

Basanta Kumar Churnakar Vs. Durga Nath Pal and ors.

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Court : Kolkata

Decided On : Feb-08-1939

Reported in : AIR1939Cal432

Appellant : Basanta Kumar Churnakar

Respondent : Durga Nath Pal and ors.

Judgement :

ORDER

Edgley, J.

1. The petitioner in this case, Basanta Kumar Ohurnakar, has applied to 'this Court in order that two orders passed by the learned Munsif of Tangail dated respectively 13th September 1938 and 22nd September 1938 may be set aside. Under the first of these two orders the learned Munsif expunged the petitioner's name from the proceedings in a pre-emption case instituted by opposite parties 1 to 3 on 4th June 1937. Under the latter order, the learned Munsif allowed the application for pre-emption filed by the aforesaid opposite parties.

2. The facts with which we are concerned in respect of the application are briefly as follows: On 12th January 1937, the petitioner executed a document which purports to be a deed of sale in favour of opposite parties 4 to 13. The petitioner's immediate landlords, opposite parties 1 to 3, there-upon applied for pre-emption under Section 26-F, Ben. Ten. Act. Their application was filed, as stated above, on

4th June 1937. The petitioner however maintained that no transfer had been effected by virtue of the document executed by him on 12th January 1937. His case was that he had actually intended to execute a mortgage deed on that date, but owing to fraud on the part of the transferees, he had been made to execute a kobala instead of a mortgage deed. He therefore instituted a suit on 25th June 1937, being Title Suit No. 119 of 1937 for the purpose of setting aside the kobala in favour of opposite parties 4 to 13. He also took steps to file an objection in the pre-emption VVase, which had been filed by opposite parties 1 to 3 to the effect that the pre-emption case in question was not maintainable on the ground that there had not been an effective transfer to opposite parties 4 to 13. On 18th August 1937, the opposite parties 1 to 3, the petitioner's immediate landlords, applied to be made parties to the suit No. 119 of 1937. Their application was however very rightly rejected by the learned Munsif of Tangail on the ground that in a suit of this nature the only necessary parties were the vendors and the vendees or their respective legal representatives. Opposite parties 1 to 3 then applied to this Court in revision against the order rejecting their application to be made parties to Title Suit No. 119 of 1937. They obtained a rule but that rule was discharged on 15th July 1938. Shortly afterwards, namely on 11th August 1938, Suit No. 119 of 1937 was heard by the learned Munsif of Tangail and decreed in favour of the petitioner before this Court, Basanta Kumar Churnakar. As a result of the decision obtained by the petitioner on that date, the kobala which he had executed on 12th January 1937 was declared void as between him and the transferees, opposite-parties 4 to 13. At that time, the pre-emption proceedings which had been instituted by opposite-parties 1 to 3 were still pending, and, on 13th September 1938 opposite parties 1 to 3 applied for an order to the effect that the petitioner's name might be expunged from the record of the aforesaid pre-emption proceedings. An order to that effect was duly made by the learned Munsif on the same day, and, as already stated, the learned Munsif on 22nd September 1938 allowed the application for pre-emption which had been filed by opposite parties 1 to 3 on 4th June 1937.

3. It has been urged by the learned advocate for the petitioner in this case that the learned Munsif -was wrong in dismissing the petitioner from the pre-emption proceedings on 13th September 1938, having regard to the fact that the petitioner

was vitally interested in the application for preemption, which had been filed by his immediate landlords, as an order for preemption in favour of his landlords would evidently have had the effect of clouding the petitioner's title. He further contended, with reference to the order passed by the learned Munsif on 22nd September 1938, that the learned Munsif acted illegally in allowing the application for pre-emption filed by opposite parties 1 to 3, as it had been held by a competent Court that there had been no transfer by the petitioner to opposite parties 4 to 13; and this being the case, the only legal basis upon which an application for pre-emption could be presented to the Court had disappeared. In my opinion, there is considerable force in these contentions.

4. The learned advocate for the opposite parties argues that a vendor has no locus standi in proceedings under Section 26-F, Ben. Ten. Act, and in support of his argument he relies upon certain observations made by M. C. Ghose J. in *Gopendra Chandra v. Nagendra Kumar* : AIR1934 Cal39 . In my view however the question as to whether or not the vendor has locus standi to contest an application for pre-emption must depend entirely upon the circumstances of the case. Certainly, it might be effectively argued in a case in which there had undisputedly been a valid transfer of a holding and in which the vendor had entirely dispossessed himself of all rights in connexion with that holding that the vendor would have no further interest in the matter and would have no locus standi to contest an (application for pre-emption. In the case, however, with which we are dealing, the position adopted by the petitioner is that he is not the vendor of the holding which the landlords are seeking to pre-empt, that it was never transferred to opposite parties 4 to 13, that he retained in the holding all the rights of an occupancy raiyat, and that the landlords therefore had no right to disturb him in his possession of the holding by pre-emption or otherwise as long as he duly paid his rent. This being the case, it seems to be clear that the petitioner was vitally interested in the result of the application for pre-emption which was filed by his landlords, and had every right to be made a party to the pre-emption proceedings in order to contest the same. In this view of the case, I consider that the order passed by the learned Munsif of Tangail on 13th September 1938 was illegal and cannot be supported.

5. The next matter which requires consideration is whether the learned Munsif was justified in allowing the landlords' application for pre-emption by his order dated 22nd September 1938; With regard to this matter, it has been argued by the learned advocate for the opposite parties that the landlords were empowered to apply for preemption under Section 26-F, Ben. Ten. Act, because at the time when they made their application, there was in existence a deed of transfer executed by the vendor in favour of opposite parties 4 to 13, in respect of which notices under Section 26-C of the Act had been duly served on the landlords and he argues that, in a case in which it can be shown that the requisite notices under Section 26C of the Act have been served upon the landlords, the Court, in a summary proceeding under Section 26-F of the Act, has-no jurisdiction to consider anything that; may have happened between the vendors and the vendees after the service of the notice in question. He therefore contends that the fact that the kobala, dated 12th January 1937, was declared to be invalid by a Civil Court on the 11th August 1938, was a fact which should not have been taken into consideration by the learned Munsif. In this contention I am unable to agree. In support of his argument the-learned advocate for the opposite parties places some reliance upon a remark by Mitter, J. in his judgment in *Satyendra Nath v. Fulson Bibi* : AIR1932 Cal625 . The facts of that particular case, however, were clearly distinguishable from those of the case now before us as the main ground upon which the learned Judge based his decision was the view which he took to the effect that the execution of a heba-bilewaz amounted to a sale. His further observations to the effect that it was not open to the Court to go into the question of what happened between the parties after the issue of p notice under Section 26-C, Ben. Ten. Act, seem to have been merely in the nature of 'obiter dicta.'

6. From the language of Section 26-F, Ben. Ten. Act, it seems to be clear that a condition precedent to an application by the immediate landlord of a holding for pre-emption is the transfer of that holding by a tenant to some other person. The whole of the procedure outlined in this Section assumes that there has been such a transfer, and Sub-sections (5) and (6) of Section 26-F which empower the Court to make pre-emption orders in favour of the landlord and set forth the effect of orders so made also assume that at the time when such order is made, there is still in existence a transfer by virtue of which the holding or a portion of the holding

sought to be pre-empted has been transferred by the tenant to another person. In this connexion it may be noted that the landlord himself need not be a party to the transfer upon which he bases his right to pre-empt. In fact, a perfectly valid transfer of a tenant's holding may be effected without reference to or consultation with the landlord. At the same time, it is clear that, unless a transfer from a tenant has in fact taken place the landlord can have no right to pre-empt.

7. The view which seems to have been adopted by the learned Munsif in his order dated 22nd September 1938 was to the effect that the pre-empting landlords could not be regarded as bound by the judgment obtained by the petitioner in Title Suit No. 119 of 1937, as the landlords were not parties to the title suit in question. Certainly, in any properly constituted suit which the landlords might be advised to bring for the purpose of establishing their title in respect of the disputed land, they might argue that they were not bound by the judgment in Title Suit No. 119 of 1937. The fact remains, however, that in a summary proceeding for pre-emption under Section 26-F, Ben. Ten. Act, which is based upon the assumption that a transfer from a tenant to a third party has taken place, a judgment such as that in Title Suit No. 119 of 1937 must be regarded as a fact in issue under Section 43, Evidence Act, and as such would therefore be admissible in evidence. If the judgment had been against the vendor, it would certainly have been admissible to show that the transfer had taken place between the vendor and opposite parties 4 to 13 and that this transfer was binding as far as the vendor and the vendees were concerned; and it would therefore have been a fact in issue which, if proved, would have justified the landlords in making an application for pre-emption under Section 26F, Ben. Ten. Act. Similarly, although the judgment was in favour of the petitioner, it must nevertheless be an important fact in issue as showing that no transfer was actually in existence binding on the alleged vendor and vendees which in a summary procedure under Section 26-G, Ben. Ten. Act, would give the landlord locus standi to apply for pre-emption. It follows therefore that, as the transfer by the petitioner to opposite parties 4 to 13 was declared void by a Court of competent jurisdiction on 11th August 1938, the learned Munsif had no jurisdiction to allow pre-emption in favour of opposite parties 1 to 3.

8. In the above view of the case, the orders of the learned Munsif dated 13th September 1938 and 22nd September 1938 cannot be supported and will therefore be set aside. This rule is accordingly made absolute with costs. The hearing fee in this Court is assessed at three gold mohurs. The application moved on 3rd January 1939 and ordered to be considered at the hearing of the rule is allowed to be withdrawn.

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