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Court : Kolkata

Decided On : Aug-21-1939

Reported in : AIR1939Cal744

Appellant : Debendra Chandra De and ors.

Respondent : Jamini Kumar Dey and ors.

Judgement :

Henderson, J.

1. This appeal is by the plaintiffs. They instituted the suit in order to recover possession of certain land. Their tenant, one Nishi, the predecessor of defendants 3 to 6, had a raiyati holding. He sold it to one Chittaranjan De. The plaintiffs thereupon applied for pre-emption under the provisions of Section 26.F, Bengal Tenancy Act. The application was allowed and they took delivery of possession through the Court. They were unable however to obtain actual possession through the obstruction of defendant 1. They accordingly instituted the present suit. Defendant 1 contends that he has an under-raiyati which was created previous to the pre-emption. The Munsif gave the plaintiffs a decree, but this decree was reversed by the Subordinate Judge in appeal. Two points arise for decision (1) whether the proceedings by which the plaintiffs exercised their right of pre-emption under Section 26-F, Ben. Ten. Act, were void, (2) whether defendant 1 was entitled to resist the plaintiffs' claim for khas possession on the strength of his

under raiyati interest. The defence contention that the preemption proceedings were void was based upon the fact that the purchaser Ghittaranjan was a minor. He is not a party to the present proceedings. It is therefore impossible for the respondents to succeed on this point unless they can show that the proceedings were void. The argument which found favour with the learned Subordinate Judge was to the effect that proceedings under Section 26.F, Ben. Ten. Act, are analogous to a suit and that an order made by the Court is similar to a decree. From this point of view it was argued that the order of the Court was void just as much as a decree against a minor who is not represented is void. It is to be noted that, if the contention of the defendants succeeds, the minor will certainly have imposed upon him the burden of paying rent and he will be left with property which quite possibly he may not want. Again, supposing there was a sudden slump in land values, it will be open to the plaintiffs to withdraw the money which they paid into Court along with their application for pre-emption. Certainly, it would be rather startling, if the position of the minor could be affected in this way.

2. The effect of a decree passed against a minor in a suit in which he is not properly represented has been discussed in several cases. In particular, I may refer to the cases in *Umapati Samanta v. Sheikh Masitulla* (1923) 10 A.I.R. Cal. 692 and *Purna Chandra v. Bejoy Chand* (1913) 17 C.W.N. 859 to which my attention was particularly drawn during the hearing of the appeal. There can be no doubt that in such a case a minor is not affected by any decree that may be passed against him and that it is a nullity so far as he is concerned. But to say that the decree was absolutely void and a mere waste piece of paper is to go a good deal further than this. A minor is certainly not bound to treat it as a nullity if he does not desire to do so, and third persons can not be heard to say that it is void. Then in the second place there is no real analogy between a decree of a Civil Court and an order passed in these proceedings under Section 26.F, Ben. Ten. Act. The order for preemption in no way corresponds to a decree and the Section really does nothing more than provide a convenient machinery for giving effect to the claim to pre-empt Under Section 26.C Ben. Ten. Act, a purchaser is bound to give notice to the registering officer and the notice is then served upon the landlord. The landlord has the right to apply to the Court for the transfer of the holding to him within a certain time of the receipt of the notice. The Court gives

notice to the purchaser merely to enable him to claim reimbursement for any payment which he may have made subsequent to his purchase. The landlord is not responsible in any way for the service of any notice. Thus, it will appear (1) that the right to pre-emption does not depend upon any decision by the Court. It flows automatically from the transfer itself; and (2) no duty is cast upon the landlord to give any notice to the purchaser. In the present case the purchaser described himself in the kobala as a major and the Court could only serve the notice in accordance with its terms. I must accordingly respectfully dissent from the view taken by the learned Subordinate Judge that these proceedings were void.

3. There remains the second question whether defendant 1 is entitled to resist the plaintiffs' claim for khas possession on account of his under-raiyati lease. As the learned Judge pointed out that lease infringes the terms of Section 48.H, Ben, Ten. Act. On behalf of the respondents, Mr. Das referred to the decisions explaining the meaning of the old Section (Section 85) which has now been repealed. Those decisions cannot afford any assistance in the present Case. Here there was nothing illegal in the terms of the lease itself. The mistake made was that the landlord's fee was not deposited. The lease therefore ought not to have been registered. Two other points were however raised in support of the respondents' claim to retain possession. The lease has actually been registered. Mr. Das expressed his willingness to pay the landlord's fee into Court. The registration was actually affected owing to a misdescription of the lessor's status in the document. As it was made in contravention of the provisions of the law it has no effect. Under the terms of the Section payment of the landlord's fee is a condition precedent to registration and the defect cannot be cured by a subsequent payment. The second point relates to the fact that the plaintiffs have now succeeded to the interest of the respondents' original lessor. It was therefore contended that they cannot be allowed to repudiate the lease without refunding the premium which was paid at the time. Mr. Sen on behalf of the plaintiffs did not contest this. The decree of the lower Appellate Court is accordingly set aside. If within a month from the arrival of the record in the lower Court the plaintiffs pay Rs. 200 into Court the decree of the Munsif will be restored. Defendant 1 will be at liberty to withdraw the money. If such payment is not made, the plaintiffs will get a

declaration of their title and a further declaration that they are entitled to receive rent from defendant 1. Defendant 1 will pay the costs of the plaintiffs in all Courts.

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