CALCUTTA HIGH COURT

Madan Mohan Ghosh

Vs.

Sishu Bala Atta

Full Bench Reference 1 of 1968 in C.R. No. 674 of 1958; C.R. Nos.2275, 3410, 3764 and 3624 of 1961, 3465 of 1965, 2027 and 2362 of 1967

(A.K. Mukherjea, Sabyasachi Mukharji and M.M. Dutt, JJ.)

28.07.1972

JUDGMENT

M.M. Dutt, J.

1. These are eight out of twelve Revision Cases referred to the Full Bench by a Division Bench consisting of Laik and S.K. Mukherjea, JJ. by their Order of Reference dated April 30, 1968. The point which induced the learned Judges of the Division Bench to refer the Revision Cases to the Full Bench is, whether the right of pre-emption under Section 2G-F of the Bengal Tenancy Act survives the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954) after Chapter VI thereof comes into force. In all these cases the reference has been made under Chapter VII, Rules 1, 2 and 4 of the Appellate Side Rules and consequently the Full Bench has to dispose of these Revision Cases also on merits. The point is involved in all these cases, but some of these involve other points which arise out of their respective facts and circumstances.

2. Laik and S.K. Mukherjea, JJ. have differed from two earlier Division Bench decisions of B.N. Banerjee and D. Basu, JJ. - one in the case of *Abharan Chandra Saha v. Sanat Kumar Sen*[1], and the other in *Jyotish Chandra Das v. Dhananjay Bag*[2], In these two decisions B.N. Banerjee and D. Basu, JJ. have held that the right of pre-emption under Section 26-F survived after the passing of the West Bengal Estates Acquisition Act, 1953.

3. Section 26-F provides that except in the case of a transfer to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase, one or more co-sharer tenants of the holding, a portion or share of which is transferred, may within four months of the service of the notice under Section 26-C, apply to the Court for the said portion or share to be transferred to himself or themselves. This section confers on a co-sharer tenant of an occupancy holding, a right to compel another co-sharer tenant to sell his share in the holding to him instead of selling it to a stranger. The use of the term 'co-sharer' in Section 26-F contemplates that the holding must be under the ownership of more than one person. The holding must be an occupancy holding, that is, it must be the holding of raiyats having occupancy rights. So long as division of the holding does not

[1]68 Cal WN 574: AIR 1964 Cal 460
[2](1964) 68 Cal WN 1055
take place in accordance with Section 88 of the Bengal Tenancy Act, the holding remains a joint holding and each co-sharer will be entitled to pre-empt in case of transfer of a share or portion of the holding by a co-sharer to a stranger. The question is, whether after the coming into force of Chapter VI of the West Bengal Estates Acquisition Act, co-sharership is destroyed, or in other words, whether new tenancies are created by virtue of the provisions of the West Bengal Estates Acquisition Act in respect of each co-sharer.

4. The West Bengal Estates Acquisition Act, 1953, came into force on February 12, 1954. Sub-section (1) of Section 4 of the Act provides that the State Government may from time to time by notification declare that with effect from the date mentioned in the notification, all estates and the rights of every intermediary in each such estate situate in any district or part of a district specified in the notification, shall vest in the State free from all encumbrances. The date of vesting as mentioned in the notification which was published, is Baisakh 1, 1362 B.S. corresponding to April 15, 1955. The term 'intermediary' as defined in the Act means a proprietor, tenure-holder, under tenure-holder or any other intermediary above a raiyat or a non-agricultural tenant and includes a service tenure-holder, end in relation to mines and minerals, includes a lessee and a sub-lessee. Under the definition a raiyat was not an intermediary but anybody above a raiyat was an intermediary. Chapter VI contains provisions for acquisition of interests of raiyats and under-raiyats. Section 49 which is the first section of Chapter VI provides, that the provisions of Chapter VI shall come into force on such date and in such district or part of a district as the State Government may, by notification in the Official Gazette, appoint and for this purpose different dates may be appointed for different districts or parts of districts. The consequences of the issue of such a notification under Section 49 are provided for in Section 52 which runs as follows:-

> "52. Application of Chapters II, III, V and VII to raiyats and under-raivats. On the issue of a notification under Section 49 the provisions of Chanters II, III, V and VII shall with such modifications as may be necessary, apply mutatis mutandis to raiyats and under-raiyats as if such raiyats end under-raiyats were intermediaries and the land held by them were estates and a person holding under a raiyat or an under-raiyat were a raiyat for the purposes of clauses (c) and (d) of Section 5:
> Provided that where raiyat or an under-raiyat retains, under Section 6 read with this section, any land comprised in a holding then notwithstanding anything to the contrary contained in sub-section (2) of Section 6, he shall pay,-
> (a) in cases where he was paying rent for the lands comprised in the holding and held by him immediately before the date of vesting (hereafter in this proviso referred to as the holding lands),-
> (i) if he retains all the holding lands, the same rent as he was paving therefor immediately before the date of vesting, and
> (ii) if the land retained by him forms part of the holding lands, such rent as bears the same proportion to the rent which he was paying for the holding lands immediately before the date of vesting as the area of the land retained by him bears to the area of all the holding lands;
> (b) in cases where he was liable to pay rent but was not paying any rent for the holding

lands immediately before the date of vesting on the ground that the rent payable by him therefor was not assessed, such rent as may be assessed, mutatis mutandis in accordance with the provisions of Section 42;

(c) in cases where he was liable to pay rent wholly in kind or partly in kind and parity in cash, then, notwithstanding anything contained in clause (c) of Section 5, such rent as may be assessed in accordance with the provisions of Section 40, and

(d) in cases where he was liable immediately before the date of vesting to pay for the holding lands a variable cash rent periodically assessed, such rent as may be assessed, mutatis mutandis in accordance with the provisions of Section 42."

5. The notification under Section 49 was published on April 9, 1956 and Chap.VI came into force in all the districts of West Bengal with effect from April 10, 1956. After Chapter VI came into force raiyats and under-raiyats who were not intermediaries till then, became intermediaries and by virtue of Section 52, the provisions of Chapters II, III, V and VII were with such modifications as may be, to apply mutatis mutandis to raiyats and under-raiyats. Notifications we reissued under Section 4 by the State Government and the interests of raiyats and-under-raiyets vested in the State with effect from Baisakh 1, 1963 B.S. corresponding to April 14, 1956.

6. Section 6 provides for the right of intermediary to retain certain lands. It is necessary to refer to the following portions of sub-section (1) of Section 6 which are relevant for our present purpose-

"6. Right of intermediary to retain certain lands.- (1) Notwithstanding anything contained in the cases mentioned in the proviso to sub-section (2) but subject to the other provisions of that sub-section, be entitled to retain with effect from the date of vesting-

(a) land comprised in homesteads;

(b) land comprised in or appertaining to buildings and structures, owned by the intermediary or by any person, not being a tenant, holding under him by leave or license;

Explanation- For the purposes of this clause, 'tenant' shall not include a thika tenant as defined in the Calcutta Thika Tenancy Act, 1949 (West Bengal Act II of 1949):

(c) non-agricultural land in his khas possession, including land held under him by any person, not being a tenant, by leave or license, not exceeding fifteen acres in area and excluding any land retained under clause (a);

Provided that the total area of land retained by an intermediary under clauses (a) and (c) shall not exceed twenty acres, as may be chosen by him;

Provided further that if the land retained by an intermediary under clause (c) or any part thereof is not utilized for a period of five consecutive years from the date of vesting, for a gainful or productive purpose, the land or the part thereof may be resumed by the State Government subject to payment of compensation determined in accordance with the principles laid down in Sections 23 and 24 of the Land Acquisition Act, 1894 (Act 1 of 1894);

(d) agricultural land in his khas possession not exceeding twenty-five acres in area, as may be chosen by him;

Provided that in such portions of the District of Darjeeling as may be declared by notification by the State Government to be hilly portions, an intermediary shall be entitled to retain all agricultural land in his khas possession, or any part thereof as may be chosen by him."

7. By a notification dated May 28, 1954, the Government of West Bengal framed rules called the West Bengal Estates Acquisition Rules, 1954, (hereinafter referred to as the Rules). Rule 4 provides that every intermediary who retains possession of any land by virtue of the provisions of sub-section (1) of Section 6, shall, subject to the provisions of that Act, be deemed to hold such land from the date of vesting-

(a) If it is agricultural land, on the same terms and conditions as an occupancy raiyat under the Bengal Tenancy Act, 1885;
(b) If it is non-agricultural land, on the same terms and conditions as a tenant under the West Bengal Non-agricultural Tenancy Act, 1949, holding non-agricultural land for not less than 12 years without any lease in writing.

8. By a notification dated September 7, 1962. Rule 4 was substituted as follows-

4. Any land retained by an intermediary under the provisions of sub-section (1) of Section 6 shall, subject to the provisions of the Act, be held by him from the date of vesting on the terms and conditions specified below:-

* * * * * *

(3) If the land held by the intermediary be agricultural land, then--
(i) he shall hold it, mutatis mutandis, on the terms and conditions mentioned in Sections 23, 23-A, clause (a) of Section 25, Sections 26 to 26-G, 52 to 55, sub-sections (1) and (2) of Section 56, Sections 65, 67, sub-section (1) of Section 68, Sections 73, 86-A, sub-sections (1), (2) and (3) of Section 87, so much of Section 159 as does not relate to protected interests Sections 161 to 163 166, sub-sections (1), (2) and (3) of Section 167, Section 168, Sections 169 to 171 and Sections 173 to 177 of the Bengal Tenancy Act, 1885.

9. This Rule again was amended by a notification dated August 1, 1964 and for the words and figures "Sections 26 to 26-G. 52 to 55". "Sections 26, 26-B, 26-C, 26-G, Sections 52 to 55" were substituted. By this amendment Section 26-F was expressly excluded from Rule 4(3).

10. In 68 Cal WN 574 : AIR 1964 Calcutta 460 it was contended that the expression "same terms and conditions as an occupancy raiyat" was not wide enough to include the right of pre-emption of an occupancy raiyat against the purchaser because such a right was not a term or condition of the tenancy, but only an incident of occupancy right. It was further contended that "term" of a tenancy meant the period for which the tenancy was created and "condition" of a tenancy signified, firstly, some quality annexed to an estate by virtue of which the estate may be defeated, enlarged or re-created, e.g., a condition as to re-entry, or a condition containing an option for renewal of the lease, or a condition as to holding over and, secondly, condition governing the relationship of landlord and tenant in matters of user, succession, enhancement or reduction of

rent, eviction and the like. This contention was overruled by Banerjee and D. Basu, JJ. and it was held that the expression "terms and conditions" in Rule 4 of the Rules, was used in its general sense and included all the incidents of an occupancy raiyati holding, be the same as between the landlord and the occupancy tenant or between the occupancy tenant and his co-sharers and that the expression "terms and conditions" would include or was intended to include the right of pre-emption of an occupancy raiyat. The same view has been expressed by Banerjee and D. Basu, JJ. in (1964) 68 Cal WN 1055. The above two Bench decisions only considered whether the words "terms and conditions" in Rule 4 before it was amended would include the right of preemption. It has been already stated. that on September 7, 1962. R.4 was substituted and in the substituted Rule 26-F was included. After the inclusion of 26-F in sub-rule (3) of Rule 4 it cannot be said that the expression "terms and conditions" in Rule 4 would not include the right of pre-emption under Section 26-F. Later, we shall consider the effect of the exclusion of 26-F from sub-rule (3) of Rule 4 by the subsequent notification dated August 1, 1964.

11. Laik and S.K. Mukherjea, JJ. have differed with the two aforesaid Bench decisions and have held that the right of pre-emption under Section 26-F did not subsist after Chapter VI of the West Bengal Estates Acquisition Act, 1953 had come into force. The reasons given by the learned Judges are contained in seven grounds which are as follows:-

> "(1) The continuance of the right of pre-emption is against the General Scheme of the Estates Acquisition Act and the Rules framed thereunder. Each agricultural tenant (intermediary) becomes a separate tenant directly under the State Government after the vesting of the right of the intermediaries. Section 6(2), Section 14(3), Section 15(5), Section 42(1), proviso (b) and Section 52 proviso (a)(ii) of the Estates Acquisition Act and Rule 31-A(2)(i), (ia), (ii) and (iia) of the Rules support the said view. There remains no co-sharer on principle in the holding as defined in Section 3(5) of the Bengal Tenancy Act or in the tenancy after the vesting.
> (2) There is no express provision in the Estates Acquisition Act about the acquisition, retention or continuance of the right of pre-emption. Section 3 of the said Act has an overriding effect.
> (3) After the vesting, each case is a case of a new engagement by the State with each intermediary (agricultural tenant included). It cannot be a case of recognition by the State Government of the old tenancy or holding with the intermediaries, be he a proprietor or a tenure-holder or a raiyati or an under-raiyati. Clause (i) of sub-rule (3) of Rule 4 expressly provides that the intermediary shall hold the land mutatis mutandis on the terms and conditions mentioned in Section 23 and several other sections of the Bengal Tenancy Act but deliberately omits Section 26-F from the said provision, though Sections 26, 26-B, 26-C and 26-G are specifically mentioned. It is difficult to conceive of a position that they would still remain as co-sharers in the holding, even after the vesting. The principles laid down by the Supreme Court in the case of *Rana Sheo Ambar Singh v. Allahabad Bank Ltd*[2]*.,* were referred to. Their Lordships, undoubtedly considered a different Act, namely, the U.P. Zamindary Abolition Act, but held inter alia that the properties vested in the State Government under Section 6 of the said Act, were resettled with the intermediary 'on a

new tenure' and not in the same right which they had in them before the vesting. It was further noticed in the said decision that there was no provision in the said U.P. Act that the said right 'shall continue to belong to the intermediary'. Accordingly, the existing right was held to be extinguished and the right created by Section 18 of the U.P. Act would be a new right. The principles laid down by the Supreme Court on the said similar statute are equally applicable here.

[2]1962 (2) SCR 441 : AIR 1961 SC 1790

(4) Alternatively, the expression 'terms and conditions' in Rule 4 of the Rules cannot be equated with the expression 'incidents' which flow from the statute or the status of a person whereas "terms and conditions" are dependent on the acts of the parties such as contracts. There is a broad distinction between the two sets of expressions. Reference to Sections 18, 48-F and 158 of the Bengal Tenancy Act might be made in this connection.

(5) Sections 8 and 10 of the Land Reforms Act, 1955, have come into force on October 12, 1963 (notification No.17998/L-Ref. of the same date). It is difficult to imagine as to how after the enforcement of the said sections the right of pre-emption under Section 26-F of the Bengal Tenancy Act would still be operative in the same field.

(6) The right of pre-emption is a personal one resting with the claimant. It is not transferable apart from the ownership in the land.

(7) The whole of the Bengal Tenancy Act including Section 26-F thereof for pre-emption, has been expressly repealed (vide notification No.14810-L-Ref. dated 25th September, 1965, published in the "Calcutta Gazette, Extraordinary", dated September 27, 1965). By the said notification Clauses (1) to (6) of Section 59 of the Land Reforms Act, along with other provisions came into force from November 1, 1965. This section repeals several statutes. Clause (5) thereof repeals the whole of Bengal Tenancy Act, 1885".

12. In ground No.3 Laik, J. refers to deliberate omission of 26-F from sub-rule (3) of Rule 4 as one of the grounds for the aforesaid conclusion, but the effect of the inclusion of 26-F in that sub-rule by the notification dated September 7, 1962 has not been considered.

12-A. Mr. Lala, learned Advocate appearing on behalf of the petitioner in Civil Revision Case No.674 of 1958 supported the order of reference. Mr. Lala submitted that in view of sub-section (2) of Section 6 of the West Bengal Estates Acquisition Act, there cannot be any scope for the argument that the right of pre-emption under Section 26-F was allowed to continue. In order to appreciate the said contention of Mr. Lala on sub-section (2) of Section 6, it is necessary to refer to sub-section (2) which runs as follows:-

"(2) An intermediary who is entitled to retain possession of any land under sub-section (1) shall be deemed to hold such land directly under the State from the date of vesting as a tenant, subject to such terms and conditions as may be prescribed and subject to payment of such rent as may be determined under the provisions of this Act and as entered in the record-of-rights finally published under Chapter V except that no rent shall be payable for land referred to in clause (h) or (i):

Provided that if any tank fishery or any land comprised in tea-garden, orchard, mill, factory or workshop, was held immediately before the date of vesting under a lease, such

lease shall be deemed to have been given by the State Government on the same terms and conditions as immediately before such date, subject to such modification therein as the State Government may think fit to make".

13. By virtue of Section 52, each raiyat becomes under sub-section (2) a direct tenant under the State with effect from the date of vesting in respect of the land which he is entitled to retain, no such terms and conditions as may be prescribed and subject to payment of such rent as may be determined under the provisions of the Act. The proviso to Section 52 contains provisions as to the amount of rent that would be payable by the raiyat or the under raiyat in respect of the land of the holding retained by him. Sub-clause (ii) of clause (a) to the proviso lays down that the raiyat or the under-raiyat shall pay, if the land retained by him forms part of the holding lands, such rent as bears the same proportion to the rent which he was paying for the holding lands immediately before the date of vesting as the area of the land retained by him bears to the area of all the holding lands. Under clause (b) where the raiyat or the under-raiyat though liable to pay rent, was not paying any rent, the rent will be assessed under Section 42. Clause (i) of sub-section (1) of Section 42 provides that if the land which the intermediary is entitled to retain under sub-section (1) of Section 6, be agricultural land, the Revenue Officer shall determine the rent payable by the intermediary on the basis of the rate of rent paid by raiyats or other persons holding land of similar description and with similar advantages in the vicinity. It is, therefore, clear that exhaustive provisions have been made for the amount of rent payable by a raiyat or an under-raiyat in respect of the land of the holding retained by him. Land retained by a raiyat of holding becomes the subject-matter of a separate tenancy and the raiyats who were his co-sharers immediately before the date of vesting, will have no interest in the land retained by him. We may take a hypothetical case where, immediately before the date of vesting. there were four raiyats of a holding. On the date of vesting each raiyat will be entitled to retain a portion of the land comprised in the holding and in respect of the respective portions each becomes a direct tenant under the State on payment of such rent as indicated in the proviso to Section 52 read with Section 42 of the Act. By virtue of sub-section (2) of Section 6 four tenancies are created in respect of the land comprised in the holding which was the subject-matter of the joint tenancy before the vesting. After the vesting, one raiyat cannot claim to have any interest in the land of the holding which the other is entitled to retain or has retained. Before vesting each of the raiyats of the holding had an interest or share in every part of the land comprised in the holding and each was a co-sharer of the other, but this is not the position after the vesting when each of the raiyats of the holding becomes a direct tenant under the State in respect of the land of the holding which he is entitled to retain under the provisions of sub-section (1) of Section 6. There is, therefore considerable substance in the argument of Mr. Lala that on the date of vesting, the raiyats of a holding ceased to be co-sharers and the holding is split up into different holdings.

14. Mr. Burman, learned Advocate appearing for the pre-emptor petitioner in C.R. 2275 of 1961, however, submitted that the raiyats of the holding who were co-sharers in respect of that holding before vesting, remained co-sharers even after vesting. It was contended by him that the words "an intermediary" in sub-sections (1), (2) and (5) of Section 6 should be read in the plural, that is, should be read as "intermediaries" and so read, all the raiyats of a holding jointly become tenants under the State under sub-section (2) of Section 6. Mr. Burman relied on Section 14 of the Bengal General; Clauses Act which says:-

"Gender and number- In all Bengal Acts and West Bengal Acts unless there is anything repugnant in the subject or context.-

* * * *

(2) words in the singular shall include the plural and vice versa". This contention of Mr. Burman cannot be accepted. Section 14 would be given effect to unless there is anything repugnant in the subject or context. Sub-sections (2) and (5) of Section 6 refer to sub-section (1) under which an intermediary is entitled to retain possession of certain lands. Unless it is possible to read 'intermediaries' in place of the words 'an intermediary', in sub-section (1) of Section 6, the contention of Mr. Burman cannot be accepted. We are. however, unable to read 'intermediaries' in place of the words 'an intermediary' in sub-section (1) without doing violence to the sub-section. Under clause (d) of sub-section (1), an intermediary shall be entitled to retain agricultural land in his khas possession not exceeding 25 acres in area, as may be chosen by him. If we read the word 'intermediaries' in place of the words 'an intermediary', in that case, all the intermediaries, namely, the raiyats, shall be jointly entitled to retain 25 acres. But, under clause (d) each intermediary is entitled to retain 25 acres of agricultural land in his khas possession. Under sub-section (5) of Section 6 an intermediary shall exercise his choice of retention of land under sub-section (1) within such time and in such manner as may be prescribed. The choice has to be exercised by filing a return in Form 'B', Schedule 'B' framed under Rule 25 of the Rules prescribes Form 'B' in which the return has to be filed. The Form contains certain foot notes which are as follows-

(i) The statement relates to all interests which an intermediary has in the whole of West Bengal.

(ii) This statement shall be filed before the Settlement Officer in whose jurisdiction the major portion of the lands which the intermediary wishes to retain is situated or before a Revenue Officer authorised by the Settlement Officer in this behalf.

(iii) Each of the co-sharers of the same interest shall submit the statement separately for his own share.

(iv) Total area of lands shown in column 7 shall not exceed 15 acres in the whole of West Bengal. If this total area is found to be in excess of 15 acres, the excess will be excluded by the Revenue Officer from any of the Khatians shown in column 2.

(vii) The statement shall be prepared in two parts. In the first part, detailed description of lands in the whole of West Bengal which will be retained by the intermediary are to be shown in one consolidated statement in this form. In the second part, the lands retained in each mouza are to be shown in separate statement for each mouza also in this form.

The foot notes (i), (iii), (iv), (v) and (vi) lead to the irresistible conclusion that each intermediary separately and not intermediaries jointly, will have to exercise their choice of retention. It is, therefore, difficult to uphold the contention of Mr. Burman that the words 'an intermediary' should be read as 'intermediaries' in the provisions of sub-sections (1), (2) and (5) of Section 6.

15. Mr. Burman strenuously urged that in view of the foot note (iii) in the Form 'B' which says

that each of the co-sharers of the same interest shall submit the statement separately for his own share, it should be held that the raiyats of a holding remained co-sharers of each other even after vesting. Mr. Burman laid emphasis on the word 'co-sharers' in foot note (iii). It is true that foot note (iii) has used the word 'co-sharers', but in our view, the term has been used with reference to the position before vesting for the sake of convenience. The other provisions which have been referred to above, clearly show that each intermediary, that is, each raiyat becomes a direct tenant under the State in respect of the land which he is entitled to retain. It does not follow from any of the provisions of the Act that the raiyats of the holding will continue to hold the land comprised in the holding as co-sharers.

16. Again, this proposition may be scrutinised from another point of view. The quantity of land which an intermediary is entitled to retain under Section 6(1) is the maximum quantity that can be retained by the intermediary out of the total area of land belonging to him in the whole of West Bengal. The foot notes under Form 'B' clearly lay down the same in unequivocal term. Before vesting, a co-sharer raiyat of a holding may own and possess other lands, apart from the land comprised in the holding in respect of which he is a co-sharer. Suppose a holding consists of 25 acres belonging to two co-sharer raiyats. One of the co-sharer raiyats may possess other lands. Such a co-sharer has to exercise his choice in respect of the land to be retained by him in accordance with the ceiling prescribed by the Act. He may choose to retain half share which comes to 12½ acres of land in the holding of which he is a co-sharer and also retain his other lands provided the total quantity of the land does not exceed 25 acres. In case the total area of the land exceeds 25 acres, in that case, he may not retain 12½ acres of land in the holding of which he is a raiyat. But he may retain a lesser quantity of land out of that holding and the balance quantity out of other lands. The other co-sharer may not possess other lands and he may choose to retain the whole of 12½ acres. Two different amounts of rent will be fixed for the land respectively retained by the two co-sharer raiyats under the proviso to Section 52 read with Section 42 of the Act. In such circumstances, it cannot be said that one remained a co-sharer of the other even after the date of vesting.

17. Sub-paragraph (2) of paragraph 7 of Schedule 'B' to the Rules provides, that in preparing or revising the record-of-rights under Chapter V the Revenue Officer shall take into consideration any statement furnished by an intermediary having regard to the provisions of Section 6 of the Act. Sub-paragraph (2) refers to the statement of the intermediary in the 'B' Form return whereby he exercises his choice of retention under Section 6. Sub-paragraph (4) of paragraph 7 provides, that the Revenue Officer shall, wherever necessary, partition the lands for the purpose of making allotment under sub-section (5) of Section 6 of the Act and demarcate the lands so partitioned by assigning such separate plot numbers as may be needed for the purpose. Under sub-paragraph (4), the Revenue Officer, therefore, partitions and demarcates the land retained by an intermediary from the rest of the holding. The land so partitioned and demarcated, belongs to the intermediary or the raiyat as the tenant holding directly under the State. The erstwhile co-sharer raiyats will have no interest whatsoever in the land retained by one of them and partitioned and demarcated by the Revenue Officer. This also clearly indicates that the intermediaries or raiyats who were co-sharers in respect of the land before vesting ceased to be so after vesting. To hold otherwise, will be contrary to the different provisions of the Act and the clear intention of the legislature in this regard.

18. Mr. Burman next argued that at least so long such a partition is not effected by the Revenue

Officer and separate khatians showing separate rents in respect of the lands so partitioned and demarcated are not made, it cannot be said that one raiyat ceased to be the co-sharer of the other in respect of the holding. Mr. Burman submitted that on the date of vesting it is not possible for any intermediary to say which portion of the land he will retain and that so long as the land comprised in the holding is not actually partitioned by metes and bounds, it cannot be said that the holding is split up and the jointness of the tenancy has come to an end. Further, it was contended by him that under sub-section (2) of Section 6 an intermediary may become a direct tenant in respect of the land he is entitled to retain, but he does not exercise his choice of retention on the date of vesting and he may wait till the last date fixed for the exercise of such choice of retention. During this period the holding would remain undivided and there could be no question of any separate tenancy coming into being on the date of vesting. Attractive though the argument is, we regret, we are unable to accept the same. Sub-section (2) of Section 6 lays down that the intermediary becomes a direct tenant in respect of the land which he is entitled to retain under sub-section (1) with effect from the date of vesting. On the date of vesting an intermediary is entitled to retain an undivided share in the holding where the holding was held by more than one intermediary. In exercising his choice of retention by the submission of a return in Form 'B', the intermediary does not specify by boundaries the land which he is entitled to retain. He is only required to retain the quantity of land proportionate to his share in the land. It is the Revenue Officer who partitions and demarcates the land retained by the intermediary. It is true that so far as the holding is concerned it remains undivided for the time being. The question necessarily arises whether a separate tenancy can be created in respect of an undivided share of the holding. The term 'holding' has not been defined in the Act, but clause (p) of Section 2 inter alia provides that expression used in the Act and not otherwise defined have in relation to the areas to which the Bengal Tenancy Act, 1885, applies, the same meaning as in that Act. Under sub-section (5) of Section 3 of the Bengal Tenancy Act, 'holding' means a parcel or parcels of land or an undivided share thereof, held by a raiyat or an under raiyat and forming the subject of a separate tenancy whether the raiyat or under raiyat has held the land before or after the commencement of the Bengal Tenancy (Amendment) Act 1928. The definition of 'holding' in the Bengal Tenancy Act as stated above, clearly indicates that an undivided share in land can be the subject-matter of a separate tenancy and can constitute a holding of a raiyat or an under raiyat. It comes to this, therefore, that even though the land remains undivided till it is demarcated by metes and bounds by the Revenue Officer under sub-paragraph (4) of paragraph 7 of Schedule 'B' to the Rules, the undivided share of the raiyat in the land which he is entitled to retain as an intermediary, becomes the subject-matter of a separate tenancy directly under the State on and from the date of vesting.

19. Lastly, it has been contended by Mr. Burman that in many cases and, at least in the case in which he appears, the Revisional record-of-rights shows the same holding and records the names of all the raiyats of the holding. The entry as regards rent is also the same which the co-sharers were liable to pay for the holding before vesting. Mr. Burman submits that in view of sub-section (4) of Section 44 of the Act the entries raise a presumption that the holding is a joint holding held by the raiyats jointly. This contention of Mr. Burman is highly fallacious. The presumption which arises under sub-section (4) of Section 44 cannot be held to have the effect of nullifying the provisions of the Act. In this connection we may refer to the provisions of Section 47 of the Act and Rule 31-A of the Rules. Section 47 is as follows:-

"47. Modification of the finally published record-of-rights. - The record-of-rights

prepared and finally published under the provisions of this Chapter or deemed to have been so prepared and finally published, for any district or part of a district in respect of which a notification under Section 4 has been duly published, shall as soon as may be after the date of vesting be modified by eliminating therefrom all the interests of the intermediaries which have vested in the State and showing therein only the tenants who hold directly under the State as a result of vesting of such interest in the State. One or more numbers to be borne on the revenue roll of the district shall be assigned by the Collector in respect of the areas to which such record-of-rights relates in accordance with such rules as the State Government may make in this behalf and the Revenue Officer shall make a certificate that the record-of-rights has been so modified and shall date and subscribe the same under his name and official designation;

Provided that entries in record-of-rights eliminated under the foregoing paragraph shall be deemed to be in force for the purpose of the preparation of the Compensation Assessment Roll and for all proceedings connected therewith or arising therefrom".

Section 47 provides for modification of the finally published record-of-rights. The proviso to Section 47 lays down that the finally published record-of-rights before it is modified, shall be deemed to be in force for the purpose of the preparation of the Compensation Assessment Roll and for all proceedings connected therewith or arising therefrom. It is therefore, clear that the record-of-rights has to be prepared with reference to the incidents before vesting and has to be finally published as such. After the final publication it has to be modified in accordance with Section 47 and Rule 31-A of the Rules. Rule 31-A is as follows:

"31-A. Modification of the finally published record-of-rights under Section 47.- (1) The record-of-rights, finally published under sub-rule (3) of Rule 30, shall then be modified in accordance with the provisions of Section 47 and paragraph 7 of Schedule B appended to these rules.

(2) Such modification shall be made by-

(i) eliminating from the record-of-rights as finally published, all entries relating to the interests of the intermediaries which have vested in the State and the revenue or rent payable by them and recording in their stead the State as entitled to receive the rent payable by the raiyats and the non-agricultural tenants;

(ia) eliminating from the record-of-rights, as finally published all entries relating to the interests of the raiyats and under-raiyats which have since the enforcement of Chapter VI of the Act, vested in the State and the rent payable by them and recording in their stead the 'State' as entitled to receive the rents from the persons holding under such raiyats or under-raiyats:

(ii) recording the names of the intermediaries who have been allowed to retain lands as tenants or lessees holding directly under the State, together with the particulars of the lands they have been allowed to so retain and the rents payable therefor to the State, being rents determined under Section 42 or otherwise;

(iia) recording the names of the raiyats and under-raiyats who have been, since the

enforcement of Chapter VI of the Act, allowed to retain lands as tenants or lessees holding directly under the State, together with the particular of the lands they have been allowed to so retain and the rents payable therefor to the State, being rents determined under Section 42 or otherwise;

(iii) recording in respect of each mouza, the particulars of the Khas lands of the intermediaries which have vested in the State excluding the lands which such intermediaries have been allowed to retain under sub-section (1) of Section 6; and

(iiia) recording in respect of each mouza, the particulars of the Khas lands of the raiyats and under-raiyats which have, since the enforcement of Chapter VI of the Act, vested in the State excluding the lands that such raiyats and under-raiyats have been allowed to retain under sub-section (1) of Section 6.

x x x x x"

Clause (iia) of sub-rule (2) shows the modifications to be made in the finally published record-of-rights in respect of the holdings of raiyats and under-raiyats. It is apparent from Rule 31-A, particularly clause (iia) of sub-rule (2), that by way of modifications a separate khatian which is usually known as 'Khanda Khatian' has to be prepared relating to the land retained by each raiyat or under raiyat, containing the particulars mentioned therein. It may be that in some cases modifications have not been made, but that fact cannot be taken into consideration in interpreting the provisions of the Act. We are, therefore, unable to accept the contention of Mr. Burman that because the finally published record-of-rights have not yet been modified in accordance with Section 47 read with Rule 31-A of the Rules, the holding continued to be joint holding and the raiyats-continued to be co-sharers of each other.

20. It has been argued by Mr. Lala that the right of pre-emption as conferred by Section 26-F on co-sharer raiyats of an occupancy holding, has been altogether abrogated by the West Bengal Estates Acquisition Act. It has been already stated that the Division Bench consisting of Banerjee and D. Basu, JJ., in 68 Cal WN 574 : AIR 1964 Calcutta 460 and in (1964) 63 Cal WN 1055 repelled the contention that the words 'terms and conditions' in Rule 4 did not include the rights of pre-emption under Section 26-F. Although the same argument as was made before the Division Bench was also repeated before us by Mr. Lala and other learned Advocates appearing on behalf of the transferees, we do not see any reason to differ with the decisions of the Division Bench in so far as it was held therein that the words 'terms and conditions' in Rule 4 also included the right of pre-emption under Section 26-F. It has been earlier stated that the Rule 4 was substituted on September 7, 1962. In sub-rule (3) of Rule 4, Section 26-F was included as one of the terms and conditions on which an intermediary shall hold, the land retained by him. This removes any doubt as to whether the words 'terms and conditions' in Rule 4 included the right of pre-emption under Section 26-F.

21. It is argued that in view of the definite inclusion of Section 26-F in sub-rule (3) of Rule 4 by the amendment effected on September 7, 1962, it cannot be said that by the enforcement of Chapter VI relating to raiyats and under-raiyats, the right of pre-emption has been totally abrogated by the legislature. It has been contended that to hold that each raiyat has become a direct tenant under the State in respect of the land which he is entitled to retain or which has been retained by him, will lead to an irreconcilable position between such an interpretation of the Act

and the provisions of sub-rule (3) of Rule 4. Further it has been submitted that in view of sub-rule (3) which was inserted in Rule 4, it should be held that the right of pre-emption is kept alive even after the enforcement of Chapter VI. This argument cannot be accepted for the reasons stated hereafter.

22. Anybody making an application before the Court in exercise of his right of pre-emption under Section 26-F must show that he is a co-sharer tenant of the holding a portion or share of which, has been transferred to a non-co-sharer. If he fails to prove that he is a co-sharer tenant of the holding in question, he cannot claim to have any right of pre-emption under Section 26-F. The primary question which has to be decided in connection with an application for pre-emption under Section 26-F is, whether the applicant is a co-sharer in the tenancy or not. In case it is found that he is a co-sharer his application will be field maintainable and he will be entitled to exercise his right of pre-emption, but if he fails to prove the same his application will be dismissed on the ground that he has no such right under Section 26-F. After the date of vesting, each raiyat of a holding ceases to be a co-sharer in respect of that holding, as found by us on an interpretation of the different provisions of the Act and the Rules. A raiyat who was a co-sharer in respect of the holding in question cannot, after the date of vesting, claim to be a co-sharer of another raiyat in respect of the land which he is entitled to retain or retained by him under sub-section (1) of Section 6. Such a raiyat is not entitled to make an application for pre-emption under Section 26-F, in respect of a transfer made by another raiyat out of the land which he is entitled to retain or which has been retained by him under sub-section (1) of Section 6. As the raiyat is not a co-sharer and as the holding prior to vesting is no longer in existence, since in its place and stead separate holdings or tenancies have come into existence by virtue of sub-section (2) of Section 6, there will be no scope for an application under Section 26-F.

23. At the same time, it cannot be said that co-sharership of a raiyati holding has been altogether abolished by the legislature particularly in view of sub-rule (3) of Rule 4 wherein Section 26-F had been specifically included. On the date of vesting there may not be any co-sharer of the raiyati holding but after the date of vesting co-sharers may come into being by devolution of interest of a raiyat relating to the land retained by him. Only in such cases, Section 26-F will apply. To take a concrete illustration, a raiyat who was a co-sharer of a particular holding retains land of the holding under sub-section (1) of Section 6 of the Act. He becomes a direct tenant in respect of the land retained by him and ceases to be a co-sharer in respect of the remaining land of the holding not retained by him or retained by other raiyats. The land which he is entitled to retain or retained by him, forms a separate holding or a separate tenancy directly under the State. If the raiyat dies after the date of vesting leaving a number of heirs, the heirs will be co-sharer-raiyats of each other. One heir being a co-sharer of the other will be entitled to invoke the provisions of Section 26-F and exercise his right of pre-emption in case any other co-sharer transfers a portion of such separate holding to any other person who is not a co-sharer. Similarly a raiyat of a separate holding created after the date of vesting, may transfer a portion of the holding to another person. That person becomes a co-sharer of the holding along with his vendor. If one of these two co-sharers transfers a portion of the holding to another person, Section 26-F will apply. On the happening of such events, namely, the death of the raiyat leaving more than one heir and transfer by the raiyat of a portion of the separate holding after the date of vesting and in similar such cases. Section 26-F will apply. It is thus found that there is no force in the argument that sub-rule (3) of Rule 4 cannot be reconciled in case it is held that on the date of vesting each raiyat becomes a direct tenant of the land which he is entitled to retain under sub-

section (1) of Section 6 of the Act. But in the absence of any such events taking place, Section 26-F will not apply between the erstwhile co-sharers.

24. Sub-rule (3) of Rule 4 was further amended on August 1, 1964, whereby Section 26-F was deleted from sub-rule (3). This deletion of Section 26-F from sub-rule (3) does not mean that the right of pre-emption has been taken away, but it has some other objective in view which will be stated presently. After the enactment of the Act, West Bengal Land Reforms Act, 1955, was enacted. By Section 8 at the West Bengal Land Reforms Act, a right of pre-emption similar to the right conferred by Section 26-F has been provided for. Section 8 came into force on October 22, 1963. Under Section 26-F the forum for making the application for pre-emption was the Court, but under Section 8 the application has to be made to the Revenue Officer. After the enforcement of Section 8 it became wholly unnecessary to allow Section 26-F to remain in sub-rule (3) of Rule 4. The amendment of sub-rule (3) was made on August 1, 1964, that is, a considerable time after the enforcement of Section 8, but in our view that does not make any difference, for the right of pre-emption will have to be exercised in accordance with Section 8 regarding transfers taking place after the enforcement of Section 8. As regards transfers made before Section 8, had been enforced, Section 26-F and not Section 8 will apply. In this connection it may be stated that on the enforcement of clause (5) of Section 59 of the West Bengal Land Reforms Act, 1955, on November 1, 1965, Bengal Tenancy Act stands repealed with effect from that date. Section 26-F was, therefore, deleted from sub-rule (3) of Rule 4 in view of the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955, although it should have been deleted simultaneously with the enforcement of Section 8.

25. We may now consider some other decisions of this Court cited at the Bar during the hearing. These decisions are (I) *Ganesh Chandra v. Sudarshan Dey*[3], (II) *Panchu Sundari Dasi v. Haripada Biswas*[4], (III) *Shiba Prosad Gerua v. Manmatha Nath Gupta*[5], (IV) *Nitai Chandra Das v. Sisir Kumar Das*[6], and *Dhananjay Senapati v. Debendra Nath Senapati*[7], These are all Single Bench decisions of this Court. Apart from these decisions, reference was made to one unreported Bench decision in *Sudhir Kumar Ghosh v. Sarat Chandra Ghosh*[8], All these decisions proceeded on the footing that on and from the date of vesting the raiyats of a holding continued to be co-sharers by retaining the land comprised in the holding. In (1964) 67 Cal WN 648 referred to above, Chatterjee, J. has taken the view that as a result of vesting persons who were deemed to be intermediaries, would still be entitled to retain the land and if they retained, they would become tenants of a new tenancy under the State on such terms as the State may prescribe. So according to Chatterjee, J. a single tenancy comes into being and not separate tenancies. Chatterjee, J. concluded that if the former co-sharers retained their interests in the holding, they became co-sharers by virtue of the Act and the Rules and that they would be entitled to the right of pre-emption. For the reasons which we have already set out in detail, we are unable to subscribe to the view expressed by Chatterjee, J. We also disagree with the view expressed in the other decisions referred to above including the unreported Bench decision.

26. Now we are to consider the position of under-raiyats before and after vesting. Section 26-F does not in terms apply to under-raiyati holdings, though an under-raiyat may have occupancy right by local customs under Section 48-G of the Bengal Tenancy Act. Mr. Sudhir Kumar Acharjee, learned Advocate appearing on behalf of the opposite parties including the purchaser in C.R. No.2275 of 1961 urged that the holding being an under-raiyati holding, the petitioner had no right of pre-emption under Section 26-F and that the

[3](1958) 62 Cal WN 360 [5](1961) 65 Cal WN 811 [7](1964) 67 Cal WN 848
[4](1961) 65 Cal WN 354

[6](1964) 67 Cal WN 633 8 Civil Revn. Case No.3366 of 1961 disposed of on 21-9-1962 (Cal)
application for pre-emption should also fail on that ground. Mr. Acharjee submitted that although under-raiyats were elevated to the position of raiyats having occupancy right, such elevation was for certain specific purposes. Our attention was drawn to Section 52 of the West Bengal Estates Acquisition Act, particularly to the words 'and a person holding under a raiyat or an under-raiyat were a raiyat for the purposes of clauses (c) and (d) of Section 5'. Clauses (c) and (d) of sub-section (1) of Section 5 are as follows:-
5. Effect of Notification.- (1) Upon the due publication of a notification under Section 4 on and from the date of vesting-

> (c) Subject to the provisions of sub-section (3) of Section 6, every non-agricultural tenant holding any land under an intermediary and until the provisions of Chapter VI are given effect to, every raiyat holding any land under an intermediary, shall hold the same directly under the State, as if the State had been the intermediary and on the same terms and conditions as immediately before the date of vesting.

(The provisos not being relevant for our purpose are omitted).

> (d) every non-agricultural tenant holding under an intermediary and until the provisions of Chapter VI are given effect to, every raiyat holding under an intermediary, shall be bound to pay to the State his rent and other dues in respect of his land, accruing on and from the date of vesting and every payment made in contravention of this clause shall be void and of no effect.

27. After Chapter VI came into force the interests of raiyats and under-raiyats vested in the State as if they were intermediaries and the land held by them were estates. Clauses (c) and (d) of Section 5(1) read with Section 52 and its proviso imply that the purposes referred to in the first part of Section 52 as quoted above are that the under-raivats will hold the land under the State and pay rent to the State in accordance with the proviso to Section 52, the amount of rent depending on the land retained by the under-raiyats. In our view, the under-raiyats having been elevated to the position of raiyats, there is no difference between a raiyat and an under-raiyat so far as the right of pre-emption under Section 26-F is concerned and our decision on the question as to the effect of the enforcement of Chapter VI on the right of pre-emption of raiyats having occupancy rights under Section 26-F, will equally apply to under-raiyats.

28. For the reasons aforesaid, we hold as follows-

> (1) After the enforcement of Chapter VI of the Act and the vesting of interest of raiyats and under-raiyats on and from April 14, 1956 corresponding to Baisakh 1, 1363 B.S. the co-sharer raiyats of a holding ceased to be co-sharers and each raiyat of the holding became a direct tenant under the State in respect of the land of that holding which he is entitled to retain under sub-section (1) of Section 6. As the co-sharer raiyats ceased to be co-sharers on and from the date of vesting the question of exercise of the right of pre-emption under Section 26-F cannot arise, for, the condition precedent to the exercise of

the right of pre-emption under Section 26-F being that the person exercising that right must be a co-sharer of the person making the transfer.

(2) When a raiyat having a separate holding or tenancy created by virtue of sub-section (2) of Section 6 relating to the land retained by him under sub-section (1) of Section 6, dies leaving more than one heir, such heirs will become co-sharers of such holding end will be entitled to the right of pre-emption under Section 26-F. Similarly, when the raiyat of such a holding transfers a portion of the holding to another person, that person will become a co-sharer of the raiyat and the right of pre-emption will also be available in such a case.

(3) A transfer made by a co-sharer raiyat as contemplated by Clause (2) above before the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955, may be pre-empted by another co-sharer in the tenancy in accordance with Section 26-F, but a transfer made after the enforcement of Section 8, the right of pre-emption by a co-sharer can only be exercised in the manner laid down in Section 8 of the West Bengal Land Reforms Act.

(4) The under-raiyats have been elevated to the status of raiyats on the enforcement of Chapter VI. There is no difference between the position of raiyats and that of under-raivats and our decision on the question as to the effect of the enforcement of Chapter VI on the right of pre-emption of raiyats will also apply to under-raiyats.

(5) The decisions in 68 Cal WN 574 : AIR 1964 Calcutta 460 and *Jyotish Chandra Das v. Dhananjay Bag*[8], in so far as they proceeded on the footing that the raiyats of a holding continued to be co-sharers even after vesting, are erroneous but they have correctly interpreted the expression 'terms and conditions' in Rule 4.

29. We have disposed of the main point referred to the Full Bench and all points ancillary thereto, but as some other points arising out of the respective facts and circumstances of some of these revision cases have been argued, we propose to consider the same. In C.R. 674 of 1958, the impugned transfer was made on January 22, 1955 and the application for pre-emption was made on June 11, 1955, that is, both took place before the enforcement of Chapter VI. It was during the pendency of the proceeding in the trial Court that Chapter VI was enforced by the issue of the notification under Section 49 and the interests of raiyats vested in the State. It has been contended by Mr. Nirmal Kumar Ganguly larned Advocate appearing on behalf of pre-emptors opposite parties that in view of sub-section (7) of Section 26-F, the enforcement of Chapter VI during the pendency of the pre-emption proceeding will not affect the proceeding. Under sub-section (5) of Section 26-F, the Court makes an order allowing an application and under sub-section (6), the Court making an order in favour of more than one co-sharer tenant apportions the property comprised in the portion or share transferred among the applicants in accordance with the manner provided in that sub-section. Sub-section (7) is as follows:

(7) From the date of the making of the order under sub-section (5)-

(a) the right, title and interest in the portion or share of the holding, accruing to the transferee from the transfer shall, subject to the provisions of Section 22 and to any orders passed under sub-section (6), be deemed to have vested, jointly and free from all

incumbrances which have been annulled or created after the date of transfer, in the co-sharer tenants whose applications to purchase have been allowed under this section.

[8](1964) 68 Cal WN 1055

(b) the liability of the transferee for the rent due from him on account of the transfer shall cease, and

(c) the Court on further application of such applicant or applicants may place him or them, as the case may be in possession of the property vested in them.

30. It is manifestly clear from the opening words of sub-section (7) that the consequences of an order passed under sub-section (5) as contained in clauses (a), (b) and (c) of sub-section (7), will take effect from the date of the order. In the instant Case, before any order was passed by the trial Court. Chapter VI had come into force. In view of our decision that the raiyats of an occupancy holding who were co-sharers before the vesting ceased to be co-sharers, the application was no longer maintainable and the proceeding for pre-emption became infructuous. The contention of Mr. Ganguly is accordingly, rejected.

31. In connection with this case, we may dispose of two other points raised by Mr. Lala, namely. (1) that occupancy right as contemplated by the un-amended Rule 4(a) is not the same occupancy right under the Bengal Tenancy Act and (2) that Rule 4(a) having used the term 'occupancy raiyat', not mentioned in any of the provisions of the West Bengal Estates Acquisition Act, Rule 4(a) is ultra vires the Act.

32. So far as the first point is concerned, in view of the clear language of Rule 4(a) entitling the intermediary who has retained possession of agricultural land, to hold the same on the same terms and conditions as an occupancy raiyat under the Bengal Tenancy Act, it cannot but be held that the contention of Mr. Lala is without any substance. The second point raised by Mr. Lala cannot be entertained, for the simple reason that no notice has been given to the Advocate-General as required under Order 27-A of the Code of Civil Procedure.

32-A. The next point that we have to consider is about the period of limitation for filing an application under Section 26-F. That point has been raised in C.R. No.3465 of 1965 and C.R. No.2097 of 1967. Section 26-F prescribes a period of four months from the service of notice under Section 26-C. The question is when the notice is not served, what should be the period of limitation for filing an application by a non-notified co-sharer. The question has been decided by a Special Bench of this Court presided over by Mukherjea, J. (as his Lordship then was) in *Asmatali v. Mujaharali*[9] It has been held by Mukheriea J. Ormond and Dass JJ. concurring with him, that Article 181 of the Indian Limitation Act, 1908 applies to the case of an application under Section 26-F by a co-sharer tenant who has not been served with a notice under Section 26-C and his application would he in time if made within three years of the sale. In applying Article 181, it has been held by his Lordship that an application under section 26F is an application under the Code of Civil Procedure.

33. In C.R. No.3465 of 1965, the date of the impugned sale is March 20, 1960 and the application for pre-emption was made on June 18, 1962, that is, within three years of the date of sale. In view of the aforesaid Special Bench decision, the application was filed quite within the period of limitation.

[9]52 Cal WN 64 : AIR 1948 Cal 48 (SB)

34. In the other case, the date of the impugned transfer is January 29, 1963 and the application for pre-emption was filed on August 13, 1966, that is beyond three years of the sale. The application is, therefore, barred by limitation. Mr. Bhunia, learned Advocate appearing on behalf of the pre-emptor-opposite party has strenuously urged that in view of the decisions of the Supreme Court which will be referred to presently, the finding of the Special Bench in Asmatali's case. 52 Cal WN 64 : AIR 1948 Calcutta 48 (SB) that an application under Section 26-F is an application under the Code of Civil Procedure which is the basis of the Special Bench decision in applying Article 181, is erroneous. In *Sha Mulchand and Co. Ltd. v. Jawahar Mills Ltd*[10]*., Bombay Gas Co. v. Gopal Biva*[11]*.* and *Smt. Prativa Bose v. Rupendra Deb*[12] the Supreme Court has held that Article 181 applies only to applications under the Code of Civil Procedure and the Article is inapplicable to applications under other enactments.

35. In our view, the aforesaid Supreme Court decisions do not at all help Mr. Bhunia. The Special Bench in Asmatali's case, 52 Cal WN 64 : (AIR 1948 Calcutta 48 SB) also noticed that Article 181 would only apply to applications under the Code of Civil Procedure, but it held that an application under Section 26-F was an application under the Code of Civil Procedure. The question whether an application under Section 26-F is an application under the Code of Civil Procedure, was not involved in any of the Supreme Court decisions referred to above and no other decision of the Supreme Court has been cited at the Bar in which the question has been decided by the Supreme Court. Accordingly the law laid down by the Special Bench in Asmatali's case, 52 Cal WN 64 : (AIR 1948 Calcutta 48 SB) still stands as good law. The contention of Mr. Bhunia that the decision of the Special Bench, that an application under Section 26-F is an application under the Code of Civil Procedure, is erroneous, is rejected.

36. Mr. Bhunia, however, contended that as the pre-emptor-opposite party was, by means of the fraud of the petitioner, kept from the knowledge of his right under Section 26-F, the opposite party was entitled to the benefit of Section 18 of the Indian Limitation Act, 1908. It appears that the trial Court found that the petitioner fraudulently suppressed the notice under Section 26-C. Applying the provisions of Section 18, the trial Court held that the application having been filed on August 13, 1966, that is, within three years after the opposite party came to know of the transfer for the first time on August 8, 1965, the application was not barred by limitation. The lower appellate Court has affirmed the said findings of the trial Court and the findings of the Courts below have not been challenged before us by Mr. Ghosal, learned Advocate for the petitioner. In view of the said findings of the Courts below we do not see any reason why Section 18 would not apply. The application for pre-emption was not, therefore, barred by limitation. But, in spite of our finding that the application was not barred, the Rule must succeed, for, according to the view which we have taken the opposite party ceased to be a co-sharer after Chapter VI came into force and consequently the application for pre-emption became non-maintainable.

37. Before we conclude we may dispose of a short point raised by Mr. Sen Gupta, learned Advocate appearing for the purchaser-petitioner in C.R. No.3465 of 1965. Mr. Sen Gupta contended that after his purchase the petitioner made certain improvements in the land

[10]1953 SCR 351 [12] AIR 1965 SC 540

[11] AIR 1964 SC 752

purchased by him by erecting a building thereon; that the pre-emptor opposite party No.1 was

bound to deposit in Court along with his application for pre-emption the compensation for the building erected by the petitioner and that for non-deposit of such costs, the application of the opposite party No.1 was not maintainable. In our opinion, this contention of Mr. Sen Gupta is without any substance, for the simple reason that the provisions of Section 26-F do not require the applicant to deposit compensation for the improvement made by the transferee. Under sub-section (2) of Section 26-F all that is required is that at the time of making the application, the applicant shall deposit in Court the amount of the consideration money or the value of the transferred portion or share of the holding, as stated in the notice under Section 26-C together with compensation at the rate of ten per centum of such amount. The contention of Mr. Sen Gupta is accordingly, overruled.

38. In view of the discussions aforesaid. Civil Rules Nos.674 of 1958, 3410 of 1961, 3624 of 1961, 3465 of 1965, 2029 of 1967 and 2362 of 1967 in which the applications for pre-emption were allowed by the Courts below in favour of raiyats who ceased to be co-sharers after the date of vesting, are made absolute and the orders of the Courts below allowing pre-emption under Section 26-F are set aside. In Civil Rules Nos.2275 of 1961 and 3764 of 1961, the orders of the Courts below disallowing the applications for pre-emption under Section 26-F are affirmed and these two rules are discharged. In each of these rules, there will be no order for costs in this Court-

Arun K. Mukherjea, J.:

39. I agree.

Sabyasachi Mukharji, J.

40. I agree.

Order accordingly.