

(1955) 08 GAU CK 0001
In the Gauhati High Court
Case No : Civil Revision No. 172 of 1954

Abdul Malik Choudhury and Others	Vs	APPELLANT
Sashi Bhusan Chaudhury and Others		RESPONDENT

Date of Decision : 24-08-1955

Acts Referred:

Sylhet Tenancy Act, 1936 — Section 162, 188, 202, 26C, 26E

Citation : (1955) 08 GAU CK 0001

Hon'ble Judges : Sarjoo Prosad, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : G.K. Deb, for the Appellant; N.M. Dam, for the Respondent

Judgement

Ram Labhaya, J.—This petition of revision is directed against an order of Mr. J.C. Bhuyan, Munsiff of Karimganj dated 31-5-1954 by which a miscellaneous application (Case No. 169 of 1953) u/s 33, Sylhet Tenancy Act was dismissed.

2. The facts leading to the petition may be briefly stated Mt. Marsia Pachman, opposite party No. 2, was an occupancy tenant of the disputed land under the petitioners and their co-sharers. She sold away her occupancy rights to O.P. No. 1 Sashi Bhushan Chaudhury for a sum of Rs. 415/- on 7th Jaistha, 1358 B.S. The petitioners coming to, know of the sale instituted the proceedings out of which this petition arise claiming that the lands be transferred In their favour.

Sashi Bhushan raised the plea that the sale was with the consent of the landlords. Other questions also arose in the case with which we are not concerned at this stage. The point on which the application was dismissed was that all the landlords were necessary parties to the proceedings and though they were impleaded at a later stage of the proceedings, the application remained defective as they were brought on the record one month after the filing of the petition.

3. The application was presented on 15-7-1953. The statement of objections was put in on 15-9-1953. On 6-3-1954 the petitioners applied for amendment of the

petition by impleading the landlords who had not been originally impleaded. They were impleaded on the same day. Notice of the sale by opposite party No. 2 in favour of opposite party No. 1 was issued on 18-2-1954 and could not have been served till some days after that date. The petitioners must have got notice of the sale under the Sylhet Tenancy Act on some date after 18-2-1954. This fact is not disputed.

The learned Munsiff came to the conclusion that this notice was of no avail to the petitioners. They had instituted the proceeding in the exercise of their right of pre-emption on the basis of the knowledge of the alleged transfer by their tenant. They had to implead all the landlords within one month of the petition, this was the only period available to them, & not having done so within one month of the petition they were not entitled to the exercise of the right claimed, by impleading them after that time.

4. Mr. Deb assailed the correctness of the decision. He agrees that all the landlords of the tenancy have to be impleaded in a proceeding u/s 33, Sylhet Tenancy Act and they would be necessary parties. If all of them did not join in the petition those not joining have to be brought in as defendants or respondents. In this case the petitioners omitted to implead some of the landlords of the tenancy. He argues that the defect was remediable.

He points out that Section 33, Sylhet Tenancy Act required a proper application by the landlord within two months of the service of the notice issued u/s 30 or 32, and urges that even if the application was originally not properly constituted the defect was remedied when after the issue of notices all necessary parties were impleaded. We think that the contention is sound in the circumstances of the case.

Section 202, Sylhet Tenancy Act provides that subject to the provisions of Section 162 where two or more persons are co-sharer landlords, anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together; or by an agent authorised to act on behalf of both or all of them. Section 33 of the Act authorises the landlord to pre-empt the sale of occupancy rights by the tenants.

By virtue of, the provisions contained in Section 202, Sylhet Tenancy Act all the landlords must join in the petition for the exercise of their right of pre-emption, in the alternative those who do not wish to join ought to be impleaded as opposite parties in such a way that the requirements of the proviso to Section 202 are satisfied. Mr. Deb concedes that the landlords were undoubtedly necessary parties and the application originally put in was not properly constituted. But his argument is that there is nothing in Section 202, Sylhet, Tenancy Act which prevents amendment of the application or its rectification.

It is noteworthy that Section 202 of the Act while laying down that all the landlords should join in the exercise of their right which they are authorised to claim does not provide that an application by one or some of the landlords, is

incompetent. If one of the landlords apply for relief u/s 3, he will have to implead all others as parties to the proceeding. This is the effect of the proviso.

The idea is that the other landlords may have the right to apply to be joined as co-applicants u/s 33 within the period of time allowed to them by Section 33(4). If the petitioner does not amend the application till a point of time that these co-sharer landlords cannot exercise their legal rights under Clause (4) it would not be possible for the court to grant relief to the applicant and the application would fail as not being properly constituted.

But if the intention of the legislature had been that the defect of non-joinder of some of the landlords would be absolutely incurable and that no amendment would be possible, it would have stated so expressly. No such directive is contained in Section 202 and it cannot be read into it. In fact if an application is rejected or dismissed on the ground that all the necessary parties have not been brought in the record and not impleaded, the decision would not be a decision on merits.

It would rest on a technical omission. A second application if properly constituted would He provided the bar of limitation does not come in the way. An amendment of the defective application cannot be against the law, unless the effect of it is to preclude the co-sharer landlords who were not originally joined in the petition from exercising their rights.

5. Section 33 of the Act also does not provide that an application u/s 33 cannot be amended under any circumstances. It provides that except in the case of transfer (a) to a co-sharer in the tenancy, (b) in execution of a decree or a certificate signed under the Bengal Public Demands Recovery Act, 1913, for arrears of rent due in respect of the holding of dues recoverable as such, (c) by exchange of lands under the same landlord, or (d) referred to in proviso 2 to Section 31, the immediate landlord of the holding or the transferred portion or share may within two months of the service of the notice issued u/s 30 or 32, apply to the Court that the holding or portion or share thereof shall be transferred to him.

This Section does not require that without Waiting for the service of the notice issued u/s 30 or 32 the immediate landlord shall apply to the Court for exercise of the right which the section gives him even if he becomes aware of the sale. It does not impose any obligation on him to move in the matter till a notice is served on him. If he thus actually applies before the notice is served and the application is not properly constituted, it will be open to him to get all other landlords who have not joined him, brought on the record within two months of the notice on him.

If the notice is served before institution of the proceeding they have to be impleaded within two months of the service of notice. The requirement of Clause (1) of Section 33 is that a valid application be made within two months of the service of the notice, but where a notice u/s 30 or 32 is issued and received by

the landlord during the pendency of a proceeding u/s 33 instituted by an application not in conformity with law, he can make an application for the amendment of the petition within two months of the receipt of notice.

This is what has happened in this case. On 18th February, the notice was issued and the other landlords were brought on the record within two months, that is on 6th March. The effect of this amendment was that a defective petition became a properly constituted one on 6.3.54. It might have been possible for the Court to reject the application before that day on the ground that all the landlords were not present in Court, but the application remained pending and its rectification was possible in law, within two months of the receipt of notice.

There was no legal impediment in the way of the petition asking to amend this petition by joining landlords who were not parties to the proceeding. The trial judge had Clause (4) of Section 33 in mind when, he held that the petitioner could not take the advantage of the notice during the pendency of the proceedings. This clause provides that

(a) When an application has been made by a co-sharer immediate landlord under Sub-section (1), any of the remaining co-sharer landlords, including the transferee if one of them, may within the period of two months, referred to in that sub-section, or within one month of the application whichever is later apply to join in the application of the co-sharer immediate landlord aforesaid, and any co-sharer landlord who has not applied under Sub-section (1) or has not applied to join under this Sub-section shall not have any further power of purchase under this Section.

This reserves the right for the non-applicant landlords to apply within one month of the application or within the period of two months of the service of notice whichever is later. If the right conferred on non-applicant landlords by Clause (4) is defeated by any omission on the part of the applicant landlord, the application may be liable to dismissal.

But it cannot be argued in this case that the right of co-sharer landlords who had not joined that petition had been defeated. It has not been shown that they could not apply within two months of the notice served on them.

Nor can it be said that they could not apply within one month of the application u/s 33(1). A properly constituted application u/s 33(1) came into existence when the co-sharer landlords who had not joined the applicant were impleaded.

The only limit on the right of the petitioner to implead co-sharer landlords was that they should be impleaded at a time when they could exercise their right u/s 33(4). This is the effect of a combined reading of Sections 202 and 33. No attempt has been made to show that the right of the subsequently impleaded landlords was defeated.

The learned Munsiff was of the view that the petitioner could not avail of the period of two months from the date of the receipt of the notice, as he had

applied before receiving notice of sale and therefore the co-sharer landlords, could be impleaded only within one month of the date of the original application. Mr. Dam has tried to support this view. The reasoning of the learned Munsiff in our opinion is not correct.

The original application did not fall u/s 33(1), which contemplates an application only after service of notice. The notice received subsequently could therefore be availed of, particularly when other co-sharers who were impleaded subsequently could exercise the right which Section 33(4) allowed them. A pending application which has been put in before receipt of notice and which does not comply with the requirements of Section 33(1) by reason of the fact that it is not by all the landlords and the non-applicant landlords are also not impleaded, can be validated when on receipt of notice if all the several landlords are made parties to the petition.

It would be necessary that the non-applicant landlords should be made parties within two months of the receipt of the notice. So far as they are concerned, they will have also the period of one month from the date the petition is validated by their inclusion. If therefore an application is not by all the landlords, then those not joining the application can be brought on record within two months of the receipt of the notice by the applicant landlords.

This would satisfy the requirements of Section 33(1) and Section 202. Petitioners therefore complied with the requirements of the two sections by getting the non-applicant landlords impleaded, within the period of two months from the date of the receipt of the notice. Neither Clause (1) nor Clause (4) of Section 33 has therefore been contravened.

6. In support of his contentions Mr. Dam has relied on three decisions of the Calcutta High Court. These are--"Muhomed Gorib Hossain Mia v. Sm. Halimnnessa Bibi" 39 Cal WN 1178 (A),-- Gajendra Nath Mandal Vs. Kunja Behari Mistri and Others, and-- Barkatulla Pramanik Vs. Ashutosh Ghose and Another, These cases do not support his contention.

They do not lay down that if an application u/s 33 is not properly constituted by reason of the failure of the petitioner to implead some of the landlords, it is not capable of amendment or that the defect or omission cannot be rectified or made good, nor do they lay down that if a notice is served on the petitioner-landlord during the pendency of the petition even though defective, he cannot remedy the defect on receipt of a notice within two months.

One obvious distinguishing feature of those cases is that in none of them a notice similar to notices u/s 30 or 32 was received by the petitioner landlord during the pendency of the petition as in this case. The propositions laid down in these cases therefore would not apply to the circumstances of this case. Assuming that the provisions of the Bengal Tenancy Act are *in pari materia* the conclusion reached in the case of 39 Cal WN 1178 (A) is not of any assistance to Mr. Dam.

It was held in this case that although in the first condition to the proviso to Section 188, no time-limit is prescribed for joining as parties defendant to an application u/s 26F(1), the other co-sharer landlords, still in order to fulfill the second condition, a co-sharer landlord, applying u/s 26F(1), must give information of his application to all the other co-sharer landlords known to him, within such time that those co-sharer landlords can if they wish, make an application u/s 26F(4a) and a deposit u/s 26F(4b) within two months of the service of notice on the co-sharer landlord who is applying u/s 26F(1) or within one month of his application u/s 26F(1), whichever is later.

We take it that this is the effect of the relevant provisions contained in the Bengal Tenancy Act and also of Section 202 and 33, Sylhet Tenancy Act read together. The landlords who have been subsequently impleaded in the case were in a position to exercise their right under Clause (4) of Section 33 by an application as contemplated by it. Even if therefore the principle laid down in 39 Cal WN 1178 (A) is applied to the facts of the case, it does not assist Mr. Dam.

In Gajendra Nath Mandal Vs. Kunja Behari Mistri and Others, the application for impleading the landlords who had not joined in the petition was admittedly more than two months after the receipt of the notice of the transfer. It was also more than one month after the petition.

It was held in that case that where some only of the co-sharer landlords apply for preemption, an application by them to add some co-sharers as parties is barred unless made within the two limits of time mentioned in Section 26F(4a) i.e., two months of the service of notice u/s 26C or 26E on the co-sharer sought to be added (if there was service), or one month of the application for preemption, whichever is later. There can be no quarrel with this proposition and the decision supports the view we have taken of the matter.

On facts the case is distinguishable. The earlier case reported in Barkatulla Pramanik Vs. Ashutosh Ghose and Another, is also distinguishable on facts. It is not necessary to refer to them in any great detail. These authorities do not support the contention of Mr. Dam.

7. For reasons given above the order of the learned Munsiff is not sustainable and is set aside. He has disposed of the petition on a preliminary point and has refused to entertain it. The case therefore shall have to be remanded to him for disposal on the merits. The petition of revision is allowed and the case is remanded to the trial court for disposal in accordance with law. Costs shall abide by the decision.

Sarjoo Prosad, C.J.

8. I agree.