

CALCUTTA HIGH COURT

Gobardhan Bar

Vs.

Gunadhar Bar

(B.K. Mukherjea, J.)

03.05.1940

JUDGMENT

B.K. Mukherjea, J.

1. This rule is directed against an appellate judgment of the subordinate Judge, second Court, Midnapur, dated 30th May 1939, reversing an order of the Munsif, first Court, Tamluk, made in a proceeding under Section 26F, Bengal Tenancy Amendment Act of 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 mouza 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 9th August 1938, a kobala was executed by Nakul Bar in respect of his half share of plot No. 1050 in favor of the opposite party and the document was registered on 24th August following. On 18th August 1938, the Bengal Tenancy Amendment Act of 1938 came into force and the petitioner who was a cosharer of the vendor presented an application within four months from the date of the sale claiming to exercise his rights of purchase under Section 26P of the new Act. The application was resisted by the opposite party purchaser on two grounds. It was contended in the first place that the kobala being executed before the new 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 cosharer tenants. The second point taken was that the application was not maintainable in the absence of the other cosharer tenants as parties to the proceeding.

2. The trial Court overruled both these contentions and allowed the petitioner's prayer. On appeal 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 and 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 kobala was executed on 9th August 1938, when the old Act was still in force, a right of pre-emption vested in the immediate landlord under Section 26P of the Act and this could not be taken away by the Amending Act of 1938 which came into force only on: 18th August 1938; the cosharer tenants

likewise could not claim any right of preemption under the new Act as the transfer took place before and not after the new 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 cosharer 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 right which he acquired on the date of the execution of the deed nor would the cosharer tenants gain any advantage which was created by a statute 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 cosharer tenants who would be entitled to exercise the right of pre-emption and not the immediate landlord. I am inclined to hold that the date of registration is the material date and both under the old Act as well as under the new, no right could possibly accrue in favor of the landlord or the cosharer tenants as the case may be, until the document of transfer was registered.

3. A transfer of occupancy holding can be made only by a registered document and no title would pass to the transferee unless registration is effected. Under Section 26C of the old 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 Section 26F the immediate landlord had two months' time after the service of notice under Section 260, to present his application for pre-emption. Not only there was no valid or complete transfer till the document was registered, but so long as it was not registered, the landlord's right to apply for preemption did not arise. If therefore the document was not presented for registration till after the expiry of the old Act, there was no accrued right in favor of the landlord which could be said to have been saved by the repealing enactment. Then again, as in the present case, if the document is registered after the new Act came into force, the provision of the new Section 26C would certainly be attracted to it. The purchaser would not have to pay landlord's fees even though the kobala was executed when the old Act was still in force, and notice would have to be served upon the cosharer tenants, within four months from the date of service of which they would have the right to come up and apply for repurchase of the share. It is fairly clear from these sections that the intention of the Legislature was that the provisions of the new Act would be applicable in respect of transfers which were registered after the new Act came into force, whereas the old Act would apply to the cases where the document of transfer was registered at a time when the old Act was still in operation.

4. It may be noted here that the Government of Bengal passed an ordinance known as the Bengal Tenancy Ordinance which came into force on 31st May 1958. By this Ordinance the time for registration of documents of transfer relating to occupancy holdings was extended and the provisions of the new Act were made available in cases where the last date for presentation of the document for registration expired any time between 31st May and 8th September 1938. These were documents executed admittedly when the old Act was in force, but the parties were given the privilege to wait till the new Act became operative so that they might have the advantages of the provisions of the new 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 Shafa as recognized by the Mahomedan law as ('well as the right of re-purchase created by Section 26F, Bengal Tenancy Act, are not rights of pre-emption in the sense in which they were used by the Roman lawyers. Preemption, 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 Section 26F, 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: vide *Budhai Sirdar v. Sonaula 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 : vide *Begum v. Muhammad Yakub*² and *Abdulla Avjal Momin v. Ismail Mugal Foda*³ But this discussion is immaterial for our present purpose, as under Section 260, Bengal Tenancy Act, the transfer can only be made by registered document and title cannot possibly pass to the transferee till registration is effected.

5. Much stress has been laid by the opposite party on Section 47, Registration Act. If; 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 party the point of time at which the deed is to be effective is when it is registered: vide *Naresh Chandra v. Girish Chandra*⁴, I hold, therefore that the view taken by the lower appellate Court on the first point cannot be sustained. 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 cosharer tenant who seeks to exercise his right of re-purchase under Section 26P, of the new Act should make the other co-sharers parties to the proceeding. It was necessary in the case of the immediate landlord under the old Section 26F by reason, of the provision of Section 188, which laid down that such applications must be made by all the cosharer landlords jointly. The provision of Section 188 cannot be attracted to the present Section 26P and, as such, I hold that the nonjoinder of the other cosharer 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.

Mohamad Akram, J.

6. I agree.

¹(14) 1 AIR 1914 Cal 234

³(22) 9 AIR 1922 Bom 124

²(94) 16 All 344

⁴ AIR 1936 Cal 17: 160 Ind. Cas. 730