

## CIVIL REVISION.

*Before Mukherjea and Akram J.J.*

GOBARDHAN BAR.

*v.*

GUNA DHAR BAR.\*

1940

April 11;  
May 3.

**Occupancy holding**—*Transfer by tenant of his share in occupancy holding—Registration of the transfer, Date of—Re-purchase, Right of—Co-sharer tenant and immediate landlord—Application to enforce right of repurchase—Necessary parties—Bengal Tenancy Act (VIII of 1885) [as amended by Bengal Tenancy (Amendment) Act (Ben. IV of 1928) and Bengal Tenancy (Amendment) Act (Ben. VI of 1938)], s. 26 F.*

Where a tenant transferred his share in an occupancy holding to a stranger by an instrument, executed while s. 26F of the Bengal Tenancy Act, 1885, as inserted by Ben. Act IV of 1928 was in force, but registered after the s. 26F as amended by Ben. Act VI of 1938 had come into operation, the right of re-purchase of such share would accrue in favour of the co-sharer tenant of the holding under the amended s. 26F and not in favour of the immediate landlord under the s. 26F as originally inserted.

Any one co-sharer tenant of such holding may apply to Court to re-purchase the share of the transferor tenant without making the other co-sharer tenants, if any, parties to the application.

CIVIL RULE obtained by a co-sharer tenant of an occupancy holding.

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

*Gopendra Nath Das and Ambica Prasanna Sen Gupta* for the petitioner.

*Radha Binode Pal and Shyama Pada Majumdar* for the opposite party.

*Cur. adv. vult.*

\*Civil Revision, No. 1348 of 1939, against the order of R. K. Chaudhuri, Second Subordinate Judge of Midnapur, dated May 30, 1939, reversing the order of Arun Kumar Das, First Munsif of Tamluk, dated Feb. 16, 1939.

MUKHERJEA J. This Rule is directed against an appellate judgment of the Subordinate Judge, Second Court, Midnapur, dated May 30, 1939, reversing an order of the Munsif, First Court, Tamluk, made in a proceeding under s. 26F of the Bengal Tenancy Act, 1885, as amended by the Bengal Tenancy (Amendment) Act, 1938. There is no dispute about the material facts which lie within a narrow compass. There was an occupancy holding recorded in interest No. 79 of the finally published record-of-rights of *mouzâ* Nilkanthea, which belonged jointly to Indra Mull and Barada Dei. One of the plots comprised in the said holding, which is C.S. plot No. 1050, was sold by these tenants to two persons, namely, Gobordhan Bar, the petitioner, and Nakul Bar, his brother. On August 9, 1938, a *kabâlâ* was executed by Nakul Bar in respect of his one-half share of plot No. 1050 in favour of the opposite party, and the document was registered on August 24, following. On August 18, 1938, the Bengal Tenancy (Amendment) Act, 1938, came into force, and the petitioner, who was a co-sharer of the vendor, presented an application within four months of the date of sale, claiming to exercise his rights of purchase under s. 26F of the Bengal Tenancy Act, 1885, as amended by the Act of 1938. The application was resisted by the opposite party purchaser on two grounds. It was contended in the first place that the *kabâlâ* being executed before the amending Act came into force, even though it was registered after that, the provisions of the old Act would apply and the rights of pre-emption could be exercised by the immediate landlord and not by the co-sharer tenants. The second point taken was that the application was not maintainable in the absence of the other co-sharer tenants as parties to the proceeding.

The trial Court overruled both these contentions and allowed the petitioner's prayer. On appeal,

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the decision was reversed, and the lower appellate Court gave effect to both the contentions urged by the opposite party and rejected the petitioner's application.

It is against this order that the present Rule has been obtained. Mr. Das, who has appeared in support of the Rule, has challenged the propriety of the decision of the lower appellate Court on both the points.

On the first point the Subordinate Judge was of opinion that, as in this case the *kabâlâ* was executed on August 9, 1938, when the old Act was still in force, a right of pre-emption vested in the immediate landlord under s. 26F of the Act as it stood before the amendment in 1938, and this right could not be taken away by the amending Act of 1938, which came into force only on August 18, 1938; the co-sharer tenants likewise could not claim any right of pre-emption under the amending Act as the transfer took place before and not after the amending Act became operative.

It is perfectly true that the amending Act of 1938 is not retrospective in its operation. It does not take away or impair any vested right that accrued under the old section and the rights which it creates could arise only in respect of transfers taking place after it came into force. The question, however, for our consideration is whether the rights of pre-emption would accrue in favour of the immediate landlord under the old section or, in favour of the co-sharer tenants under the new, as soon as the conveyance is executed, or would they come into existence only when the document is registered. If the date of execution is the material date, the decision of the Subordinate Judge is right and neither the landlord would lose any rights which he acquired on the date of the execution of the deed, nor would the co-sharer tenants gain any advantage which was created by

an Act not then in existence. If, on the other hand, the rights could not arise unless there was a completed transfer by registration of the sale deed, it is the co-sharer tenants who would be entitled to exercise the right of pre-emption and not the immediate landlord.

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I am inclined to hold that the date of registration is the material date and both under the old section as well as under the new, no right could possibly accrue in favour of the landlord or the co-sharer tenants as the case may be, until the document of transfer was registered.

A transfer of an occupancy holding can be made only by a registered document, and no title would pass to the transferee unless registration is effected. Under the old s. 26C of the Act, the registering officer would not register a deed unless the landlord's fees and the process fees for service of notice on the landlord were paid by the vendee, and under the old s. 26F the immediate landlord had two months' time after the service of the notice under s. 26C, within which to present his application for pre-emption. Not only was there no valid or completed transfer till the document was registered, but, so long as it was not registered, the landlord's right to apply for pre-emption did not arise. If, therefore, the document was not presented for registration till after the replacement of the old section, there was no accrued right in favour of the landlord which could be said to have been saved by amending Act of 1938. Then again, as in the present case, if the document is registered after the new s. 26F came into force, the provision of the new s. 25C would certainly be attracted to it. The purchaser would not have to pay landlord's fees even though the *kabála* was executed when the old s. 26C was still in force, and notice would have to be served upon the co-sharer tenants within four months from the date of service of which they would have

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the right to come up and apply for re-purchase of the share. It is fairly clear from these sections that the intention of the legislature was that the provisions of the amending Act would be applicable in respect of transfers which were registered after the amending Act came into force, whereas the old Act would apply to cases where the document of transfer was registered at a time when the old Act was still in operation.

It may be noted here that the Government of Bengal passed an Ordinance known as the Bengal Tenancy Ordinance which came into force on May 31, 1938. By this Ordinance, the time for registration of documents of transfer relating to occupancy holdings was extended and the provisions of the amending Act were made available in cases where the last date for presentation of the document for registration expired any time between May 31, and September 8, 1938. These were documents executed admittedly when the old Act was in force, but the parties were given the privilege to wait till the amending Act became operative so that they might have the advantages of the provisions of the amending Act.

The view I am taking does not militate, in any way, with the general principles relating to the law of pre-emption. Under the Mahomedan law also, no right of pre-emption can arise unless the sale is complete and there is a total cessation of the vendor's right to the property. It may be pointed out here that the right of *shâfâ* as recognised by the Mahomedan law as well as the right of re-purchase created by s. 26F of the Bengal Tenancy Act are not rights of pre-emption in the sense in which they were used by the Roman lawyers. Pre-emption, according to Roman law, connoted an obligation on the part of the intending vendor to sell preferentially to the pre-emptor if he offered as good conditions as any intending vendee. The right of purchase that is created by s. 26F of

the Bengal Tenancy Act, like the right of pre-emption under the Mahomedan law, attaches an obligation to a particular status which binds the purchaser from the person obliged to hand over the property purchased to the obligee on receiving the price paid by him for it with or without additional compensation: *Budhai Sardar v. Sonauallah Mridha* (1). The obligation can only arise when the property passes from the original owner to the purchaser. There is undoubtedly some conflict of judicial opinion as to when a sale under Mahomedan law becomes complete, and it has been held by some authorities that, for purposes of giving effect to the right of pre-emption, a sale would be deemed to be complete under Mahomedan law as soon as the price is paid and possession of the property delivered to the purchaser: *Begam v. Muhammad Yakub* (2); *Abdulla Avjal Momin v. Ismail Mugal Foda* (3). But this discussion is immaterial for our present purpose, as, under s. 26C of the Bengal Tenancy Act, the transfer can only be made by registered document and title cannot possibly pass to the transferee till registration is effected.

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Much stress has been laid by the opposite party on s. 47 of the Indian Registration Act, 1908. It is undoubtedly true that as between the transferor and the transferee the registered document takes effect from the date of execution; and if there is a competition between two documents relating to the same property, both of which are registered, the one executed earlier in point of time will have priority, but as regards third parties the point of time at which the deed is to be effective is when it is registered: *Nareshchandra Datta v. Gireeshchandra Das* (4). I hold, therefore, that the view taken by the lower appellate Court on the first point cannot be sustained.

(1) (1914) I. L. R. 41 Cal. 943.  
 (2) (1894) I. L. R. 16 All. 344.

(3) (1921) I. L. R. 46 Bom. 302.  
 (4) (1935) I. L. R. 62 Cal. 979.

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On the second point also, I am of the opinion that the decision of the Subordinate Judge is wrong. There is no provision in the Bengal Tenancy Act which makes it necessary that the co-sharer tenant who seeks to exercise his right of re-purchase under s. 26F of the Act as amended in 1938 should make the other co-sharers parties to the proceeding. It was necessary in the case of the immediate landlord under the old s. 26F by reason of the provision of s. 188, which laid down that such applications must be made by all the co-sharer landlords jointly. The provision of s. 188 cannot be attracted to the present s. 26F and, as such, I hold that the non-joinder of the other co-sharer tenants would not in any way make the proceeding defective.

The result is that the Rule is made absolute, and the judgment of the lower appellate Court is set aside and that of the trial Court restored.

The petitioner will have his costs in this Rule—the hearing-fee being assessed at one gold mohur.

AKRAM J. I agree.

*Rule absolute.*

P.K.D.