CIVIL REVISION.

Before Lodge J.

1935

June 9, 10, 12.

MAHAMMAD GARIB HOSAIN MIYA

v.

HALIMANNESA BIBI*.

Bengal Tenancy—Pre-emption—Application by one co-sharer landlord, when maintainable—Notice—Limitation—Bengal Tenancy Act (VIII of 1885), ss. 26F(1), *26F*(4) (a), *26F*(4)(b), *188.*

Section 188 of the Bengal Tenancy Act governs section 26F of that Act and contemplates that an application to pre-empt the transferee of an occupancy *râiyati* holding under section 26F (*1*) of the Act shall ordinarily be made by the whole body of co-sharer landlords acting together. Such application, if made by some only of the co-sharer landlords, is maintainable, provided that (*i*) all the other co-sharer landlords are made parties-defendants to the proceeding and (*ii*) they are informed of the application within such time as will allow them to comply with the provisions of clauses (*4*)(*a*) and (*4*)(*b*) of section 26F if they so desire.

Baikunthachandra Shaha v. *Shamsul Huq* (1) and *Surjyakumar Mitra* v. *Noabali* (2) referred to.

CIVIL RULE obtained by a co-sharer landlord against the transferee of an occupancy *râiyati* holding.

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

Prakashchandra Pakrashi for the petitioner.

Ajitkumar Datta for the opposite party.

Beereshwar Chatterji for the Deputy Registrar.

LODGE J. This Rule arises out of an order passed in a proceeding under section 26F of the Bengal Tenancy Act.

Opposite party No. 1 is the transferee of an occupancy *râiyati* holding. Petitioner is one of the immediate co-sharer landlords of that holding. On

*Civil Revision, No. 1623 of 1934, against the order of Rameshchandra Sen Gupta, Munsif of Comilla, dated Aug. 30, 1934.

(1) (1934) I. L. R. 61 Calc. 870. (2) (1931) I. L. R. 59 Calc. 15.

14th May, 1934, petitioner made an application under section 26F (*1*) praying that the holding be transferred to himself. The transferee and five of the petitioner's co-sharers were made defendants in that application. On 21st June, 1934, the transferee filed a petition of objection and pointed out therein that there were twenty-three co-sharers of the petitioner, of whom only five had been made parties. On 30th July, 1934, petitioner applied to add the eighteen co-sharers named in the transferee's objection, as parties defendants and was permitted to do so. The Munsif, who heard the application, held that petitioner was well aware that he had co-sharers who were not made parties before 30th July, 1934; and that, as all the co-sharers were not made parties within two months of the service of notice under section 26C nor within one month of the date of application under section 26F (*1*), the application was time-barred. The Munsif, accordingly, rejected the application under section 26F (*1*). Against that order the present Rule has been obtained.

It has been contended on behalf of the petitioner that no period of limitation has been prescribed within which co-sharer landlords are to be made parties to the proceeding under section 26F (*1*), and that the learned Munsif was wrong in rejecting the application on the ground of limitation.

The learned Munsif's decision is based on an interpretation of sections 26F and 188 of the Bengal Tenancy Act, and it is with those two sections that we are concerned. In the first place, the learned advocate for the petitioner has argued that section 188 has no application to a proceeding under section 26F. He argues that section 188 applies only to proceedings in which action by the sole landlord or by the entire body of landlords acting together is contemplated: that it does not apply to proceedings in which a single co-sharer is entitled to act. Inasmuch as section 26F (*1*) permits an application by a co-sharer it is not necessary for the application

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to be made by the whole body of landlords. I am unable to accept this view. In the first place, if section 188 had no application to a proceeding under section 26F, the proviso to the section would not have been made applicable to a proceeding under section 26F (*1*). In the second place, it has been held in *Baikunthachandra Shaha* v. *Shamsul Huq* (1), that section 188 does govern section 26F, and no other authority on the question has been cited. I am satisfied, therefore, that section 188 governs proceedings under section 26F.

Section 188 of the Bengal Tenancy Act reads as follows:—

> 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 authorised to do must be done either by both or all those persons acting together or by an agent authorised 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 defendants to the suit or proceeding 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
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> (*i*) file an application under sub-section (*1*) of section 26F.....

This section contemplates that an application to pre-empt under section 26F (*1*) shall ordinarily be made by the whole body of co-sharer landlords acting together. One or more co-sharers, not being the whole body of co-sharer landlords, may, however, make an application under section 26F (*1*), provided that certain conditions are fulfilled. If those conditions be not fulfilled, such co-sharers are not entitled to pre-empt under section 26F.

The conditions to be fulfilled are—

(*i*) that all the other co-sharer landlords be made parties defendant to the proceeding; and

(*ii*) that all the other co-sharer landlords be given an opportunity of joining in the proceeding as co-applicants.

(1) (1934) I. L. R. 61 Calc. 870.

The first of the conditions is designed to inform all the interested co-sharers of the proceeding and to enable them to note the result and correct their collection papers and records if necessary. This object would be attained if the co-sharers were made parties at any time before final orders on the application were passed. The second of the two conditions is designed to protect one co-sharer against pre-emption by another co-sharer. The legislature recognises that a co-sharer landlord may be quite willing to allow the original transferee to remain in possession of the holding, but be unwilling to allow one or more of his co-sharers to step into the shoes of that transferee. For this reason a co-sharer is given the right of joining in the proceedings as co-applicant. If, however, a co-sharer landlord desires to join in the proceedings as co-applicant he must comply with the conditions laid down in section 26F, sub-sections (*4*) (*a*) and (*4*) (*b*). If such co-sharer do not apply within two months of the service of notice under section 26C or 26E, or within one month of the application under section 26F (*1*), he has no right to join in the proceeding as co-applicant. If, therefore, he be not informed of the application under section 26F (*1*) in sufficient time to comply with the provisions of section 26F, sub-sections (*4*) (*a*) and (*4*) (*b*), it cannot be said that he is given an opportunity of joining in the proceeding as a co-applicant.

In such a case, it would follow that the conditions under which one or more co-sharers, not being the whole body of landlords, are entitled to make an application under section 26F (*1*) had not been fulfilled, and the application under section 26F (*1*) would not be maintainable.

The above argument applies where notices under section 26C or 26E have been duly served on all the co-sharer landlords. But, as pointed out in *Baikunthachandra Shaha* v. *Shamsul Huq* (1) and in *Surjyakumar Mitra* v. *Noabali* (2), the Bengal

(1) (1934) I. L. R. 61 Calc. 870. (2) (1931) I. L. R. 59 Calc. 15.

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Tenancy Act does not take into account the possibility that notices may not have been duly served on all the co-sharer landlords. It has been held in the two cases referred to that a co-sharer landlord, upon whom no notice under section 26C or 26E has been served, may apply under section 26F (*1*) within a reasonable time of the date of his knowledge of the transfer. None of the rulings, to which my attention has been drawn, discuss the rights of such a co-sharer to join in an application under section 26F (*4*) (*a*).

The learned advocate for the petitioner has argued that the same principle should be applied to applications under section 26F (*4*) (*a*) as to applications under section 26F (*1*); and that it should be held that a co-sharer, upon whom no notice has been served under section 26C or section 26E, may apply under section 26F (*4*) (*a*) within a reasonable time of his knowledge of the transfer. He argues further that, if this view be adopted, the application of one co-sharer under section 26F (*1*) should not be rejected on the ground that the second of the two conditions laid down in the proviso to section 188 has not been fulfilled, if the right of the other co-sharers to join in the proceedings as co-applicants has not become barred by limitation.

The right to apply under section 26F (*4*) (*a*) to join as co-applicant in proceedings instituted under section 26F (*1*) by a co-sharer is distinct from the right to institute the proceedings under section 26F (*1*). The right given under section 26F (*4*) (*a*) to join in the proceedings is given to a landlord who does not desire to pre-empt unless his co-sharers insist on doing so. If, therefore, the result of refusing to extend the time for joining in the application be to invalidate the original application under section 26F (*1*), the other co-sharers who did not apply under section 26F(*1*) will not be prejudiced.

It is not necessary to extend the period of limitation in order to protect the interest of the

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co-sharer landlord upon whom no notice has been served. The extension of time is for the benefit mainly of the co-sharer landlord upon whom notice was duly served and who has applied under section 26F (*1*), but has omitted—possibly deliberately—to inform his co-sharer of his action.

On the other hand, the extension of time allowed in *Baikunthachandra Shaha* v. *Shamsul Huq* (1) and *Surjyakumar Mitra* v. *Noabali* (2) was necessary to protect the interests of the co-sharer landlord upon whom no notice was served. It is obvious that a transferee may have every justification for omitting to serve notices of the transfer on all the co-sharer landlords. If he should omit to serve notices on all, then, however justifiable the omission, he exposes himself to the liability of pre-emption by a co-sharer landlord upon whom no notice was served, for an indefinite time. There will ordinarily be less excuse for one co-sharer landlord omitting to inform the other co-sharer landlords of his intention to apply or of his application under section 26F (*1*). He will ordinarily know who his co-sharers are. He does not derive his knowledge from the conduct of the transferee. He will ordinarily be ignorant whether notices under section 26C or 26E have or have not been served upon his co-sharers.

A co-sharer landlord applying under section 26F (*1*) is presumed to know the necessity of informing his other co-sharers of the application within sufficient time to enable them to comply with the conditions of section 26F, sub-sections (*4*) (*a*) and (*4*) (*b*). If he intentionally omits to inform them in time, there is no reason why he should benefit by the omission, possibly unintentional and excusable, of the transferee to serve notices upon other co-sharers which omission has not affected his conduct in any way.

I can see no reason, therefore, to extend the rule laid down in *Surjyakumar Mitra's* case (2) to applications under section 26F (*4*) (*a*).

(1) (1934) I. L. R. 61 Calc. 870. (2) (1931) I. L. R. 59 Calc. 15.

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I understand by the second condition mentioned in the proviso to section 188 that a co-sharer landlord, upon whom notice under section 26C or E of a transfer has been served and who wishes to apply under section 26F (*1*), must give information of his application to all the co-sharer landlords known to him, within such time that those co-sharer landlords can, if they wish, make an application under section 26F (*4*) (*a*) and a deposit under section 26F (*4*) (*b*) within two months of the service of notice on the co-sharer landlord who is applying under section 26F (*1*) or within one month of his application under section 26F (*1*), whichever is the later. If he does not give all of them the information within the time so described, his application under section 26F (*1*) should be rejected, not on the ground that it is barred by limitation, but on the ground that the conditions on which alone the application can be entertained, have not been fulfilled.

In the present case, eighteen of the co-sharers were brought on to the record on 30th July, 1934, *i.e.*, more than two months after the date of the application under section 26F (*1*) and, therefore, necessarily more than two months after the service of notice under section 26C. Notice of the application was served on them after 30th July, 1934. It is not suggested that they were given information of the application under section 26F (*1*) in any other manner than by service of notice after 30th July, 1934. They were not therefore given an opportunity of joining in the proceeding as co-applicants. Such being the case, the conditions under which petitioner was entitled to apply under section 26F (*1*) were not fulfilled, and his application was rightly rejected. This Rule is discharged with costs—two gold mohurs.

Rule discharged.

A. K. D.