree for recovery of money. The petitioner not having appealed against the order, regarding it as in part an order under s. 158, sub-s. (c), cannot challenge the finding that the holding is an occupancy holding, but in my judgment he can attack the order for payment of Rs. 168-12-9 to the opposite parties in a manner which would not involve a challenge to the finding that the holding is an occupancy holding. In fact, the petitioner's advocate does not challenge the said finding. In my view the application filed by the opposite parties was a composite application,—two applications combined into one,—but different in scope, though for their adjudication there was a common point involved, namely, the status of the tenant. If a memorandum of appeal had in fact been lodged before the learned District Judge, the prayer for discharging the order for payment of Rs. 168-12-9 could not have been urged before him in the appeal. For that reason I hold that the application for revision which has only challenged the said order for payment of money based on s. 26J is maintainable.

On the merits, the points made by Sir Saadulla, appearing for the petitioner, are four in number, namely :—

(i) that the conveyance having been executed during the pendency of the attachment made at the instance of the opposite parties, was not valid against them, and there being no valid transfer in law, no transfer fee is payable under s. 26C by his client;

(ii) that the transfer fee payable under s. 26C or 26E is for the purpose of getting recognition of the transferee from the landlord and when the landlords in this case have by their conduct refused such recognition by proceeding to execute the rent decree under Chap. XIV of the Bengal Tenancy Act against Abdul Kader, without making his client a party to the execution proceedings, no transfer fee is payable under s. 26C;

(iii) that his client having purchased in execution of a decree for arrears of rent due in respect of the holding no transfer fee is payable under s. 26E; and

(iv) that, even if the other contentions are not tenable, the Court below ought to have gone into the question as to whether his client had accepted the conveyance and if the facts alleged by him are found to be true, no transfer fee is payable by him and landlord's application under s. 26J ought to have been dismissed.

The third contention proceeds upon a misapprehension. The opposite parties have not laid their claim, basing the cause of action on the petitioner's purchase at the Court sale. They have based it on the petitioner's private purchase, that is, by the conveyance mentioned above. There is accordingly no substance in this point, and I overrule it.

In dealing with the first and second contentions, I will proceed on the basis that the conveyance was accepted by the petitioner, and that it represents a genuine transaction. The second point urged by Sir Saadulla does not appeal to me. At a time when occupancy holdings were not transferable by law, fees or *selâmis* paid by a transferee was no doubt a price for recognition of the transfer by the landlord. But when the law has made such holdings transferable (s. 26B) there is no scope for the theory of recognition by the landlord. The transfer is good and

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passes title from the transferor to the transferee, whether the landlord signifies his acceptance or not. The landlord's right to the transfer fee is now a statutory right. If the deed of transfer describes it as an ordinary occupancy holding and no landlord's fee is paid to the Sub-Registrar, he would not register it and the title would not pass, for the transfer of such a holding can only be by registered instrument. If the document falsely describes the holding to be a *mokarrari* one, and a fee prescribed by s. 12 of the Bengal Tenancy Act is paid, the document would be accepted for registration by the Sub-Registrar and he would register it, if execution is admitted and document presented in time in accordance with the rules for registration of documents. The false description of the tenancy would not affect the transfer of title. This is plain by reason of the provisions of s. 26J, which proceeds on the basis of a transfer of title, giving right to the landlord to recover, together with compensation, the money of which he had been deprived by reason of the registration being affected on the basis of the false recital. When the landlord's non-recognition of the transfer has no effect on the transfer, I fail to see how the conduct of the opposite parties in proceeding with the rent execution in the manner indicated above is material. The petitioner having purchased *pendente lite* cannot claim to be made a party to the execution proceedings and there was no obligation on the part of the landlords to make him a party thereto. Still the petitioner's purchase by the aforesaid conveyance gave him valuable rights against the landlords, for he, by depositing the amount recoverable under the rent decree and the statutory compensation, could have had the sale set aside, or could have applied for setting aside the sale under s. 174 (1) and 174 (3) respectively of the Bengal Tenancy Act if a stranger had purchased the holding at the Court-sale. I hold accordingly that the opposite parties are entitled to recover the balance of the transfer fee and compensation, if they are not otherwise debarred from doing so.

This leads me to consider the first and the fourth contentions urged on behalf of the petitioner, which, in my opinion, are the only substantial points involved in this Rule. For the reasons hereafter appearing, I do not agree with the first contention, but hold that the fourth contention is a sound one and as the facts bearing upon it have not been investigated by the lower Court, I must remand the case. In dealing with the first point, I accordingly proceed on the assumption that the transfer had been accepted by the petitioner and he paid the sum of Re. 1 as transfer fee.

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Although s. 26C, unlike s. 26E, does not indicate by whom the landlord's transfer fee has to be paid, the first para. of s. 26J makes it clear that it is the purchaser who is under the obligation to pay it to the Sub-Registrar at the time when the instrument of transfer is presented for registration. Section 26J is, in my judgment, based on the principle that the transferee cannot be allowed to escape from the liability to pay the landlord's transfer fee by taking a transfer with a false or incorrect recital as to the nature of the tenancy purchased which has led the Sub-Registrar to register it. The obligation to pay the same arises at that point of time when the instrument is presented for registration. Whether the instrument of transfer is effective in passing title to him the purchaser, or not, cannot be investigated at the time of the presentation of the instrument for registration. The registering officer has no power to investigate the question, and on principle the legislature has given him no such power, for to do so would be to invest him with the functions of a civil Court. The following illustration may serve to make the point clear. A, the occupancy *râiyat*, sells his entire holding to B, but later on sells the same over again to C, who, not knowing of the transfer to B, accepts the transfer and pays the consideration money. C's instrument of transfer is then presented for registration. In this case he was to pay the landlord's transfer fee, for without it his instrument

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of transfer would not be registered, although by the transfer he got no title, the property having been already transferred to B. In this case, when he finds no title has passed to him, his remedy would be against his vendor, and he can recover the landlord's transfer fee from him as damages. On principle and on the language of ss. 26C and 26J, I hold that when the transfer has been accepted by the purchaser, that is, when there has been a transfer in fact, the transferee is bound to pay the landlord's transfer fee in full and if not paid amicably, it can be recovered by the landlord through the help of the Court under the provisions of the second para. of s. 26J. Whether the transfer has in law passed title to him is entirely foreign to the enquiry held by the Court in proceedings started under s. 26J. For these reasons I overrule the first contention urged by Sir Saadulla.

In view of what I have said above the fourth point does not present any difficulty. I have held above that there must be a transfer in fact to attract the operation of s. 26J. A transfer of property implies two parties, the persons proposing to sell and a person proposing to buy and the terms being agreed to by the said two parties. Suppose an occupancy *râiyat* A, the terms of whose tenancy are onerous, executes a conveyance with a recital that the property is rent free and purports to transfer it to B, his enemy, without the knowledge of the latter, goes to the registration office, presents it for registration and pays out of his pocket the landlord's fee of Rs. 2 to the Sub-Registrar and gets it registered, it would be unreasonable to fix the liability for the payment of the balance of the landlord's transfer fee and compensation on B under the provisions of s. 26J. In such a case I hold it would be open to B, when proceedings are started against him under s. 26J, to show that there was no transfer to him in fact, on the ground that he has not accepted the instrument at all. On the said principle I hold that in this case it was open to the petitioner to plead and prove that

before the presentation for registration, he resiled from the bargain. In deciding this question, the question whether he paid the sum of Re. 1 as landlord's fee at the time of registration, as also the question, as to whether he took possession before his purchase at the rent sale would be material questions. I accordingly remand the case to the lower Court for adjudication on the limited point which I have indicated above.

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The Rule is accordingly made absolute. Hearing fee, 1 gold *mohur*, to abide final result.

Rule absolute. Case remanded.

G.K.D.