
(1947) 05 CAL CK 0027
In the Calcutta High Court

Goas Ali Bhuiya and Others

APPELLANT

Vs

Lal Mia and Others

RESPONDENT

Date of Decision : 30-05-1947

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F(1)(a)

Citation : AIR 1948 Cal 27

Hon'ble Judges : Ellis, J;Chakravartti, J

Bench : Full Bench

Judgement

Chakravartti, J.—The question involved in this Rule is whether an heir of a person who purchased a share of an occupancy holding before 1928 but was not recognized by the landlord, is protected from pre-emption u/s 26F(1)(a), Bengal Tenancy Act, in case he purchases a further share of the holding. The Court below has answered the question in the negative for reasons which, the petitioners contend, are erroneous.

2. The relevant facts are as follows. One Shafi was the original holder of an occupancy holding" consisting of a little over 8 kanis of land. In June 1900, he sold an is gandas share of the holding to one Maharam Ali, who was the father of" petitioners 1 and 2 and great grandfather of petitioner 3. Maharam Ali was not recognised by the landlord as a tenant. In 1907, Shafi made a second, sale and thereby transferred 2 kanis 8 gandas and 1 kara of land; out of the same holding to one Mahammad Waif. Shafi died in 1920 and on 9-4-1925 some of his heirs who are opposite parties No, 1-3 to this rule, and his widow, Alekjan Bibi now dead, transferred a further 2 Kanis and 8 Gandas of land to Mahammad Wali and at the same time executed in his favour an indemnity bond for Rs. 400 as a security for quiet enjoyment against other co-sharers. On the death of Maharam Ali in 1931, his heirs, petitioners 1 and 2, inherited his properties and on 28-10-1945, petitioner 1 made a gift of a 3 1/4 gandas interest in the holding to his grandson, petitioner 3. Meanwhile, Mahammad Wali had died in 1941. On 11-3-1946, the petitioners, along with opposite party 8, purchased from some of

the heirs of Mahammad Wali a 12 annas share of his interest in the holding as also the rights of the vendors under indemnity bond. Thereupon, the heirs of Shafi, who are opposite parties 1 to 7, applied for preemption u/s 26F, Bengal Tenancy Act.

3. The application was resisted by the petitioners and opposite party Section It is not necessary to refer to defences which have been disposed of by the findings of the Courts below and were not pressed further before Rs. The main contention of the purchasers was that before the present transfer, the petitioners were already co-sharers in the tenancy whose existing interest had accrued otherwise than by purchase and accordingly their share under the present transfer was protected from pre-emption Under Clause (a), Section 26P(1). Petitioners 1 and 2, it was said, had acquired the 18 Jgardae interest of their father Maharam Ali by inheritance from him; and petitioner 3 had acquired a 3j gandas interest by gift from petitioner 1. But although opposite party 8 was a party to the petition of objection, it was not disputed at the trial that he being a stranger to the tenancy, his interest was preemptible.

4. The rejoinder of the applicants for preemption was that Maharam Ali was never recognized by the landlord and accordingly neither he, nor anyone claiming under him could be regarded as a "co-share in the tenancy" within the meaning of Section 26P (1)(a). It was contended further that petitioner 8, who claimed under a gift from one of the heirs of Maharam Ali was in no better position. Before the appellate Court it appears also to have been contended that since the interest claimed by the petitioners was originally acquired by Maharam Ali by purchase, Section 26F(1)(a) did not apply at all.

5. The Courts below have found as a fact that Maharam All was not recognized by the landlord as a tenant. No question was raised as to whether Mahammad Wall, the person from whose heirs the present purchase was made, had been recognized and on that point, which might give rise to a further problem, there is no contention or finding.

6. It will be convenient to refer at this stage to the actual terms of Section 26P in order that the findings of the Courts below may be the better appreciated. The Section so far as is material, reads as follows:

26F (1). Except in the case of?

(a) 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 apply to the Court for the said portion or share to be transferred to himself or themselves.

The trial Court held that the expression "co-sharer in the tenancy" occurring in clause (a) was not synonymous with "co-sharer tenant" occurring in the latter part of the Section. The latter expression, which had been used to describe the person who could apply for pre-emption, meant a person who held a share in the

tenancy and was recognized by the landlord as a tenant, that is to say, a co-sharer tenant in the strict and technical sense of the term. But the former expression which had been used to describe the person whose purchase was protected from preemption, meant simply a person who had acquired a share in the lands of the tenancy, whether he had been recognized by the landlord or not. In that view, the Court held that the petitioners, who undoubtedly held a share in the lands of the tenancy and who and whose pre-decessor-in-interest had been in possession of that share for over 40 years, were "co-sharers in the tenancy" and, consequently, the present purchase by them was protected from pre-emption. The application for pre-emption was accordingly allowed only in respect of the share of opposite party 8.

7. On appeal by opposite parties 1 to 7, the lower appellate Court held that "co-sharer in the tenancy" meant the same thing as "co-sharer tenant" and that to say that a person could be the former without being the latter, would be almost a contradiction in terms. The learned Judge referred to the decision of Edgley J. in *Abdul Majid and Others Vs. Altab Ali and Others*, where it was held that an unrecognised purchaser of a share of an occupancy holding not being a "co-sharer tenant" could not maintain an application for preemption and following that decision he held that for the same reason, such a person, if he made a further purchase, was not protected from preemption, since he was not a "co-share in the tenancy."

8. The learned Judge, however, overruled the contention that in determining the status of the petitioners, the acquisition to be regarded was the original acquisition by their predecessor Maharam All, He held that the reference in Section 26P(1)(a) was quite clearly to acquisition by the present holder; but in view of his finding on the other question, he set aside the order of the trial Court and allowed the application for preemption in respect of the shares of the petitioners as well.

9. Thereupon, the present Rule was obtained by the petitioners. The only ground urged before us was that in holding that the petitioners were not "co-sharers in the tenancy" and their purchase was not protected from pre-emption, the lower appellate Court was in error. In support of this contention, reliance was placed on an unreported decision of Mitter A.C.J. in Civil Rule No. 611 of *Amir Sardar and Another Vs. Ismail Hossain Sardar*, .

10. In the unreported case above referred to, one heir of an unrecognized transferee of a share in an occupancy holding had sold his interest to a stranger and thereupon another heir had applied for pre-emption. The question which the learned Acting Chief Justice had to consider was the same as had arisen before Edgley J. in *Abdul Majid and Others Vs. Altab Ali and Others*, viz., whether the applicant for pre-emption, being an unrecognized transferee of a share in the tenancy or, what is the same thing, an heir of such a transferee, was a "co-sharer tenant." The precise question arising in the present case, viz., whether an unrecognized transferee of a share is a "co-sharer in the tenancy" and as such

protected from pre-emption in case he purchases a further share, did not directly arise for decision in either case. But the learned Acting Chief Justice held that "co-sharer tenant" meant the same thing as "co-sharer in the tenancy" in Clause I(a) of Section 26P and seems to have relied on that meaning of the term as one of the reasons for holding that an unrecognized transferee of a share was entitled to apply for pre-emption, Edgley J. had taken the view that the applicant for pre-emption must be a "tenant" as defined in Section 3(17), Ben, Ten. Act and that since a person who had purchased a share of a non-transferable occupancy holding before 1928 but had not been recognized by the land-lord, could not be a "tenant," he had no right to apply for pre-emption u/s 26F(1). From this view, the learned Acting Chief Justice dissented and he gave two reasons for his opinion. He held that since an unrecognized transferee of a share of an occupancy holding was not the owner of the fee simple but facially held the land under another person and was liable to pay rent, he would be a "tenant" within the definition contained in Section 3(97). In the second place he held that even if such a person did not, strictly speaking, come under the definition, he would, be a "co-sharer tenant" within the meaning of Section 26F(1), because all that the Section contemplated was a co-sharer in the occupancy holding, which would appear from the use of the expression "co-sharer in the tenancy" in Clause (a).

11. With the greatest respect, while we agree with the learned Acting Chief Justice in his conclusion, we doubt if the first reason given by him is correct. Under the definition contained in Section 3(17), a "tenant" must hold land under another person and be liable to pay rent to that person. In other words, he must hold land under the person to whom he is liable to pay rent. So long as a purchaser of a share in a non-transferable occupancy holding is not recognized by the landlord, there can be no relationship of landlord and tenant between the parties and it is difficult to see how the purchaser can be said to hold the land under the landlord, although he may not be the owner of the fee simple. In any event, assuming he did hold the land under the landlord, he would not be liable to pay anything to the landlord, at least not rent. So long as the recorded tenants did not abandon the holding, the landlord would be entitled to recover the full rent from them and while not recognizing the transferee, he would not, at the same time, be entitled to take notice of his presence on a portion of the land and recover damages from him for use and occupation. But even assuming he would be entitled to recover something, it would not be rent due on account of holding the land under him as a tenant, but damages for occupation as a trespasser. We are accordingly of opinion that an un-recognized transferee of a share of a non-transferable occupancy holding could not be said to be a "tenant" within the meaning of the definition and it was rightly so held in Abdul Majid and Others Vs. Altab Ali and Others, .

12. We agree, however, with the learned Acting Chief Justice that the two expressions "co-sharer in the tenancy" and "co-sharer tenant" as used in Section 26F(1), bear the same meaning. The same view has been taken by the lower appellate Court in the present case. We are further of opinion that the two

expressions cover a person who purchased a share of a non-transferable occupancy holding before 1928 but was not recognized by the landlord and that in holding to the contrary, the lower appellate Court was in error.

13. That the two expressions have been used in the same cases appears clear from Sub-section (4) of Section 26F. There it is provided that when a co-sharer tenant has made an application for pre-emption.

any of the remaining co-sharer tenants, including; the transferee, if one of them, may apply to join in the said application?.

14. It will be noticed that although a share of an occupancy holding, even if sold to a co-sharer tenant, may in certain cases be pre-emptible, under this Sub-section such co-sharer purchaser is himself given the right to join in the application for pre-emption. The transferee is described as "one of the remaining co-sharer-tenants" that is to say, a co-sharer tenant. Turning now to Clause (a) of Sub-section (1), it will appear from that provision that when the transfer is to a "co-sharer in the tenancy" whose existing interest has accrued by purchase, an application may be made by one or more co-sharers of the holding for pre-emption of the portion of share transferred. Leaving aside the case of a person whose existing interest in a share of the holding was acquired by purchase but who has not been recognized, there can be no question that a recognized purchaser of a share is a "co-sharer in the tenancy" whose existing interest has accrued by purchase. Nor can there be any question that he is a "co-sharer tenant." If he purchases a further share, one or more of the remaining co-sharers may apply for pre-emption, but under Sub-section (4), he too may apply to join in the application as a co-sharer tenant. It will thus appear that the same person is referred to as a "co-sharer in the tenancy" in Sub-section 1(a) and as "one of the co-sharer tenants" in Sub-section (4) and there can be no doubt that the two expressions are synonymous.

15. We may observe in passing that the object of Section 26P in making a co-sharer by purchase subject to pre-emption, in case he makes a further purchase, is not very clear. If the intention was to keep the holding as far as possible in the hands of the original tenants and to prevent a co-sharer by purchase from making further acquisitions, it is not clear why he is given the right to join in the application for pre-emption, when a further share purchased by him is sought to be pre-empted by the other co-sharers. On the one hand, a further share purchased by him is made subject to pre-emption, on the other hand, he is enabled to retain a slice by joining with the other co-sharers when they apply to pre-empt. He is not excluded altogether. This, however, is a question of the policy of the law with which the Court is not concerned.

16. As regards the principal question involved in this Rule, we are of opinion that in ascertaining the true meaning of the expressions "co-sharer in the tenancy" and "co-sharer tenant" as used in Section 26P, regard must be paid to the object of the Section. The Section as it now stands, is limited to adjusting the rights of

co-sharer tenants inter se or as against a stranger "purchaser. It has no reference to the landlord. In view of the scope of the Section, it appears to us that by the terms "co-sharer in the tenancy" and "co-sharer tenant" the Legislature meant persons who could claim to be regarded as co-sharers as against the tenants; It is trite knowledge that a transfer of a share of a non-transferable occupancy holding is binding on the transferor tenant, although the transferee may not have been recognized by the landlord. It is also binding on the remaining co-sharers, if any the sense that they cannot keep out the transferee from the share transferred, nor dispossess him, nor claim damages for his entering upon the land, but must accept him as standing in the shoes of their co-sharer, clothed in his rights. Such being the position of an unrecognized transferee, it is not reasonable to suppose that the Legislature, in enacting a Section which dealt with the rights of co-sharer tenants as between themselves or as against third parties, intended to exclude unrecognized transferees who were, for all practical purposes, co-sharer tenants in relation to the transferor and his co-sharers. So to do would be to deny to such transferees for the purposes of Section 26P only a status which they had as against the holders of the remainder of the holding under the rest of the Bengal Tenancy Act and the general law. In our opinion, the correct view of Section 26P is that by the terms "co-sharer in the tenancy" and "co-sharer tenant" the Legislature intended to denote all persons who had the status of co-sharers as against the tenants of the holding and that, therefore, the terms include an unrecognized transferee of a share of a non-transferable holding who made his purchase before the amending Act of 1928.

17. The petitioners were not the persons who made the unrecognized purchase of 1900; but, in our opinion, the lower appellate Court is clearly right in holding that what is relevant under the another part of Clause (a) of Section 26P(1) is how the interest of the present holders was acquired. The petitioners acquired their interest by inheritance and by gift, that is to say, otherwise than by purchase. They have still to be "co-sharers in she tenancy," but, in that regard, their status being the same as that of their predecessor, in interest Maharam Ali who was an unrecognized transferee of a share in the holding, they must be held to be such co-sharers for the reasons we have already given. Accordingly their present purchase is protected from pre-emption u/s 26F(1)(a), as the trial Court rightly held.

18. In the result, the Rule is made absolute. The judgment and the order of the lower appellate Court are set aside and the order of the trial Court is restored, though we do not endorse all the reasons given in its judgment. As the order of the lower appellate Court had the support of a decision of this Court, we direct that each party will bear its own costs throughout.

Ellis, J.

19. I agree.