

(1972) 07 CAL CK 0039

In the Calcutta High Court

Case No : Reference No. 1 of 1968, in C.R. No. 246 of 1961

Chaitanya Charan Nayak

APPELLANT

Vs

Manik Chandra Nandy and Others

RESPONDENT

Date of Decision : 28-07-1972

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26C, 26F

Evidence Act, 1872 — Section 115

West Bengal Estates Acquisition Act, 1953 — Section 6(1)

Citation : AIR 1972 Cal 520 : (1973) 1 ILR (Cal) 571

Hon'ble Judges : Sabyasachi Mukharji, J; Murari Mohan Dutt, J; A.K. Mukherjea, J

Bench : Full Bench

Advocate : S.C. Mitter, for the Appellant; A.D. Mukherjee and Hrishikesh Chatterjee, for the Respondent

Judgement

M.M. Dutt, J.—This Revision Case is one of the group of Revision Cases numbered as Full Bench Reference No. 1 of 1968 referred to the Full Bench by Laik and S. K. Mukherjee JJ. under Chapter VII, Rules 1, 2 and 4 of the Appellate Side Rules. The point which induced the learned Judges of the Division Bench to refer these cases to the Full Bench is, whether the right of preemption u/s 26-F of the Bengal Tenancy Act survived the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954) after Chapter VI thereof came into force. That point has been decided by us in our judgment delivered to-day in some other Revision Cases included in the Full Bench Reference No. 1 of 1968. The present Revision Case with which we are concerned, involves some other points and as such-it is being disposed of separately.

2. This Rule has been obtained by the petitioner whose application for pre-emption u/s 2G-F was dismissed by the Munsif. First Court. Aram-bagh by his order dated June 24, 1960. On appeal by the petitioner, the learned Subordinate Judge, Additional Court, Hooebly. affirmed the order of the learned Munsif and dismissed the appeal.

3. One Satish Chandra Singha settled certain land of which the disputed land forms part, by a Patta dated April 13, 1954 in favour of one Ajit Kumar Mondal in occupancy right. Ajit Kumar Mondal sold half share in the land to the petitioner on July 18, 1958. The petitioner, therefore, became a co-sharer of Ait in respect of the holding. On May 10, 1959 Ait sold the remaining half share to the opposite parties who are strangers. The petitioner made an application for pre-emption u/s 26-F in respect of the said half share of the holding transferred by Ait in favour of the opposite parties. The application was opposed by the opposite parties who contended inter alia that neither the petitioner nor the said Ait Kumar Mondal had any right of occupancy in the holding concerned and as such the application for pre-emption u/s 26-F was not maintainable.

4. Both the courts below have taken the view that the right of preemption u/s 26-F is not available in respect of an occupancy holding created by a grant from the landlord.

5. In this case, there is no dispute that the predecessor-in-interest of the petitioner and the opposite parties namely, the said Ajit Kumar Mondal was not a settled raiyat of the village in which the holding is situate. By the Patta dated April 13, 1954 occupancy right was conferred by the landlord Satish Chandra Singha in favour of Ait. The question necessarily arises whether right of occupancy can be created by a grant and whether the holder of such a right is entitled to avail of the statutory right of pre-emption u/s 26-F. In Bindeshwari Prasad Singh v. Kesho Prasad Singh. 31 CWN 74 : (AIR 1926 PC 79). it has been observed by the Privy Council that "a right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor." This observation suggests that a right of occupancy cannot be conferred by a grant from the landlord. The right has to be acquired in accordance with the provisions of the Bengal Tenancy Act.

6. Mr. Mitter, however, strongly relied on a decision of R. C. Mitter. J. in Jogendra Narayan v. Askar Ulla ILR (1937) Cal 455 : (AIR 1937 Cal 271 which has been affirmed in the Letters Patent Appeal from that decision by Guha and Bartley, JJ. It has been held by Mitter, J. that a right similar to occupancy right under the Bengal Tenancy Act may be conferred by a landlord upon his tenant by an express grant. Mitter, J. observed as follows :--

"Occupancy rights are creatures of statutes, or to be more precise the creatures of custom adopted by statute, which by defining the nature of the evidence, which a person claiming such rights is required to adduce, have extended such rights to a larger class of raiyats.***** They are creatures of customs or of statute only in the sense that acquisition of such rights by raiyats does not depend upon the bounty or gift of the landlord, but they can be acquired against his will. This in my judgment does not imply that the landlord cannot by grant confer on his tenant, rights, exactly similar to rights of occupancy. He can in his grant define rights which he is granting to his tenant, by mentioning in detail in the different clauses of the Patta the exact incidents of the rights he is granting.

If he does so the raiyat or tenant would get these rights, and I can conceive of no principle of law which would prevent the raiyat or tenant from successfully asserting those rights given to him by his Patta against his landlord.

It, may be that in one respect only there may be a difficulty namely, about the right of pre-emption of the landlord, by virtue of rule against perpetuities, but I do not see any difficulty so far as the right of occupation of such a -person is concerned."

7. Mitter, J. distinguished the aforesaid Privy Council decision by observing that the Privy Council did not definitely decide the point nor did it decide it finally.

8. The Bengal Tenancy Act lays down the manner whereby occupancy right can be acquired by a raiyat. The right of pre-emption as provided for in Section 26-F is one of the rights which is available to an occupancy raiyat under the Bengal Tenancy Act. when a statute prescribes that under certain circumstances a particular right can be acquired by a person, it is difficult to see how that right can be created in a manner not contemplated by the statute. When by a contract of lease a tenancy is created, the landlord may confer certain rights and impose certain obligations on the tenant. Such rights may be similar to the rights of an occupancy raiyat under the Bengal Tenancy Act, but it cannot be said that an occupancy raiyati-holding is created. The landlord who confers such rights on the tenant will be bound to recognise the same and the tenant would be entitled to assert those rights against the landlord. This does not, however, imply that the tenant becomes an occupancy raiyat so that he may exercise the right of pre-emption u/s 26-F. The right of preemption u/s 26-F is available to an occupancy raiyat against a stranger purchaser of a share or portion of the occupancy holding from the co-sharer of the occupancy raiyat. Such a purchaser, in our opinion, will not be bound by any term in the contract of lease whereby occupancy rights including the right of pre-emption have been granted by the landlord.

9. In Jogendra Narayan's case referred to above Jogendra Narayan Dhar Vs. Askarulla, under the terms of the Patta the tenant was granted the right to remain on the land permanently and he could be ejected on two grounds only, namely, for using the land in a manner which would render it unfit for the purpose of the tenancy, or for breaking a condition in the lease which is consistent with the provisions of the Bengal Tenancy Act. It was held that the tenants could not be ejected simply by the service of a notice to quit as the landlord had by the Patta conferred on the tenants a right to remain on the land permanently and had contracted himself out of the right to terminate the tenancy by a six months" notice to quit. as we have already observed that the landlord would be bound by the terms and conditions of the lease, the tenants in Jogendra Narayan's case could not be ejected excepting on either of the two grounds as provided in the Patta. This right of the tenants in that case may be similar to the right of an occupancy raiyat under the Bengal Tenancy Act, but simply because the tenants were conferred with that right and other rights

similar to occupancy rights under the Bengal Tenancy Act, the tenants, in our opinion, did not acquire the status of an occupancy raiyat under the Bengal Tenancy Act. Nowhere in the decision in Jogendra Narayan's case it has been laid down that the person who is conferred with rights similar to occupancy rights, acquired the status of an occupancy raiyat under the Bengal Tenancy Act. All that has been laid down in that decision is that a right similar to occupancy right under the Bengal Tenancy Act may be conferred by a landlord upon his tenant by express grant and that the tenant shall be entitled to assert such a right against the landlord like any other contractual right. The decision in Jogendra Narayan's case does not militate against the view taken by us.

10. Mr. Mitter, however, submitted that the opposite parties were estopped from challenging the status of the petitioner as an occupancy raiyat. The question of estoppel arises in this way. In the notice u/s 26-C which has been served upon the petitioner relating to the transfer made in favour of the opposite parties, the petitioner has been described as an occupancy raiyat and the holding has been described as an occupancy holding. In the Kobala by which the opposite parties purchased the half share of the holding, the holding has been described as an occupancy holding. After the said notice was served, the petitioner made an application for pre-emption by making the requisite deposited. Mr. Mitter contended that in view of the fact that the petitioner was described in the notice u/s 26-C as an occupancy raiyat, the opposite parties were estopped from challenging the nature of the tenancy or the status of the petitioner. In support of his contention Mr. Mitter relied on a number of Bench decisions of this Court of which reference may be made to Sm. Malati Bala Deb Gupta Vs. Narendra Chandra Bhattacharjee and Others, and Nural Hossain Mallik and Another Vs. Mihilal Sheikh and Others, . In Malati Bala's case B.K. Mukherjee J. (as his Lordship then was) has held that when a purchaser purchased a property which is specifically described as an occupancy holding and gives notice to the co-sharer tenants u/s 26-C and on the faith of the representation contained in the notice that the property purchased is an occupancy holding, the co-sharer tenants apply for pre-emption u/s 26-F and deposit money which is required to be deposited under that section, a plea of estoppel may be legitimately taken by the pre-emptor against the purchaser and unless it is shown that the applicant for pre-emption had previous knowledge as to the real character of the tenancy, the purchaser would be precluded from alleging or proving that the tenancy was of a nature different from what it was represented to be. The same view has been expressed by Chakravarti, J. (as his Lordship then was) in the aforesaid Bench decision in Nural Hossain's case. In an earlier Bench decision in Surendra Narayan v. Notan Behari 53 Cal LJ 414 : AIR 1931 Cal 4831 the principle of estoppel was applied in such a case. In a subsequent Bench decision in Sankaracharja Mullick Vs. Sk. Sademani and Others, , Mukherjee J. reiterated the same principles as laid down in Malati Bala's case.

11. In a later Bench decision in Shiromani Prasad Bhakat v. Raehu-nandan Prasad Shaw (1954) 58 CWN 612. G. N. Das, J. has agreed with the decisions in

Malati Bala's case and Sankaracharia's case referred to above, that the plea of estoppel may be available to a pre-emptor against the purchaser. Das, J. has, however, held that in order to found an estoppel against a purchaser it must be proved that a representation was made by the purchaser sought to be estopped and that the pre-emptor seeking to raise the plea acted on the faith of the representation and did so to his prejudice. Das, J., has taken the view that neither Section 26-C nor Rule 25 of the Rules framed under the Bengal Tenancy Act require that it is the transferee who has to file the notice and that the cases on the point do not lay down the proposition that a plea of estoppel arises if the pre-emptor makes a deposit on receipt of a notice u/s 26-C merely reciting that the pro-1 party transferred is an occupancy holding. According to Das J. the decision in Malati Bala's case and Sankarcharja's case proceeded on the assumption that it was the purchaser who gave the notice. It therefore, follows from the decision in Shiromani Prasad's case that before the purchaser is held to be estopped from challenging the nature of the tenancy, the pre-emptor must prove that the notice u/s 26-C describing the holding as an occupancy holding, was served by the purchaser and that the pre-emptor acted to his detriment on the representation made in the notice.

12. Relying on the decision in Shiromani Prasad's case, (1954) 58 Cal WN 612 the courts below negated the plea of estoppel raised by the petitioner.

13. The decision in Shiromani Prasad's case (1954) 58 CWN 612 rests mainly on the ground that under Section 26-C and Rule 25 of the Rules framed under the Bengal Tenancy Act. there is no indication as to who will serve the notice upon the co-sharer tenants. It is true that there is no specific indication, but at the same time it cannot be lost sight of that the purchaser is vitally interested in getting the document of transfer registered and he will take all steps in that regard. It can, therefore, be reasonably presumed that the notice u/s 26-C is served at the instance of the purchaser. We respectfully agree with the view expressed in the decisions in Malati Bala's case and Sankaracharia's case referred to above and also the decision expressing similar view. In the instant case, the notice u/s 26-C which was served upon the petitioner contains a statement that the holding is an occupancy holding. No explanation has been given by the opposite parties why such a statement has been made and there is no evidence that the petitioner was aware of the true nature of the tenancy. The petitioner relying upon the statement in the notice, made the application and made the requisite deposit u/s 26-F. In our view, therefore, the opposite parties are estopped from challenging the nature of the tenancy of the petitioner.

14. Although the petitioner succeeds on this point, the petitioner cannot ultimately succeed in the Rule in view of our decision in the Full Bench Reference No. 1 of 1968 to the effect that on the date of vesting of raiyati interests in the State under the West Bengal Estates Acquisition Act. the co-sharer raiyats of a holding ceased to be co-sharers in respect of the land of the holding which each of the raiyats was entitled to retain under Sub-section (1) of Section 6. The

petitioner was no doubt a co-sharer raiyat before vesting, but after vesting he ceased to be a co-sharer and he was not entitled to make an application for pre-emption u/s 26-F.

15. For the reasons aforesaid the. Rule is discharged, but there will be no order for costs in this Rule.

Arun K. Mukherjea, J.

16. I agree.

Sabyasachi Mukharji, J.

17. I agree.