

Hiru Sepai Vs. Sultan Sepai

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Court : Kolkata

Decided On : Jul-17-1974

Reported in : AIR1975Cal1,79CWN1

Judge : Sankar Prasad Mitra, C.J., ;M.M. Dutt and ;A.K. De, JJ.

Acts : West Bengal Land Reforms Act, 1956 - Sections 4(1) and 8(1); ;Bengal Tenancy Act, 1885 - Section 26(F)

Appeal No. : Full Bench Reference No. 2 of 1972 in C.R. No. 470 of 1971

Appellant : Hiru Sepai

Respondent : Sultan Sepai

Advocate for Def. : Panchanan Pal, ;Amar Nath Dhole, ;Debabrata Nandi, ;Bhudeb Bhattacharjee and ;Jyotsna Das, Advs.

Advocate for Pet/Ap. : S.C. Mitter, ;S.P. Roy Choudhury and ;Tapan Kumar Mukherjee, Advs.

Judgement :

M.M. Dutt, J.

1. This Rule has been referred to a Full Bench by a Division Bench of this Court. The circumstances which induced the learned Judges of the Division Bench 'to

refer the Rule to the Full Bench is that there is a conflict between two Division Bench judgments of this Court on the following point as formulated by them:--

'Whether an application for preemption can be resisted by a party under the provisions of the West Bengal Land Reforms Act, 1956, who has ceased to be a co-sharer on the date of hearing of the application even though he was a co-sharer on the day the application was made.' The Division Bench decisions which are said to be conflicting on the point are Bidyut Baran De v. Nityananda Das, (1969) 73 Cal WN 654 and Karamali Sheikh v. Necher Ali Sheikh, in Civil Rule No. 1926 of 1968, disposed of on October 7, 1969 (Cal). It may be stated at the outset that the point referred to above has not been correctly formulated by the Division Bench which will appear from the facts of the case which are stated hereafter.

2. One Mohammad Sepai was admittedly a co-sharer of the disputed holding. On January 4, 1964, by a registered Kobala he transferred to the opposite party Sultan Sepai. .64 1/3 acres of land out of 1.93 acres appertaining to Khatian No. 118. Again on October 19, 1966, by another registered Kobala he transferred .07 acres of land appertaining to the said Khatian to the opposite party. On December 9, 1966, the petitioner Hiru Sepai, a co-sharer of the disputed holding filed an application for pre-emption under Section 8(1) of the West Bengal Land Reforms Act, 1956 (hereinafter referred to as the Act) before the Revenue Officer in respect of the first transfer dated January 4, 1964. The said application was registered as Misc. Case No. 166 of 1966. On November 13, 1967, he made another application for pre-emption under Section 8(1) in respect of the second transfer dated October 19, 1966, which gave rise to Misc. Case No. 214 of 1967. By two separate orders both dated July 14, 1969, the Revenue Officer, allowed both the applications for pre-emption. The opposite party filed two appeals being Misc. Appeal No. 4 of 1967 relating to the first transfer and Misc. Appeal No. 3 of 1969 relating to the second transfer. It so happened that before Misc. Appeal No. 4 of 1969 relating to the first transfer was disposed of the learned Munsif by his order dated December 22, 1970, allowed the Misc Appeal No. 3 of 1969 on the ground that on the date of the second transfer, the opposite party Sultan Sepai having already become a co-sharer by virtue of the first transfer in his favour, the application for pre-emption was not maintainable.

3. The petitioner moved this Court under Article 227 of the Constitution against the said order of the learned Munsif rejecting his application for pre-emption of the Second transfer and obtained a Rule being C. R. No. 470 of 1971. The Rule came up for, hearing before S.K. Bhattacharyya, J., who referred the matter to a Division Bench by his order dated February 3, 1972. As aforesaid, the Division Bench in its turn referred the Rule to the Full Bench. It may be stated that during the pendency of the Rule the other Misc. Appeal being Misc. Appeal No. 4 of 1969 in respect of the first transfer was dismissed by the learned Munsif by his order dated March 6, 1971.

4. The point which arises from the facts stated above is, whether a person who becomes a co-sharer of a holding by virtue of a prior purchase can be pre-empted by a co-sharer raiyat of the holding in respect of the second or subsequent purchase made by him.

5. In the unreported Bench decision referred to above, the petitioner purchased a portion of the holding by a Kobala dated May 8, 1965. Thereafter, he purchased another portion of the holding on June 16, 1965. Both these transfers were sought to be pre-empted by a contiguous raiyat, the opposite party in the Rule, on the ground of vicinage under Section 8(1) of the Act. One of the contentions of the petitioner was that so far as the second transfer was concerned he could not be pre-empted as he had already become a co-sharer by virtue of his first purchase. This contention of the petitioner was upheld by the Bench and it was held that when the second purchase was made by the petitioner he had already become a co-sharer in the holding, and as Section 8(1) of the Act expressly excluded from its scope transfers in favour of co-sharers, the prayer for pre-emption in respect of the second transfer was not clearly maintainable.

6. In the other Bench decision in Bidyut Baran's case, (1969) 73 Cal WN 654 the application for pre-emption was under Section 26F. The facts of that case are that one Krishnamoyee who had four annas share in an occupancy raiyati holding sold two annas share to one Probhas who in his turn sold to Bidyut. The remaining two annas share of Krishnamoyee devolved upon Hem by inheritance. The sons of Nagendra who had twelve annas share in the raiyati holding sold that share to one

Sakhi. Three applications for pre-emption under Section 26-F were made, namely, one by Hem, one by Bidyut and one by Sakhi. The question that was before the Bench was whether Bidyut who acquired the two annas share of Krishnamoyee was entitled to pre-empt Sakhi when Hem who stepped into the shoes of Krishnamoyee by inheritance had also made an application for pre-empting the transfer in favour of Bidyut. It was held that Bidyut's purchase by which he claimed the right of pre-emption in respect of Sakhi's purchase, was subject to the right of preemption of Hem and that Hem's application for pre-emption having been rightly allowed by the learned Munsif, Bidyut's application for pre-emption of Sakhi must fail. In that connection, it was observed by P.N. Mookerjee, A. C. J. who delivered the judgment of the Bench that Hem's right of pre-emption was an overriding right and, once that right was exercised, the other right would vanish.

7. On behalf of the petitioner. Mr. Shyama Charan Mitter has strongly relied on the said observation of P.N. Mookerjee, A. C. J., in Bidyut Baran's case (1969) 73 Cal WN 654. He submits that although Section 4(1) of the Act recognises a raiyat as the owner of his holding and also confers on him the right to transfer the holding, the ownership of the raiyat and the transfer that may be made in respect of the holding are subject to certain restrictions and limitations. One of the restrictions is that a transfer which is made by a raiyat of a holding is subject to the right of preemption of the other co-sharers of the holding if the transfer is made to a person who is not a co-sharer. It is contended by him that although, as a consequence of the first purchase made by the opposite party, he became a co-sharer of the holding, the petitioner's right of preemption of the second transfer to the opposite party cannot be defeated on the ground that on the date of the second transfer the opposite party was already a co-sharer of the holding by virtue of the first transfer. He submits that so long the right of pre-emption of a co-sharer exists or so long it is not extinguished by lapse of time or otherwise, relating to a particular transfer or transfers, the same cannot be nullified.

8. On the other hand, Mr. Panchanan Pal, learned Advocate appearing on behalf of the opposite party puts forward the same contentions which were made on behalf of the petitioner in the said unreported Bench decision, namely, that the opposite party having become a co-sharer by virtue of his first purchase, the

application for pre-emption is not maintainable in respect of the second transfer. He submits that the test in this regard is whether the transferee was a co-sharer on the date the transfer was made to him. It is contended that the opposite party was a co-sharer on the date of the second transfer by virtue of his first transfer and, as such. Section 8(1) was not applicable to him.

9. Section 8 of the Act runs as follows:--

'8. Right of purchase by co-sharer or contiguous tenant.-

(1) If a portion or share of a holding of a raiyat is transferred to any person other than a co-sharer in the holding, any co-sharer raiyat of the holding may, within three months of the service of the notice given under Sub-section (5) of Section 5, or any raiyat possessing land adjoining such holding may, within four months of the date of such transfer, apply to the Revenue Officer specially empowered by the State Government in this behalf, for transfer of the said portion or share of the holding to him, subject to the limit mentioned in Sub-section (3) of Section 4, on deposit of the consideration money together with a further sum of ten per cent, of that amount:

Provided that if a co-sharer raiyat and a raiyat possessing land adjoining such holding both apply for such transfer, the former shall have the prior right to have such portion or share of the holding transferred to him, and in such a case, the deposit made by the latter shall be refunded to him;

Provided further that as amongst raiyats possessing lands adjoining such holding preference shall be given to the raiyat having the longest common boundary with the land transferred.

(2) Nothing in this section shall apply to-

(a) a transfer by exchange or by partition or,

(b) a transfer by bequest or gift, or,

(c) a usufructuary mortgage mentioned in Section 7, or,

(d) a transfer for charitable or religious purposes or both without reservation of any pecuniary benefit for any individual.'

Section 8(1) confers on a co-sharer raiyat and a contiguous raiyat a right of pre-emption in case of a transfer of a portion or share of a holding of a raiyat to any person other than a co-sharer in the holding. Under Section 26-P of the Bengal Tenancy Act, a similar right was conferred on a co-sharer raiyat. The Bengal Tenancy Act has been repealed by Section 59 of the Act which came into force with effect from November 1, 1965. The Act which has taken the place of the Bengal Tenancy Act has also made a similar provision for pre-emption under Section 8(1). There is, however, a material difference between Section 26-F of the Bengal Tenancy Act and Section 8(1) of the Act. While Section 26-F provided that the right of pre-emption could be exercised against a transferee whose existing interest had accrued otherwise than by purchase. Section 8(1) has not made any such provision. Section 26-F, therefore, does not recognise a co-sharer by purchase as a co-sharer in respect of an application for pre-emption that is made against such a person, although he had acquired an existing interest in the tenancy by virtue of a prior purchase. Relying on this departure in Section 8(1) from Section 26-F, it has been argued on behalf of the opposite party that the intention of the legislature is that no application for pre-emption will be maintainable against a transferee whose existing interest in the holding has accrued under a previous transfer. It is contended that this distinction between the two provisions cannot be overlooked or ignored and we have been pressed to hold that unlike Section 26-F of the Bengal Tenancy Act, Section 8(1) impliedly prevents a co-sharer raiyat from pre-empting a transferee whose existing interest in the holding has accrued by purchase.

10. It is not that for the first time the right of pre-emption has been conferred on a raiyat under Section 8 of the Act, but as stated already, such a right was there under Section 26-F of the Bengal Tenancy Act. Regarding properties other than raiyati holdings a similar right has been conferred on a co-sharer by Section 44 of the Transfer of Property Act and Section 4 of the Partition Act. The paramount object behind the conferment of the right of pre-emption on a co-sharer is to prevent the introduction of a stranger into the property. A co-sharer has a right to

veto a transfer to a stranger of a portion of the property of which he is a co-sharer, and thereby prevent him from coming on the property. Reference may be made to a Bench decision of this Court in *Khodeja v. Mahamed Abdul Khalique*. 44 Cal WN 981 = (AIR 1940 Cal 472) where it was observed by Dr. Bijan Kumar Mukherji (as he then was) that the object of Section 26-F of the Bengal Tenancy Act was undoubtedly to prevent a stranger from coming upon a holding. The real reason behind the law of pre-emption is, therefore, to prevent stranger from acquiring property in any area which has been populated by a particular fraternity or class of people *Bhau Ram v. Baijna'th Singh*. : AIR 1962 SC1476 .

11. In view of the express provisions of Section 26-F that an application for pre-emption could be made against a person whose existing interest in the tenancy had accrued by purchase, it would be no answer for a subsequent purchaser to a claim for pre-emption by a co-sharer that he had become a co-sharer in the tenancy by virtue of a previous transfer of a portion of the holding. Under Section 26-F, a co-sharer in the tenancy was entitled to apply for pre-emption against a subsequent transferee without pre-empting the first transfer, for in view of the specific language of Section 26-F the transferee would not be considered as a co-sharer by virtue of his previous purchase. Under Section 8(1) of the Act also, a co-sharer in the holding has undoubtedly the right to pre-empt a transferee. In view of the fact that Section 8(1) has departed from Section 26-F of the Bengal Tenancy Act in that it does not provide that an application for pre-emption can be made against a transferee whose existing interest has accrued by purchase, It seems prima facie that a co-sharer in the holding will not be able to pre-empt a transferee who is a co-sharer in the tenancy under a previous purchase. It thus appears that Section 8(1) is capable of two interpretations. One such interpretation is based on the difference between the language of Section 26-F of the Bengal Tenancy Act and Section 8(1) of the Act as pointed out above and under this an application for pre-emption of the second transfer is not maintainable. The other interpretation that may be made of Section 8(1) gives effect to the very object for which the right of pre-emption has been conferred on a co-sharer. The question, however, is that when a co-sharer applies for pre-emption both in respect of the first transfer as also in respect of the second transfer to the same person as in the instant case, whether his application for pre-emption against the second transfer is to be

dismissed on the ground that by virtue of his first transfer, the transferee had become a co-sharer in the holding on the date of the second transfer. In considering this question, we are to decide which of the two interpretations referred to above should be accepted, or in other words, of these two interpretations which one is consistent with the legislative intent and the object of the law of preemption. At this stage, it will be profitable to refer to an observation of the House of Lords in *Nokes v. Doncaster Amalgamated Collieries Ltd.*, (1940) AC 1014, that if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. Keeping in view the above principle of interpretation we may refer to a few provisions of the Act. Under Section 4(1) of the Act the ownership of the holding of a raiyat has been made subject to the other provisions of the Act. In view of Section 4(1), the ownership of the holding of a raiyat by purchase, is, therefore, subject to the right of pre-emption of a co-sharer under Section 8(1). Under Clause (b) (ii) of Sub-section (1) read with Sub-section (4) of Section 5 of the Act a registering officer shall not accept for registration any instrument of transfer of a share or portion of holding to which Section 8 applies unless notices giving particulars of the transfer in the prescribed form are filed for service on all the co-sharers. There can be no doubt that these provisions have been made for the purpose of giving the co-sharers an opportunity to exercise their right of pre-emption. In *Audh Behari Singh v. Gajadhar Jaipuria*, : [1955]1SCR70 , it has been observed by the Supreme Court that the law of preemption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right to sell and compels him to sell the property to his co-sharer or neighbour, as the case may be. The same view has been expressed by the Supreme Court in *Sundar Singh v. Narain Singh*. : [1966]3SCR863 . It has been already noticed that the paramount object behind the right of pre-emption is to prevent introduction of strangers into the property. In our opinion, it is manifestly clear that with this object in view the legislature enacted Section 8(1) of the Act conferring this long recognised right of preemption on co-sharer raiyats. There can, therefore, be no doubt that the second of the two

interpretations referred to above is consistent with the legislative intent and the object behind the right of preemption. Now can, it be said that in case of successive transfers to the same person, a co-sharer in the holding will be entitled to pre-empt the first transfer only and not the subsequent transfer or transfers on the ground that the transferee had already become a co-sharer on account of the first transfer to him. The answer must obviously be in the negative, for if held otherwise it will be against the intention of the legislature and defeat the object and purpose for which Section 8 has been enacted.

12. We have construed Section 8(1), but we are yet to consider the material difference noticed above between Section 26-F of the Bengal Tenancy Act and Section 8(1) of the Act for when the legislature has, in enacting Section 8(1) made a departure from Section 26-F to the extent already indicated, the construction which we have put on Section 8(1) will not be complete unless the effect of this departure is considered and explained. The difference which has been noticed between the provisions of Section 26-F of the Bengal Tenancy Act and the provisions of Section 8(1) of the Act does not in our opinion, materially affect the exercise of right of pre-emption by a co-sharer raiyat under Section 8(1). The only effect seems to be that in case of successive transfers to a stranger, Section 8(1) requires a co-sharer raiyat to be more vigilant in the exercise of his right. He has to apply for pre-emption not only against the second or subsequent transfer but also against the first transfer. Under Section 26-F a co-sharer raiyat in the tenancy was entitled to pre-empt, any of the subsequent transfers to a stranger without pre-empting the prior transfer. It is true that by virtue of his first transfer, the transferee becomes a co-sharer but if that transfer is subject to right of pre-emption of a co-sharer raiyat, the co-sharership of the transferee is not perfect and unqualified so long the right of pre-emption of the co-sharer subsists. This, in our opinion is the effect of the omission to provide in Section 8(1) the right of pre-emption of a co-sharer raiyat against a transferee whose existing interest in the holding has accrued by purchase.

13. In the instant case, so long the right of pre-emption of the petitioner exists or continues or does not come to an end the opposite party cannot claim to be a full and complete co-sharer of the holding so as to defeat the right of the petitioner so

far as the second purchase made by him on October 19, 1966 is concerned. If the petitioner had not sought to pre-empt the opposite party in respect of his first purchase or if the application of the petitioner for pre-emption had failed for some reason or other, the opposite party's right as a co-sharer of the holding by virtue of his first purchase would have been perfect and complete. In such contingency, the petitioner would not have any right of pre-emption in respect of the second purchase made by the opposite party. As the petitioner has sought to pre-empt both the transfers and there is no dispute that the applications, for pre-emption have been made within the period of limitation, the petitioner's right to pre-empt the second transfer cannot be defeated on the ground that the second transfer has been made to the opposite party who has become a co-sharer in the holding by his first purchase. To hold otherwise, would be to practically set at naught the right of pre-emption conferred on a co-sharer raiyat by Section 8 for it will be liable to be defeated by the device and contrivance of the transferor and the transferee of a raiyati holding. As for example A, a co-sharer of a raiyati holding having twelve annas share therein makes a transfer of one anna share to B. On the next day he transfers the remaining eleven annas share to B. If it is held that B has become a co-sharer on the date the second transfer was made by virtue of the first transfer made in his favour and that, as such. C another co-sharer of the holding is precluded from pre-empting B in respect of the second transfer, although he made an application for pre-emption in respect of the first transfer within the period of limitation, it will be simply defeating the right of preemption of a co-sharer which has been long recognised. In our view, such is not the intention of the legislature. This right of pre-emption of a co-sharer is, as observed by P. N. Mookerjee, A. C. J., in the Bench decision in Bidyut Baran's case (1969) 73 Cal WN 654 an overriding right and cannot be defeated by subsequent transfer or transfers provided, however, the right exists and has not been extinguished as stated herein above.

14. In the circumstances, we are of the view that the said unreported Bench decision in Civil Rule No. 1926 of 1968, disposed of on October 7, 1969 (Cal) has not been correctly decided. The learned Munsif was wrong in dismissing the application for pre-emption. Accordingly, the order of the learned Munsif in Misc. Appeal No. 3 of 1969 is set aside and that of the Revenue Officer in Misc. Case

No. 214 of 1967 is restored. The Rule is made absolute, but there will be no order as to costs.

Sankar Prasad Mitra, C.J.

15. I agree.

A.K. De, J.

16. I agree.

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