(1934) 03 CAL CK 0007

In the Calcutta High Court

Behary Lal Roy and Others — APPELLANT

Vs

Pulin Behary Paul and Another — RESPONDENT

Date of Decision : 20-03-1934

Acts Referred:
Bengal Tenancy Act, 1885 — Section 26D, 26P

Citation : AIR 1934 Cal 691 : 152 Ind. Cas. 480

Hon'ble Judges : Costello, J

Bench : Division Bench

Judgement

Costello, J.—In this case the present petitioners made an application u/s 26-P, Ben. Ten. Act, for the purpose of securing the transfer to them as landlords of a certain holding it having previously been sold in execution of a money decree obtained in the second Court of the Subordinate Judge of Comilla against a man named Dengu Charan Debnath and some others and purchased by persons who are the opposite parties in the proceedings.

2. The sale had been confirmed on 15th June 1932 and shortly thereafter, and within the time specified in Section 26-F the present petitioners as landlords deposited with the Collector Rs. 89-15-0 as the landlords'' transfer-fee u/s 26-D, Bengal Tenancy Act. The petitioners after having received notice of the transfer on 31st August 1932 applied on 1st November 1932 for a re-transfer of the holding to them u/s 26-F of the Act after depositing the price of the holding together with compensation at the rate of ten per cent. The opposite party appeared on 9th December 1932, and on 22nd December 1932 they put in a petition stating that they had annulled an encumbrance on payment of Rs. 1,200 which the petitioners were liable to pay with interest at 12? per cent, per annum under the provisions of Sub-section (3), Section 26-F. The learned Munsif of Comilla by his judgment of 31st July 1933 made an order that the application by the landlords should be allowed if they deposited within fifteen days from that date the landlords'' transfer-fee, Rs. 89-15-0, with interest at 12? per cent per annum from 27th May 1932 to 15th August 1933, and in addition Rs. 1,200 with

interest at 124 per cent per annum from 8th November 1932 to 15th August 1933 and directed that the matter should be put up for final decision on 15th August 1933, thereby giving the petitioners fifteen days'' time within which to make the payments specified. The payments were not made and accordingly on 15th August 1933 the final order was made dismissing the application. It is against that order that these proceedings have been taken.

3. Mr. Sen on behalf of the petitioners has argued that the learned Munsif was wrong in requiring the petitioners to pay the amount of the mortgage money which had been expended by the opposite party for the purpose of getting rid of the mortgage then subsisting upon the property. The petitioners in the proceedings endeavoured to establish that the transaction was not a bona fide one and that therefore there was never a genuine mortgage at all. On that question of fact the learned Munaif said:

I am of opinion from the evidence on the record that the opposite parties made a bona fide payment of Rs. 1,200 on 22nd Kartick, 1393 and thus annulled the encumbrance of Ex. A-I,

which was the mortgage in question Mr. Sen has argued that the expression "annulling encumbrances" on the property as used in Sub-section (3), Section 26-F, does not cover a case where the mortgage is paid off in the ordinary way but only applies to "annulling encumbrances" such as are provided for in connexion with sales in execution of decrees for rent. I see no reason at all for putting that limited construction on the expression. It is quite true that Section 26-C, which deals with transfer inter partes in the ordinary way by registered instruments, does provide in Sub-section (6) that any sum payable on account of a mortgage of the holding shall be deemed to be the consideration money or part thereof, whereas in the present instance the sale really took place under the provisions of Section 26-E. At the same time however it must be borne in mind that the language of the Bengal Tenancy Act is not always quite as accurate and as explicit as one would wish; but looking at the matter broadly it seems to me, on reading Sub-sections (2) and (3), Section 26-F, that it was intended that before a landlord could exercise his right of pre-emption he should pay not only the actual consideration money or the value of the property but any one or more of the three classes of sums set out in Sub-section (3), that is to say, money paid in respect of rent for the period after the date of transfer or as the landlord''s transfer fee or in annulling encumbrances on the property, and upon those sums he should also pay the equivalent of 12? per cent. per annum from the date of payment of any one of those sums. It seems to me that it would be manifestly unjust that the transferee who bad paid a certain sum upon the footing that there was an encumbrance on the property should be required to retransfer the property to the landlord upon the basis that it was free from such encumbrance. If, on the other hand, it is to be taken that the landlord acquired the property subject to the encumbrance then there would seem to be no reason in equity why, if in fact that encumbrance is annulled in the sense of being removed by payment of the amount of the mortgage, he should not pay such sum as has been paid to redeem the mortgage. I see no reason at all for putting upon the expression "annulling encumbrances" the narrow interpretation which Mr. Sen was suggesting.

4. Mr. Sen also made a grievance of the fact that the Munsif had not acceded to the request which had been put forward by the landlords that they should be allowed to take a transfer of such portion of the holding as was not actually subject to the mortgage, it being a fact in the present case that only a portion of the holding was actually comprised within the terms of the mortgage in question. The answer to that is that Section 26-F only contemplates a transfer to the immediate landlord of the holding for the transferred portion or share thereof; in other words it only contemplates that the landlord shall be entitled to acquire by pre-emption whatever has been transferred to the original transferee, and not what has been transferred and divided up to suit the convenience or pocket of the landlord. In my opinion, the landlord must take the whole of what is transferred or nothing.

5. I have no doubt whatever that the learned Munsif has dealt with this application properly, and applying his mind to the question whether the landlords ought to be required to pay the amount of the mortgage or not he has come to a decision on it. In these circumstances, quite apart from what is the correct view of the law, there seems to be no reason at all why this Court should interfere u/s 115, Civil P.C. This rule must, therefore, be discharged with costs, hearing fee one gold mohur.

