CIVIL REVISION.

Before R. C. Mitter J.

1936

April 24, 27.

SHACHEENDRA NATH CHAKRABARTI

v.

TRAILOKYA NATH CHAKRABARTI*.

Bengal Tenancy—*Pre-emption—Transfer of occupancy holding to third person—Application for pre-emption by co-sharer landlords, principles and procedure governing the same—Limitation—Bengal Tenancy Act (VIII of 1885), ss. 26F(1), 26F(4)(a), 148A, 188.*

In the case of an application for pre-emption by some of the co-sharer landlords under s. 26F(*1*) of the Bengal Tenancy Act to pre-empt an occupancy holding from the purchaser of the same, the effect of s. 188 of the Act is that the remaining co-sharer landlords must be made opposite parties, either in the original application or by amending the same within the periods of limitation mentioned in sub-s. (4) (*a*) of s. 26F of the Act. In such cases it is the duty of the Court, and not of applicants, to call upon the said co-sharer landlords opposite parties to join in the application by inserting such a direction in the summons.

Muhammad Garib Hosain Miya v. *Halimannesa Bibi* (1) and *Gajendra Nath Mandal* v. *Kunja Behari Mistri* (2) referred to.

The co-sharer landlords opposite parties wishing to join in the other co-sharers landlords' application for pre-emption must apply to be joined as co-applicants within two months of the service of notice of transfer on them or within one month of the application for pre-emption made by some of the co-sharers under s. 26F(*1*) of the Act, whichever gives them the longest time. The period of one month must be counted from the date of the filing of the application under s. 26F(*1*) and not from the date of the service thereof. In case of delay of service of the summons beyond a month for laches of the applicant for pre-emption, the said application should be dismissed. In case of non-service of such summons within the period of one month of the filing of the application for pre-emption by the laches of the Court or of its officers, the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injuries done to them by the same.

Gada Dhar Sarkhel v. *Gopal Chandra Das* (3) referred to.

In the case of a co-sharer landlord opposite party's application to become a co-applicant in pre-emption cases being made in time as under the aforesaid

*Civil Revision No. 1392 of 1935, against the order of Pratap Chandra Sen Gupta, Central Munsif of Dacca, dated July 29, 1935.

(1) (1935) I. L. R. 63 Cal. 102. (2) (1936) 40 C. W. N. 506.
(3) (1936) I. L. R. 63 Cal. 1079.

principles, he should deposit in Court his share of the price of the holding stated in the notice of transfer together with ten per cent. as compensation within the period of limitation as under s. 26F (*4*) (*a*) of the Act. The amount to be deposited by a co-applicant, in case of there being no disputes as to shares, is to be according to the proportion that his share bears to the share of the other co-sharer landlords who want to pre-empt. In cases of disputes as to shares or rights of any of such co-applicants or of his feeling uncertainty about the amount he has to deposit, the Court must determine the amount to be paid by him upon being moved within the period of limitation. But after determination of the amount, the Court cannot extend the time for making the deposit beyond the period indicated in cl. (*a*) of s. 26F(*4*) of the Act, except in cases of prejudice being caused by the mistakes and laches of the Court or of its officers.

CIVIL RULE obtained by some of the landlords.

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

Bhupendra Nath Ray Chaudhuri for the petitioners.

Prakash Chandra Pakrasi for the opposite parties.

Cur. adv. vult.

R. C. MITTER J. The two petitioners before me and sixteen other persons are the immediate landlords of an occupancy holding. The tenants transferred their holding to certain persons for a price of Rs. 90 by a registered conveyance. The notices of transfer required to be filed with the registration officer under s. 26C of the Bengal Tenancy Act were served on all the landlords on March 5, 1935. Two of these landlords, namely, the two petitioners before me, made on May 2, 1935, an application for pre-emption under s. 26F(*1*). They made the transferees and the remaining landlords opposite parties to their application for pre-emption. In the said application they stated that they had one anna nine *gandâs* and two *krânts* share in the landlords' interest and the landlords opposite parties had the remaining shares therein. Notice of this application was served on the co-sharer landlords on May 22, 1935. On June 1, 1935, two

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of them, namely, the opposite parties before me, appeared and made an application. They have 5 annas 6 *gandâs* 2 *karhâs* and 2 *krânts* share, that is one-third share, in the landlords' interest. In the said appliction they stated that the petitioners before me have a small share and if they are allowed to pre-empt the whole they would suffer great loss. They, the said opposite parties, then went on to state that they have not been able to collect the money which they are required by law to deposit for enabling them to join in their co-sharers' application for pre-emption. They then state as follows :—

> Accordingly these opposite parties after depositing the money according to their shares *will* join in the application for pre-emption.

The prayer is for some time to make the said deposit. On this application the Court made the following order on June 1, 1935 :—

> "Notice duly served. Opposite parties Nos. 8 and 9, co-sharer landlords " (the opposite parties before me), " want time to join the petitioners in their claim for pre-emption by depositing the requisite money. Case adjourned to June 21, 1935, for hearing. Opposite parties Nos. 8 and 9 may deposit the requisite amount and join as co-petitioners by the next date".

The opposite parties deposited, on June 21, Rs. 33 by a *châlân*. The *châlân* shows that Rs. 30 was deposited on account of the price (being one-third thereof) and Rs. 3 as compensation. No formal application was made at a later stage by them praying for becoming co-applicants for pre-emption.

The transferees did not contest the application for pre-emption. The contest is between two sets of landlords, namely, the petitioners and opposite parties before me, and if the opposite parties succeed they would be entitled to have two-thirds share in the holding and the petitioners one-third share, because the proportion of their shares in the landlords' interest is 2 to 1. In fact the said parties have been allowed by the learned Munsif to pre-empt according to the said proportion.

The petitioners contended before the lower Court and also before me that the opposite parties cannot be allowed to pre-empt for two reasons, namely,—

(*a*) that they never made any application for becoming co-applicants for pre-emption, and

(*b*) that the deposit made by them was out of time, the learned Munsif having no power to extend the time for deposit beyond June 2, 1935, *i.e.*, beyond one month of the filing of the petitioners' application for pre-emption.

Before I deal with these points and the reasons given by the learned Munsif for overruling them it is necessary to examine in some detail the provisions of the statute on the subject. When a landlord, or the whole body of landlords or some of the co-sharer landlords, apply for pre-emption under sub-s. (*1*) of s. 26F, he or they, as the case may be, must deposit in Court with the application the price of the property as stated in the notice of transfer and ten per cent. compensation. When such an application is made some days before the last date unaccompanied by such a deposit, but the deposit is made later on but within the period of limitation a question may be and has been raised in some of the reported cases as to whether there is sufficient compliance with the statute. On this point there is a divergence of Judicial opinion. See *Girish Chandra Ghose* v. *Jadavpur Estate, Ltd.* (1) and *Sidheswari Prosad Roy Chowdhury* v. *Genda Mia* (2). I am not called upon in this case to decide this point, and if I had been, I would have inclined to the view expressed by Mitter J. in the case of *Sidheswari Prosad Roy Chowdhury* v. *Genda Mia* (2).

In the case where some of the co-sharer landlords apply for pre-emption under sub-s. (*1*) of s. 26F, the

(1) (1934) 39 C. W. N. 232. (2) (1930) 61 C. L. J. 27.

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remaining co-sharers must be made opposite parties, either in the application as originally filed or by an application for amendment made within one of the two periods of time mentioned in sub-s. (*4*)(*a*) of s. 26F. This is my view of the effect of s. 188. The words "giving opportunity of joining in the proceed-"ings" occurring in that section mean this. It is not necessary that the co-sharer landlord applicant must *invite* the remaining co-sharer landlords made opposite parties by him to come forward and join in his application for pre-emption nor is he required to give his consent to their so joining. All that he is required to do is to place his co-sharer landlords so far as the proceedings are concerned in a position to join in the pre-emption if they like. It would be for the Court to call upon the said co-sharer landlords opposite parties to join in the application for pre-emption by inserting such a direction in the summons. This is, in my judgment, the effect of the cases of *Mahammad Garib Hosain Miya* v. *Halimannesa Bibi* (1) and *Gajendra Nath Mandal* v. *Kunja Behari Mistri* (2) and of s. 148A(*2*). The absence of an express statement in his application for pre-emption to the effect that he has no objection to his co-sharers joining in his application for pre-emption or that he would be willing to treat them as co-sharer applicants is not required and its absence would not make his application for pre-emption, if it is otherwise good, a bad one.

It is not necessary in this case to consider the provisions of sub-s. (*3*) of s. 26F. Whether the landlord applying for pre-emption can be required to deposit under this sub-section as a condition precedent to pre-emption sums of money on heads other than those expressly mentioned therein need not be considered in this case. The said question has been considered in the case of *Secretary of State for India in Council* v. *Sukh Chand Saw* (*3*).

(1) (1935) I. L. R. 63 Cal. 102. (2) (1936) 40 C. W. N. 506.
(3) (1934) 38 C. W. N. 849.

The matters that have to be next considered are the rules and procedure to be followed by a co-sharer landlord opposite party wishing to join in his co-sharers' application for pre-emption.

Co-sharer landlords opposite parties must apply to be joined as co-applicants within two periods, whichever gives them the longest time, *i.e.*, within two months of the service of notice of the transfer on them or within one month of the application made by their co-sharer under s. 26F(*1*). I am here considering only the case where the notice of transfer has been served on them. The period of one month must be counted from the date of the filing of the application under s. 26F(*1*) and not from the date of the service thereof. The latter interpretation of sub-s. (*4*)(*a*) of s. 26F cannot, in my judgment, be adopted, for that would be introducing into the statute words which are not there. I fail to see how hardship would result by adopting the former construction. If the service of the summons be delayed beyond a month by reason of the acts or defaults of the applicant for pre-emption, his application for pre-emption would be thrown away on the ground of non-compliance with s. 188. The co-sharer landlords opposite parties cannot complain of such a course or of losing their right of pre-emption in such a case, for it must be taken from their not making an independent application under s. 26(*1*) that they had no objection to the transferees possessing the holding, but had objection only to their co-sharer possessing it alone by the exercise of the right of pre-emption.

If the summons be not served within the period of one month of the filing of the application under s. 26F(*1*) by an act of omission or mistake of the Court or of its officers the application of the co-sharer applicant under s. 26F(*1*) would be a good one, but the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injury

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done to them by its acts or defaults or those of its officers: *Gada Dhar Sarkhel* v. *Gopal Chandra Das* (1).

If according to the principles discussed above a co-sharer landlord opposite party's application to become a co-applicant is in time, the further question of deposit in Court of his share of the price of the holding as stated in the notice of transfer and ten per cent. compensation has to be considered. This deposit should ordinarily accompany such an application but if it is not put in along with the application it is not fatal, but it must be deposited within the period of limitation prescribed in s. 26F, sub-s. (*4*), cl. (*a*) for such an application. In the case where there is no dispute as to the respective shares of the landlords who are the original applicants for pre-emption and who later on wish to become a co-applicant, the amount to be deposited by such a co-applicant can be easily ascertained by him. It must be according to the proportion that his share bears to the share of the other co-sharers landlords who want to pre-empt, for it is on that proportion that the final order for pre-emption must define their respective sharers in the pre-empted holding. If there is a dispute as to the shares or right of any of such co-applicant or if he feels uncertainty or doubt about the amount he has to deposit, the Court has to determine the amount to be paid by him. The Court must be *moved* in such a case in time and when so moved a duty would be cast on the Court to determine the amount in time. After determining it it can extend the time for deposit but not beyond the period of time indicated in cl. (*a*) of sub-s. (*4*). The whole scheme in the matter of deposit whether the application is under s. 26F(*1*) or 26F(*4*) seems to me to be that the deposit to be made by applicants or the co-applicants for pre-emption must be made within the

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

time limit imposed by statute for making such applications. In both these classes of applications there must be the same exceptions when prejudice is caused by the mistakes, acts and defaults of the Court itself or of its officers.

It is now necessary to examine the reasons given by the learned Munsif in support of his order. His reasons are as follows:—

(*i*) the application of the opposite parties dated June 1, 1935, must be considered to be an application for joining as co-applicants.

(*ii*) that the deposit made by the opposite parties was in time as it was made within one month of the *date of the service* of the notice of the application for pre-emption made by the petitioners, which is the time up to which the Court can extend time for such deposit.

(*iii*) that even if the law does not empower the Court to extend time up to the aforesaid period, but only up to a month from the date of the filing of the application for pre-emption under s. 26F(*1*), the petitioners' application under that sub-section was not a proper one as s. 188 had not been complied with, as they did not embody in their application an invitation to the opposite parties and their other co-sharers to come and join in their application.

The last mentioned reason is not obviously sound. If the petitioners' application for pre-emption has not complied with the provisions of s. 188, their application will then have to be dismissed on that ground, but the so-called defect cannot nullify the provisions of the s. 26F(*4*)(*b*) by authorising the Court to receive as a good deposit an amount of money put in beyond the periods of time mentioned in s. 26F(*4*)(*a*), mistakes and omissions of the Court itself or of its

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officers being out of the question. I have also indicated in the earlier part of my judgment the scope of s. 188 and I hold that the petitioners' application for pre-emption was not a defective one.

The first reason given by the Court below may or may not be sound. It depends upon the construction of the application made by the opposite parties on June 1, 1935. The words of the application imply that it is merely an application for time. Even if it be considered to be an application by the opposite parties for becoming co-applicants for pre-emption it does not help them for, in my judgment, their deposit of a part of the amount of the price of the property sold and compensation was made too late.

This leads me to consider the second ground given by the learned Munsif. In the case before me the opposite parties did not ask the Court to determine the amount they will have to put in and that amount was never determined by the Court. They had no doubt in the matter, for without the Court naming any amount they deposited Rs. 33 on June 21, 1935. The learned Munsif held that limitation for an application to become co-applicant runs from the *date of the service on them* of the petitioners' application for pre-emption, the other case, namely, the application of the co-applicants must be within two months of the service of the notice of transfer on them need not be considered in this case. The reason given is that a deposit can only be made by co-applicants after the Court determines the amount and makes an order requiring the amount so determined to be deposited. The learned Munsif says that the Court would not be in a position in many cases to determine the amount within one month of the filing of the application for pre-emption under s. 26F(*1*) by a co-sharer. Says the learned Munsif that the notice of the said application may be served

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on the co-sharers either on the 30th day from the date of filing of the application under s. 26F(*1*) or even beyond a month thereof. In the last mentioned case, as I have indicated above, there is no difficulty. If the service was delayed by the applicant under s. 26F(*1*), his application will have to be dismissed; if the mistakes or omissions of the Court or its officers were responsible, the Court would relieve against the prejudice caused. If the notice is served within one month of the date of the filing of the application for pre-emption the intending co-applicant can himself in most cases calculate the amount and put it in time. If he feels any doubt or uncertainty, or if shares in the landlord's interest are in dispute, he can at once apply to the Court to fix the amount, which the Court can do immediately without making any final adjudication about the shares, and subject to that adjudication later on. On this part of the case the learned Munsif says that a determination of the amount cannot be made till the Court has made up its mind as to whether the several landlords wishing to pre-empt should be given on pre-emption in equal shares in the pre-empted holding or shares in proportion to their respective shares in the landlord's interest. If that be the criterion, the Court would not be in a position to determine the amount till the case is fully heard and the stage of sub-s. (*5*) of s. 26F has been reached. That would in most cases extend the time much beyond a month of the *service of the notice* of the application made under s. 26F(*1*). I do, therefore, hold that a Court cannot extend the period for making a deposit by a co-applicant beyond the periods of time mentioned in cl. (*a*) of sub-s. (*4*) of s. 26F.

I accordingly make this Rule absolute and dismiss the opposite party's claim for pre-emption. The result is that the lower Court is directed to pass an order for pre-emption only in favour of the petitioners before me, after requiring them to deposit such

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further sums of money that they may be liable to put in under the provisions of sub-s. (*3*) of s. 26F.

The contesting parties to bear their respective costs throughout.

Rule absolute.

A. K. D.