

**(1954) 03 CAL CK 0009**  
**In the Calcutta High Court**  
**Case No : A.F.A.D. No. 238 of 1949**

Radha Govinda Sar and Others

APPELLANT

Vs

Sm. Sushila Dassi and Others

RESPONDENT

**Date of Decision :** 08-03-1954

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 26F, 26F(4), 26F4(2)

**Citation :** AIR 1954 Cal 497

**Hon'ble Judges :** P.N. Mookerjee, J

**Bench :** Single Bench

**Advocate :** Manindra Krishna Ghosh, for the Appellant; Sarat Chandra Janah, for the Respondent

**Final Decision :** Dismissed

## Judgement

1. The appellant was the plaintiff In a suit for declaration of title & recovery of khas possession. The suit was the sequel to a proceeding under Order 21, Rule 100, Civil P. C. and it arose under the following circumstances:

2. The plaintiff along with his brother Dharani Sar, since deceased, and their cousin Gopal Chandra Sar held an occupancy raiyati jama of Rs. 12-5-12 gds. in Mouza Mandar, District Midna-pore. That jama which contained an area of 8.22 acres was recorded in Interests Nos. 80, 60 and 61. Subsequently, however, the jama was partitioned amongst the three co-sharers and on the strength of that partition the plaintiff got his allotted portion of 1.40 acres registered (kharijed) in the landlord's sherista at a separate jama of Rs. 2-10-10 ps. On 5-4-1920, the plaintiff sold a portion (1.06 acres) of this separated jama to defendant No. 7, Bibhuti Sar and the predecessor of defendants Nos. 1 to 4, Satish Chandra Sar by name.

On 26-5-1939, defendants Nos. 1 to 4, and defendant, No. 7 sold a portion (1.02 acres) of their said 1.06 acres of land to defendant No. 5, Kartick Sar and the husband or predecessor-in-interest (Bon-behary Sar, since deceased), of

defendant No. 6. No notice of this sale was served upon the plaintiff who was admittedly a "cosharer in the tenancy" and a "co-sharer tenant" u/s 26F, Bengal Tenancy Act. The plaintiff, however, on coming to know of the sale applied on 14-9-1944 for preemption under the said section in "Misc. Case No. 158 of 1944" and took possession of the said lands (1.02 acres) in pursuance of the order of pre-emption made in his favour on 27-6-1945.

In the meantime, on 15-4-1943, that is, prior to the plaintiff's application for pre-emption, defendants Nos. 5 and 6 had sold, out of their said 1.02 acres, the suit land comprising .47 acres and recorded in C. S. Dag No. 664 of Interest No. 80 to Gopal Sar and, on 4-8-1946, this sale was pre-empted by defendants Nos. 1 to 4 in Misc. Judicial Case No. 88 of 1944 which had been started earlier than the plaintiff's pre-emption. On the strength of this pre-emption order in their favour, defendants Nos. 1 to 4 dispossessed the plaintiff from the suit land and thereupon the present suit was brought by the plaintiff after an unsuccessful attempt to get back possession under Order 21, Rule 100, Civil P. C.

3. In the pre-emption proceeding (Misc. Case No. 158 of 1944), started by the plaintiff, Gopal Sar was not made a party and, although, at one stage, defendants Nos. 1 to 4 were therein impleaded, they were not so impleaded as pre-emptors of Gopal Sar's purchase, but in their capacities of former owners and, further, their names were eventually struck out and the plaintiff's pre-emption proceeding was continued and brought to a close in the plaintiff's favour in their absence. The defendant's pre-emption case also was only against Gopal Sar and the plaintiff was no party thereto.

4. The Courts below have dismissed the plaintiff's suit on the ground that the pre-emption order, obtained by him in Misc. Case No. 158 of 1944, did not bind either Gopal Sar or the contesting defendants Nos. 1 to 4 who acquired the said Gopal Sar's interest in the suit land accruing to him from the transfer in his favour by the admitted owners defendants Nos. 5 and 6, as the plaintiff's, pre-emption order was not obtained against any of those persons (Gopal Sar or defendants Nos. 1 to 4). In the view of the two Courts below, Gopal Sar was a necessary party to the plaintiff's preemption proceeding and, he not having been impleaded therein, the pre-emption order obtained by the plaintiff was ineffective in law against him or against defendants Nos. 1 to 4 who were entitled to claim title to the suit land as Gopal's legal representatives. In the result, the suit was dismissed by the trial Court and also by the lower appellate Court, and hence the present Second Appeal by the plaintiff.

5. In support of the appeal, two points have been urged by Mr. Ghosh. He has first contended that the Courts below were wrong in holding that Gopal Sar was a necessary party in the plaintiff's pre-emption proceeding. In the submission of the appellant's learned Advocate, a subsequent purchaser is not a necessary party in a proceeding for pre-emption u/s 26F, Bengal Tenancy Act, and for this proposition he has placed particular reliance on an unreported decision of this Court -- "Kaseraddin Dafadar v. Adeladdi Fakir", Civil Revn. Case No. 1854 of

1946 (Cal) (A) decided by Henderson, J., on 30-1-1946. The appellant's second argument rests on the fact that though a co-sharer in the disputed tenancy or a "co-sharer tenant" in respect thereof, he was not impleaded in the defendants' pre-emption proceeding and as such the pre-emption order in the latter's favour did not bind him. In developing the argument, Mr. Ghose went so far as to say that a "co-sharer tenant" or a "co-sharer in the tenancy" was a necessary party to a pre-emption proceeding u/s 26F, Bengal Tenancy Act.

6. In my opinion, neither of the two arguments advanced by the appellant's learned Advocate, can be accepted and there is no valid ground for disturbing the decision of the two Courts below dismissing the plaintiff's suit. My reasons I shall presently indicate below.

7. There is nothing expressly stated in Section 26F, Bengal Tenancy Act, or in any relevant statutory provision as to who are necessary parties to an application under that section. That question, therefore, falls to be decided on general principles. One of these principles is that nobody should be prejudiced by an order passed behind his back or made without giving him an opportunity of contesting the same. u/s 26F(4), the pre-emptor gets the right, title and interest accruing to the pre-emptor from the pre-empted transfer. In effect, therefore, the order of pre-emption relates back to the date of the pre-empted transfer which necessarily implies that any subsequent transfer is, under the statute made subject to the pre-emptor's rights under the said order or, in other words, that the subsequent transferee's title to the property is intended by the statute to be affected by such order. On the general principle, stated above, the subsequent transferee should, therefore, be heard before an order for pre-emption is made; in other words, he should be made a party in the pre-emption proceeding.

This was the view taken by R. C. Mitter, J. in the case of -- Amir Sardar and Another Vs. Ismail Hossain Sardar, . For the reasons which I have given above I respectfully agree with the said decision. It is true that, on some occasions, the joinder of the subsequent transferee may give rise to complications and considerably widen the scope of the pre-emption proceeding, but that is certainly preferable to the obvious injustice which may otherwise result to the subsequent transferee from his being deprived of his property without a hearing. The contrary view of Henderson, J., In the case, cited by Mr. Ghosh, sanctions the wresting of one's property behind his back and to such an unjust proposition, I am not prepared to assent in the absence of a clear -- either express or arising by necessary implication, -- statutory provision to that effect. I may add further that the concluding words of Sub-section (5) of Section 26F also seem to suggest that subsequent transferees should be made parties to a proceeding under that section.

8. Three other decisions remain to be noticed in this connection. In the unreported case of --"Biseswari Saha v. Rajnath Saha", (Civil Revn. Case No. 2247 of 1945 D/- 15-11-1945 (C) ), Mukher-jea, J., as he then was, did not

decide this question but actually left open the rights of the subsequent transferee and in the other two, viz., --" Girija Nath Kundu Vs. Ahamadali Sardar and Others, (D) and -- Lokeman Ali Vs. Abdul Motaleb and Another, , the learned Judges merely held that the subsequent transferee was at least a proper party to the pre-emption proceeding. In my opinion, none of the above cases warrants the view that the subsequent transferee is not a necessary party to the pre-emption proceeding.

9. Clearly also, the pre-emption order obtained by defendants Nos. 1 to 4 suffers from no legal defect. On the date when they applied for pre-emption, the plaintiff could, at best, have claimed to be a "co-sharer tenant" or a "co-sharer in the tenancy," entitled to pre-empt in accordance with law. This right of pre-emption of a "co-sharer tenant" or a "co-sharer in the tenancy" -- which two phrases have been held to be interchangeable & as bearing the same meaning (vide -- Amir Sardar and Another Vs. Ismail Hossain Sardar, and -- Goas Ali Bhuiya and Others Vs. Lal Mia and Others, , -- is, however, an independent right of his which cannot be affected or taken away by any pre-emption proceeding or order to which he is not a party (vide in this connection -- Dhananjay Mallick Vs. Annada Charan Maity and Others, (G) and -- Brindaban Ghose and Another Vs. Jiban Chandra and Others, (H), and it is quite proper to hold -- and, indeed, it has been expressly held -- " Gobardhan Bar Vs. Gunadhar Bar, -- that such "co-sharer tenant" or "co-sharer in the tenancy" is not a necessary party to a pre-emption proceeding at the instance of another, although he is certainly a proper party thereto and may be so impleaded and served with notice of the proceeding so as to facilitate his participation therein under Sub-section 4(2) of Section 26F.

10. I, accordingly, hold that the plaintiff was not a necessary party to the pre-emption proceeding of defendants Nos. 1 to 4 and in spite of his non-joinder in the said pre-emption proceeding the order passed in that proceeding vested the said defendants with the right, title and interest of the pre-empted purchaser Gopal Sar and made them his legal representatives so as to entitle them to claim the benefit -- and, indeed, to take the fullest advantage -- of Gopal's non-joinder in the plaintiff's pre-emption proceeding.

11. In the light of the foregoing discussion, I am bound to hold that the pre-emption order, obtained by the plaintiff, does not bind the contesting defendants and, indeed, it is of no legal effect so far as they are concerned, and, that being so, the present suit which is essentially an action in ejectment against the said defendants must necessarily fail on the simple ground that the plaintiff has failed to make out any title, -- not to speak of a better title, -- as against them in respect of the suit property. The appellant's suit was, therefore, rightly dismissed by the two Courts below and their decision must be upheld.

12. I, accordingly, dismiss this appeal. Having regard, however, to the circumstances of this case, I would direct that the parties will bear their own costs in this Court and also in the two Courts below.