## 7 SCOB [2016] HCD 64

#### HIGH COURT DIVISION

CIVIL REVISION NO. 2218 OF 2010

Sree Paresh Chandra Pramanik

.... Petitioner

-Versus-

Md. Mokbul Hossain and others

... Opposite Parties

**Present:** 

Mr. Justice Borhanuddin

State Acquisition and Tenancy Act, 1950 Sub-section 10 of section 96 And Succession Act, 1925 Section 28: No One appear

..... For the Petitioner

Mr. Md. Harun-or-Rashid, with Mr. Md. Enamul Huq Molla, Advocates ...... For Opposite Party no.1

Heard on:- 10.08.2015, 16.08.2015 Judgment dated: 17.08.2015

Section 28 of the Indian Succession Act, 1925, provides mode of computing of degrees of kindred in the manner set forth in the table of kindred set out in schedule 1. From the table of schedule 1, annexed with the counter affidavit, it is evident that brother-in-law is not a relation within three degrees by consanguinity. Pre-emptee opposite party no.1 being not a relation within three degrees by consanguinity of the donor is not entitled to get protection of Sub-section 10 of section 96 of the State Acquisition and Tenancy Act.

... (Para-13)

#### Judgment

### Borhanuddin, J:

- 1. This rule has been issued calling upon opposite party no. 1 to show cause as to why judgment and order dated 28.04.2010 passed by the learned Additional District Judge, Naogaon, in Civil Miscellaneous Appeal No. 10 of 2008 reversing judgment and order dated 24.01.1998 passed by the learned Senior Assistant Judge, Naogaon, in Pre-emption Case No. 3 of 2003 rejecting the case, should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.
- 2. Facts relevant for disposal of the rule are that opposite party no.1 as pre-emptor instituted Miscellaneous Case No. 3 of 2003 in the Court of learned Assistant Judge, Naogaon, under section 96 of the State Acquisition and Tenancy Act contending interalia that the preemptor is owner and possessor of plot nos. 1580, 1578 and 1571 which are adjacent to the case land as such, pre-emptor is a contiguous land holder; Pre-emptee opposite party no.2 secretly transferred the case land to pre-emptee opposite party no.1 by registered deed of gift

dated 08.10.2002; When preemptee opposite party no.1 went to take possession of the case land, the pre-emptor came to know about transfer of the land by deed of gift; Pre-emptee opposite party no.1 is not a relation of the pre-emptee opposite party no.2 within three degrees by consanguinity; Preemptor procured certified copy of the deed on 12.12.2002 and applied for preemption by depositing consideration money with compensation as per law.

- 3. Pre-emptee opposite party no.1 contested the case by filing written objection contending interalia that the case is not maintainable, barred by limitation and bad for defect of parties. Further contending that pre-emptee opposite party no.2 nourished and brought up pre-emptee opposite party no.1 from his childhood and after attaining majority transferred the case land in favour of the preemptee-opposite party no.1 vide registered deed of gift and delivered possession thereof; Pre-emptor is not a contiguous land holder; Preemption case is not maintainable since case land transferred by deed of gift; Case is liable to be rejected.
- 4. After hearing the parties and assessing evidence on record, learned Senior Assistant Judge, Atrai, Naogaon, rejected the case vide judgment and order dated 24.01.1998.
- 5. Being aggrieved, pre-emptor as appellant filed Miscellaneous Appeal No. 10 of 2008 in the Court of learned District Judge, Naogaon. On transfer, the appeal was heard and disposed of by the learned Additional District Judge, 1<sup>st</sup> Court, Naogaon, who after hearing the case and reassessing evidence on record allowed the appeal by his judgment and order dated 28.04.2010.
- 6. Having aggrieved by and dissatisfied with the judgment and order, pre-empteerespondent as petitioner preferred this revisional application under Section 115(1) of the Code of Civil Procedure and obtained the present rule with an order of stay.
- 7. This matter has been posted in the cause list for the last few days with name of the learned Advocates but no one appears on behalf of the petitioner to press the rule.
- 8. Mr. Harun-or-Rashid with Mr. Md. Enamul Huq Molla, learned advocates appearing for the opposite party no.1 by filing a counter affidavit submits that the learned Senior Assistant Judge committed an illegality in holding that preemption Case under section 96 of the State Acquisition and Tenancy Act is not maintainable against deed of gift without considering sub-section 10(c) of section 96 of the State Acquisition and Tenancy Act which prevails at the time of execution and registration of the deed of gift. He also submits that it is evident that preemptee-opposite party no.1 is not a relation of the donor within three degrees by consanguinity as such, miscellaneous case under section 96 of the State Acquisition and Tenancy Act is very much maintainable. He next submits that after reassessing evidence on record, appellate court below arrived at a finding that exhibit '2' clearly shows that plot no.1578 owned by the pre-emptor is adjacent to the case land and as such, pre-emptor is a contiguous land holder. In support of his submissions, learned advocate referred to the case of Mir Amanullah-Vs- Mohammad Sharif and others, reported in 44 DLR 228 and the case of Golam Mostafa and others-Vs- Kazem Ali Khan and others, reported in 50 DLR 544.
- 9. Heard the learned advocate. Perused revisional application, judgment and order passed by the courts below alongwith lower courts record and decisions cited by the learned advocate.
- 10. I have gone through the judgment and order passed by the courts below. It appears that learned Senior Assistant Judge rejected the case on two counts firstly, miscellaneous case for pre-emption is not maintainable against transfer of land through deed of gift and secondly,

pre-emptor is not a contiguous land holder. Though the appellate court below after reassessing evidence on record arrived at a finding that pre-emptor is a contiguous land holder but did not revert finding of the trial court that the case for pre-emption is not maintainable since case land transferred by deed of gift. Whether pre-emption is maintainable against transfer through deed of gift is a question of law and there is hardly any dispute that a question of law can be raised at any stage of a proceeding.

11. Sub-section 10(c) of section 96 of the State Acquisition and Tenancy Act, before amendment by Act No. XXXIV of 2006, was as follows:

# "96. Right of Pre-emption-

- (10) Nothing in this section shall apply to;
- (a) .....
- (b).....
- (c) a transfer by bequest or gift (including Heba but excluding Heba-bil-Ewaj for any pecuniary consideration) in favour of the husband or wife or the testator or donor, or of any relation by consanguinity within three degrees of the testator or donor."
- 12. The Pre-emptee No.1 who contested the case by filing written objection admitted himself that pre-emptee opposite party no.2 is his brother-in-law. The preemptee-opposite party no.1 deposed as OPW.1:

"নালিশী সম্পত্তির মূল মালিক আমার ভগ্নিপতি রাখাল চন্দ্র প্রাং ছিলেন। আমি আমার বোনের বিয়ের পর i (NÀCa 1;M;m 0%cBfp)-এর বাড়ীতে লালিত পালিত হই।"

13. Section 28 of the Indian Succession Act, 1925, provides mode of computing of degrees of kindred in the manner set forth in the table of kindred set out in schedule 1. From the table of schedule 1, annexed with the counter affidavit, it is evident that brother-in-law is not a relation within three degrees by consanguinity. Pre-emptee opposite party no.1 being not a relation within three degrees by consanguinity of the donor is not entitled to get protection of Sub-section 10 of section 96 of the State Acquisition and Tenancy Act. Learned Senior Assistant Judge committed an error of law resulting in an error in the decision occasioning failure of justice in holding otherwise. In the case of Golam Mustafa and others-Vs- Kazem Ali Khan and others, reported in 50 DLR 544, this Division held:

"A transaction by way of Hiba-bil-Ewaz without pecuniary consideration is covered by the exception mentioned under section 96(10)(c) and the land covered by such deed of HIba-bil-Ewaz is not pre-emptible. But such land would otherwise be pre-emptible if the donee is not a relation of the donor within three degrees by consanguinity".

- 14. From schedule of exhibit '2' i.e registered sale deed dated 29.10.2001 it is apparent that plot no.1578 owned by the preemptor is adjacent to the case land described in schedule 6 of the deed of gift. As such, I cannot disagree with the finding of the appellate court below that the pre-emptor is a contiguous land holder.
- 15. Under the facts and circumstances of the case and for the reasons stated above, I do not find any reason to interfere with finding of the learned Additional District Judge.
  - 16. Accordingly, Rule is discharged.
- 17. Judgment and order dated 28.04.2010 passed by the learned Additional District Judge, Naogaon, in Miscellaneous Appeal No. 10 of 2008 is maintained.
  - 18. Order of stay granted at the time of issuance of the rule is hereby vacated.
- 19. Send down lower courts record along with a copy of this judgment to the court concern at once.