In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:
Mr. Justice Jahangir Hossain

Civil Revision No. 4017 of 2001

In the matter of :
An application under 115(1) of the Code of Civil Procedure
And
In the matter of :
Kulsum Bibi
…………………petitioner
Abdul Kader Munshi and others
……………………….. Opposite parties
Mr. Md. Abdul Awal Miah, Advocate
…….for the petitioner
Mr. Mohammad Eunus
………for the Opposite parties

Judgment on 28.01.2016

The vendor-petitioner obtained the Rule upon presenting a revision application under section 115(1) of the Code of Civil Procedure against the judgment and order dated 23.04.2001 passed by the learned Sub-ordinate Judge, Artha-Rin-Adalat, Patuakhali in Miscellaneous Appeal No. 54 of 2000, reversing those of dated 02.07.2000 passed by Senior Assistant Judge [Judge-in-charge], Bauphal, Patuakhali in Miscellaneous Case No. 26 of 1994 filed by the pre-emptor-present-opposite party No.01 under section

96 of the State Acquisition and Tenancy Act, dismissing the prayer for pre-emption.

The case of the pre-emptor, in a nutshell, is that the vendor opposite-party Nos. 6-10 having owners and possessors of 36 decimals of land sold the same to the vendees by a registered deed of sale dated 24.02.1994 behind the back knowledge of the pre-emptor who is a co-sharer by inheritance in the case holding No. 199. Getting such knowledge of sale of the land, he presented pre-emption application before the Senior Assistant Judge, Bauphal depositing the consideration money along with compensation. Thereafter, the pre-emptor by an amendment of the plaint [pre-emptor-applicant] dated 10.05.1998 contended that the agreement dated 24.02.1994 and the order of redemption dated 08.06.1996 are collusive that made an attempt to frustrate the pre-emption right. In the pre-emption case the vendee present-opposite-party No. 2 appeared by filing written objection but subsequently he did not vie with pre-emptor in the pre-emption case filed before the said Senior Assistant Judge, Bauphal.

On the other hand, vendor opposite-party No. 6 [present-petitioner] contested the pre-emption case by placing written objection denying the material allegations made in the application for pre-emption contending that the impugned kabala was not an out and out sale having accompanied by a written agreement of recovery and having being refused to recovery of the case land, the vendor opposite-party No. 6 filed a Miscellaneous Case No. 77 Bau/94-95 under section 95 A of the State Acquisition and Tenancy Act and got an order of redemption on 06.08.1995 and got back the land under pre-emption and the sale is no longer subsists and as such there is no cause of action for pre-emption.

On closure of the evidence both oral and documentary, the learned Senior Assistant Judge [Judge-in-charge] rejected the prayer for pre-emption on 02.07.2000.

Being aggrieved by and dissatisfied with the said judgment and order dated 02.07.2000, the pre-emptor present opposite-party No. 1 preferred a Miscellaneous Appeal No. 54 of 2000 before the learned District Judge, Patukhali and the same was allowed on hearing both the

parties by the learned Subordinate Judge, Artha-Rin-Adalat on 23.04.2001. The vendor-present-petitioner having aggrieved presented a revision application before this Court under section 115(1) of the Code of Civil Procedure and obtained the Rule as stated above.

Mr. Md. Abdul Awal, learned Advocate appearing on behalf of the vendor-petitioner contends that the Appellate Court did not at all discuss the evidence committing an error of law occasioning failure of justice. The court of appeal was misdirected itself in total approach of the matter and thus came to an erroneous decision causing thereby a serious miscarriage of justice. He further submits that prayer for pre-emption was prohibited under section 96(10)(d) of the State Acquisition and Tenancy Act since the transfer was, in fact, a mortgage. As per section 95A of the State Acquisition and Tenancy Act the transfer was accompanied with an agreement for re-conveyance and the same was usufructuary mortgage as contemplated in the aforesaid section.

Though, the transfer of the land in question was made by a registered deed but subsequently it was re-transferred

to the owner by an order of the Assistant Commissioner [Land] dated 08.06.1995, marked as exhibit-'Ka'.

He further contends that the object of the enactment of section 95A to protect the helpless 'Raiyat' from the classes of money lenders and the transaction entered into with the Raiyat by way of mortgage is not governed by the Transfer of Property Act but must be deemed a complete usufructuary mortgage as defined in Bengal Tenancy Act [32 DLR(AD)235]. An agreement for re-conveyance can be specifically enforced and the provision for registration for such agreement as required under section 95(2) of the said Act is not applicable in this case. In this regard he has referred to the decisions namely 49 DLR [HC] 45, 1 MLR [AD] 46 and 47 DLR [HC] 67.

He has contended that the case land has already been redeemed by the order dated 08.06.1995 of the Assistant Commissioner [Land]. As a result of which the case land under pre-emption had gone back to the vendor-petitioner and that be so the pre-emption application cannot be entertained. For all and above he has also cited some decisions namely 29 DLR [HC] 164, 37 DLR [HC] 324, 35

DLR [AD] 225 and 58 DLR [AD] 209. He finally submits that the Court of Appeal passed the impugned judgment and order merely upon surmises and conjectures without any reference of evidence of the pre-emptor and as such the same cannot be sustainable in law and liable to be set aside.

No affidavit-in-opposition filed by the pre-emptor-present opposite-party No.01.

However, Mr. Mohammad Eunus, learned Advocate appearing on behalf of the pre-emptor-present-opposite party contends that the vendor-petitioner of the sale deed created an unregistered deed of re-conveyance that was not proved by the oral evidence in accordance with the Evidence Act. An unregistered document must be proved by its writer and attesting witnesses but none of the witnesses came forward to prove the document of the so called re-conveyance. The vendor-petitioner submitted certified copy of the order of the Assistant Commissioner [Land], marked as exhibit- 'Ka', during trial of the case but in which no description of any land or anything mentioned.

He further contends that the vendor-petitioner tried to show a compromised document but the same has not

been supported by any witness although it is a private document. To defeat the right of pre-emption, the vendor-present petitioner and land purchasers collusively prepared an agreement of re-conveyance during pendency of the pre-emption case and to that effect no evidence has been produced before the trial court but the trial court most illegally dismissed the case of pre-emption.

In support of the said contentions he has referred to the decisions namely 1 BLC [AD] 25, 59 DLR [HCD] 116, 8 MLR [AD] 207, 13 MLR [AD] 287, 24 BLD [AD] 121, 5 BLC [AD] 183 and 42 DLR [AD] 289.

He has further contended that although five vendors sold out the land in question to the 05 vendees whereas the redemption prayer was made by only vendor present-petitioner to the Assistant Commissioner [Land] which makes clear that the redemption was made collusively.

Heard the learned Advocates of both the parties at length, perused the application and the impugned judgment of the Appellate Court, judgment of the trial court and other connected documents on record, wherefrom it transpires that a transfer of land in question was made on

24.01.1994 by a registered sale deed by the present-petitioner along with four others. And the pre-emptor present-opposite party No. 1 filed a pre-emption application within four months of the transfer on 11.06.1994. Admittedly pre-emptor- present-opposite party No. 01 is a co-sharer of the land in question. During pendency of the pre-emption case the vendor-present petitioner filed an application before the Assistant Commissioner [Land] for redemption of the sold land showing an agreement made by the purchasers to the vendors and subsequently the redemption prayer was allowed on a solenama on 08.06.1995.

Now the question is before this court as to whether an unregistered agreement with a solenama for redemption was made beyond the respective law of the land and whether such conduct can be done during pendency of the pre-emption case.

It is found in the revision application that the transfer of sale deed was executed on 24.02.1994 and the pre-emption case was filed by the pre-emptor-present-opposite party No. 01 on 11.06.1994, within the time of limitation.

During pendency of the said pre-emption case, the vendor-petitioner within around six months of the transfer of the land filed an application before the Assistant Commissioner [land] for redemption stating that the sale deed had been executed with a view to re-transfer the land in question to him and subsequently showed an agreement prepared on cartridge-paper along with a solenama. It is not emerged in the judgment of both the courts below that re-transfer of the land to the vendors has been stated in the sale deed or the subsequent agreement for redemption got registered.

Thus, it can be opined that it is not a difficult task to make an unregistered agreement at any time by any of the makers to frustrate the right of pre-emption and that is why law has been enacted to prevent such type of transactions. It may create suspicion in the mind of a reasonable person, as to why within a few months of transfer of the land in question, the vendor-present petitioner only alone, excluding co-vendors took steps promptly to get back the land by making such unregistered agreement having no specified period in lieu of such consideration as the validity of such transaction provided in section 95A of the State

Acquisition and Tenancy Act to be done within 7 [seven] years meant such early transaction to be a mechanical and colorable one. It is not found in this case and other connected documents on record that the co-vendors have claimed the land in question for reconveyence.

It appears from exhibit- 'Ka' that there is no description of land, mentioned in the order of redemption dated 08.06.1995. The agreement was made on a plain cartridge-paper which has not been supported by any related witnesses. The learned Advocate for the present opposite-party No.01 submits that the vendor-petitioner has failed to prove the re-transfer and the value of the land in question and its costs refunded to the purchasers. As per section 95(2) of the State Acquisition and Tenancy Act, the subsequent agreement was not registered but the law stipulates that every such complete usufructuary mortgage shall be registered under the Registration Act, 1908 [Act of XVI of 1908]. It further reveals from exhibit-'Ka' which states as follows,

> *"বিবাদী সোলেনামা দাখিল করিয়াছেন। দেখলাম। উভয় পক্ষের বক্তব্য শুনলাম। সোলেনামা গৃহিত হইল। বাদীর সম্পত্তিতে তার সত্ব প্রতিষ্ঠিত হইল।"*

From the said order of the Assistant Commissioner [Land] it appears that there is no sign of redemption like re-transferring the land to the vendor-present petitioner. It is merely an order of declaration in which no schedule of the land in question has been described.

By such conduct it indicates that this was a colorable and collusive transaction made by the intended instigation of the vendor-petitioner having arranged with the purchasers violating the section 52 of the Transfer of Property Act. As the vendor-petitioner has failed to show that he along with other co-vendors re-occupied the land in question from the purchasers following the provision of law after having been inducted in furtherance of possession of the land and as such this transfer did not affect the right of pre-emption in any way. It finds support from the decision in the case of Mozaffar Ali Bepary –Vs- Omar Ali and others, reported in 1 BLC [AD] 25, where it was held that,

> ***"Land under pre-emption was sold on 30.01.1979 by a registered sale deed and it was retransferred on 24.01.1978 in pursuance of an***

> ***agreement and the pre-emption case was filed on 30.05.1979. As the pre-emption had collusively arranged with his vendors to get the land retransferred and the transfers are colorable and sham transactions without parting with its possession, they did not affect the right of pre-emption."***

If there was a good intention to re-transfer the property in question to the seller it must be mentioned in the sale deed as per law. During pendency of the pre-emption case the vendor-petitioner alone took initiative showing an un-registered agreement for frustrating the right of pre-emption of the pre-emptor. If the vendors had necessity for the land to get back upon usufructuary mortgage with the purchasers, they ought to have offered the same first to the co-sharers of the land like the pre-emptor-present opposite-party No. 01 but they did not show such initiative taken by them at any time.

In the light of the facts and circumstances as discussed above, it is envisaged that if such conduct or act is allowed in the name of re-transfer during pendency of the pre-emption case, it will continue to happen in every event of the pre-emption right. The transaction made by the vendor-petitioner and the purchasers proves that they had ill

motive to defeat the right of pre-emption in the instant case.

It has also supported by the decision of our Apex Court, reported in 13 MLR [AD] 287, which is as follows,

> ***"Again transfer of the case land to a third party during the pendency of the pre-emption case is hit by the doctrine of lispendens as contemplated under section 52 of the Transfer of Property Act, 1882. The transactions made during the pendency of the pre-emption case are held by the learned judge of the High Court Division as mere paper transactions and sham papers which could not stand on the way of allowing the pre-emption case. The Apex Court affirmed the findings of the High Court Division as perfectly justified."***

It finds more support from the decision in the case of Mukter Hossain and others –Vs- A. Matin Sarker and others, reported in 59 DLR, 116 where it was held as under:-

> ***"There is no scope to accept mechanically the agreement and sell deed together to constitute a mortgage without excluding all probabilities of creating a post-date agreement to defeat the right of pre-emption."***

It finds support from the decision in the case of Ajufannessa Bibi –Vs- Safar Miah, reported in 30 DLR [AC] 41 where it was held as under:-

> ***"A private document cannot be taken notice of and marked as an exhibit without any formal proof,***

> ***unless the requirement of such proof is waived by the opposing party. The marking of the said document as an exhibit may however, give rise to a belief that it bears the writing or signature of a person, as has been deposed to by the witness who proves the said document. The question as to whether the document is a genuine one or it represents the true state of affairs is a question of fact which is to be decided by the Court concerned in the light of the facts and circumstances of the case. There is no legal pre-emption which the Court is bound to make in respect of such a document."***

If an unregistered agreement for reconveyance is shown to be specifically enforced it must be proved by sufficient evidence by the person who places it before the court for its benefit. The case in hand no such proof is found to be relied upon. It is true that the object of legislation under section 95A of the State Acquisition and Tenancy Act regarding usufructuary mortgage was enacted to protect the helpless Raiyat, the owner of the land from the classes of money Lenders but the usufructurary mortgage has to be made, not with the intent to ruin the right of pre-emption in any manner. Re-transfer should be made to the original owner prior to the filing of the application seeking pre-emption right. In the present case it is found that an agreement of re-transfer on a cartridge-

paper, which has not been marked as exhibit by the witness in the trial court, indicates that it is a colorable show-up or a mere paper transaction made by vendor-petitioner during pendency of the pre-emption application and no sign of possession had gone back to the original owners. Deed of reconveyance is to be executed and registered before filing of the application for pre-emption. It appears from documents on record that the present-opposite-party No. 01 knowing the fact of unregistered agreement filed by the vendor-petitioner before the Assistant Commissioner [Land] brought an amendment in his pre-emption application pending in the trial court meant that such agreement was made after filing of the pre-emption case to frustrate the right of pre-emption.

The Appellate Court below on consideration of both oral and documentary evidence as a final court of fact held that for the purpose of defeating the rights of pre-emption, only the vendor-present petitioner had collusively arranged with the purchasers to get the land re-transferred. Hence, the alleged re-transfer during pendency of the pre-emption case is a colorable and sham transaction and in fact, the

vendor-present petitioner did not take part excluding four others with the possession of the land in question and as such subsequent transfer did not affect the right of pre-emption of the pre-emptor. The learned Sub-ordinate Judge upon proper application of the principle of law and facts and circumstances of the case has rightly allowed the appeal.

Thus, the impugned judgment does not suffer from any infirmity which warrants any interference by this single bench. In the result, the Rule is discharged without any order as to costs.

Let a copy of this judgment be communicated to the courts below along with lower court records at once.