

Mukti Devi Vs. Monorama Mitra and ors.

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Court : Kolkata

Decided On : May-20-1936

Reported in : AIR1936Cal490

Appellant : Mukti Devi

Respondent : Monorama Mitra and ors.

Judgement :

ORDER

R.C. Mitter, J.

1. This case raises interesting points of law and some of them are points of first impression. The matter has been very ably and fairly argued by Mr. Ahmed appearing on behalf of the petitioner, and although I am in substance holding against him it must not be taken that I have not taken into consideration the arguments he has advanced. Three points have been raised before me which I will state hereafter after setting out the relevant facts which are as follows: Abdul Malek Molla held an occupancy holding under a large number of co-sharer landlords. He sold a portion thereof by a registered instrument to the petitioner before me, Mukti Devi. The notice of transfer was duly served and within two months of the service of the said notice two sets of co-sharer landlords made two independent applications for pre-emption under Section 26.F, Ben. Ten. Act. The first of these applications was filed on 20th November 1934 by three of the co-

sharer landlords, Sudhir Kanta Ghose, Kamakhya Prosad Ghose and Haridas Ghose. Most of the remaining co-sharer landlords, including one Monorama Mitra, was made opposite parties to this application, but this application was, as has been ultimately found by the Court, defective because one co-sharer landlord had not been made a party to this application. On 23rd November 1934 another application was made under Section 26-F by Monorama Debi to whom two of the co-sharer landlords joined later on. In this application all the remaining co-sharer landlords or their benamidars were made parties. The first application was numbered Misc. Case No. 203 and the second Misc. Case No. 207 of 1934.

2. On 8th December 1934 Monorama who was a co.applicant on Misc. Case No. 207 made an application in Misc. Case No. 203 for joining as a co-applicant with the applicants of that case and this application of hers was granted on 8th December 1934. Case No. 203 then proceeded, but that case was ultimately dismissed by the Court on the ground that one of the co-sharer landlords had not been made a party to the application and therefore the application was not maintainable in view of the provisions of Section 188, Ben. Ten. Act. After the dismissal of the said application the application which was numbered 207 was proceeded with. The lower Court has allowed that the application, and it is against the order of the lower Court passed in that case, the present Rule has been granted.

3. It is necessary to state two other facts in connexion with Misc. Case No. 207 for the purpose of following the three points which have been raised by Mr. Ahmed. In that application Haridas, a co-sharer landlord, was made an opposite party. He was described as a minor, but no guardian was ever proposed or appointed. Later on an application was made on his behalf, unrepresented by any guardian, to become a co-applicant and that application was granted, and ultimately Haridas, described as a minor, but not in fact represented by a guardian or a next friend, continued on the record. One of the opposite parties to this application was Lalan Chandra Ghose. Later on two persons, Nirode Gopal Ghose and Nani Gopal Ghose, filed an application on 19th December 1934 to become co-applicants along with Monorama. They made their case that their benamidar was Lalan who had been named as an opposite party in Monorama's original application. They

were allowed on 'that date to become co-applicants in Mis. Case No. 207.

4. Mr. Ahmed raises three points: (i) that Section 188, Ben. Ten. Act, has not been complied with inasmuch as Haridas cannot be deemed to be a party to the proceedings at all, because being a minor he was not represented by a guardian. The application which is the subject-matter of Misc. Case No. 207, he says, must be considered to be an application in which one co-sharer has been left out namely Haridas (ii) that Monorama could not continue the application which is the subject matter of Misc. Case 207, inasmuch as she became a co-applicant later on in Misc. Case 203 which has ultimately been dismissed on account of defect of parties and (iii) that the Court could not add Nirode and Nani parties to Misc. Case 207 after the period of limitation provided for under Section 26-F. With regard to the third point the Court has remarked that there is no defect in the original application for pre-emption, inasmuch as Lalan, the benamidar of Nirode and Nani, was on the record from the very beginning, the application therefore if it is not otherwise bad by reason of the defect regarding Haridas, was a good application. In my judgment this view of the Court below is sound because a benamidar represents in a suit or proceeding fully, the beneficial owner. The fact is that Lalan made a party to these proceedings from the very beginning, represented Nirode and Nani as their benamidar. This principle has been laid down in *Gur Narayan v. Sheo Lal Singh* 1918 P C 140. This is a case where the beneficial owners wanted to come in and represent themselves instead of their benamidar representing them. There is on this score no difficulty as regards the application, which is the subject matter of Misc. Case No. 207 and I, accordingly, overrule the third point.

5. With regard to the first point there can be no doubt that if Haridas was, in fact, a minor the proceedings which have been continued in the Court below, and which have terminated with the order of preemption were irregular proceedings. Evidence was led on behalf of the applicants for pre-emption, that Haridas was an adult at the date when Monorama filed an application of 23rd November 1934. Evidence to that effect that Haridas was a minor then and is still a minor, has been led on behalf of the purchaser, but the Court below has not recorded any finding on the question of minority of Haridas at the material point of time. In my judgment, the Court below ought to have recorded a finding on this point, and if it came to the

conclusion that Haridas was a minor it was under the duty to appoint a guardian for him, under the provisions of Order 32, R. (3), Civil P. C. I have examined the evidence myself: No relation of Haridas has been examined to prove his age. The only witness examined is a neighbour of Haridas. His evidence goes counter to the statement made in Monorama's petition where he was described as a minor. I cannot rely on this evidence adduced on behalf of the applicants for pre-emption, that Haridas was aged 22 years in the year 1934. His school register has been proved by the purchaser and it shows that at that date he was a little over 15 years. In this state of the evidence I must record a finding that Haridas was a minor at the date of the application and is still a minor.

6. Mr. Ahmed said that inasmuch as Haridas was a minor at the date when the application was made, and no guardian was appointed he cannot be considered to be a party to those proceedings at all, and so Section 188 has not been complied with. I do not see how I can give effect to that contention. If the provisions of Order 32, Rule 3 be examined it leads to this that the appointment of the guardian of a minor defendant is to be made after the institution of the suit or proceedings against him, the duty of making the appointment of a proper person as guardian of a minor is on the Court and there must be, having regard to the procedure that has to be followed by the Court in selecting a guardian for a defendant or opposite party, an appreciable interval, it may be short it may be long, between the filing of the suit against the minor or the filing of the application for pre-emption with a minor as opposite party, and the selection and appointment of his guardian. An application for pre-emption, or a suit, cannot be instituted with a guardian of a minor defendant or opposite party already appointed. I, accordingly, hold that Haridas must be taken to be made a party to the application for pre-emption at the time when that application was presented, but the subsequent proceedings are irregular because the Court has not discharged its duty in appointing a guardian of a person whose name appeared in the proceedings with the description that he was a minor. The application filed on behalf of Haridas purporting to act himself to become a coapplicant was also an irregular application and the order thereon is an irregular order. On this point, as I have said already, Section 188 does not hit the application for pre-emption and the proper order which must be passed, having regard to these defects, is to discharge the order for pre-emption which has been

passed and to remit the case to the lower Court in order that the proceedings may be continued after the Court has appointed a proper person as guardian of Haridas.

7. Unless there is some substance in the second point (it has not, for the reasons which I shall hereafter state) I may mention, at this stage, that the order which I propose to pass is the order which I have indicated above. This leads me to the second point. Before the Misc. Case No. 207 was actually taken up for hearing the Court had made an order by which Nirode and Nani became co-applicants with Monorama, and they continued as co-applicants. At the stage when Misc. Case No. 207 was heard the position is this that there were at least two other co-applicants with Monorama. It is said that Monorama could not prosecute two applications for pre-emption passed on the self same transfer, namely the application in case 203 in which she had become a co-applicant by reason of the order of the Court dated 8th December 1934 and Misc. Case No. 207 in which she was alone the original applicant but later on had two other applicants with her. It is quite clear from a comparison of Section 148-A (9), Ben. Ten. Act, with the provisions of Section 26-F, that a co-sharer landlord is not bound to exercise his right of pre-emption by becoming a co-applicant in his or her co-sharer's application for pre-emption filed under Section 26-F (1). There is no provision corresponding to Section 148-A (9), in that part of the Bengal Tenancy Act which deals with the co-sharers' right of pre-emption. In fact the provisions of Section 26-F (4) (a), indicate that co-sharer landlords have independent rights to make independent applications under Sub-section 1 of Section 26-F and they are not bound to exercise their rights of pre-emption only by becoming co-applicants in their co sharers pending application. The applications in Misc. Cases Nos. 207 and 203 could accordingly, go on simultaneously and the second application for pre-emption which was the subject matter of Misc. Case No. 207 was not incompetent by reason of the filing of the earlier application by other co-sharer landlords which was numbered Misc. Case No. 203. I go further, that Monorama when she had ultimately two other co-applicants with her could not in law withdraw from her application by an express application without the consent of her co-applicants Here the position was that of a co-plaintiff and it is a principle of law, as has been held by Swinfen Eady, J., in *In Re: Mathews-Oates v. Mooney* (1905) 2

Ch 460, that 'where there are coplaintiffs one cannot sever as of right.'

8. If Monorama could not sever, as of right, from her application for pre-emption by an express act I do not see on what principle it can be said that she cannot maintain her application for pre-emption along with her co-applicants because of her act in connection with Misc. Case No. 203 which can at most lead to an inference that she wanted to withdraw from her own application, and wanted to pursue her remedy for pre-emption as a co-applicant in Misc. Case No. 203. On this principle I overrule also the second point. There remains only another point to be considered. As I have said above that the proceedings of the Court below have been irregular by reason of the non-appointment of the guardian of Haridas, the order complained of must be discharged and the proceedings must be remanded to to the lower Court, in order that they may be continued after the Court appoints a proper person as his guardian, but it is necessary to guard against the interest of Haridas, when he would be so represented . by a proper guardian if Haridas, represented by a guardian wants to become a co-applicant for pre-emption. The application for pre-emption has been filed, as I have said, on 23rd November 1934. In accordance with the provisions of Section 26-F (4) (a), a co-sharer landlord opposite party has to make his application for becoming a co-applicant within two months from the date of the service of the notice of the transfer on him, or within one month from the date of the filing of his co-sharer's application for pre-emption. These periods have long expired. If the Court had done its duty and had promptly appointed a guardian for Haridas, that guardian would have had time to make an application for joining as a co-applicant within the period mentioned in Sub-section 4 (a) of Section 26-F. The fact that the Court overlooked that Haridas was a minor, a fact which appeared on the face of the application for pre-emption, is a fact which must be considered.

9. In *Gadadhar Sarkel v. Gopal Chandra Das* 1936 Cal 343. I have held that where by reason of some act or omission on the part of the Court or its officers an injury has been done, it is the duty of the Court to relieve parties against the injustice caused by its own acts or defaults or the acts or defaults of its officers. That was a case of pre-emption under Section 26-F and was a case where by reason of a sad omission on the part of the Court to look to the records of the case, a co-sharer

opposite party could not come in and make his application for becoming a co-applicant within the time limited in Sub-section 4 (a), of Section 26-F, Ben. Ten. Act. In my judgment, the principle which I have laid down in that case governs the present case and my direction is that after a proper guardian has been appointed for Haridas, the Court would entertain an application on behalf of Haridas, made by such guardian for becoming a co-applicant, if that application is made promptly, that is to say, as soon as the person so appointed assumes his office as guardian of the minor. The rule is made absolute in these terms, the case is sent back to the lower Court in order that the directions given above may be carried out. So far as the costs of this Court are concerned the parties do bear their own costs. Let the affidavits filed be kept with the record.

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