APPELLATE CIVIL.

Before Henderson J.

1939

Aug. 17, 21.

DEBENDRA CHANDRA DE

v.

JAMINI KUMAR DE*

Landlord and Tenant—*Occupancy holding—Pre-emption proceedings—Minor purchaser described as major in document of purchase and notice served on him as such, Proceedings, if void—Landlord's fee—Non-payment on registration of under-*râiyati *lease, Effect of—Bengal Tenancy Act (VIII of 1885), ss. 26F., 48H.*

The right to pre-emption under s. 26F. of the Bengal Tenancy Act does not depend upon any decision by the Court, but flows automatically from the transfer itself, and no duty is cast upon the landlord to give any notice to the purchaser. If a minor purchaser describes himself as a major in an instrument of transfer of an occupancy holding and is therefore served with notice as such, the pre-emption proceedings are not void and a third party is not entitled to urge that they are void.

Umapati Samanta v. *Sheikh Masietulla* (1) and *Purna Chandra Kunwar* v. *Bejoy Chand Mahatab* (2) referred to and distinguished.

When an under-*râiyati* lease is registered without depositing the landlord's fee as required by s. 48H. of the Bengal Tenancy Act, owing to a misstatement of the lessor's status, it has no effect, and the defect cannot be cured by a subsequent payment; the landlord can repudiate the lease subject to the equity of refunding the premium, if any paid by the under-*râiyat*.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs.

The facts of the case and the arguments in the appeal sufficiently appear from the judgment.

Chandra Sekhar Sen for the appellants.

Nripendra Chandra Das for the respondents.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 1692 of 1937, against the decree of Keshab Chandra Sen, Second Subordinate Judge of Chittagong, dated July 7, 1937, reversing the decree of Abani Bhushan Ganguli, Fourth Munsif of Chittagong, dated May 4, 1937.

(1) (1922) 37 C. L. J. 496. (2) (1913) 17 C. W. N. 549.

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HENDERSON J. This appeal is by the plaintiffs. They instituted the suit in order to recover possession of a certain land. Their tenant, one Nishi, the predecessor of defendants Nos. 3 to 6, had a *râiyati* holding. He sold it to one Chitta Ranjan De. The plaintiffs, thereupon, applied for pre-emption under the provisions of s. 26F of the Bengal Tenancy Act. The application was allowed and they took delivery of possession through the Court. They were unable, however, to obtain actual possession through the obstruction of defendant No. 1. They accordingly instituted the present suit. Defendant No. 1 contends that he has an under-*râiyati*, which was created previous to the pre-emption. The Munsif gave the plaintiffs a decree, but this decree was reversed by the Subordinate Judge in appeal.

Two points arise for decision: (i) whether the proceedings by which the plaintiffs exercised their right of pre-emption under s. 26F of the Bengal Tenancy Act were void; (ii) whether defendant No. 1 was entitled to resist the plaintiffs' claim for *khâs* possession on the strength of his under-*râiyati* interest.

The defence contention that the pre-emption proceedings were void was based upon the fact that the purchaser Chitta Ranjan was a minor. He is not a party to the present proceedings. It is, therefore, impossible for the respondents to succeed on this point unless they can show that the proceedings were void. The argument, which found favour with the learned Subordinate Judge, was to the effect that proceedings under s. 26F of the Bengal Tenancy Act are analogous to a suit and that an order made by the Court is similar to a decree. From this point of view it was argued that the order of the Court was void just as much as a decree against a minor who is not represented is void.

It is to be noted that, if the contention of the defendants succeeds, the minor will certainly have

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imposed upon him the burden of paying rent and he will be left with the property which quite possibly he may not want. Again supposing there was a sudden slump in land values, it will be open to the plaintiffs to withdraw the money which they paid into Court along with their application for pre-emption. Certainly it would be rather startling, if the position of the minor could be affected in this way.

The effect of a decree passed against a minor in a suit in which he is not properly represented has been discussed in several cases. In particular, I may refer to the cases of *Umapati Samanta* v. *Sheikh Masietulla* (1) and *Purna Chandra Kunwar* v. *Bejoy Chand Mahatab* (2), to which my attention was particularly drawn during the hearing of the appeal. There can be no doubt that in such a case a minor is not affected by any decree that may be passed against him and that it is a nullity so far as he is concerned. But to say that the decree was absolutely void and a mere waste piece of paper is to go a good deal further than this. A minor is certainly not bound to treat it as a nullity, if he does not desire to do so, and third persons cannot be heard to say that it is void.

Then, in the second place, there is no real analogy between a decree of a civil Court and an order passed in these proceedings under s. 26F of the Bengal Tenancy Act. The order for pre-emption in no way corresponds to a decree and the section really does nothing more than provide a convenient machinery for giving effect to the claim to pre-empt. Under s. 26C of the Bengal Tenancy Act a purchaser is bound to give notice to the registering officer and the notice is then served upon the landlord. The landlord has the right to apply to the Court for the transfer of the holding to him within a certain time of the receipt of the notice. The Court gives

(1) (1922) 37 C. L. J. 496. (2) (1913) 17 C. W. N. 549.

notice to the purchaser merely to enable him to claim reimbursement for any payment which he may have made subsequent to his purchase. The landlord is not responsible in any way for the service of any notice.

Thus, it will appear: (i) that the right to pre-emption does not depend upon any decision by the Court; it flows automatically from the transfer itself; and (ii) no duty is cast upon the landlord to give any notice to the purchaser. In the present case the purchaser described himself in the *kabâlâ* as a major and the Court could only serve the notice in accordance with its terms.

I must, accordingly, respectfully dissent from the view taken by the learned Subordinate Judge that these proceedings were void.

There remains the second question whether defendant No. 1 is entitled to resist the plaintiffs' claim for *khâs* possession on account of his under-*râiyati* lease. As the learned Judge pointed out, that lease infringes the terms of s. 48H of the Bengal Tenancy Act.

On behalf of the respondents Mr. Das referred to the decisions explaining the meaning of the old section (section 85) which has now been repealed. Those decisions cannot afford any assistance in the present case. Here there was nothing illegal in the terms of the lease itself. The mistake made was that the landlord's fee was not deposited. The lease, therefore, ought not to have been registered.

Two other points were, however, raised in support of the respondents' claim to retain possession. The lease has actually been registered. Mr. Das expressed his willingness to pay the landlord's fee into Court.

The registration was actually affected owing to a misdescription of the lessor's status in the document.

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As it was made in contravention of the provisions of the law it has no effect. Under the terms of the section payment of the landlord's fee is a condition precedent to registration and the defect cannot be cured by a subsequent payment.

The second point relates to the fact that the plaintiffs have now succeeded to the interest of the respondents' original lessor. It was, therefore, contended that they cannot be allowed to repudiate the lease without refunding the premium which was paid at the time . Mr. Sen on behalf of the plaintiffs did not contest this.

The decree of the lower appellate Court is accordingly set aside. If within a month from the arrival of the record in the lower Court the plaintiffs pay Rs. 200 into Court the decree of the Munsif will be restored. Defendant No. 1 will be at liberty to withdraw the money. If such payment is not made, the plaintiffs will get a declaration of their title and a further declaration that they are entitled to receive rent from defendant No. 1. Defendant No. 1 will pay the costs of the plaintiffs in all Courts.

Appeal allowed; suit decreed.

A. A.