

(1954) 06 CAL CK 0009
In the Calcutta High Court
Case No : A.F.A.D. No. 246 of 1947

Sital Chandra Kolley and Another

APPELLANT

Vs

Heirs of Mihilal Kolley and Others
 Heirs of Mihilal
Kolley and Others Vs Sital Chandra Kolley and Another

RESPONDENT

Date of Decision : 29-06-1954

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F
Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1877 — Section 18, 22, 27
Transfer of Property Act, 1882 — Section 40
Trusts Act, 1882 — Section 91

Citation : AIR 1955 Cal 21 : 58 CWN 1000 : (1956) 2 ILR (Cal) 469

Hon'ble Judges : Sen, J;P.N. Mookerjee, J

Bench : Division Bench

Advocate : Charu Chandra Ganguli, Narendra Nath Banerjee, S.C. Janah and
Arun Kumar Janah, for the Appellant;

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.—This appeal raises an interesting question.

2. On 4-7-1945 respondents 1-4 filed a suit against the appellants and one Mohanta Patra for specific performance of a contract of reconveyance. That suit was dismissed by the trial court but, on appeal, it was decreed by the learned Subordinate Judge, First Court, Howrah. From this appellate decision the present second appeal has been preferred by defendants 2 and 3.

3. Briefly stated, the plaintiffs-respondents" case was as follows:

The disputed property which comprises an undivided share of an occupancy rayati holding originally belonged to them (respondents 1-4). On 15-3-45, in pursuance of an arrangement between the parties for sale and resale, they (the plaintiffs) sold the suit property to Mohanta Patra (who was defendant 1 in the trial court) by the Kobala (Ex. 1) and simultaneously obtained from him the

agreement for reconveyance (Ex. 2) which is the foundation of the present suit. The appellants before us (who were defendants 2 and 3 in the trial Court), alleging to be cosharers of the disputed occupancy rayati holding, applied for pre-emption u/s 26F, Bengal Tenancy Act, against the transferee defendant 1 alone and succeeded in getting an order in their favour. The respondents duly tendered to the appellants the consideration, payable under the agreement for reconveyance (Ex. 2), but the latter refused to accept the same and reconvey the suit property.

4. The appellants' defence was that the alleged agreement for reconveyance (Ex. 2) was not genuine and that, in any event, it was not enforceable against them and could not affect or prevail over their right" in respect of the disputed property. They claimed to have become absolutely entitled to the suit property as a result of the preemption proceedings and they also set up inter alia the defence of bona fide transferees for value without notice.

5. The learned Munsif came to the conclusion (that the agreement (Ex. 2) was not genuine and, in that view of the matter, he dismissed, the respondents' suit, consideration of all other questions being rendered unnecessary by reason of his above finding.

On appeal, the learned Subordinate Judge reversed the learned Munsif's decision, holding inter alia that the agreement (Ex. 2) was genuine and that the appellants' pre-emption must be subject to, the said agreement. The learned Judge further found that the appellants had actual, in any event, constructive notice of the said agreement before the pre-emption proceedings and were thus not bona fide transferees without notice.

The respondents' suit was, accordingly, decreed by the lower appellate Court and the unsuccessful defendants 2 and 3 have now come up in second appeal to this Court.

6. Three questions were raised in support of this appeal. In the first place, the learned Subordinate Judge's finding that the agreement (Ex. 2) was genuine was challenged. It was next contended that, even assuming that the said finding was correct, that agreement could not in law affect the appellants' title to the property, obtained under the order of pre-emption, and the said title could not be held to be subject to the said agreement (Ex. 2). Thirdly, it was urged that, in any event, the appellants were in the position of bona fide transferees for value without notice in relation to the disputed property, acquired by them in the pre-emption proceedings, and the learned Subordinate Judge's finding to the contrary was wrong.

It was, accordingly, claimed that, on this ground at least the agreement (Ex. 2) should be held not to be binding or enforceable against them (the appellants) and the plaintiffs' suit should be dismissed,

7. Of the above three contentions the first and the third may be shortly disposed

of.

8. The question whether the agreement (Ex. 2) was genuine or not is a pure question of fact. True, the judgment of the learned Subordinate Judge is, on this point, a judgment of reversal. But he appears to have considered all "the different aspects of the matter and all the relevant materials on record before affirming the genuineness of the agreement (Ex. 2). In these circumstances, it is not open to us to interfere with his said finding in second appeal. That finding must, accordingly, stand.

9. On the third question too, the learned Subordinate Judge's finding in the plaintiffs' favour cannot be disturbed. On a review of the evidence before him the learned Judge has held that the present appellants had actual notice of the plaintiffs' agreement (Ex. 2). He has further held that, in any event, they must be held to have had constructive notice of the same from the plaintiffs' undisturbed possession of the suit property after and in spite of the Kobala (Ex. 1) as, even on the view of facts, most favourable to them, they must at least be deemed to have failed to make the necessary enquiries in the matter. Neither of these grounds is really open to challenge before us.

The learned Judge has believed the evidence of the plaintiffs' witness, P. W. 2, that the present appellants had actual knowledge of the plaintiffs' agreement (Ex. 2) even before they lodged their pre-emption application. Admittedly also, the plaintiffs remained in possession of the suit property in spite of the Kobala (Ex. 1) and there is nothing to show that the contesting defendants who are the appellants before us made the relevant enquiries in the matter. In this state of facts, it is hardly open to us to say in second appeal that the learned Subordinate Judge was not justified in holding that the contesting defendants had notice -- actual and/or constructive -- of the plaintiffs' agreement (Ex. 2) some time before the institution of their pre-emption proceedings and, accordingly, we affirm his said finding.

10. The appellants' first and third contentions thus failing, the position must be accepted that the disputed agreement for reconveyance (Ex. 2) was genuine and, further, that it was simultaneous with the Kobala (Ex. 1) and made in pursuance of the arrangement for sale and resale, and that the appellants had notice of the same before the relevant pre-emption proceedings, and, on that footing, the appellants' second contention, namely, the question of the rights and obligations of the parties under the said agreement (Ex. 2) vis-a-vis the pre-emption proceedings will have to be determined. The question, thus arising, is a pure question of law depending mainly upon the true construction of Section 26F -- more particularly, Section 26F(7), Bengal Tenancy Act, and also upon Sections 18 (a) and 27(b), Specific Relief Act, Sections 40 and 54, Transfer of Property Act and Section 91, Trusts Act.

11. u/s 26F(7), Bengal Tenancy Act cumbrances"ct -- to quote only its relevant part -- "the right, title and interest accruing to the transferee (pre-emptee) from

the transfer" vests in the successful pre-emptor "free from all incumbrances" which have been created after the date of the transfer". The necessity of this latter provision arises because, under the statute, "the right, title and interest", referred to in the earlier part of the extract quoted above, vests in the pre-emptor only when the order of pre-emption is made.

It appears further that the liability for rent for the intervening period remains with the transferee as, under Clause (b) of the said Sub-section (7), the transferee's liability on account of rent ceases from the date of the pre-emption order. Indeed, it seems to me that, broadly speaking, the statute seeks an equitable adjustment of the rights and liabilities of the parties with particular reference to the date of the transfer and places the pre-emptor substantially in the same position as the pre-emptee (transferee) was when he took the relevant transfer, forming the subject-matter of the pre-emption.

12. On the wording of the section two questions demand consideration for our present purpose, namely-

(i) what is "the right, title and interest accruing to the transferee from the transfer" when the relevant sale is accompanied by a simultaneous or contemporaneous agreement for resale or repurchase?

and (ii) whether the agreement for resale or repurchase constitutes an "incumbrance" and, if so, is it an incumbrance "created after the date of the transfer"?

13. Now, there is nothing in law to prevent parties from entering into simultaneous agreements for sale and resale or into one compact or composite agreement for such purposes. The two may be inter-dependent in the sense that the "agreement upon one part of the bargain may well have promoted agreement as to the rest" but, so long as they are intended to be effected as separate and independent transactions, -- an outright sale to be followed by a reconveyance, -- as opposed to a single transaction of the nature of a mortgage or the like, they are both legal and provable in law.

"The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached" and, although the agreement for sale and re-sale may have been entered into at one & the same time and being interdependent, as stated above, may be broadly looked at as forming parts of the same transaction, if the sale and the re-sale can be separated and can be held to have been intended to be effected separately or as separate and independent transactions, namely, an outright sale to be followed by a reconveyance, there is no bar to the agreement for reconveyance, whether oral or written or registered or unregistered, having full effect in law. Neither the Registration Act (Ss. 17 and 49) nor the Evidence Act (Ss. 91 and 92) will stand in the way.

14. A pure agreement for resale or reconveyance which is by itself no more than

a mere agreement for sale "does not, of itself, create any interest in or charge on" -- nor does it, strictly speaking, directly affect, -- Immovable property (vide Section 54, Transfer of Property Act). So far as irnmoveable property is concerned, the writing (the deed of agreement for resale or repurchase) "as such" merely creates the right to obtain another document, namely, the deed of reconveyance. It will thus fall not u/s 17(1) but u/s 17(2), Registration Act, and will not be within the mischief of Section 49 of the said Act, Again, the stipulation for re-sale or reconveyance being strictly collateral to the sale which it has induced, though touching on a common subject-matter and being thus, broadly speaking, part of the same transaction, may well be proved under Sections 91 and 92, Evidence Act.

15. What I have stated above seems to be the true effect of the Privy Council decision -- AIR 1949 32 (Privy Council) read in the light of the two English cases -- "Morgan v. Griffith", (1871) 6 Ex 70 (B) and -- "Erskine v. Adeane", (1873) 8 Ch A 756 (C) and the two decisions of this country -- Harkisandas Bhagvandas and Others Vs. Bai Dhanu, and -- "Ma Nan Shein v. U Yaing", AIR 192T Rang 314 (E) which were particularly referred, to by their Lordships and the principles whereof were evidently approved by them. The terms of the sale are not affected by the agreement for resale or re-purchase. The outright sale stands but, side by side, stands also the simultaneous agreement for re-sale and both are valid and provable in law.

16. The simultaneous agreement for re-sale --no matter that, strictly speaking, it is prior to the actual sale -- may well be enforced against a subsequent transferee of the property except a bona fide transferee for value without notice (vide Sections 18(a) and 27(b), Specific Relief Act, the expression "imperfect title" occurring in the earlier of these two sections obviously including cases of DO title too). Clearly also the obligation under the said agreement is one annexed to the ownership of the property as it is intended to be performed and can be performed only by a person who is the owner of the property and not otherwise or independently of such ownership.

It is thus enforceable against all persons except a (bona fide) transferee for consideration (value) without notice (vide Section 40, Transfer of Property Act).

It is also an obligation in the nature of a trust, similarly enforceable u/s 91, Trusts Act. I am further - of the opinion that the principles of these sections, -- if not the sections themselves --consistent as they are with "justice, equity and good conscience", would, in the absence of provisions to the contrary, apply to all transfers, voluntary or involuntary and statutory or otherwise, and affect all transferees, unless they are bona fide transferees for value without notice, and the obligation, referred to above, will have to be viewed accordingly. Clearly also, this obligation under the agreement for re-sale arises and/or becomes annexed to the ownership of the property simultaneously with the transfer under the original sale and "the right, title and interest accruing to the transferee (vendee) from the transfer (sale)"" cannot be considered apart from that obligation and, in

effect, therefore, it is subject to that obligation which, however, is not enforceable against a subsequent transferee for value without notice.

17. Viewed in the above context, the transfer pre-empted or to be pre-empted u/s 26F, Bengal Tenancy Act, is the sale subject to the obligation, arising from or by reason of the agreement for re-sale or purchase. "The right, title and interest accruing to the transferee (preemptee) from the transfer" is, therefore, the entire bundle of rights and obligations, passing under the sale and the agreement for re-sale. The obligation under the agreement for re-sale is, as I have shown above, enforceable against all subsequent transferees -- voluntary or involuntary, statutory or otherwise -- except (bona fide) transferees for value without notice. It is thus enforceable against a pre-emptor with notice of the agreement for resale and the pre-emptor's right u/s 26F, Bengal Tenancy Act, will be subject to the obligation under the said agreement and must be viewed in that light.

18. Even assuming that the words "the right, title and interest accruing to the transferee (pre-emptee) from the transfer" in Section 26F(7), Bengal Tenancy Act, means only the right, title and interest, passing under the relevant sale and not the sale, read with the agreement for resale or repurchase, or, in other words, that the transfer, contemplated by or in the section, does not include the collateral agreement for re-sale as well, the position does not materially change. The agreement for re-sale undoubtedly gives rise to an obligation, annexed to the ownership, which, whether as such obligation or otherwise, is enforceable against all subsequent transferees with notice. This obligation which effectively springs into existence simultaneously with the sale in question is, having regard to its very nature and legal incidents, plainly, in my view, an "in cumbrance" within the meaning of the said Section 26F(7), Bengal Tenancy Act.

At any rate, it is hardly inappropriate to call it an "in cumbrance" within the meaning of that section. It is not, however, an incumbrance "created after the date of the transfer" -- which obviously means subsequent to the transfer, though not necessarily on a different or subsequent date --- as it arises simultaneously with the sale and not subsequent thereto. The obligation, therefore, arising, from the simultaneous agreement for re-sale or repurchase, is not affected by Section 26F(7) which, in its material part, as already quoted, refers only to incumbrances created after the date of the transfer."

19. The substance of the matter may now be conveniently set forth as follows:

An agreement for re-sale may well stand side by side with a sale and/or an agreement for sale. They do not necessarily involve any incongruity or illegality. The fact that the sale and the re-sale are to be effected as separate and independent transactions does not prevent the obligation under the agreement for re-sale from becoming annexed to the ownership (which passes by the sale) simultaneously with the transfer so as to remain unaffected by Sub-section (7) of Section 26F, Bengal Tenancy Act. The obligation under the agreement for resale

becomes annexed to the ownership by reason of the principle, underlying Section 40, Transfer of Property Act. That section, it is true, applies, generally speaking, only to voluntary transfers (vide Section 2(d) of the Act) but the principle, underlying it, does, in my view, apply to involuntary transfers as well including statutory transfers unless excluded either expressly or by necessary implication.

The same result also follows from a consideration of Section 91, Trusts Act. The agreement for resale creates some sort of a fiduciary relationship between the parties, to the benefit of which the original transferor will be entitled, so long as the agreement remains enforceable in law, and this fiduciary relationship or the benefit thereof which arises simultaneously with the agreement for resale and, therefore, simultaneously with the transfer too, and is available against a transferee with notice, is not affected by Section 26F(7), Bengal Tenancy Act.

20. Applying the above principles to the facts of the instant case before us, the net position is that, in spite of the pre-emption, the agreement for re-sale (Ex. 2) remained enforceable -- and it has been validly enforced by the learned Subordinate Judge -- against the present appellants who, though they are in a sense statutory transferees, are transferees with notice of the same.

21. I would, therefore, affirm the decision of the learned Subordinate Judge, decreeing the respondents' suit for, specific performance of the agreement for re-sale (Ex. 2).

22. On behalf of the appellants, strong reliance was placed on the decision of this Court," reported in -- (Tarapada Karati v. Sudhamoy Dolui", 53 Cal WN 678 (P)), and we were pressed to hold on the strength of that decision that, as a matter of law, the agreement for reconveyance (Ex. 2) was not enforceable against the appellants. We have carefully examined the decision cited but we do not think that it really affects the question, now before us.

23. The same remarks apply to the later decision of this Court, reported in -- ("Nishikanta Das Vs. Jnanendra Nath Mondal and Others,), where the learned Chief Justice, sitting with Sinha J., reaffirmed his earlier" view (53 Cal WN 678 (F)) that, for purposes of Section 26F, Bengal Tenancy Act, the existence of a contemporaneous agreement for re-sale, -- or even of a reconveyance in pursuance of such agreement (vide Nishikanta Das Vs. Jnanendra Nath Mondal and Others,) -- would not be relevant.

24. The question whether such an agreement was legally enforceable against the pre-emptor if he had notice of the same prior to the pre-emption Order or the pre-emption proceedings did not --and, indeed, it could not -- strictly arise in any of the two cases, cited above. Such a question or a question of title between the pre-emptor and the claimant under the agreement, or the reconveyance would indeed be wholly outside the scope of pre-emption proceedings, out of which, admittedly, the two cases cited arose. Any observations on either of the said two questions in the judgments of the learned Chief Justice would thus be more or less in the nature of obiter dicta and, although deserving the highest respect and

the utmost consideration, they would not be binding on this Court, unless found sound on principle.

To the extent, therefore, that those observations conflict with the views, expressed in this judgment, I would respectively put them aside as, in my opinion, they do not appear to have taken note of the reasons which have prompted me to reject the appellants' contention and which I have sufficiently set out above.

25. As to the merits of the actual decisions. in the said, two cases cited (Nishikanta Das Vs. Jnanendra Nath Mondal and Others, (F)) it is quite unnecessary to express any opinion on the present occasion. The actual decisions were possibly right. At least, they seem to be so prima facie, and further consideration may well be reserved for appropriate future occasions. Strictly speaking, all that was actually decided in those two cases was merely this,

"that the existence of a contemporaneous agreement for re-sale or re-purchase does not necessarily preclude the application of Section 26F, Bengal Tenancy Act,"

That position may be conceded and may, even, be accepted, but it does not, from such concession or acceptance, necessarily follow that the preemption order nullifies the agreement or that it (the agreement) cannot be enforced against the pre-emptor, even if he had notice of the "same prior to the said order or even before the pre-emption proceedings,

26. I would, therefore, hold that the pre-emptor, u/s 26-F, Bengal Tenancy Act, who takes a pre-emption order or, at any late, institutes his pre-emption proceedings with notice of an agreement for resale, prior to or contemporaneous with the sale in question and otherwise valid and enforceable in law, is bound by the same and cannot resist its enforcement by reason merely of Sub-section (7) of that section.

27. It has been argued before us that the adoption of this view may involve hardship and in-justice and may encourage attempts to evade the statute but I am not impressed. Specific performance is in the discretion of the Court and it has ample power to refuse it to prevent hardship or injustice or evasion of statute. In the facts of this case we feel amply satisfied that the plaintiffs cannot be denied relief on any of the above grounds. Rather, ends of justice require that the agreement ("Ex. 2) should be specifically enforced against the appellants (who applied for pre-emption with full knowledge and/or notice of the same when the records contain sufficient materials to justify the finding of the learned Subordinate Judge that, by the Kobala (Ex. 1), the suit property was sold at about one-fourth of its real value.

Refusal of specific performance would mean that the appellants would get the suit land at a nominal value and the plaintiff-respondents would lose their valuable property for a paltry sum for no fault of theirs. We do not also find any

attempt on the plaintiffs' part to evade the statute, as, on the findings of the final Court of fact, the agreement for resale (Ex. 2) must be held to be genuine and "bona fide". No question of hardship to the appellants also arises in the circumstances of the present case.

28. In the above view of the matter, I would dismiss the present appeal and uphold the decision of the learned Subordinate Judge decreeing the plaintiffs' suit for specific performance. Having regard, however, to the circumstances of this case, I would direct the parties to bear their own costs in this Court.

Sen, J.

29. This second appeal arises from a suit for the specific performance of a contract for reconveyance of 1.165 acres of homestead and danga or high land in Mouza Kumaria. The land in question was sold on 15-3-43 by the plaintiff-respondents Mihilal Koley and others to one Mohanta Patra for the consideration of Rs. 150/-. The appellants Sital Chandra Koley and another applied u/s 26-F, Bengal Tenancy Act, for pre-emption of the land and they succeeded in their application though the application was opposed by Mohanta Patra. The plaintiffs instituted Title Suit No. 338 of 1945 in the Court of the Munsif, Amta, for reconveyance of the land to them; alleging that there was a simultaneous agreement for reconveyance of the land to them by the purchaser Mohanta Patra provided they could repay the amount of the consideration within the period of five years, and they alleged that the pre-emptors Sital Chandra and another had notice of such agreement and were bound by the same.

In the suit, Mohanta Patra was impleaded as defendant 1, while Sital Chandra Koley and another were defendants 2 and 3. Defendants 2 and 3 contested the suit, while defendant 1 appeared at a somewhat late stage and supported the plaintiff. The learned Munsif dismissed the suit, holding that there was no simultaneous agreement for reconveyance and that the unregistered deed of agreement had been created for the purpose of the suit by collusion between the plaintiffs and defendant 1. In appeal, the learned Subordinate Judge, Howrah, held that the deed of agreement was a genuine document and that there was a simultaneous agreement for reconveyance. He also held that defendants had notice of the agreement and must be held to be bound by the same.

Accordingly he allowed the plaintiffs' appeal. Defendants 2 and 3 have preferred this second appeal. The points urged in this appeal are that the learned Subordinate Judge was wrong in holding that defendants 2 and 3 had notice of the agreement, and that in any case as defendants 2 and 3, appellants, did not derive their title from the original transferee, Mohanta Patra, but from an order of the Court giving effect to their statutory right of pre-emption, the agreement for reconveyance could not be enforced against them.

30. As regards the first point, it is urged that as the agreement for reconveyance is not registered, it cannot be said that the appellants had knowledge of the same. This point was not however overlooked by the learned Subordinate Judge.

The learned Subordinate Judge referred to the evidence of the scribe Rajani Kanta Sil (P. W. 2) that prior to the pre-emption case defendant 3 had asked for copies of the deed of sale to Mohanta Patra and the deed of agreement from him. The learned Subordinate Judge considered P. W. 2 a reliable witness.

Further, the learned Subordinate Judge found that the plaintiffs continued to be in possession in spite of the sale to Mohanta Patra, and that the appellants had obtained possession from the plaintiffs after their success in the pre-emption case, and that such possession must have put the appellants on their inquiry even if they had not known of the agreement before, and that in the circumstances it must be held that the appellants had notice of the agreement. The inference drawn by the learned Subordinate Judge from the facts found by him is a legal inference, and there is no reason to consider it a wrong finding.

31. On the question of the existence of a simultaneous agreement for reconveyance, the finding of the learned Subordinate Judge, being a finding of fact based on evidence, is binding on us. The question now arises whether the agreement is enforceable against the appellants who derived their title by pre-emption. The right and title obtained by pre-emption u/s 26-F, Bengal Tenancy Act, is set out in Sub-section (7), Clause (a), as follows:

"From the date of the making of the order under Sub-section (5) the right, title and interest in the portion or share of the holding accruing to the transferee by the transfer shall, subject to the provisions of Section 22 and to any orders 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 the transfer, in the co-sharer tenants whose applications to purchase have been allowed under this section."

32. A contract for sale (including reconveyance) of immovable property does not by itself create any interest in or charge on such property (Section 54, Transfer of Property Act); but it creates an obligation annexed to the ownership of immovable property, and may be enforced against a transferee with notice thereof (Section 40, Transfer of Property Act, and illustration thereto). Such obligation annexed to the ownership of immovable property must be regarded as an encumbrance within the meaning of Section 26-F (7), Bengal Tenancy Act. In view of the terms of Sub-section (7) of Section 26-F quoted above, the pre-emptor gets the right, title and interest of the transferee free from all encumbrances created after the date of transfer; hence if the transferee were to make an agreement for reconveyance after the date of the transfer to him, such agreement would not bind the pre-emptor.

But where there is a simultaneous agreement for reconveyance made on the same date as the date of transfer, the pre-emptor cannot get the right, title and interest of the transferee free from the burden of such agreement; the principle of Section 40, Transfer of Property Act, would apply in such a case; the pre-emptor if he had notice of the agreement before he obtained the order of pre-

emption would be bound by the agreement.

It has been urged on behalf of the appellants that a pre-emptor who obtains a transfer to himself by operation of law is not a transferee within the meaning of Section 40, Transfer of Property Act. No doubt Section 2(d), Transfer of Property Act, provides that nothing contained in the Transfer of Property Act other than Section 57 and Chapter IV (Sections 58 to 104) will be deemed to affect any transfer by operation of law, and therefore Section 40 of the Act is not directly applicable to transfer by operation of law, like transfer u/s 26-F, Bengal Tenancy Act. But the principles underlying the provisions of the Act not directly applicable to transfer by operation of law have in many cases been applied to such transfers.

Reference may be made to -- Shivaprasad Singh Vs. Prayagkumari Debee and Others, , where the principles of Section 36 were applied; -- "Ramanathan v. Unnamalai Achi", AIR 1942 Mad 632 (I), where the principle of Section 53 was applied, and other cases. In -- "Nur Muhammad v. Dinshaw Har-Masji", AIR 1922 PC 393 (J), their Lordships of the Privy Council did not expressly hold that Section 40, Transfer of Property Act, would apply to execution sales, but did not rule out its application. They observed:

"Assuming that..... Section 40, Transfer of Property Act, has full scope, it is only if the purchaser at a judicial sale bought with notice of the contract that it could be enforced against him."

33. A co-sharer tenant may, like any other person, sell his share of a tenancy to obtain funds to tide over a crisis, expecting to be able to buy back his share when the crisis is over and conditions are easier for him; in such a case, he might make an agreement for repurchase within a stipulated time, rather than a mortgage by conditional sale which is unacceptable to many parties because of the provisions of the Bengal Money Lenders Act, 1940; such an agreement for repurchase would generally reduce the price he could get for his share; in the present case, the learned Subordinate Judge has found that the price obtained by the plaintiff-respondents was much lower than the actual value of the property sold.

In such a case, it is clearly inequitable that another co-sharer, who is able to step into the shoes of the buyer, in view of the provisions of Section 26-F, Bengal Tenancy Act, should have a better title than that of the buyer, in not being subject to the agreement of repurchase, and should thus be able to obtain the share of the tenancy at an unduly low price and to bar the original vendor's right to repurchase for ever. It would clearly be equitable to hold that the co-sharer who steps into the shoes of the buyer should be bound by the buyer's agreement to reconvey, provided that he had notice of such agreement.

Though Section 40, Transfer of Property Act, may not directly apply, it lays down an equitable principle which is applicable to the case of transfer by operation of law, e.g., under the provisions of Section 26F, Bengal Tenancy Act, and this principle should in our opinion be applied in this case.

Section 91, Trusts Act, is relevant in this connection, viz., "when a person acquires property with notice that another person has entered into an existing contract affecting the property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract." In view of the principle laid down in Section 40, Transfer of Property Act, and the provisions of Section 91, Trusts Act, it must be held that the plaintiffs may obtain specific performance of their agreement of repurchase against the pre-emptors.

34. The learned Advocate for the appellants has also relied on the reasoning in the case -- Tarapada Karati Vs. Sudhamoy Dolui and Others in support of his contention that an agreement for reconveyance does not avail against a claim for pre-emption. It is quite right that an agreement for reconveyance does not bar an application for pre-emption u/s 26-F; it was held in the above case that a sale with a simultaneous oral agreement for reconveyance was still an absolute sale and the agreement could not exclude the operation of Section 26-F, Bengal Tenancy Act.

In a later case -- Mrs. A. Cacacie Vs. S. Safdar Ali, , the earlier decision was re-affirmed and it was held that all subsequent transfers by the transferee were subject to the right of the pre-emptor u/s 26F, Bengal Tenancy Act. But the question now before us is whether the obligation arising from an agreement for reconveyance, if simultaneous with the transfer, can be enforced against the pre-emptor, this question did not arise for consideration to either of the above cases; these cases do not help to decide the question now before us, and the question must be answered independently.

As pointed out earlier, though a transfer by operation of law is not a transfer within the meaning of Section 40, Transfer of Property Act, the principle laid down therein may be applied to such a transfer, and that being so, it follows that an agreement for reconveyance simultaneous with the transfer sought to be pre-empted may be enforced against the pre-emptor where the pre-emptor had notice of such agreement.

35. Accordingly this appeal must fail and I agree with the order passed by my learned brother.