
(1937) 07 CAL CK 0031
In the Calcutta High Court
Case No : Civil Rev. No. 42 of 1931

Ananta Lal Saha

APPELLANT

Vs

Kamakhya Charan Das and Others

RESPONDENT

Date of Decision : 06-07-1937

Acts Referred:

Citation : (1937) 07 CAL CK 0031

Final Decision : Dismissed

Judgement

M.C. Ghose, J.—This is an application under sec. 115, C. P. C., by a co-sharer landlord whose petition under sec. 26F of the Bengal Tenancy Act has been dismissed by the trial Court. Upon hearing the learned Advocates, it appears that a certain raiyati holding was sold on 15th January, 1936, and purchased by Opposite Party No. 1 who is the 10 annas co-sharer landlord of the superior right. The Petitioner is the 6 annas co-sharer. No notice was served upon the Petitioner but he came to know of the sale on 10th May, 1936. Thereupon, on 19th May, 1936, he applied for pre-emption of his 6 annas shares and paid the 6 annas share of the purchase money. The Munsif on 13th June, 1936, dismissed that application on the ground that the whole of the consideration money has not been paid. Thereupon, on 7th July, 1936, the Petitioner filed a second application depositing the whole of the purchase money and impleading all persons whom the Opposite Party in the previous objection had alleged to be co-sharer landlords. This second application was opposed by the Opposite Party on the grounds, namely, that the first application of 19th May, 1936, having been dismissed, no second application could lawfully be made and secondly, that the application was out of time and thirdly, that the case was not maintainable as no notice was served on Opposite Party No. 1 describing him as a co-sharer and inviting him to join in the application for pre-emption. The learned Munsif has dismissed the application on two grounds, firstly, that the application is not maintainable as Opposite Party No. 1 was not served with a notice as a co-sharer landlord and invited to apply for pre-emption and, secondly, that after the first application, the second application did not lie.

2. There is no force in the first ground. The Opposite Party knew that he was a co-sharer landlord. When the Petitioner who is a 6 annas co-sharer landlord applied for pre-emption of his share, the Opposite Party opposed him on the ground that such application did not lie but he must apply for pre-emption of the whole. When he again applied for pre-emption of the whole and he was duly served with a notice, he came with the technical plea that he received a notice as a purchaser but did not receive a notice describing him as a co-sharer landlord nor was he invited to apply for pre-emption of his share. This ground is altogether puerile and unworthy of consideration.

3. The next ground on which the learned Munsif dismissed the application was that after one application under sec. 26F is dismissed, a second application does not lie. On this point, the Court finds that if a second application is entertained it is likely to give rise to various complications. The learned Advocate for the Opposite Party has urged that the dismissal of the first application was final and conclusive and operates as *res judicata*. *Res judicata* has been defined in sec. 11 of the Code of Civil Procedure. In this case even if the application be considered in the same manner as if it was a suit, it is to be noted that the first application was dismissed for technical defects and not on the merits. There could, in my opinion, be no *res judicata* in this matter.

4. The last point taken by the learned Advocate is that the sale was held on 15th January, 1936 and the Petitioner's story that he came to have knowledge on 10th May, 1936, is not correct. In the counter-affidavit it has been stated that the registered deed of sale was shown to the Petitioner and the land being adjacent to the Petitioner's shop and the Opposite Party was actually possessing it after the sale, the Petitioner must have come to know of it before 10th May, 1936. This is a question of fact. On this, the trial Court believed the story of the Plaintiff and noted that the evidence adduced by the Opposite Party is improbable and unreliable.

5. It cannot, therefore, be said that the Petitioner did not come within reasonable time. The case of *Gajendra Nath Mandal v. Kunja Behari Mistri* 40 C. W. N. 506 (1936) was quoted in support of the proposition that a second application did not lie after the first one was dismissed. But that decision does not support the argument. In that case, it was held that the second application would be barred if it was filed more than two months after the service of notice. Now, in this case, there was no notice and the second application was actually filed within two months of the date of knowledge.

6. In the result, the Rule is made absolute and the Petitioner's application for pre-emption is allowed. The Petitioner will get the costs of this Court, hearing-fee, one gold mohur.