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Court : Kolkata

Decided On : Mar-21-1952

Reported in : AIR1953Cal216,56CWN775

Judge : P.N. Mookerjee, J.

Acts : Tenancy Law; ;Bengal Tenancy Act, 1885 - Section 26F, 26F(2) and 26F(3)

Appeal No. : A.F.A.D. No. 1045 of 1948

Appellant : Nur Mohammad

Respondent : Seraj and ors.

Advocate for Def. : Purnendu Narayan Nath, Adv.

Advocate for Pet/Ap. : Manindra Nath Ghose and ;Anil Kumar Sen, Adv.

Disposition : Appeal allowed

Judgement :

P.N. Mookerjee, J.

1. Three brothers Kalu, Chand and Tufani were the admitted original owners in equal shares of an occupancy raiyati holding comprising 10 decimals roughly six cottahs of land of c. s. plot No. 1109 of mouza Jagadishpur.

2. According to the plaintiffs, Kalu orally sold his share to Tufani some twenty years back so that Tufani became owner of two-thirds share of the above 10 decimals -- that is, of about four cottahs out of the above area of roughly six cottahs of land. On 16th Chaitra 1352 B.S. Tufani sold his above land roughly four cottahs to defendant 1 Nur Mohammad Shaik for a consideration of Rs. 700/-. Thereupon the plaintiffs who were the heirs of Chand and thus co-sharers of the above holding applied for pre-emption under Section 26 F, Bengal Tenancy Act in respect of defendant 1's said purchase. They duly made the necessary deposit (which I shall hereafter call the pre-emption money) and succeeded in getting an order in their favour. The plaintiffs, however, were unable to obtain possession of a moiety of the above pre-empted land, that is, of about two cottahs, on account of resistance of defendant 2 Sher Mohammed who claimed to have purchased the same from the heirs of Kalu on 1st January 1947. The present suit was accordingly instituted by the plaintiffs on 21st July 1947 for a declaration of their title to the said disputed two cottahs and for recovery of possession of the same. In the alternative the plaintiffs prayed for refund of a moiety of the pre-emption money that is the amount paid by him, to defendant i in the pre-emption proceedings.

3. The suit was contested by defendants 1 & 2 & their material defence was that Kalu never sold his land to Tufani so that the latter had only an one-third share in the holding in question and nothing more than this one-third share measuring roughly two cottahs in area had passed to the plaintiffs by virtue of the above pre-emption proceedings and as, admittedly, the plaintiffs had already got possession of this area they were not entitled to any relief in the present suit. In short, the defence on the question of title was that as Tufani had never any title to the suit land no title thereto accrued to defendant 1 from Tufani's transfer in his favour so that the plaintiffs acquired no title to the suit land by virtue of the pre-emption proceedings. On the question of refund the defence contended that as for the 'pre-emption money' that is, the money paid in the pre-emption proceedings, the plaintiffs were entitled only to the right, title and interest accruing to the transferee from the transfer pre-empted and as, under the circumstances hereinbefore recited, transferee-defendant 1 got only Tufani's one-third share in the holding in question by the relevant transfer, which one-third share had admittedly been taken

possession of by the plaintiffs in the pre-emption proceedings, the latter were not entitled to refund of any portion of the said 'pre-emption money'. The defendants accordingly prayed for a total dismissal of the plaintiffs' suit.

4. The learned Munsif held inter alia that the plaintiffs' story that Tufani had orally purchased Kalu's share was true and that, accordingly, the plaintiffs got by the pre-emption proceedings two-thirds share of the 10 decimal land, that is, roughly four cottahs, including the suit land. In that view of the matter he decreed the plaintiff's suit for declaration of title and recovery of possession and did not think it necessary to consider their alternative claim for proportionate refund of the 'preemption money'.

On appeal this decision was substantially reversed and the plaintiffs' claim for declaration of title and recovery of possession in respect of the suit land was dismissed and they succeeded only on their alternative prayer for proportionate refund of the 'pre-emption, money'. The learned Additional District Judge held against the plaintiffs on the question of Tufani's oral purchase from Kalu and, in that view of the matter, he came to the conclusion that Tufani never had more than one-third of the 10 decimals of land so that the plaintiffs by virtue of the pre-emption proceedings got only this, one-third, roughly measuring two cottahs, of which possession had admittedly been obtained by them and which admittedly was no part of the suit land. The learned Additional District Judge accordingly dismissed the plaintiff's suit for declaration of title and recovery of possession but having been of the opinion that the price or 'preemption money' paid by the plaintiffs was for twice the area to which the plaintiffs, as now found, acquired a valid title and that, accordingly, they were entitled to a refund of the 'pre-emption money' in respect of the moiety of the pre-empted lands to which the preemptee (defendant 1) is now found to have no title, he decreed the plaintiffs' alternative claim for refund.

Against this decision of the learned Additional District Judge defendant 1 has preferred the present second appeal and the short submission that has been made on his behalf is that as, under Section 26 F, Bengal Tenancy Act, for the pre-emption money the pre-emptor gets only the right, title and interest accruing to

the transferee from the transfer in question there is no scope for any refund of the pre-emption money either in whole or in part and that, accordingly, the learned Additional District Judge was in error in allowing the plaintiffs' alternative prayer for refund.

5. There has been no cross-appeal or cross-objection by the plaintiffs against the dismissal of their claim of title and possession by the lower appellate Court. It is also clear that the learned Additional District Judge considered all the relevant materials as also the different reasons given by the learned Munsif on the question of the alleged oral purchase of Tufani from Kalu. It further appears that on the materials on record the finding of the learned Additional District Judge that such oral purchase has not been satisfactorily proved is a good finding. In such circumstances, the decision of the learned Additional District Judge on this part of the case cannot be successfully challenged in this Court and necessarily, therefore, it follows that the plaintiffs did not by the pre-emption proceedings acquire anything beyond Tufani's original one-third share in the above .10 decimals of land of the occupancy raiyati holding of c.s. plot No. 1109 as nothing more than that one-third share had passed to preemptee-defendant 1 under his purchase from Tufani. Clearly, therefore, the plaintiffs' prayers for declaration of title and recovery of possession were unsustainable and rightly rejected by the learned Additional District Judge.

6. One other matter may be noticed at this stage before passing to the consideration of the appellant's submission on the question of refund. There is a finding by the learned Additional District Judge that although defendant 1 did not acquire the suit land or any portion thereof by his purchase from Tufani he did purchase the same subsequently on, 1-1-47 that is, after the disposal of the preemption proceedings, from Kalu's heirs. Can the plaintiff's under such circumstances invoke the aid of the doctrine of 'feeding the estoppel' in support of their claim of title and, possession in respect of the suit land? In my opinion the answer must be against the plaintiffs, as the case being clearly one of involuntary transfer by reason of the law of preemption, there can be no possible scope for the application of any doctrine of estoppel. The finding of the learned Additional District Judge, noted above, is, therefore, of no assistance to the plaintiffs and

their claim of title-and possession must, in spite thereof, be held to have been rightly dismissed by the lower appellate Court.

7. The only question, now remaining for consideration, is the appellant's submission against the learned Additional District Judge's decree for refund in favour of the plaintiffs-respondents. That question -- it seems to me-- must be answered in the appellant's favour. Section 26 F, Bengal Tenancy Act in Sub-sections (2) and (3) provides for certain deposits to be made by the intending pre-emptor which I have compendiously called above the 'preemption money' and in lieu thereof he gets only the right, title and interest accruing to the transferee or the pre-emptee from the transfer pre-empted (vide Section 26 F (7), Bengal Tenancy Act). Clearly, therefore, Section 26 F, Bengal Tenancy Act -- under which the plaintiffs claimed to pre-empt and succeeded in preempting defendant 1's purchase from Tufani-- recognises the principle of 'caveat emptor' and is thus inconsistent with the idea of refund of the pre-emption money or any part thereof in case of defect in the preemptee's title. The plaintiffs' claim for refund cannot, therefore, be allowed in view of the terms of Section 26 F (7), Bengal Tenancy Act. Even apart, from statute a claim of refund based on defect of the preemptee's title is entirely foreign to the subject of pre-emption. Pre-emption implies involuntary transfer and it is well known that in cases of involuntary transfer the universally accepted rule is that the transferee takes the transfer at his own risk. There is no question of any contract and there is thus 'no scope also for any application of the doctrine of refund for failure of consideration. On statute and principle alike, the plaintiffs' alternative claim for refund must, therefore, fail. The learned Additional District Judge was, therefore, in error in decreeing this alternative claim and to that extent his decision must be set aside.

8. In the result, therefore, this appeal succeeds. The judgment and decree of the learned Additional District Judge so far as it decrees the plaintiffs' suit are set aside and the suit is dismissed in its entirety. In the circumstances of this case the parties will bear their own costs throughout.