

(1984) 06 CAL CK 0021
In the Calcutta High Court
Case No : A.F.A.D. No. 853 of 1975

Kartick Chandra Kapat

APPELLANT

Vs

Amulya Charan Kapat (deceased by LRs) and Others

RESPONDENT

Date of Decision : 22-06-1984

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F
West Bengal Estates Acquisition Act, 1953 — Section 6(1), 6(2)
West Bengal Land Reforms Act, 1955 — Section 8

Citation : AIR 1986 Cal 185

Hon'ble Judges : Manasnath Roy, J

Bench : Single Bench

Advocate : Nirmala Kumari Chaturvedi, for the Appellant; Parimal Das and Kumud Ranjan Purkait, for the Respondent

Judgement

Manasnath Roy, J.—This appeal from appellate decree, is directed against the judgment and decree dated 18th March 1975 and 7th April 1975, made in Title Appeal No. 501 of 1974 by the learned Subordinate Judge, 4th Court, Alipore reversing thereby the judgment and decree dated 25th February 19 4, passed in Title Suit No. 68 of 1968 by the learned Munsif, 6th Court, Alipore.

2. The concerned suit was one for declaration and injunction and was filed on 7th February 1968, wherein the claim of the plaintiff was that the suit land and other lands belonged to defendants Nos. 1 and 2 and by a Registered Deed of partition dated 7th September 1962, between them, the suit property along with other properties were allotted to the defendant No. 2, Kamalesh Kapat and since then, he was in exclusive possession of them. It was further stated that by Kobala dated 5th December 1962, the defendants Nos 3 and 4 purchased the property in suit from the said defendant No. 2, with a condition for reconveyance, incorporated in another deed executed on the same date.

3. It has been stated, that as per the terms of the deed of agreement, the defendants Nos. 3 and 4 reconveyed the property in suit, by executing a Kobala

dated 29th January 1963 to defendant No. 2 and since then, he had been in possession of the properties in question. The plaintiff asserted that thereafter, he purchased the suit property from the said defendant No. 2 under a Kobala dated 24th March 1963 and the further allegation was that, the defendant No. 1 claiming to be a co-sharer of defendant No. 2, filed an application u/s 261 of the Bengal Tenancy Act, which was registered as Misc. Case No. 89 of 1963. for the purpose of pre-empting the transfer, sought to be made by the Kobala dated 5th December 1962 and which was executed by the defendant No. 2 in favour of defendants Nos. 3 and 4. In that proceeding, the plaintiff in this suit, was opposite party No. 4, while defendants Nos. 3, 2 and 4 were opposite parties Nos. 1, 2 and 3 respectively.

4. It was stated that on 25th November 1967, the said Misc. Case was allowed and the plaintiff further asserted that the order of preemption was void and was passed without jurisdiction, as after the passing of the West Bengal Estates Acquisition Act, 1953 (hereinafter referred to as the said 1953 Act), the petitioner of the concerned Misc. Case, ceased to be a co-sharer with the defendant No. 2. Such being the position, it was also claimed that by the judgment in the said Misc. Case No. 89 of 1965, the right, title and interest of the plaintiff in respect of the suit land was not affected in any way and he was in peaceful possession of those properties as before. It has been alleged, that in spite of the above facts, the defendant No. 1 had put the said decree dated 25th November 1967, into execution, with a prayer for delivery of Khas possession of the suit property, after evicting the plaintiff therefrom, and as such the concerned suit had to be filed.

5. The suit was contested by defendant No. 1 and he contended inter alia amongst others that the same was not maintainable in law and in its form, apart from claiming that the suit was barred u/s 34 of the Specific Relief Act and so also barred by res judicata. It was further alleged that the answering defendant got possession of the suit property through Court, by executing the order of pre-emption of 10th February 1968 and as such, it was incorrect to say and suggest that the plaintiff was in possession of those lands. It was also claimed that plaintiff contested the Misc. Case No. 89 of 1965 as opposite party No. 4, but he never pleaded that status of the co-sharer automatically ceased on and from the date of vesting, in terms of the said 1953 Act, which was in force at that time. Thus, it was claimed that the case as was sought to be pleaded through an amendment of plaint and to the effect that the suit was barred by principles of constructive resjudicata, was not available to the plaintiff.

6. On the pleadings as above the learned Court below framed the issues as under, for consideration : --

1. Is the suit maintainable in its present form?
2. Has the plaintiff right, title and interest as alleged?
2. Is not the plaintiff's interest affected by the order of pre-emption?

4. Is the plaintiff entitled to injunction as prayed for?

5. To what relief, if any, is the plaintiff entitled?

6. Has the suit been properly valued and duly stamped?

7. The learned Court below, on consideration of the evidence on record or as was available, held and observed that the suit was barred by constructive res judicata and the same was hit u/s 34 of the Specific Relief Act, apart from holding that the plaintiff was not entitled to adjudicate the question of co-sharership of the defendants at a late stage, when the possession of the suit property was already taken. On such findings, the learned Munsif dismissed the suit with costs.

8. On appeal, the learned Appellate Court observed that the points which were required to be decided; were whether the order in Misc. Case No. 89 of 1965 was a nullity and without jurisdiction and whether, the suit was barred by constructive res judicata and also whether the same was hit u/s 34 of the Specific Relief Act.

9. The learned Appellate Court has also recorded that the transfer as alleged, was effected on 5th December 1962 and Misc. Case No. 89 of 1965 was filed on 29th November 1965. It should be noted here that about the date of filing of the Misc. Case, there was some dispute and difference amongst the learned Advocates appearing before me. The date as mentioned by the learned Appellate Court was claimed by Miss Chaturvedi to be appropriate, but Mr. Das claimed such date to be 17th December 1965. The learned Appellate Court has also recorded that the order in the concerned Misc. Case, was passed on 25th November 1967 and the instant suit was filed on 7th February 1968. It has also been recorded that the delivery of possession was taken on 10th February 1968.

10. The learned Appellate Court has recorded that the question whether the defendant No. 1, was a co-sharer at the time of the concerned transfer i.e. on 5th December 1962, was required to be decided first. On such point, it was submitted before him, that on the vesting of the properties as per the provisions of the said 1953 Act, the Raiyats or under-Raiyats ceased to be co-sharers. Such submissions were made on the basis of the determinations in the case of Madan Mohan Ghosh and Others Vs. Sishu Bala Atta and Others, . In that case, it has been observed that after the enforcement of Chapter VI of the W.B. Estates Acquisition Act and the vesting of interest of raiyats and under-raiyats on and from April 14, 1956 corresponding to Baisakh 1, 1363 B.S. the co-sharer raiyats of a holding ceased to be co-sharers and each raiyat of the holding became a direct tenant under the State in respect of the land of that holding which he is entitled to retain under Sub-section (1) of Section 6. As the co-sharer raiyats ceased, to be co-sharers on and from the date of vesting the question of exercise of the right of, pre-emption u/s 26-F of the Bengal Tenancy Act cannot arise, for the condition precedent to the exercise of the right of pre-emption u/s 26-F being that the person exercising that right must be a co-sharer of the person making the transfer and when a raiyat having a separate holding or tenancy created by virtue of a Sub-section (2) of Section 6 relating to the land retained

by him under Sub-section (1) of Section 6, dies leaving more than one heir, such heirs will become co-sharers of such holding and will be entitled to the right of pre-emption u/s 26-F. Similarly, when the raiyat of such a holding transfers a portion of the holding to another person, that person will become a co-sharer of the raiyat and the right of preemption will also be available in such a case. It has also been observed that a transfer made by a co-sharer raiyat as contemplated by clause (2) above before the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955 may be pre-empted by another co-sharer, in the tenancy in accordance with Section 26-F but a transfer made after the enforcement of Section 8, the right of pre-emption by a co-sharer can only be exercised in the manner laid down in Section 8 of the West Bengal Land Reforms Act and the under-raiyats have been elevated to the status of raiyats on the enforcement of Chapter VI. There is no difference between the position of raiyats and that of under-raiyats and what has been stated above on the question as to the effect of the enforcement of Chapter VI on the right of pre-emption of raiyats will also apply to under raiyats.

11. The case as cited above, was a Full Bench decision of this Court and there it has also been observed that the decision in *Abharan Chandra Saha Vs. Sanat Kumar Sen*, in so far as they proceeded on the footing that the raiyats of a holding continued to be co-sharers even after vesting are erroneous but they have correctly interpreted the expression terms and conditions in Rule 4, W.B. Estates Acquisition Rules. 1954. 62 CWN 360 and 65 CWN 354 and *Shiba Prasad Gerua Vs. Manmatha Nath Sen Gupta and Others*, ; *Nitai Chandra Das Vs. Sisir Kumar Das and Others*, ; *Dhananjay Senapati and Others Vs. Debendranath Senapati and Another*, and Civil Revn. Case No. 3366 of 1961, D. 21-9-1962 (Cal) Overruled and the Full Bench further opined that according to that interpretation, the expression "terms and conditions" in Rule 4 includes the right of preemption of an occupancy raiyat u/s 26-F and on the date of vesting the raiyats of a holding ceased to be co-sharers and the holding is split up into different holdings. Apart from holding that the words "an intermediary" cannot be read as intermediaries. It was also the findings of the Full Bench that where both the impugned transfer and the application for preemption were made before the enforcement of Chapter VI which took place during the pendency of the pre-emption proceeding but before any order was passed by the trial Court, as the raiyats of an occupancy holding who were co-sharers, the application was no longer maintainable and the proceeding for preemption from the opening words of Sub-section (7) of Section 26-F that the consequences of an order passed under Sub-section (5) as contained in Clauses (a), (b) and (c) of Sub-section (7), will take effect from the date of the order and Article 181 of the Limitation Act, 1908 applies to the case of an application u/s 26-F by a co-sharer tenant who has not been served with a notice u/s 26-C and his application would be in time if made within three years of the sale. In applying Article 181. an application u/s 26-F is an application under the Code of Civil Procedure. The Full Bench has also observed that where the pre-emptor was kept by fraud from the knowledge of

his right u/s 26-F he is entitled to the benefit of Section 18 of the Limitation Act. On the basis of such determinations, the further question which was posed by the learned Appellate Court, was whether the right of pre-emption u/s 26-F of the Bengal Tenancy Act survived the 1953 Act, after Chapter VI of the same came into force and applying the tests as laid down in the above-mentioned Full Bench decision, the learned Appellate Court has found that the defendant No. 1, was not a co-sharer of the concerned holding at the time of the alleged transfer on 5th December 1962 and he ceased to be such a co-sharer on 14th April 1956 and as such, with the transferor the suit property to defendants Nos. 3 and 4 on 5th December 1962, the defendant No. 1 did not get any right of pre-emption or the claim of being a co-sharer. It was also observed that the right to file a claim for pre-emption being gives to a co-sharer only and the defendant No. 1 not being such a co-sharer, had no sueh right to file the concerned Misc. Case No. 89 of 1965 and such being the position and circumstances, the continuance and the result of the said Misc Case would not get the sanction of law. The order passed in Misc. Case No. 89 of 1965, was also found and declared to be a nullity and without jurisdiction and in support of such findings, the learned Appellate Court has observed that before the vesting, it would be clear from the opening words of Sub-section (7) of Section 26-F of Bengal Tenancy Act, that the consequences of an order passed under Sub-section (5) as contained in Clauses (a), (b) and (c) of Sub-section (7) would take effect from the date of the order and on such view and analysis of facts, it was found that the concerned Misc. Case was filed at the stage when Chapter VI of said 1953 Act had already come into force, apart from holding that at the time of the impugned order, the said Chapter VI was in operation. Such being the position, the learned Appellate Court was of the view that any order passed u/s 26-F, granting the right of pre-emption after coming into force of Chapter VI of the said 1953 Act, should be declared as null and void. At this stage, we must also have it on record that Bengal Tenancy Act was repealed with effect from 1st of November 1965 and the concerned Misc. Case was filed, naturally after that being either on 29th November 1965 or on 7th December 1965 since the said Misc. Case was filed admittedly after the repeal of the Bengal Tenancy Act, so the discrepancy in the date of filing, in my view, would have no adverse effect, when there was no dispute between the learned Advocates appearing before me, that the said Misc. Case was filed after the date of repeal as mentioned above.

12. Before the learned lower Appellate Court a point was sought to be raised on constructive res judicata, in terms of the explanation IV of Section 11 of the CPC and it was claimed by the Respondents therein that the plaintiff could have taken the plea of co-sharership in the concerned pre-emption case as well as in the execution proceedings therefore and he not having taken such steps even though there was the necessary opportunity, would be debarred from raising such issues. Such point was found by the learned Appellate Court to be a defence not on facts but on law and it was observed that there was no bar in raising such question in a subsequent proceedings. Before the learned Appellate Court it was

also submitted by the Respondents concerned that the suit was barred u/s 34 of the Specific Relief Act, contending that the possession of the property was taken on 10th February 1968 but the plaintiff has not taken any steps for recovery of possession. There was no dispute about the delivery of possession as mentioned above, which was delivered on 10th February 1968 and which fact appeared from Ext. C. On such facts, the learned Appellate Court returned the verdict that possession of the property was taken during the pendency of the suit viz. at the time of filing of the suit. It has further been observed that since such possession was taken on the basis of an order which has been declared to be a nullity and without jurisdiction, so in the eye of law, no possession was actually passed or there was any sanctity for such possession. It has further been observed that during the pendency of the suit, possession as mentioned above, was taken and the same was also hit by doctrine of lis pendens. That being the position, the suit was also found to be barred u/s 34 of the Specific Relief Act.

13. On the basis of the above findings, the findings as arrived at by the learned Munsif were set aside. Since, it is a case of reversal, I think the findings of the learned Munsif should also be restated, before making any determinations on the basis of the submissions as made.

14. Issue No. 1 of the learned Munsif was the issue on the question of maintainability of the suit in its present form and the submissions on behalf of the plaintiff were that the Court which earlier decided the pre-emption case, had no jurisdiction at the relevant point of time to entertain such proceedings u/s 26F of the Bengal Tenancy Act and as such, the grant of pre-emption in respect of the land in suit in favour of defendant No. 1, was a nullity. The learned Munsif has of course found that the 6th Court, who had earlier determined the proceedings had both pecuniary and territorial jurisdiction to hear the concerned application and it was not in dispute that either under the said 1953 Act or under the West Bengal Land Reforms Act, 1955 (hereinafter referred to as the said 1955 Act), the jurisdiction of the Civil Court to entertain petition for pre-emption was not barred at the relevant time. On the basis of the determinations in the case of Madan Mohan Ghosh and Others Vs. Sishu Bala Atta and Others, , it was submitted before the learned Munsif that the defendant No. 1 was not a co-sharer after the enforcement of Chapter VI of the said 1953 Act and vesting of interest of Raiyats and under-Raiyats on and from 14th April 1956, which is corresponding to 1st Baisakh 1363 B.S. It has also been observed that since the co-sharers Raiyats had ceased to be co-sharers on and from the said date of vesting, the question of exercise of the right of pre-emption u/s 26F of the Bengal Tenancy Act could not arise. The learned Munsif, on a reference to the relevant dates has further found that initial pre-emption order which was made was not absolutely without jurisdiction, as the learned Court at that time had due and perfect jurisdiction to try a suit under the provisions of Section 26-F of the Bengal Tenancy Act and such position has not been altered till the date when the judgment allowing the pre-emption or till such order of pre-emption was put to execution and possession of the suit property was recovered thereunder. It has also been

observed that a Court would have perfect jurisdiction to decide a matter in view of the steps it had taken and in view of the fact that that it had taken an erroneous view, would not in any way, vitiate the jurisdiction of the same. The learned Munsif has also commented on the non-availing of the other remedy by way of an appeal by the plaintiff. Apart from the above, the learned Munsif has found that the plaintiff could have urged in the pre-emption proceeding that after coming into force of the said 1953 Act, the defendant No. 1 not a co-sharer of the defendant No. 2 and since without taking recourse to such opportunities, he has sought to reopen the whole matter and more particularly the same has been long disposed of by the delivery of possession of the land in suit, the suit was hit by principles or *res judicata*. It was also observed by the learned Munsif that the suit would also be bad in view of the proviso to Section 34 of the Specific Relief Act and more particularly so when Ext. C established that possession of the lands in suit was delivered to the defendant No. 1, in execution of the pre-emption order and there was only a prayer for declaration of the title of the plaintiff and injunction but no prayer for declaration of the title of the plaintiff and injunction but no prayer for recovery of possession of the suit land. On such findings as above, the suit was dismissed and it was found in answer to issue No. 2, which related to the fact as to whether the plaintiff had right, title and interest, that he has no such right. In view of the findings as indicated above, the other issues were consequently decided and it was ultimately held that the plaintiff was not entitled to the decree for injunction or any other reliefs in the suit.

15. Miss Chaturvedi, on the facts of the present case stated that the father of the defendants Nos. 1 and 2 had died in 1356 B.S. and thereafter, they continued in joint possession and the right as co-sharer of those defendants, existed. It was stated by her that on or about 7th September 1962, the brothers as mentioned above, got the property partitioned and on such, defendant No. 2 got the suit property and then on 5th December 1962, defendant No. 2, Kamalesh Kapat; transferred his properties to defendants Nos. 3 and 4 with an agreement for reconveyance. Thus, it was claimed by Miss Chaturvedi that the right of defendant No. 1, accrued on such transfer, which happened on 5th December 1962. It was stated by her that on 29th January 1963, there was a reconveyance in favour of the said defendant No. 2 by defendants Nos. 3 and 4 and thereafter, on 29th March 1962, the defendant No. 2 had transferred the property again to the plaintiffs, and since then, the plaintiffs were in possession. Since the right of defendant No. 1 had accrued, according to Miss Chalurvedi on 5th December 1962, so Section 8 of the said 1955 Act, she claimed, had no application. It was then stated by Miss Chaturvedi that on 17th December 1965, the application for pre-emption u/s 26F of the Bengal Tenancy Act, which according to her, in the facts of this case had application, was filed and the same was numbered as Misc. Case No. 89 of 1965. This Misc. case, Miss Chaturvedi claimed was initiated at a point of time when the said 1953 Act came into force or was really in force. The said Misc. Case was allowed on 25th November 1967 and thereafter, Miss Chalurvedi claimed, that the execution case was duly started and the objection u/

s 47 of the Code of Civil Procedure, which was taken, was appropriately rejected on 27th January 1968. It was claimed by her that immediately thereafter and as indicated earlier, on 7th February 1968, the suit, out of which the present appeal arises, was filed without any prayer for recovery of possession and more particularly, the suit was only for declaration and confirmation of title, since there was no prayer for recovery of possession. Miss Chalurvedi also claimed the suit to be incompetent the facts of the present case. Apart from the above, she also claimed that as on 10th February 1968, possession was taken by the defendant No. 1 and a long time has passed since then, so no interference, at least should be made, to make such settled facts, unsettled. As indicated earlier, the learned Trial Court allowed the pre-emption u/s 26-F of the Bengal Tenancy Act and for the reasons as restated hereinbefore and the appeal, which was taken was allowed and thus the judgment and decree of the learned Trial Court was set aside. It was Miss Chaturvedi's one of the specific contentions that the present case would come under the exceptions as indicated in the Full Bench determination in the case of Madan Mohan Ghosh and Others Vs. Sishu Bala Atta and Others, . It was then and categorically claimed by her, that without amending the prayers in the plaint and correspondingly asking for recovery of possession, the suit was not maintainable. She further claimed that the Jama in the instant case was not partitioned and there was no Kharij and such fact was also not duly and appropriately considered by the learned Appeal Court. On the basis of her submissions as indicated above, the first and foremost consideration would be whether the entire issue in the subsequent suit, which was earlier concluded by the Court, having territorial and pecuniary jurisdiction or the decision as made by a competent Court, could be reopened. While on such question, Miss Chaturvedi, after placing Section 11 of the CPC and exceptions IV and VIII, claimed that the subsequent or the present proceeding as taken by the plaintiffs, was hit by res judicata or principles analogous thereto or at least was hit by constructive res judicata. Rule 4 of the West Bengal Estates Acquisition Rules, 1954, deals with the terms and conditions of holding lands, retained by an intermediary u/s 6(1) and lays down that subject to the conditions as specified, any land retained by an intermediary under the provisions of Sub-section (1) of Section 6 shall, subject to the provisions of the Act, be held by him from the date of vesting and the said Rule was substituted by notification No. 122/4L. Ref., dated 7th September 1962. It would further appear that Section 8 of the said 1955 Act, which deals with the right of purchases by co-sharer or contiguous tenant, was incorporated with the object to secure consolidation of holding, by giving the right of pre-emption to a co-sharer or a Raiyat of an adjoining area, so that the land in question, can be used in the most advantageous manner and also to prevent fragmentation of the land. It should also be noted that in terms of the provisions contained in Section 59(5) of the said 1955 Act, the Bengal Tenancy Act has been repealed, without prejudice to the provisions of Clause (1) of Section 2 of the said 1953 Act.

16. Miss Chaturvedi, as indicated earlier, claimed that the suit, out of which or

from the decisions whereof this appeal arises, to be not maintainable, as the earlier proceeding being Misc. Case No. 89 of 1967 was filed after the said 1953 Act came into force or the same was in operation and points as involved in the suit were also in issue or raised and decided in that proceeding. She claimed further, that since there was no dispute about the jurisdiction, both pecuniary and territorial, of the learned Munsif trying the said Misc. case, so after the determination as made by him, this proceeding would be hit by the principles and provisions as mentioned earlier viz., *res judicata* or principles analogous thereto. It was also claimed by her that the plaintiff opposite party No. 4 contested the said Misc. case, where the question of co-sharership was also raised and evidence was sought to be led through the Tahashildar to prove the splitting up of the Jama and thus the plaintiffs in the present case, were debarred from raising such issues again. It was also claimed by her that if the present suit was not hit by *res judicata* or principles analogous thereto, the same would be hit, at least by constructive *resjudicata* and that too in the circumstances as indicated above and in any event, the jama having remained common, the judgment and decree as passed by the learned Appeal Court, was improper.

17. To establish her submissions that this case would come within the exceptions as mentioned and laid down in the case of *Madan Mohan Ghosh and Others Vs. Sishu Bala Atta and Others*, , reference was made by Miss Chaturvedi, to the observations and findings in paragraphs 19, 20, 21 and 25 of the determination, which are quoted hereunder :

"19. Anybody making an application before the Court in exercise of his right of pre-emption u/s 26F must show that he is a co-sharer tenant of the holding a portion or share of which has been transferred to a non-sharer. If he fails to prove that he is a co-sharer tenant of the holding in question, he cannot claim to have any right of pre-emption u/s 26F. The primary question which has to be decided in connection with an application for pre-emption u/s 26F is, whether the applicant is a co-sharer in the tenancy or not. In case it is found that he is a co-sharer his application will be held maintainable and he will be entitled to exercise his right of preemption, but if he fails to prove the same his application will be dismissed on the ground that he has no such right u/s 26F. After the date of vesting each raiyat of a holding ceases to be a co-sharer in respect of that holding, as found by us on an interpretation of the different provisions of the Act and the Rules. A raiyat who was a co-sharer in respect of the holding in question cannot, after the date of vesting, claim to be a co-sharer of another raiyat in respect of the land which he is entitled to retain or retained by him under Sub-section (1) of Section 6. Such a raiyat is not entitled to make an application for preemption u/s 26F in respect of a transfer made by another raiyat out of the land which he is entitled to retain which has been retained by him under Sub-section (1) of Section 6. As the raiyat is not a co-sharer and as the holding prior to vesting is no longer in existence, since in its place and stead separate holdings or tenancies have come into existence by virtue of Sub-section (2) of Section 6,

there will be no scope for an application u/s 26F.

20. At the same time, it cannot be said that co-sharership of a raiyat holding has been altogether abolished by the legislature, particularly in view of Sub-rule (3) of rule 4 wherein Section 26F had been specifically included. On the date of vesting there may not be any co-sharer of the raiyat holding, but after the date of vesting co-sharers may come into being by devolution of interest of a raiyat relating to the land retained by him only in such cases, Section 26F will apply. To take a concrete illustration, a raiyat who was a co-sharer of a particular holding retains land of the holding under Sub-section (1) of Section 6 of the Act. He becomes a direct tenant in respect of the land retained by him and ceases to be a co-sharer in respect of the remaining land of the holding not retained by him or retained by other raiyats. The land which he is entitled to retain or retained by him, forms a separate holding or a separate tenancy directly under the State. If the raiyat dies after the date of vesting leaving a number of heirs, the heirs will be co-sharers raiyats of each other. One heir being a co-sharer of the other will be entitled to invoke the provisions of Section 26F and exercise his right of pre-emption in case any other co-sharer transfers a portion of such separate holding to any other person who is not a co-sharer. Similarly, a raiyat of a separate holding created after the date of vesting any transfer a portion of the holding to another person. That person becomes a co-sharer of the holding along with his vendor. If one of these two co-sharers transfers a portion of the holding to another person, Section 26F will apply. On the happening of such events, namely the death of the raiyat leaving more than one heir and transfer by the raiyat of a portion of the separate holding after the date of vesting and in similar such cases, Section 26F, will apply. It is thus found that there is no force in the argument that Sub-rule (5) of rule 4 cannot be reconciled in case it is held that on the date of vesting such raiyat becomes a direct tenant of the land which is entitled to retain under Sub-section (1) of Section 6 of the Act. But in the absence of any such events taking place Section 26F will not apply between the erstwhile co-sharers.

21. Sub-rule (3) of rule 4 was further amended on August 1, 1964 whereby Section 26F was deleted from Sub-rule (3). This deletion of Section 26F from Sub-rule (3) does not mean that the right of pre-emption has been taken away, but it has come other objective in view which will be stated presently. After the enactment of the Act, West Bengal Land Reforms Act, 1955, was enacted, by Section 8 of the West Bengal Land Reforms Act, a right of pre-emption similar to the right conferred by Section 26F has been provided for Section 8 came into force on October 22, 1963. u/s 26F the forum for making the application for pre-emption was the Court, but u/s 8 the application has to be made to the Revenue Officer. After the enforcement of Section 8 it became wholly unnecessary to allow Section 26F to remain in Sub-rule (3) of rule 4. The amendment of Sub-rule (3) was made on August 1, 1964, that is a considerable time after the enforcement of Section 8, but in our view that does not make any difference for the right of pre-emption will have to be exercised in accordance with Section 8 regarding

transfers taking place after the enforcement of Section 8. As regards transfers made before Section 8 had been enforced, Section 26F and not Section 8 will apply. In this connection it may be stated that on the enforcement of Clause (5) of Section 59 of the West Bengal Land Reforms Act, 1955, on November 1, 1965. Bengal Tenancy Act stands repealed with effect from that date, Section 26F was, therefore, deleted from Sub-rule (3) of rule 4 in view of the enforcement of Section 8 of the West Bengal Land Reforms Act, 1955, although it should have been deleted simultaneously with the enforcement of sec. 8.

25. We have disposed of the main point referred to the Full Bench and all points ancillary thereto, but as some other points arising out of the respective facts and circumstances of some of these revision cases have been argued, we propose to consider the same. In C.R. 674 of 1958. the impugned transfer was made on January 22, 1955 and the application for pre-emption was made on June 11. 1955 that is. both took place before the enforcement of Chapter VI. It was during the pendency of the proceeding in the trial court that Chapter VI was enforced by the issue of the notification u/s 49 and the interests of raiyats vested in the State. It has been contended by Mr. Nirmal Kumar Ganguly, learned Advocate appearing on behalf of (sic) Section 26-F, the enforcement of Chapter VI during the pendency of the preemption proceeding will not affect the proceeding. Under Sub-section (5). Section 26F, the Court makes an order allowing an application and under Sub-section (6), the court making an order is comprised in the portion or share transferred among the applicants in accordance with the manner provided in that sub-section. Sub-section (7) is as follows : --

"(7) From the date of the making of the order under Sub-section (5) --

(a) the right, title and interest in the portion or share of the holding accruing to the transferee from the transfer shall, subject to the provisions of Section 22 and to any order passed under Sub-section (6), be deemed to have vested, jointly and free from all incumbrances which have been annulled or created after the date of transfer, in the co-sharer tenants, whose applications to purchase have been allowed under this section.

(b) the liability of the transferee for the rent due from him on account of the transfer shall cease, and

(c) I the Court on further application of such applicant or applicants may place him or them, as the case may be, in possession of the property vested in them."

18. Thereafter. Miss Chaturvedi referred to the determinations in the case of Shiba Prosanna Banerjee Vs. Mrityunjoy Khan and Others, , in which case, there was a partition of a particular tenancy amongst its co-sharers. Upon such a partition. Plot 1768 was exclusively allotted to opposite parties 2 and 3 in C.R. No. 2049/73, while Plot 1767 was kept joint by the co-sharers. There was no evidence that such partition was consented to by the landlord. Thereafter, O.P. Nos. 2 and 3 transferred their interests in Plots 1768 and 1767 to Mrityunjoy O.P. No. 1, a stranger, without serving, any notice upon Shiva Prosanna, a co-sharer,

of such transfer to Mrityunjoy. When Shiba Prosanna came to know of such transfer, he made an application for pre-emption u/s 24 of the W.B. Non-Agricultural Tenancy Act 1949 in the Court of the Subordinate Judge, Burdwan. This application was resisted by Mrityunjoy. The application was allowed by that Subordinate Judge and on appeal by Mrityunjoy, the Addl. District Judge allowed the appeal in part. The appellate court below took the view that as by the partition. Plot 1768 was allotted exclusively to O.P. Nos. 2 and 3, Shiba Prosanna ceased to be a co-sharer in respect of that plot and accordingly, his application so far as that plot was concerned was not maintainable. It was however held that in regard to Plot No. 1767, Shiba Prosanna was a co-sharer and he could claim pre-emption in respect of that plot. Being aggrieved, both Shiba Prosanna and Mrityunjoy moved this court in revision and obtained two Rules and it has been held that so long as the holding is not split up by partition amongst the co-sharer-tenants with the consent of the landlord, each co-sharer continues to be a tenant under the same landlord and is entitled to make an application for pre-emption on the principles as laid down in *Abinash Chandra Jana and Others Vs. Chakradhar Khatua and Another*, . The question involved in the above case was, whether on the partition of the land comprised in the tenancy of non-agricultural tenants without the knowledge and consent of the landlord, such tenancy was split up and the tenants ceased to be co-sharers. Such question came up for consideration and it has been observed, in connection with the exercise of right of pre-emption u/s 26F of the Bengal Tenancy Act, which is somewhat similar to Section 24 of the West Bengal Non-agricultural Tenancy Act and in the case of *Debendra Nath Sen Vs. Ganendra Nath Bera*, , G. N. Das J. took the view that a partition among co-tenants, would be binding on the co-tenants, who joined in the partition and was effective against the whole world except the landlord. In that case, partition was effected without the consent of the landlord. It was, however, held that in view of the partition, an application for pre-emption was not maintainable. In *Shiba Prosanna Banerjee's* case as indicated above, a reference was also made to the case of *Goas Ali Bhuiya and Others Vs. Lal Mia and Others*, , a decision by Chakravorti, J. (as he then was) and while considering the scope of Section 26F, it has been observed that in view 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 against the tenants. It has been observed in *Shiba Prosanna Banerjee Vs. Mrityunjoy Khan and Others*, that the said observation of Chakravorti, J. was relied on by G. N. Das J., in his judgment as mentioned above. In *Shiba Prosanna Banerjee's* case (supra), it has also been indicated that a later Bench decision in the case of *Abinash Chandra Jana and Others Vs. Chakradhar Khatua and Another*, , dissented from the decision of G.N. Das J. as indicated above and overruled the same.

19. The question of repeal being involved in this case, Miss Chaturvedi, while submitting on the effect thereof, relied on and referred to Section 6 of the General Clauses Act, which is corresponding to Section 8 of the Bengal General

Clauses Act and then to the Full Bench determination as referred to hereinbefore and contended that since facts are to be judged on the basis of or on the facts of each case, so in the special facts of this case, it should be held that Section 26F of the Bengal Tenancy Act, for all intents and purposes was applicable more particularly so, when under the different provisions of the General Clauses Act, there could be no bar in respect of any accrued right of a subject or such right which accrued prior to the repeal, as in this case. That being the position, according to Miss Chaturvedi, Sub-section (5) of Section 59 of the said 1955 Act, would be no bar in maintaining the application u/s 26F. In a case for pre-emption u/s 8 of the said Act, how the nature of the land should be determined, has been considered in the case of *Eyachhin Ali Naskar and Another Vs. Golap Gazi*, . Miss Chaturvedi referred to that determination, where it has been observed that the nature of a holding, whether it is agricultural or non-agricultural, is to be determined with reference to the uses of the land comprised in the holding. It has also been observed in that case that where a holding was described in the record of rights as Rayati Dakhalisatta Bisista and the nature of the land comprised in the holding a bastu with two huts standing thereon, the land cannot be treated as "agricultural land" to which the provisions of Land Reforms Act, 1955, would apply and the holding cannot be said to be a holding held by a raiyat for which preemption u/s 8 of the Land Reforms Act, would be available.

20. While on her submissions on res judicata or principles analogous thereto or constructive res judicata as applicable in this case and in support of them, Miss Chaturvedi referred firstly, to the case of *Benaras Ice Factory Ltd. Vs. Sukhlal Amarchand Vadnagra*, and more particularly to the observations that a matter which is deemed to have been in issue constructively, would not, in the very nature of things, have been actually heard and decided and where a question of jurisdiction depends upon the existence of a fact and a party to whom it was open to prove that fact does not do so, he is thereafter prevented by the doctrine of constructive res judicata from agitating the same, apart from the observations to the effect that where a person takes advantage of an order and tries to obtain an order founded thereon, he cannot turn round and say that the order was one without jurisdiction; the ratio is that, if a person invites the jurisdiction of a Court, he cannot thereafter turn round and say that the Court has no jurisdiction. Then and secondly, reference was made to the case of *M. Thimma Raju and Another Vs. Dronamraju Venkatakrishna Rao and Another*, . In that case, in a suit for partition and separate possession some lands were sold during the pendency of the suit. The plaint was amended bringing the purchasers on record, their purchases were impeached and decree was sought against them. Since no court-fee was paid for the relief of possession, it was not granted and it has been held (1) a second suit against the purchasers for possession being one between the same parties and on the same cause of action was barred by Order 2 Rule 2 and (2) further, the relief of possession, which could have been sought in the previous suit, not having been sought, the second suit for the relief was also barred on the principles of res judicata. Thirdly, reference was made to the

determinations in the case of Kumaraswami Gounder and Others Vs. D.R. Nanjappa Gounder (dead) and Others, . In that case, it was alternatively claimed that the plaintiffs' claim was barred by res judicata, by virtue of the decision of the trial court in an earlier proceeding, which was affirmed by the High Court. It was contended that on such determinations, which construed the concerned will in that case, no further inconsistent claim can be projected and such view was accepted, considering that the decision in the earlier suit became final and was binding on the plaintiffs in the subsequent suit. Reference was also made by Miss Chaturvedi, while on the point as indicated above, to the case of Abhoy Kanta Gohain Vs. Gopinath Deb Goswami and Others, , where it has been observed that even an erroneous decision on a question of law operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous, is binding on the Parties and then, to the Full Bench determinations in the case of Denobandhoo Chowdhry v. Kristomonee Dossee ILR 1876 Cal 152. In that case, certain property, originally belonging to the husband of the plaintiff, was conveyed by him by deed of gift to his daughter after her marriage with the defendant, as her stridhan. Some years after the daughter's death, the plaintiff brought a suit to recover the property, on the ground that the deed of gift was a forgery, and that she was entitled to the property as heiress of her husband; but her suit was dismissed, the deed of gift being found to be genuine and in a suit subsequently brought to recover the same property, on the ground that the plaintiff was heiress of her daughter, held by the majority of a Full Bench (Garth, C J., Dissenting) that the suit was barred.

21. Further reference was made by Miss Chaturvedi to the Full Bench case in Union of India v. Khemchand Rajkumar ILR (1972) Cal 154 and then to the case of Kameswar Pershad v. Rajkumari Ruttun Koer (1892) 19 Ind App 234 where it has been held that where the personal liability of the Defendant might and ought to have been claimed against him in a former suit brought by the same Plaintiff on the bond to enforce such alleged charge, that a new suit for that purpose is barred, as res judicata u/s 13 of the Code of Civil Procedure. In the other Calcutta decision as referred to above, it has been observed that if a party having an opportunity to contest the facts relating to jurisdiction of, the Court does not choose to do so in an earlier proceeding and the Court does not suffer from any inherent lack of jurisdiction, he will be debarred from challenging the jurisdiction of that Court in all subsequent proceedings by the principles of constructive res judicata.

22. Mr. Das, appearing for the respondents stated that the West Bengal Land Reforms Act, 1955 came into operation of 12th October 1963, the transfer by Defendant No. 2 to Defendants Nos. 3 and 4 was effective on 5th December 1962 and thus the cause of action arose or accrued on that date of transfer i.e. before the coming into force of the amendment of the 1955 Act as mentioned

above. It was also stated by Mr. Das that the reconveyance in the instant case and to the original vendor was effected on 29th January 1963 and thus the result would be that Section 26F will not apply. The subsequent transfer to the plaintiff, according to Mr. Das was made on 29th March 1963, and thus at that time Misc. Case No. 89 of 1965 was not and could not be the subject matter of pre-emption the more so, as the transfer was not affected at all. Mr. Das further pointed out that Bengal Tenancy Act was repealed on 1st November 1965 i.e. with the coming into force of Section 59 of the West Bengal Land Reforms Act and the application in question was filed after such repeal. For the effect of such repeal, reliance was placed by Mr. Das to Maxwell's Interpretation of Statutes (12th Edn), and on the basis of the Rules as laid down, Mr. Das contended, that a law would not be repealed by becoming obsolete and if an Act expired or was repealed, it should be regarded, in the absence of provisions to the contrary as if, as observed in the case of *Surtees v. Ellison* (1829) 9 B & C 750 that the said law never existed, except as to matters and transactions past and closed. It was also contended by Mr. Das that in terms of the observations in *R v. West Riding of Yorkshire Justices* (876) 1 QBD 220 such repealing Acts are, unless the contrary intention appears, not to affect the previous operation of any enactment so repealed or any thing duly done or suffered under any enactment so repealed or affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment. This subsequent view, as indicated above, was considered and discussed in the case of *Hamilton Cell v. White* (1922) 2 KB 422 and it has been observed by Atkin LJ that such provision was not intended to preserve the abstract rights conferred by the repealed Act and the application should only be in respect of specific rights given to an individual upon the happening of one or other of the events specified in the statute". A view contrary to the above, was of course expressed earlier in the case of *Abbott v. Minister of Lands* (1895) A.C. 425 and what should be the "accrued right" or "right accrued" has been discussed and laid down in the case of *G. Ogden Industries Pvt. Ltd. v. Lucas* (1969) 1 All ER 121. The Privy Council in the case of *Director of Public Works v. Ho Po Sang* (1961) AC 901 had also the occasion to consider similar provisions as above of the Hong Kong Interpretation Ordinance and it has been observed in the facts of that case and considering the submissions, that under some repealed enactment, a right has been given but that in respect of some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal, the former is preserved by the Interpretation Act. The later is not".

23. The respective dates of transfer and reconveyance in this case are 5th December 1962 and 29th January 1963 and the categorical submissions of Mr. Das on the basis of those dates and the other dates as mentioned herein before were, thus the plaintiff had the necessary right and not the defendants in this

case and such right should be existing at the time of making the petition or the same should subsist at the time of passing the concerned order. He claimed further that at the time of pre-empting the necessary right, so far as the defendant, did not exist or survive, as the property at that time was with the co-sharer. In support of his submissions as above, Mr. Das relied on the observations to the effect that the person claiming pre-emption, in order to succeed, must have the right of pre-emption not only at the time of sale of the land by the owner but at the time of the institution of the suit for preemption and also at the time of passing the decree in the suit by the trial Court, as made in the case of Kalipada Ghosh Vs. Dulal Chandra Ghosh, . It was Mr. Das's specific contentions that not only on the basis of the above, but also on the basis of the determinations that a pre-emptor, in order to succeed, must have a right to pre-empt not only at the time of sale of the lands by the landlord but also at the time of institution of the suit for pre-emption and also at the time of passing of the decree in the suit by the trial Court and in other words his tenancy must remain intact and he must hold the land in his capacity as a tenant till the date of the decrees, as made in the case of Bhagwan Das (Dead) by Lrs. and Others Vs. Chet Ram, , the learned Munsif had no jurisdiction to try and determine the suit in this case and he totally overlooked the above state of laws.

24. While on the question of Section 26F of the Bengal Tenancy Act, it was argued by Mr. Das that the exceptions as indicated in the case of Madan Mohan Ghosh and Others Vs. Sishu Bala Atta and Others, would not come to the aid of the applicant herein and in fact such determination supports the case of the Respondents in this Appeal. It was claimed, that on the admitted splitting up of the tenancy, there was really a cessation of co-sharership by operation of law. Mr. Das also contended on the basis of the relevant and material dates and that too with justification, that this case would be governed by the old CPC and steps taken or initiated u/s 26F would be a proceeding and not a suit and thus he claimed that the rule of res-judicata or principles analogous thereto would not be applicable in this case, the more so when, an Authority u/s 26F has limited jurisdiction. Mr. Das also contended that the effect of the repeal of Bengal Tenancy Act was not at all or appropriately considered by the learned Court below. It was claimed by him that in terms of Section 6 of the General Clauses Act read with Section 59 of the said 1955 Act and Section 2(p) of the said 1953 Act, the Bengal Tenancy Act, 1885 was repealed for all intents and purposes or the same had outlived its effectiveness and such fact also overlooked and not duly considered by the learned Court below. It was also contended on the basis of the observations in the case of Surendra Nath Jana v. Abhimanyu Jana (1980) 1 Cal LJ 135 that the application for pre-emption as filed in this case and after the amendment, was incompetent. Mr. Das also contended that since on the basis of the determinations, the application for pre-emption u/s 26F of the Bengal Tenancy Act, would not be maintainable after the enforcement of Section 8 of the said 1955 Act, as made in the case of Sudhanaya Charan Pal Vs. Manick Chandra Pal, . the instant application for pre-emption was also not maintainable.

25. In answer to the question of maintainability of the suit without the necessary and appropriate prayer for recovery of possession. Mr. Das could not contend otherwise, but submitted that amendment, if necessary, may be allowed and done either on remand or here in this Court. Miss Chaturvedi claimed that if such prayer is allowed at this stage., the effect of possession of her clients for more than 10 years must also be considered. She also tried to distinguish the determinations in Kalipada Ghosh v. Dulal Chandra Ghosh (supra) and Sudhanaya Charan Pal v. Manick Chandra Pal (supra) on the facts of this case and made a further reference to the case of Nabin Majhi Vs. Tela Majhi and Another, , where it has been observed that the expression "a Court of limited jurisdiction" in explanation VIII to Section 11 of the CPC as inserted by the Code of Civil Procedure/Amendment Act, 1976, does not mean a Court of limited pecuniary jurisdiction, the decision of a Court having a lesser pecuniary jurisdiction e.g. a Munsiff's Court, would not be resjudicata in a suit brought in a Court having a higher pecuniary jurisdiction e.g. subordinate Judge's Court. She also referred to paragraph 6 of that determination, for establishing the circumstances and why the said explanation VIII was added.

26. On the basis of the available pleadings and on consideration of the respective submissions as made on the basis of the determinations in the case of Madan Mohan Ghosh and Others Vs. Sishu Bala Atta and Others, , I find and hold that the exceptions as indicated therein would not entire to the benefit of the appellants herein and as such, it must be held that on the splitting up of the tenancy, there was in fact a cessation of the rights of the co-sharers. It should also be held that in the facts of this case, the submissions on application of rules of res judicata or principles analogous thereto would not be appropriately available or applicable and on that account, the submissions of Mr. Das. as indicated hereinbefore, should prevail and such would also be the position in respect of the submissions of Mr. Das on the effect of repeal of the Bengal Tenancy Act and really the learned Court below has not at all considered such effect duly. I further think that the findings of the learned Appeal Court on the question of pre-emption and the maintainability of the application for the same, do not require any interference and as such the submissions of Mr. Das and not those of Miss Chaturvedi should prevail and succeed.

27. Thus the findings of the learned Appeal Court on the points as indicated hereinbefore, require no interference and they must be upheld. But, Miss Chaturvedi's submissions that in the facts of this case, without the necessary and appropriate prayer for recovery of possession, the plaintiff could not succeed, would be of some force. Such being the admitted position, even though I hold the vie was indicated above, I remand this case to the learned trial Court, for passing a decree, if possible, after allowing the plaintiff to have his plaint and prayer amended and also with corresponding opportunities to the defendants. The learned trial Court, while making such decision, if necessary and if so advised, should also allow the parties to have such evidence, as they would desire, subject of course to the relevancy of such evidence.

28. The appeal thus succeeds to the extent as indicated above and the case is remanded for necessary decision after setting aside the determinations, only on the ground as indicated above. There will be no order as to costs in this appeal.