CIVIL REVISION.

Before R. C. Mitter J.

MUKTI DEBEE

v.

MANO RAMA DEBEE.*

1936

May 19, 20.

Bengal Tenancy—Pre-emption—Right of co-sharer landlord to make independent application, and not to withdraw his application without co-applicant's consent—Minor opposite party, Court's duty to appoint guardian-ad-litem of—Procedure in case of Court's mistake—Code of Civil Procedure (Act V of 1908), O. XXXII, r. 3—Bengal Tenancy Act (VIII of 1885), ss. 26F, 188.

Under O. XXXII, r. 3 of the Code of Civil Procedure, the duty of appointing a guardian of a minor party in any suit or proceeding after its institution is on the Court.

An order under s. 26F of the Bengal Tenancy Act for pre-emption passed upon the application of some co-sharer landlords against opposite parties (one of them being a minor without a guardian-*ad-litem*) is not hit by s. 188 of the Act, but is irregular and is to be set aside. Thereafter, a proper guardian-*ad-litem* of the minor being appointed by the Court, the proceedings are to be continued. In such a case, the Court, having overlooked the fact of the minor not being represented by a guardian, would, after such guardian-*ad-litem's* appointment by it, entertain his application to become a co-applicant (the same being promptly made), in spite of the expiration of the periods of limitation allowed under s. 26F (*4*) (*a*) of the Act for the making of the said application.

Under s. 26F of the Act, co-sharer landlords have independent rights to make independent applications for pre-emption, and are not bound to exercise their rights of pre-emption only by becoming co-applicants in their co-sharers' pending application for pre-emption.

A co-sharer co-applicant for pre-emption under s. 26F of the Act cannot withdraw his application without the consent of his co-applicants.

In re *Mathews. Oates* v. *Mooney* (1) relied on.

CIVIL RULE obtained by the petitioner.

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

*Civil Revision, No. 1004 of 1935, against the order of Ramani Ranjan Biswas, Third Munsif of Narail, dated April 29, 1935.

(1) [1905] 2 Ch. 460.

1936

Mukti Debee
v.
Mano Rama Debee.

Amiruddin Ahmad for *Nausher Ali* for the petitioner.

Hemendra Chandra Sen and *Rajendra Bhooshan Bakshi* and *Surajit Chandra Lahiri* (for Deputy Registrar) for the Opposite Party.

R. C. MITTER J. This case raises interesting points of law and some of them are points of first impression. The matter has been very ably and fairly argued my Mr. Ahmad appearing on behalf of the petitioner, and, although I am in substance holding against him, it must not be taken that I have not taken into consideration the arguments he has advanced.

Three points have been raised before me, which I will state hereafter, after setting out the relevant facts which are as follows:—Abdul Malek Molla held an occupancy holding under a large number of co-sharer landlords. He sold a portion thereof by a registered instrument to the petitioner before me, Mukti Debee. The notice of transfer was duly served and, within two months of the service of the said notice, two sets of co-sharer landlords made two independent applications for pre-emption under s. 26F of the Bengal Tenancy Act. The first of these applications was filed on November 20, 1934, by three of the co-sharer landlords, Sudheer Kanta Ghosh, Kamakhya Prasad Ghosh, and Hari Das Ghosh. Most of the remaining co-sharer landlords, including one Mano Rama Mitra, were made opposite parties to this application, but this application was, as has been ultimately found by the Court, defective, because one co-sharer landlord had not been made a party to this application. On November 23, 1934, another application was made under s. 26F by Mano Rama Debee, to which two of the co-sharer landlords joined later on. In this application all the remaining co-sharer landlords or their *benâmdârs* were made parties. The first application was numbered Mis. Case No 203 and the second Mis. Case No. 207 of 1934.

1936

Mukti Debee
v.
Mano Rama Debee.

R. C. Mitter J.

On December 8, 1934, Mano Rama, who was a co-applicant in Mis. Case No. 207, made an application in Mis. Case No. 203, for joining as a co-applicant with the applicants of that case, and this application of hers was granted on December 8, 1934. Case No. 203 then proceeded, but that case was ultimately dismissed by the Court on the ground that one of the co-sharer landlords had not been made a party to the application, and, therefore, the application was not maintainable in view of the provisions of s. 188 of the Bengal Tenancy Act. After the dismissal of the said application, the application which was numbered 207 was proceeded with. The lower Court has allowed that application, and it is against the order of the lower Court passed in that case that the present Rule has been granted.

It is necessary to state two other facts in connection with Mis. Case No. 207 for the purpose of following the three points which have been raised by Mr. Ahmad. In that application, Hari Das, a co-sharer landlord, was made an opposite party. He was described as a minor, but no guardian was ever proposed or appointed. Later on an application was made on his behalf unrepresented by any guardian, to become a co-applicant and that application was granted, and ultimately Hari Das, described as a minor, but not in fact represented by a guardian or a next friend, continued on the record. One of the opposite parties to this application was Lalan Chandra Ghosh. Later on, two persons, Nirode Gopal Ghosh and Nani Gopal Ghosh, filed an application on December 19, 1934, to become co-applicants along with Mano Rama. They made their case that their *benâmdâr* was Lalan, who had been named as an opposite party in Mano Rama's original application. They were allowed on that date to become co-applicants in Mis. Case No. 207.

Mr. Ahmad raises three points: (i) That s. 188 of the Bengal Tenancy Act has not been complied

1936

Mukti Debee v. *Mano Rama Debee.*

R. C. Mitter J.

with, inasmuch as Hari Das cannot be deemed to be a party to the proceedings at all, because, being a minor, he was not represented by a guardian. The application which is the subject matter of Mis. Case No. 207, says he, must be considered to be an application in which one co-sharer has been left out, namely, Hari Das; (ii) that Mano Rama could not continue the application, which is the subject-matter of Mis. Case No. 207, inasmuch as she became a co-applicant later on in Mis. Case No. 203, which has ultimately been dismissed on account of defect of parties and (iii) that the Court could not add Nirode and Nani parties to Mis. Case No. 207 after the period of limitation provided for under s. 26F.

With regard to the third point, the Court has remarked that there is no defect in the original application for pre-emption, inasmuch as Lalan, the *benâmdâr* of Nirode and Nani, was on the record from the very beginning; the application, therefore, if it is not otherwise bad by reason of the defect regarding Hari Das, was a good application. In my judgment, this view of the Court below is sound, because a *benâmdâr* represents in a suit or proceeding fully the beneficial owner. The fact is that Lalan, made a party to these proceedings from the very beginning, represented Nirode and Nani as their *benâmdâr*. This principle has been laid down in the case of *Gur Narayan* v. *Sheolal Singh* (1). This is a case where the beneficial owners wanted to come in and represent themselves instead of their *benâmdâr* representing them. There is on this score no difficulty as regards the application, which is the subject-matter of Mis. Case No. 207, and I, accordingly, overrule the third point.

With regard to the first point, there can be no doubt that, if Hari Das was in fact a minor, the proceedings, which have been continued in the Court below and which have terminated with the order of

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

1936

Mukti Debee
v.
Mano Rama Debee.

B. C. Mitter J.

pre-emption, were irregular proceedings. Evidence was led on behalf of the applicants for pre-emption that Hari Das was an adult at the date when Mano Rama filed the application of November 23, 1934. Evidence to the effect that Hari Das was a minor then, and is still a minor, has been led on behalf of the purchaser, but the Court below has not recorded any finding on the question of minority of Hari Das at the material point of time. In my judgment, the Court below ought to have recorded a finding on this point, and, if it came to the conclusion that Hari Das was a minor it was under the duty to appoint a guardian for him, under the provisions of O. XXXII, r. 3 of the Civil Procedure Code. I have examined the evidence myself. No relation of Hari Das has been examined to prove his age. The only witness examined is a neighbour of Hari Das. His evidence goes counter to the statement made in Mano Rama's petition, where he was described as a minor. I cannot rely on this evidence adduced on behalf of the applicants for pre-emption, that Hari Das was aged 22 years in the year 1934. His school register has been proved by the purchaser and it shows that at that date he was little over 15 years. In this state of the evidence I must record a finding that Hari Das was a minor at the date of the application and is still a minor.

Mr. Ahmad said that, inasmuch as Hari Das was a minor at the date when the application was made, and no guardian was appointed, he cannot be considered to be a party to those proceedings at all, and so s. 188 has not been complied with. I do not see how I can give effect to that contention. If the provisions of O. XXXII, r. 3, be examined, it leads to this that the appointment of the guardian of a minor defendant is to be made after the institution of the suit or proceeding against him; the duty of making the appointment of a proper person as guardian of a minor is on the Court and there must be, having regard to the procedure that has to be followed by the

Court in selecting a guardian for a defendant or opposite party, an appreciable interval,—it may be short, it may be long,—between the filing of the suit against the minor or the filing of the application for pre-emption with a minor as opposite party, and the selection and appointment of his guardian. An application for pre-emption or a suit cannot be instituted with a guardian of a minor defendant or opposite party already appointed. I, accordingly, hold that Hari Das must be taken to be made a party to the application for pre-emption at the time when that application was presented, but the subsequent proceedings are irregular because the Court has not discharged its duty in appointing a guardian of a person whose name appeared in the proceedings with the description that he was a minor. The application filed on behalf of Hari Das, purporting to act himself to become a co-applicant, was also an irregular application and the order thereon is an irregular order. On this point, as I have said already, s. 188 does not hit the application for pre-emption and the proper order which must be passed, having regard to these defects, is to discharge the order for pre-emption which has been passed and to remit the case to the lower Court in order that the proceedings may be continued after the Court has appointed a proper person as guardian of Hari Das.

Unless there is some substance in the second point (I may say it has not, for the reasons which I shall hereafter state), I may mention, at this stage, that the order which I propose to pass is the order which I have indicated above.

This leads me to the second point. Before the Mis. Case No. 207 was actually taken up for hearing the Court had made an order by which Nirode and Nani became co-applicants with Mano Rama and they continued as co-applicants. At the stage when Mis. Case No. 207 was heard the position was this that there were at least two other co-applicants with

1936

Mukti Debee v. *Mano Rama Debee.*

R. C. Mitter J.

Mano Rama. It is said that Mano Rama could not prosecute two applications for pre-emption passed on the self-same transfer, namely, the application in Case No. 203 in which she had become a co-applicant by reason of the order of the Court dated December 8, 1934, and Mis. Case No. 207, in which she was alone the original applicant, but later on had two other co-applicants with her. It is quite clear from a comparison of s. 148A (*9*) of the Bengal Tenancy Act with the provisions of s. 26F, that a co-sharer landlord is not bound to exercise his right of pre-emption by becoming a co-applicant in his or her co-sharer's application for pre-emption filed under s. 26F (*1*). There is no provision corresponding to s. 148A (*9*) in that part of the Bengal Tenancy Act which deals with the co-sharer's rights of pre-emption. In fact the provisions of s. 26F (*4*) (*a*) indicate that co-sharer landlords have independent rights to make independent applications under sub-s. (*1*) of s. 26F, and they are not bound to exercise their rights of pre-emption only by becoming co-applicants in their co-sharer's pending application. The applications in Mis. Case Nos. 207 and 203 could, accordingly, go on simultaneously and the second application for pre-emption which was the subject matter of Mis. Case No. 207 was not incompetent by reason of the filing of the earlier application by the other co-sharer landlords which was numbered Mis. Case No. 203. I go further, and hold that Mano Rama, when she had ultimately two other co-applicants with her, could not in law withdraw from her application by an express application without the consent of her co-applicants. Here the position was that of co-plaintiff and it is a principle of law, as has been held by Swinfen Eady J. in the case of *In re Mathews. Oates* v. *Mooney* (1), that "where there "are co-plaintiffs one cannot sever as of right". If Mano Rama could not sever, as of right, from her application for pre-emption by an express act, I do not see on what principle it can be said that she

(1) [1905] 2 Ch. 460.

cannot maintain her application for pre-emption along with her co-applicants because of her act in connection with the Mis. Case No. 203, which can at most lead to an inference that she wanted to withdraw from her own application, and wanted to pursue her remedy for pre-emption as a co-applicant in Mis. Case No. 203. On this principle I overrule also the second point.

There remains only another point to be considered. As I have said above, that the proceedings of the Court below have been irregular by reason of the non-appointment of the guardian of Hari Das, the order complained of must be discharged and the proceedings must be remanded to the lower Court, in order that they may be continued after the Court appoints a proper person as his guardian, but it is necessary to guard against the interest of Hari Das, when he would be so represented by a proper guardian, if Hari Das represented by a guardian wants to become a co-applicant for pre-emption. The application for pre-emption has been filed, as I have said, on November 23, 1934. In accordance with the provisions of s. 26F (*4*) (*a*), a co-sharer landlord opposite party has to make his application for becoming a co-applicant within two months from the date of the service of the notice of the transfer on him, or within one month from the date of the filing of his co-sharer's application for pre-emption. These periods have long expired. If the Court had done its duty and had promptly appointed a guardian for Hari Das, that guardian would have had time to make an application for joining as co-applicant within the period mentioned in the sub-s. (*4*) (*a*) of s. 26F. The fact that the Court overlooked that Hari Das was minor—a fact which appeared on the face of the application for pre-emption,—is a fact which must be considered. In the case of *Gada Dhar Sarkhel* v. *Gopal Chandra Das* (1) I have held that where by reason of some act or omission on the part of the

(1) (1936) I. L. R. 63 Cal. 1079.

1936

Mukti Debee
v.
Mano Rama Debee.

R. C. Mitter J.

Court or its officers an injury has been done, it is the duty of the Court to relieve parties against the injustice caused by its own acts or defaults or the acts or defaults of its officers. That was a case of pre-emption under s. 26F and was a case where by reason of a sad omission on the part of the Court to look to the records of the case, a co-sharer opposite party could not come in and make his application for becoming a co-applicant within the time limited in sub-s. (*4*) (*a*) of s. 26F of the Bengal Tenancy Act. In my judgment, the principle which I have laid down in that case governs the present case and my direction is that after a proper guardian has been appointed for Hari Das, the Court would entertain an application on behalf of Hari Das made by such guardian for becoming a co-applicant, if that application is made promptly, that is to say, as soon as the person so appointed assumes his office as guardian of the minor.

The Rule is made absolute in these terms, the case is sent back to the lower Court in order that the directions given above may be carried out. So far as the costs of this Court is concerned, the parties do bear their own costs.

Let the affidavits filed be kept with the record.

Rule absolute.

A. K. D.