

Khodeja and anr. Vs. Mahamad Abdul Khaleque and ors.

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Court : Kolkata

Decided On : Jun-26-1940

Reported in : AIR1940Cal472

Appellant : Khodeja and anr.

Respondent : Mahamad Abdul Khaleque and ors.

Judgement :

Derbyshire, C.J.

1. In my opinion this rule must be made absolute. Certain co-sharers in a holding have transferred or purported to transfer their interest to one of the other cosharers and seven strangers. There are altogether ten cosharers of this holding. Two of the cosharers, neither of them the one to whom the transfer has been made along with the seven strangers, claimed a right of pre-emption given under Section 26-F, Ben. Ten. Act, which was brought into operation in 1938. The stranger transferees and some of the other cosharers, we are told, opposed this transfer. When these proceedings were started, the two claimant co-owners claimed pre-emption of the whole of the portion of the holding which had been transferred, but during the proceedings they limited their claim to that portion which had been transferred to the strangers. As there were eight transferees and seven of them strangers we must assume that the two claimant co-owners limited their claim of pre-emption to the seven-eighths transferred to the strangers. The learned Judge was of the opinion that the claimants could claim the whole of the

portion transferred or nothing. Consequently he made no order under Section 26-F for pre-emption. We are asked to say that the learned Judge wrongly declined to exercise his jurisdiction, or exercised it with material irregularity. I am unable to take the same view of the matter as the learned Judge. The purpose of the Section is to prevent a portion of the holding being transferred to outsiders against the wishes of the co-owners. It seems to me that the portion which has been transferred must be looked upon as divided into two segments-one transferred to the co-owner, namely one-eighth, and the other seven-eighths transferred to the strangers. As regards the transfer of one-eighth of the portion transferred to the co-owner, that seems to me to come within exception (a) to Section 26-F which runs as follows : 'A transfer to a cosharer in the tenancy whose existing interest has accrued otherwise than by purchase.' So that the right of preemption claimed now by the two co-owners does not apply to that one-eighth of the portion alienated. However as regards the other seven-eighths of the portion proposed to be alienated, it seems to me that the words of Section 26-F(1)(e) directly apply, namely that

one or more cosharer tenants of the holding, a portion or share of which is transferred, may within four months of the service of notice under Section 26-C, apply to the Court for the said portion or share to be transferred to himself or themselves.

2. Therefore, with regard to seven-eighths of the portion alienated in favour of the seven strangers, Section 26-F applies and the claimant co-owners are entitled to pre-empt that in favour of themselves. The learned Judge in refusing to make an order of preemption under Section 26-F, it seems to me, was refusing to exercise a jurisdiction he had and therefore his order must be set aside and the matter remitted to him so that he may deal with it according to law in the light of the judgment of this Court. In my opinion therefore for the reasons I have stated, this rule must be made absolute with costs-the hearing fee being assessed at one gold mohur.

B.K. Mukherjea, J.

3. I agree. The petitioners in this rule are some of the co-sharer tenants in respect of an occupancy holding carrying a rental of Rs. 19 odd. On 18th January 1939 the opposite parties, Nos. 10, 11, 12 and 15, who were some of the other cosharers, sold their interest in the said holding to eight purchasers who were made opposite parties Nos. 1 to 8 in this rule. Of these eight persons, the opposite party No. 2 was already a cosharer in the same tenancy, having an existing interest to the extent of two annas and three pies share, which he acquired by in-heritance, and the remaining seven persons were strangers. After the sale, the present petitioners who are two of the cosharer tenants to exercise their rights of pre-emption¹ under Section 26F of the amended Bengal Tenancy Act 1938, and the question arises as to whether they are entitled to claim pre-emption in view of the provisions of Section 26F(a), Ben. Ten. Act, which excludes the operation of the Section when the transfer is made in favour of an existing cosharer. The lower Appellate Court was of opinion that as the petitioners can only claim pre-emption as regards the entire interest sold and not a portion of the same, the petitioners were not entitled to have pre-emption even with regard to the 7/8ths share that was purchased by the stranger purchasers. I agree with my Lord, the Chief Justice, that the view of the lower Appellate Court is not right. Clause (a) of Section 26F, Ben. Ten. Act, contemplates a case where the purchase is made by a cosharer who has an existing interest otherwise than by purchase in the tenancy, and by such cosharer alone. If there are other purchasers along with him, who are outsiders, Clause (a), in my opinion, would be operative with regard to the share acquired by the cosharer purchaser and not with regard to the shares purchased by others.

4. The object of this Section is undoubtedly to prevent a stranger from coming upon a holding if any of the remaining cosharers, who are also not cosharers by purchase, are willing to purchase that share. This object is already fulfilled when the purchase is made by such a cosharer and consequently no right of preemption has been given in such cases. But I think that the object of the Section would be totally frustrated if the Section is held to be inapplicable when a cosharer figures as a purchaser jointly with other persons who are strangers out and out. In such a case the right of pre-emption, in my opinion, can be exercised by the other cosharer tenants with respect to that portion of the holding which has been

acquired by the stranger purchasers. The lower Appellate Court laid considerable stress upon certain decisions of this Court, to wit, Behary Lal v. Pullin Behary Paul : AIR1934 Cal691 and Surabala Basu v. Rukmini Kanta (1938) 42 C.W.N. 288, and it was of the opinion that if the petitioners were entitled to have pre-emption at all, that could be exercised only with regard to the whole and not to a portion of what has been transferred and, as in this case this could not be allowed, the petitioners would have no rights whatsoever. The cases relied on by the lower Appellate Court are under the old Section 26F, Ben. Ten. Act, which related to powers of re-purchase by the landlords and not by cosharer tenants. The principle stated in the cases is undoubtedly sound. But the petitioners here do not really want to exercise their rights of pre-emption with regard to a portion only of what has been sold. That portion which has been sold to opposite party No. 2 comes within the purview of Clause (a) of Section 26F and must be ignored altogether for purposes of this case. The purchase therefore was only with regard to the remaining 7/8ths and the petitioners want to pre-empt the entirety of this share. In these circumstances, I agree-that the rule must be made absolute and the case remitted to the Subordinate Judge to be dealt with in accordance with law.

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