

(1968) 05 CAL CK 0032

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1800 of 1962

Santosh Sardar and
another

APPELLANT

Vs

Surendranath
Karmakar

RESPONDENT

Date of Decision: May 20, 1968

Citation: 73 CWN 852

Hon'ble Judges: Bijayesh Mukherji, J

Bench: Single Bench

Advocate: P.N. Mitra, Bhupal Chandra Roy Chowdhury and Bhabani Prasun Chatterjee, for the Appellant; Hem Chandra Dhar and Pravash Chandra Basu, for the Respondent

Final Decision: Dismissed

Judgement

Bijayesh Mukherji, J.

The decision of this appeal by the defendants from an appellate judgment and decree of affirmance turns principally on the determination of the question: are the subsequent transferees of part of an occupancy holding necessary parties to the proceedings for pre-emption u/s 26F of the Bengal Tenancy Act, 8 of 1885, initiated by a cosharer of the holding against the cosharer who has sold, and his vendee, the first purchaser ? The plaintiff Surendra Nath Karmakar, now respondent, and one Satish Chandra Roy had a moiety share each in the occupancy holding. On May 13, 1955, Satish sold the whole of his half share to Jitendra Nath Mukherji. On "November 4, 1957, Jitendra sold just that: what he had purchased from Satish: to Santosh Sardar and Nidhiram Naskar, the two defendants, now the appellants before me. On February 21, 1958, the plaintiff respondent moved the Court for pre-emption u/s 26F. In such proceedings, the vendor Satish was a party; so was the first vendee Jitendra; but the subsequent vendees, the two appellants, were not. This fosters the question the present judgment opens with.

2. To resume noticing the facts, on April 26, 1958, the pre-emption proceedings culminated in an order in favour of the petitioning pre-emptor, the respondent before me. That was followed by his getting into possession on May 27, 1958, of the moiety of the occupancy holding so pre-empted.

The appellants, it is said, threatened on or about July 30, 1958, to dispossess him. Hence the suit on September 9, 1958 - a suit out of which this appeal arises. During the carriage of the suit, dispossession was alleged. Recovery of possession was, therefore, the relief the plaintiff respondent prayed the Court for.

3. It has been held by the judge in the court of first instance, and on appeal, by the appellate judge as well, that the appellants' subsequent purchase on November 4, 1957, was subject to the right of pre-emption-a right which had accrued in favour of the plaintiff respondent so soon as the cosharer Satish had transferred his moiety share to Jitendra on May 13, 1955. It, therefore, matters little, the learned judges conclude, that the appellants were not made parties in the pre-emption proceedings. So, the respondent's suit was decreed and an appeal against that failed. This is why the defendants, the subsequent transferees on November 4, 1957, have come up to this Court in second appeal.

4. Mr. Mitra, appearing on behalf of the appellants, contends that they were necessary parties to the preemption proceedings, which could, therefore, be of no effect in their absence. A contention as this is rested on the decision of R. C. Mitter, A. C. J. in (1) [Amir Sardar and Another Vs. Ismail Hossain Sardar](#), . True it is that there his Lordship observed :

The subsequent purchaser is, therefore, vitally interested in the proceedings for pre-emption and so is not only a proper but is a necessary party.

But the context in which it has been said must not be overlooked. Amir Sardar was the first purchaser against whom the pre-emption proceedings started. Mohar Ali Molla, who was the subsequent purchaser from Amir Sardar, came to be added later as a party to the application for preemption. An order was made for preemption. Amir Sardar and Mohar Ali Molla came up to this Court in revision. One of the points taken was "Dismiss Mohar Ali Molla, the subsequent purchaser from these proceedings. Whatever rights the pre-emptor may have against such subsequent transferee will have to be tried out in a suit or other proceeding between them. In sum, Mohar Ali Molla was sought to be demoted as an unnecessary party. This his Lordship did not countenance. Far from having been an unnecessary party, Mohar Ali Molla, his Lordship held, was a proper party and a necessary party too. He could not, therefore, be dismissed from the proceedings. That is the context. And the context furnishes the ratio, which is that and that only, and no more. To put it in another form, the ratio is: "Subsequent purchasers, if impleaded in pre-emption proceedings, cannot be dismissed therefrom as unnecessary parties and relegated to a separate suit." Certainly the ratio is not: "you do not join a subsequent

purchaser in an application for pre-emption at the peril of the lis being struck down then and there, as every litigation is struck down in the absence of a necessary party." That this is so appears to be amply borne out by other observations in the judgment itself, such as-

A. The right of pre-emption given to a co-sharer tenant arises as soon as the other co-sharer sells to a stranger purchaser.

B. The effect of the order for preemption is to vest in the pre-emptor from the date of that order the right, title and interest in the share of the holding accruing to the transferee from the transfer free from all encumbrances created after the transfer.

C. A sale by the purchaser from the co-sharer tenant to another is no doubt not an encumbrance, but the latter takes the property with the infirmity attaching to the title of his vendor.

D. An order for pre-emption destroys the subsequent purchaser's vendor's title from the date of the making of the order for pre-emption. His vendor's title being destroyed, his own title gets destroyed too.

E. Any other view would put it in the power of a transferee from a co-sharer to defeat the statutory right of the other co-sharer to pre-empt. (Indeed, how long would the preempting co-sharer chase one transferee after another with a view to protecting his lis from absence of a necessary party ?)

The conjoint effect of such observations appears to be that a subsequent transferee, if impleaded in pre-emption proceedings, cannot be eliminated therefrom, he being a proper party, and a necessary party too pro-tanto : not that, if he is not impleaded so, he shakes off the infirmity attaching to the title of his vendor and can stave pre-emption for ever, he being not a necessary party in that large sense. Indeed, the very facts, and in particular, the contention, upon which the decision in (1) Amir Sardar's case rests, on the point I am on now, so cut down the largeness of the concept of a necessary party.

5. In (2) [Lokeman Ali Vs. Abdul Motaleb and Another](#), , Lodge, J. would not make a subsequent transferee more than a proper party-a view with which I respectfully agree. Indeed, the order of the trial court striking off the name of Sumsuzzoha, a subsequent transferee, and, therefore, not a necessary party, was set aside, and it was held that he was a proper party. In (3) [Girija Nath Kundu Vs. Ahamadali Sardar and Others](#), , the first purchaser was Pramatha Nath Kundu for Rs. 500, and the second purchaser was Girija Nath Kundu for Rs. 1,000. Edgley, J., in the circumstances, found the subsequent transferee Girija disentitled to any money in excess of Rs. 500 plus 10%, that is, Rs. 550, deposited in Court by the pre-emptor, because Girija had taken the property subject to the right of preemption by the pre-emptor. For the balance of his consideration money, he was referred to a properly constituted suit, which he could not have been referred to, were he a

necessary party in the large sense.

6. What is more, R. C. Mitter, A. C. J. followed these two decisions: (3) Girija Nath Kundu's case and (2) Sheikh Lokeman Ali's case, as contended for, and rightly, by Mr. Dhar, appearing for the respondent. This evokes the reply that his Lordship did follow the two earlier decisions in so far as they did not clash with his Lordship's own view of a subsequent purchaser being a necessary party. But, as I have tried to point out, it was farthest from his Lordship's mind to lay down that a subsequent transferee was a necessary party in its widest amplitude.

7. Mr. Dhar cites (4) Goas Ali Bhuya v. Lal Mia, (1947) 52 CWN 90, the burden of which is the true meaning of "Co-sharer in the tenancy" and "Co-sharer tenant" in Section 26F, sub-section 1-also one of the points in (1) Amir Sardar's case (supra). But that has got little to do with the case on hand. And I leave it at that.

8. Therefore, in missing the appellants from his pre-emption proceedings, the respondent has not missed the bus for ever. He has lost only an opportunity which could have helped him to adjust the equities between the parties. But he has another opportunity, of a suit, he has availed of so far with success. It is however said, that way is barred against the respondent. Because a lis as this falls under the third class of cases, in which a liability may be established as founded upon statute, on the line of that well-known classification made by Willes, J. in (5) The Wolverhampton New Waterworks Company v. Hawkesford, (1859) 6 CB (NS) 336-a classification, the main principles of which have been approved of in the Supreme Court, on one hand, in (6) [N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others](#), , and in the House of Lords on the other, in (7) Neville v. London "Express" Newspaper Ltd. [1919] AC 368. What is this third class of cases ? It is that class where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. Where such is the case, the remedy provided by the statute, the form given by the statute, must be followed and adhered to. This then is the third class, which Lord Than-kerton reiterates in (8) AIR 1940 105 (Privy Council) , thus: "With respect to that class it has always been held that the party must adopt the form of remedy given by the statute."

9. Now, what is the remedy given by section 26F about a subsequent transferee, just as each of the two appellants is ? None whatever. One has to search section 26F in vain for such remedy. This led Edgley J. to observe in (3) Girija Kundu's case (supra) :

The provisions of the Bengal Tenancy Act, as they stand, do not expressly deal with the rights of cosharer tenants in respect of transfers subsequent to the original transfer which gives them the right to pre-empt.

So, the third category of Willes, J.'s classification, relied upon, on behalf of the appellants, does not reach the case on hand.

10. The first transfer by Satish to Jitendra on May 13, 1955, was for a consideration of Rs. 1,500. The second transfer by Jitendra to the two appellants on November 4, 1957, was for a consideration of Rs. 5,000. It is, therefore, argued that were the appellants impleaded in the pre-emption proceedings, they would have got, at the least Rs. 1,500 plus, 10%, just as Girija Kundu, the subsequent transferee, got Rs. 500 plus 10% in the case before Edgley, J. Certainly this may be said. But the appellants have made their bed and must lie on it. They purchased with their eyes wide open: Purchasers, beware. They knew full well that their vendor Jitendra was under a legal disability to deal with the property-the holding of an occupancy raiyat-to the prejudice of the pre-emptor, the respondent, subject to whose right of pre-emption their purchase was. On top of all that, their vendor bound himself to repay Rs. 5,000 to them, should his title go wrong. It has gone wrong very much indeed. Truth to tell, it has been destroyed. So, the appellants may look for their remedy that way, if they are so advised.

11. In view of all that goes before, it is hardly necessary to examine the contention resting, it is said, on the recital in the appellants' sale-deed that the vendor has no co-sharer, and on the pre-empting respondent having thereby got no notice thereof, as the result of which it was not possible for him to make the appellants parties.

12. Thus, all points taken in support of the appeal, including the principal one, fail the appellants.

13. In the result, the appeal fails and is dismissed with costs. Leave to appeal under clause 15 of the Letters Patent has been asked for. It is allowed.