CIVIL REVISION.

Before Edgley J.

1939

Feb. 6, 8.

BASANTA KUMAR CHURNAKAR

v.

DURGA NATH PAL.*

Landlord and Tenant—Pre-emption—Right to apply—Scope of the inquiry into and parties to an application for pre-emption—Bengal Tenancy Act (VIII of 1885), s. 26F—Bengal Tenancy (Amendment) Act (Ben. VI of 1938).

Unless there is in fact a real transfer of the holding by the tenant, the immediate landlord of the tenant has no right to apply for pre-emption under s. 26F of the Bengal Tenancy Act, 1885, as it stood before the Bengal Tenancy (Amendment) Act, 1938.

Satyendra Nath Rai Chaudhury v. *Fulsom Bibi* (1) distinguished.

In an application under s. 26F of the Bengal Tenancy Act, 1885, as it stood before the Bengal Tenancy (Amendment) Act, 1938, the Court can, at the instance of tenant-transferor, inquire into the reality or otherwise of the transfer.

In an application for pre-emption under s. 26F of the Bengal Tenancy Act, 1885, prior to the Bengal Tenancy (Amendment) Act, 1938, a tenant is competent to contest the application if the alleged transfer is tainted with fraud.

Gobinda Chandra Choudhury v. *Nagendra Kumar Choudhury* (2) referred to.

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The material facts of the case appear from the judgment.

Jatindra Nath Sanyal for the petitioner. The existence of a transfer is a condition precedent to the maintainability of an application under s. 26F of the Bengal Tenancy Act, 1885. In the present case, the transfer having been declared to be void by a

*Civil Revision, No. 1838 of 1938, against the orders of Subodh Chandra Mukherji, Second Munsif of Tangail, dated Sep. 13 and 22, 1938.

(1) (1931) 36 C. W. N. 486. (2) (1933) 37 C. W. N. 914.

competent Court, there was nothing to go upon and the Munsif acted without jurisdiction in proceeding to deal with the application under s. 26F of the Bengal Tenancy Act, 1885, even after the transfer was declared to be fraudulent by a competent Court. My second point is that the learned Court below acted illegally and with material irregularity in striking out the name of the petitioner from the pre-emption proceedings. The petitioner was vitally interested in the result of these proceedings. He is a necessary party.

Surajit Chandra Lahiri for the opposite party. The tenant-transferor is not a necessary party to a proceeding under s. 26F. The language of sub-s. (*3*) of s. 26F suggests that notice of the application is to be served on the transferee alone and not on the transferor as well. I rely on the case of *Gobinda Chandra Choudhury* v. *Nagendra Kumar Choudhury* (1). Having regard to the scheme of Chap. V of the Bengal Tenancy Act, 1885, a proceeding under s. 26F, must be deemed to be a summary proceeding and in such a proceeding a Court has no jurisdiction to see what has happened after the service of the notices.

Under s. 26C of the Act a landlord would be placed in a very difficult position, if, after the service of notices under s. 26C, he has to enquire into the validity of a transfer before filing an application under s. 26F. This view also receives support from the case of *Satyendra Nath Rai Chaudhury* v. *Fulsom Bibi* (2).

Lastly, the judgment in the suit for setting aside the *kabâlâ* was obtained behind the back of the opposite parties Nos. 1 to 3 and it was *ex parte*. As such the opposite parties Nos. 1 to 3 are not bound by it and they are entitled to show that it was the result of a collusion between the present petitioner and

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opposite parties Nos. 4 to 13. The judgment not being *inter parties* is not admissible against opposite parties Nos. 1 to 3.

Sanyal, in reply.

Upendra Kumar Ray for the Deputy Registrar.

Joy Gopal Ghosh for the petitioner in the petition for stay of further proceedings, moved on January 3, 1939.

EDGLEY J. The petitioner in this case, Basanta Kumar Churnakar, has applied to this Court in order that two orders passed by the learned Munsif of Tangail, dated respectively September 13, 1938, and September 22, 1938, may be set aside. Under the first of these two orders, the learned Munsif expunged the petitioner's name from the proceedings in a pre-emption case instituted by opposite parties Nos. 1 to 3 on June 4, 1937. Under the latter order, the learned Munsif allowed the application for pre-emption filed by the aforesaid opposite parties.

The facts with which we are concerned in respect of the application are briefly as follows:—On January 12, 1937, the petitioner executed a document, which purports to be a deed of sale in favour of opposite parties Nos. 4 to 13. The petitioner's immediate landlords, opposite parties Nos. 1 to 3, thereupon applied for pre-emption under s. 26F of the Bengal Tenancy Act. Their application was filed, as stated above, on June 4, 1937. The petitioner, however, maintained that no transfer had been effected by virtue of the document executed by him on January 12, 1937. His case was that he had actually intended to execute a mortgage deed on that date, but, owing to fraud on the part of the transferees, he had been made to execute a *kabâlâ* instead of a mortgage deed. He, therefore, instituted a suit on June 25,

1937, being Title Suit No. 119 of 1937, for the purpose of setting aside the *kabâlâ* in favour of opposite parties Nos. 4 to 13. He also took steps to file an objection in the pre-emption case, which had been filed by opposite parties Nos. 1 to 3, to the effect that the pre-emption case in question was not maintainable on the ground that there had not been an effective transfer to opposite parties Nos. 4 to 13. On August 18, 1937, the opposite parties Nos. 1 to 3, the petitioner's immediate landlords, applied to be made parties to the suit No. 119 of 1937. Their application was, however, very rightly rejected by the learned Munsif of Tangail on the ground that, in a suit of this nature, the only necessary parties were the vendors and the vendees or their respective legal representatives. Opposite parties Nos. 1 to 3 then applied to this Court in revision against the order rejecting their application to be made parties to Title Suit No. 119 of 1937. They obtained a Rule, but that Rule was discharged on July 15, 1938. Shortly afterwards, namely, on August 11, 1938, suit No. 119 of 1937 was heard by the learned Munsif of Tangail and decreed in favour of the petitioner before this Court, Basanta Kumar Churnakar. As a result of the decision obtained by the petitioner on that date, the *kabâlâ* which he had executed on January 12, 1937, was declared void as between him and the transferees, opposite parties Nos. 4 to 13. At that time, the pre-emption proceedings which had been instituted by opposite parties Nos. 1 to 3 were still pending, and, on September 13, 1938, opposite parties Nos. 1 to 3 applied for an order to the effect that the petitioner's name might be expunged from the record of the aforesaid pre-emption proceedings. An order to that effect was duly made by the learned Munsif on the same day, and, as already stated, the learned Munsif, on September 22, 1938, allowed the application for pre-emption which had been filed by opposite parties Nos. 1 to 3 on June 4, 1937.

It has been urged by the learned advocate for the petitioner in this case that the learned Munsif was

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wrong in dismissing the petitioner from the pre-emption proceedings on September 13, 1938, having regard to the fact that the petitioner was vitally interested in the application for pre-emption, which had been filed by his immediate landlords, as an order for pre-emption in favour of his landlords would evidently have had the effect of clouding the petitioner's title. He further contended, with reference to the order passed by the learned Munsif on September 22, 1938, that the learned Munsif acted illegally in allowing the application for pre-emption filed by opposite parties Nos. 1 to 3, as it had been held by a competent Court that there had been no transfer by the petitioner to opposite parties Nos. 4 to 13; and, this being the case, the only legal basis upon which an application for pre-emption could be presented to the Court had disappeared. In my opinion, there is considerable force in these contentions.

The learned advocate for the opposite parties argues that a vendor has no *locus standi* in proceedings under s. 26F of the Bengal Tenancy Act, and in support of his argument he relies upon certain observations made by M. C. Ghose J. in the case of *Gobinda Chandra Choudhury* v. *Nagendra Kumar Choudhury* (1). In my view, however, the question as to whether or not the vendor has *locus standi* to contest an application for pre-emption must depend entirely upon the circumstances of the case. Certainly it might be effectively argued in a case in which there had undisputedly been a valid transfer of a holding and in which the vendor had entirely dispossessed himself of all rights in connection with that holding that the vendor would have no further interest in the matter and would have no *locus standi* to contest an application for pre-emption. In the case, however, with which we are dealing, the position adopted by the petitioner is that he is not the vendor of the holding which the landlords are seeking

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to pre-empt, that it was never transferred to opposite parties Nos. 4 to 13, that he retained in the holding all the rights of an occupancy *râiyât* and that the landlords, therefore, had no right to disturb him in his possession of the holding by pre-emption or otherwise as long as he duly paid his rent. This being the case, it seems to be clear that the petitioner was vitally interested in the result of the application for pre-emption, which was filed by his landlords, and had every right to be made a party to the pre-emption proceedings in order to contest the same. In this view of the case, I consider that the order passed by the learned Munsif of Tangail on September 13, 1938, was illegal and cannot be supported.

The next matter which requires consideration is whether the learned Munsif was justified in allowing the landlords' application for pre-emption by his order dated September 22, 1938. With regard to this matter, it has been argued by the learned advocate for the opposite parties that the landlords were empowered to apply for pre-emption under s. 26F of the Bengal Tenancy Act, because at the time when they made their application, there was in existence a deed of transfer executed by the vendor in favour of opposite parties Nos. 4 to 13, in respect of which notices under s. 26C of the Act had been duly served on the landlords and he argues that, in a case in which it can be shown that the requisite notices under s. 26C of the Act have been served upon the landlords, the Court, in a summary proceeding under s. 26F of the Act, has no jurisdiction to consider anything that may have happened between the vendors and the vendees after the service of the notice in question. He, therefore, contends that the fact that the *kabâlâ*, dated January 12, 1937, was declared to be invalid by a civil Court on August 11, 1938, was a fact which should not have been taken into consideration by the learned Munsif. In this contention I am unable to agree. In support of his argument the learned advocate for the opposite

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parties places some reliance upon a remark by Mitter J. in his judgment in the case of *Satyendra Nath Rai Chaudhury* v. *Fulsom Bibi* (1). The facts of that particular case, however, were clearly distinguishable from those of the case now before us, as the main ground upon which the learned Judge based his decision was the view which he took to the effect that the execution of a *hibâ-bil-ewâz* amounted to a sale. His further observations to the effect that it was not open to the Court to go into the question of what happened between the parties after the issue of a notice under s. 26C of the Bengal Tenancy Act seem to have been merely in the nature of *obiter dicta*.

From the language of s. 26F of the Bengal Tenancy Act, it seems to be clear that a condition precedent to an application by the immediate landlord of a holding for pre-emption is the transfer of that holding by a tenant to some other person. The whole of the procedure outlined in this section assumes that there has been such a transfer, and sub-ss. (*5*) and (*6*) of s. 26F, which empower the Court to make pre-emption orders in favour of the landlord and set forth the effect of orders so made, also assume that at the time when such order is made, there is still in existence a transfer by virtue of which the holding or a portion of the holding sought to be pre-empted has been transferred by the tenant to another person. In this connection, it may be noted that the landlord himself need not be a party to the transfer upon which he bases his right to pre-empt. In fact, a perfectly valid transfer of a tenant's holding may be effected without reference to or consultation with the landlord. At the same time it is clear that, unless a transfer from a tenant has in fact taken place, the landlord can have no right to pre-empt.

The view which seems to have been adopted by the learned Munsif in his order dated September

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22, 1938, was to the effect that the pre-empting landlords could not be regarded as bound by the judgment obtained by the petitioner in Title Suit No. 119 of 1937, as the landlords were not parties to the title suit in question. Certainly in any properly constituted suit which the landlords might be advised to bring for the purpose of establishing their title in respect of the disputed land, they might argue that they were not bound by the judgment in Title Suit No. 119 of 1937. The fact remains, however, that in a summary proceeding for pre-emption under s. 26F of the Bengal Tenancy Act, which is based upon the assumption that a transfer from a tenant to a third party has taken place, a judgment such as that in Title Suit No. 119 of 1937 must be regarded as a fact in issue under s. 43 of the Indian Evidence Act and, as such, would therefore be admissible in evidence. If the judgment had been against the vendor, it would certainly have been admissible to show that the transfer had taken place between the vendor and opposite parties Nos. 4 to 13 and that this transfer was binding as far as the vendor and the vendees were concerned; and it would, therefore, have been a fact in issue which, if proved, would have justified the landlords in making an application for pre-emption under s. 26F of the Bengal Tenancy Act. Similarly, although the judgment was in favour of the petitioner, it must nevertheless be an important fact in issue as showing that no transfer was actually in existence which was binding on the alleged vendor and vendees and which in a summary procedure under s. 26G of the Bengal Tenancy Act would give the landlord *locus standi* to apply for pre-emption. It follows, therefore, that, as the transfer by the petitioner to opposite parties Nos. 4 to 13 was declared void by a Court of competent jurisdiction on August 11, 1938, the learned Munsif had no jurisdiction to allow pre-emption in favour of opposite parties Nos. 1 to 3.

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In the above view of the case, the orders of the learned Munsif, dated September 13, 1938, and September 22, 1938, cannot be supported and will, therefore, be set aside. This Rule is accordingly made absolute with costs. The hearing fee in this Court is assessed at three gold *mohurs*.

The application moved on January 3, 1939, and ordered to be considered at the hearing of the Rule is allowed to be withdrawn.

Rule absolute.

N. C. C.