

7 SCOB [2016] AD 37**APPELLATE DIVISION****PRESENT:****Ms. Justice Nazmun Ara Sultana****Mr. Justice Syed Mahmud Hossain****Mr. Justice Muhammad Imman Ali****CIVIL APPEAL NO.179 of 2008**

(From the judgment and order dated 26.11.2006 passed by the High Court Division in Civil Revision No.376 of 1997.)

Shantipada Shil :Appellant

=Versus=

Sunil Kumar Sarker and others :Respondents

For the Appellant : Mr. M. A. Quiyum, Senior Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent No.1 : Mr. Habibul Islam Bhuiyan, Senior Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

Respondent Nos.2-31 : Not represented.

Date of hearing : 06.05.2014 and 07.05.2014.

Date of judgment : 08.05.2014

Pre-emption:

On scrutiny of the deposition of this preemptor-petitioner we find that the preemptor-petitioner while deposing before court, though denied this alleged fact that he obtained the certified copy of the case kabala in the year 1982 for the opposite party No.2, but he did not deny the fact that he was the engaged lawyer of the opposite party No.2. The opposite party No.2 filed Other Suit No.70 of 1982 challenging the genuineness of the impugned kabala. In the circumstances it is not believable at all that the preemptor-petitioner could not know about the case kabala before his alleged date of knowledge. From the facts and circumstances stated above it is rather proved beyond any doubt that the preemptor-petitioner knew about the case transfer in the year 1982. In the circumstances the trial court rightly dismissed the case for preemption. ... (Para-13)

J U D G M E N T

Nazmun Ara Sultana, J:

1. This Civil Appeal, by leave, has arisen out of the judgment and order dated 26.11.2006 passed by the High Court Division in Civil Revision No.376 of 1997 discharging the rule.

2. The preemptor-respondent No.1 herein filed Miscellaneous Case No.45 of 1985 in the Court of the Assistant Judge, Boalkhali, Chittagong both under section 96 of the State Acquisition and Tenancy Act and under section 24 of the Non-Agricultural and Tenancy Act for pre-emption of the case land on the averments that he was a co-sharer of the case holding while the purchaser-opposite party was a stranger to that. That on 25.09.1973 the vendor-opposite party No.2 sold the case land to the purchaser-opposite party No.1 by a registered kabala dated 25.09.1973 beyond the knowledge of the petitioner. That no notice of that kabala was ever served upon the petitioner and the purchaser-opposite party No.1 also did not take possession of the case land and the son of the vendor- opposite party remained in possession of the case land as before. That on 17.07.1985 when the purchaser- opposite party No.1 came to the case land for constructing a house thereon the petitioner, for the first time, could know about the case transfer. Thereafter, he obtained the certified copy of that kabala on 31.07.1985 and being thus confirmed about the sale in question filed the preemption case on depositing the requisite amount within the statutory period of limitation from the date of his knowledge.

3. The purchaser-opposite party No.1 and the respondent Nos.2, 18 and 19 contested that case by filing separate written objection. The material case of the purchaser-opposite party No.1 was that he purchased the case land within the full knowledge of the father of the petitioner-who was co-sharer of the case holding and that the petitioner was not at all a co-sharer of the case holding at the time of sale in question. That after purchasing the case land the purchaser-opposite party mutated the case land in his name and the B.S. record of rights in respect of the case land also was duly prepared in the name of the purchaser-opposite party. The further case of this purchaser opposite party No.1 was that after his purchase of the case land the opposite party No.2-the son of the vendor-filed Other Suit No.70 of 1982 in the Court of Munsif, 1st Court, Potia, Chittagong against him for declaring the case kabala collusive and void and that in the plaint of that suit, in para-3, the opposite party No.2 stated clearly that his Advocate Mr. Sunil Kumar Sarker (the present preemptor-petitioner) obtained the certified copy of the present case kabala for him. That the opposite party No.2 filed another case being No.18 of 1982 in the Court of Union Parishad against this purchaser-opposite party and in that case also the present preemptor-petitioner was a witness. This purchaser- opposite party, in his written objection, stated also that he exchanged 15 decimals of land out of the case land with some other land of Jogeshwar Shil in the year 1982 and thereafter he sold out 96 decimals of land to Jogeshwar Shil in the year 1983 and now he is in possession of only 5 decimals of land out of the case land.

4. The opposite party No.2 also filed a written objection alleging that the case kabala was forged and that his mother Modhumaloti never executed this kabala and that Modhumaloti left for India in 1965.

5. The opposite party No.18 filed written objection stating that he got the case land from the opposite party No.1 by way of exchange and that subsequently he sold out that land to Babul Shil-the opposite party No.19.

6. The opposite party No.19 also filed a written objection stating that he purchased some portion of the case land from the opposite party No.18.

7. However, the trial court, on consideration of the evidence adduced by both the sides, dismissed the case for preemption by the judgment and order dated 22.02.1992. Against that judgment and order of the trial court the preemptor-petitioner preferred Miscellaneous Appeal No.93 of 1992 before the learned District Judge, Chittagong which was ultimately heard and disposed of by the learned Subordinate Judge, 1st Commercial Court, Chittagong. This appellate court below, on hearing both the parties and examining the evidence on record allowed the appeal, set aside the judgment and order of the trial court and allowed the preemption case by the judgment and order dated 02.11.1996.

8. Being aggrieved by that judgment and order of the appellate court below the purchaser-opposite party No.1 preferred the above mentioned Civil Revision No.376 of 1997 before the High Court Division and obtained rule. A Single Bench of the High Court Division ultimately, after hearing both the parties, discharged that rule by the impugned judgment and order.

9. Mr. M. A. Quiyum, the learned Senior Advocate appearing for the preemptee-appellant has mainly submitted before us that this case for preemption filed long 14 years after the case transfer is hopelessly barred by limitation, that there are ample evidence on record and facts and circumstances to prove that this preemptor-petitioner knew about the case transfer from the very beginning; that the appellate court below and the High Court Division committed great error and injustice in allowing the case for preemption ignoring this inordinate delay in filing this preemption case and also the evidence and facts and circumstances telling that the preemptor-petitioner knew about the case transfer from the very beginning. The learned Counsel has made argument to the effect also that the trial court duly considered all these evidence and facts and circumstances and rightly came to the decision that this preemption case was hopelessly barred by limitation, but the appellate court below and the High Court Division without reversing these findings and decision of the trial court whimsically allowed the case for preemption on misinterpretation and misappreciation of the evidence on record. The learned Counsel has pointed out also that in this case there is a strong fact to prove that this preemptor-petitioner knew about the case transfer from the very beginning. Elaborating this argument the learned Counsel has stated before us that in the very written objection filed before the trial court this preemptee-appellant stated clearly that immediate after the case transfer the opposite party No.2-the son of the vendor-opposite party filed Other Suit No.70 of 1982 before the 1st Court of Munsif, Potia, Chittagong challenging the genuineness of the case kabala and in the plaint of that suit the opposite party No.2 stated clearly that this present preemptor-petitioner was his engaged lawyer and he obtained the certified copy of the case kabala for him. The learned Counsel has pointed out also that this preemptee-appellant, in support of this case, filed the certified copy of the plaint of Other Suit No.70 of 1982 which was duly marked as exhibit-P, and the trial court though rightly took into consideration this exhibited-P, but the appellate court below and the High Court Division ignored this exhibit-P and most illegally and erroneously allowed the case for preemption. The learned Counsel for the preemptee-appellant has contended that the judgment of the trial court was a correct one and the judgments of the appellate court below and the High Court Division are wrong.

10. Mr. Habibul Islam Bhuiyan, the learned Senior Advocate for the preemptor-respondent has made submissions supporting the impugned judgment. He has argued that in

this case it is rather an admitted fact that the son of the vendor-opposite party is still in possession of the case land and that the purchaser-opposite party never took possession of the case land before the alleged date of knowledge of the petitioner as stated in the petition for preemption and in the circumstances the appellate court below did not commit any wrong in allowing the case for preemption and the High Court Division also rightly affirmed the judgment and order of the appellate court below. Mr. Habibul Islam Bhuiyan has argued also that the exhibit-P is not a conclusive proof of the defence case that the preemptor-petitioner knew about the case transfer from the very beginning. The learned Counsel has argued that this exhibit-P is not at all a statement of the preemptor- petitioner himself and that the preemptor-petitioner, during trial of the case, clearly denied the alleged fact that he obtained certified copy of the case kabala for the opposite party No.2. The learned Counsel for the preemptor-respondent has argued that both the appellate court below and the High Court Division, on proper appreciation of evidence on record and other facts and circumstances rightly allowed the case for preemption and in the circumstances this appeal is liable to be dismissed.

11. We have considered the arguments advanced by the learned Counsel of both the sides and gone through the impugned judgment and order of the High Court Division and those of the appellate court below and the trial court and also the evidence on record.

12. Admittedly, this preemption case was filed long 14 years after the case transfer. It is also an admitted fact that at the time of case transfer the preemptor-petitioner was not a co-sharer to the case holding since his father was alive at that time and at the death of his father the preemptor-petitioner became co-sharer to the case holding. So, the preemptor-petitioner was not entitled to get any notice of the case transfer. Admittedly, the father of the preemptor-petitioner-who was the co-sharer of the case holding-did not file any preemption case. The purchaser-opposite party, in his written objection, stated clearly that the father of this preemptor-petitioner knew about the case transfer very well. However, the preemptor-petitioner has contended that after the death of his father the registration of the kabala in question as per section 60 of the Registration Act was completed and as such the preemptor-petitioner, who became the co-sharer of the case holding before that, was entitled to get preemption of the case land. However, the main question in this case for preemption is whether the case for preemption is barred by limitation or not.

13. It has already been mentioned above that this case for preemption has been filed long about 14 years after the case transfer. The preemptor-petitioner though has pleaded that he had no knowledge about the case transfer before his alleged date of knowledge-as mentioned in the application for preemption-but on examining the evidence on record we do not find that this case of the preemptor-petitioner was proved. Though, admittedly, the opposite party No.2-the son of the vendor was in possession of some portion of the case land but this fact alone cannot be a proof of the petitioner's case that he could not know about the case transfer before his alleged dated of knowledge. In this case there are, rather, sufficient evidence and

facts and circumstances to prove that the preemptor-petitioner had knowledge about the case transfer from the very beginning. In this case the documents filed from the side of the contesting opposite parties have proved that after his purchase the purchaser opposite party transferred some of the case land to the opposite party No.18 and later the opposite party No.18 transferred some of the case land to opposite party No.19 and both these subsequent purchasers have deposed in this case claiming their possession in the case land. Over and above, there is another strong evidence which proves that the preemptor-petitioner knew about the case transfer from the very beginning. This is exhibit-P-about which I have already mentioned above. Admittedly, the opposite party No. 2-the son of the vendor-filed Other Suit No.70 of 1982 challenging the genuineness of the case kabala immediate after the execution and registration of the same. It should be mentioned that the said Other Suit No.70 of 1982 was ultimately dismissed. However, in the plaint of that suit the opposite party No.2 stated clearly that this preemptor-petitioner was his engaged lawyer and he obtained a certified copy of the case kabala for him. Mr. Habibul Islam Bhuiyan, the learned Counsel for the preemptor-respondents has argued that during trial of the case the preemptor-petitioner clearly denied this statement of exhibit-P that he obtained certified copy of the case kabala for the opposite party No.2. But on scrutiny of the deposition of this preemptor-petitioner we find that the preemptor-petitioner while deposing before court, though denied this alleged fact that he obtained the certified copy of the case kabala in the year 1982 for the opposite party No.2, but he did not deny the fact that he was the engaged lawyer of the opposite party No.2. The opposite party No.2 filed Other Suit No.70 of 1982 challenging the genuineness of the impugned kabala. In the circumstances it is not believable at all that the preemptor-petitioner could not know about the case kabala before his alleged date of knowledge. From the facts and circumstances stated above it is rather proved beyond any doubt that the preemptor-petitioner knew about the case transfer in the year 1982. In the circumstances the trial court rightly dismissed the case for preemption. The appellate court below and the High Court Division committed wrong in allowing the preemption case.

14. So this appeal succeeds.

15. Hence it is ordered that this appeal be allowed on contest without any order as to cost.

16. The impugned judgment and order of the High Court Division and also that of the appellate court below are set aside and the judgment and order of the trial court be restored.