

section 96 of the State Acquisition and Tenancy Act, 1950 claiming to be the co-sharers of the holding of the case land stating that vendor transferred the case land to the pre-emptees on 19.09.1994 without serving any notice to the pre-emptors and beyond their knowledge. The pre-emptees are strangers in the holding, in question. It was stated that the pre-emptors having had the information of the sale deed sought to be pre-empted obtained the certified copy of the same on October 19, 1994 and thereupon had the definite knowledge about the impugned transfer to the pre-emptees. Hence, was the case.

The prayer for pre-emption was resisted by the pre-emptee Nos.1-3. Their case, in short, was that the seller having felt necessity of selling the case land approached the pre-emptors and requested them to purchase the same but they declined to purchase. Thereafter, the seller approached the pre-emptees and they agreed to purchase the case land which is the adjacent land to the pre-emptees' dwelling homestead. The price was settled in a 'Mazlish' held on 02.09.1994 in presence of the pre-emptors, who are the uncles of the pre-emptees, and some respectable persons of the locality. Father of the pre-emptees is the full brother of the pre-emptors and co-sharer of the case holding. The pre-emptors gave consent to the sale and settled the price of the case land and assured the pre-emptees that they would not file any case for pre-emption in case of purchase by the pre-emptees and, thus, having had the assurance from the pre-emptors, the pre-emptees purchased the case land so the claim of pre-emption is barred by the principles of waiver, acquiescence and estoppel and as such the Miscellaneous Case was liable to be dismissed.

The trial Court dismissed the Miscellaneous Case. The pre-emptors preferred appeal which was allowed by the appellate Court. Then the appellant filed civil revisional application in the High Court Division and obtained Rule. The High Court Division, by the impugned judgment and order, discharged the Rule. Thus, the appellant has preferred this appeal upon getting leave.

Mr. Probir Neogi, learned Senior Counsel appearing with Mr. Baker Uddin Bhuiyan, for the appellant, submits that the pre-emptors took leading part in bringing about the transaction by assisting the seller in selling the land, negotiated the price of the case land and assured the pre-emptees that they would not file any case for getting the case land by way of pre-emption. The conduct of the pre-emptors is being sufficient to give rise to waiver and acquiescence, the High Court Division erred in law in not holding that the instant application for pre-emption was barred by the principles of waiver, estoppel and acquiescence. He further submits that the High Court Division misconceived the facts as well as law and, thereby, failed to appreciate the decision reported in 14 BLD (AD) 20 which is very much applicable in view of the facts and circumstances of the case.

Mr. Khair Ezaz Maswood, learned Counsel appearing for the pre-emptor-respondents, submits that the right to pre-empt is a statutory right and such statutory right was accrued in favour of the pre-emptors on the date of registration of the case deed, the High Court Division rightly held that since the pre-emptors acquired a right to get the case land by way of pre-emption long after the alleged talk of sale, the instant case was not barred by the provisions of waiver, estoppel and acquiescence.

In this appeal, the moot point for determination is as to whether the instant application for pre-emption was barred by provisions of waiver, estoppel and acquiescence or not.

It is not disputed that the pre-emptees are the nephews of the pre-emptors. By this time, after the death of their father, the pre-emptees became co-shares of the disputed holding. It is also not disputed that the case land is the adjacent land to the pre-emptees' dwelling homestead. In their written objection, the pre-emptee-appellant, inter alia, stated that at about 3.00 P.M. on 02.09.1994 a meeting was held in presence of the vendor, pre-emptees, pre-emptors and other local elites including Abul Hashem Mozumder, Jonab Ali and Ismail Pradhaniya at the dwelling house of the pre-emptees and in that meeting price of the disputed property was settled at tk.30,000/- at the instance of Joynal Abedin Talukder (Pre-emptor No.1), Jonab Ali Talukder (Pre-emptor No.4) and Ali Newaz Talukder (Pre-emptor No.3). The pre-emptors gave their consent saying that they would not file application for pre-emption if the pre-emptees purchase the case land. They also advised the pre-emptees to show lesser price of the case land in the sale deed than that of the settled price to avoid high registration cost. O.P.W.1 Md. Iqbal Hossain Talukder in his evidence categorically stated the aforesaid facts and O.P.W.2 corroborated the testimony of O.P.W.1. The pre-emptors while cross-examining the O.P.W.1 did not put any question on those particular facts to weaken or destroy the case of the pre-emptees. The pre-emptors did not cross-examine the O.P.W.1 in respect of the consent, advise, settlement of the price of the case land and assurance given by the pre-emptors to impeach the accuracy, credibility and general value of the evidence of O.P.W.1. When the

opponent failed to put his essential and material case in cross-examination, it must follow that he believed that testimony given could not be disputed at all. Since the O.P.W.1 has not been cross-examined on those particular facts and even no suggestion was given to O.P.W.1 by the pre-emptors that the statements made by O.P.W.1 in his examination-in-Chief were not true, we are of the view that the pre-emptors gave consent and advised the pre-emptees to purchase the case land and settled the price of the same and assured the pre-emptees that they would not file the application for pre-emption which was complete assurance on the part of the pre-emptors.

Lord Coke said that it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth. In simple words, estoppel means one cannot contradict, deny or declare to be false the previous statement made by him. It means to stop. According to it, when any person says one-thing at one time and another thing at another time, then he is prevented from doing so.

In *Bishen Singh V. Khazan Singh*, AIR 1958 page 838 Indian Supreme Court while approving the classic judgment of Mahmood J, in *Gobind Dayal V. Inayatullah*, (1885) ILR 7 All 775(FB), 'that the right of pre-emption was simply a right of substitution' observed that, "Courts have not looked upon this right with great favour, presumply, for the reason that it operated as a clog on the right of the owner to alienate his property." Having thus persuaded and assisted the purchasers by giving assurance and by conduct that they acquiesced in their ownership they somersaulted to grab the case property by staking their own claim and attempting to unsettle the legal effect of their own conduct. Estoppel is a very generic and amorphous rule in the law of Evidence. Where a person by his words

of conducts induces to another person to believe a fact and subsequently acts according to that belief or to alter his previous position, he is barred from later changing position. The doctrine established in the section 115 of the Evidence Act is not a rule of equity rather a rule of evidence, applied to the Court of Law. In the case of B.L Shreedhar V.K.N. Munireddy (AIR 2003 SC 578) Indian Supreme Court held that a doctrine of estoppel is capable of creating or defeating rights. It is a complex legal notion involving the statement to be acted upon.

Principle of estoppel operates a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished (Indira Bai V. Nand Kishore AIR 1991 SC 1055). In Pateswari Pratab Narain Singh V. Sitaram AIR 1929 PC 259 it was held,

“Assuming that prior completed purchase by the appellant would under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him to re-assert it.”

If a party has taken up a particular position at one stage of litigation it is not open to him to approbate and reprobate from the position.

In this case the pre-emptors themselves refused to purchase and consented to sell and took active part in bargaining of sale and assured the pre-emptors that they would not pre-empt, that is, a concrete offer to sell was made to the pre-emptors before the execution and registration of the impugned deed. In Indira Bai's case (supra) it was observed that even otherwise on facts found that the respondent knew of the sale deed, assisted

the appellant in raising the construction and after the construction was completed he exercised the right of pre-emption which itself demonstrated that the conduct of the respondent was inequitable and it was held that the Court, which are primarily courts of equity, justice and good conscience cannot permit the respondent to defeat the right of appellant and invoke a right which has been called a weak and inequitable right.

Right of pre-emption or first option to buy is a right to acquire certain property before it can be offered to any other person. It gives someone the right to be offered the chance to buy land before the land owners offers it to another party. It means the right of a person to acquire case land in preference to other persons, and it arises in respect of such land only in the case of sale. A co-sharer under the law of pre-emption has right to substitute himself in place of a stranger in respect of a portion of the property purchased by him, meaning thereby that where a co-sharer transfers his share in the holding, the other co-sharer has right to veto such transfer and thereby prevent the stranger from acquiring the holding.

Here, in this case the vendor informed the pre-emptors about his intention to sell the case land and the pre-emptors refused to purchase the same and they settled the price of the case land and assured that they would not file any case for getting the same by way of pre-emption so they were disqualified from subsequently maintaining case for pre-emption as they were estopped from seeking their right as they had waived and given up their right voluntarily. Their right of pre-emption was extinguished by the principles of waiver and abandonment with full knowledge of such right. They have lost their right mandated under section 96 of the State

Acquisition and Tenancy Act since they themselves abandoned and conveyed their decision to the pre-emptees.

In case of Akhlesur Rohman and others V. Safarullah and others (14 BLD AD 20) the pre-emptor took a leading part in bringing about the transaction, he assisted the sellers in selling the land, encouraged the buyers to purchase the same and himself negotiated the price. It was observed,

“In our opinion, this conduct of the pre-emptor was reasonably sufficient to give rise to waiver and acquiescence , and thus, estoppel will operate in any case, because, the conduct of the pre-emptor has induced the purchasers (Appellant) to alter their position and the pre-emptor can not now turn round and assert his right to undo a transaction which is very largely the result of his own creation.”

In the case of Fazaruddin V. Maijuddin reported in 42 DLR(AD)62 it was observed,

“It is true, the right of pre-emption accrues after transfer of the land, and statutory right of pre-emption can not be taken away by mere verbal assurance of the person having such right, unless other facts and circumstances clearly make out a case of acquiescence or waiver.”

When a court evaluates claim of waiver, its goal is to determine whether or not that right was given up voluntarily. It must also be proven

that the other side knew the rights that they have waived as well as possible consequences.

In the case of Syed Shamsul Alam V. Syed Hamidul Haque reported in 69 DLR(AD) 339 this Division observed that the facts and circumstances proved on evidence do not establish that the conduct of the pre-emptor amounted to waiver, acquiescence or estoppel affecting his right of pre-emption. But in this case, we have already found that the conduct and assertion of the pre-emptor established the ingredients of waiver, acquiescence and estoppel.

The right of pre-emption is not a right to the land sold but a right to the offer of the land about to be sold. The right of pre-emption becomes enforceable only when there is a sale but the right exists antecedently to the sale. The pre-emptor has a secondary right or a remedial right to follow the land sold. The right being a preferential right to acquire the interest, which is proposed to be sold, can be defeated by all legitimate methods. If a pre-emptor waives or gives up his right without raising any objection to the sale in favour of third party, the Court may hold that pre-emptor has already given up his right. From the pleadings and evidence adduced by the pre-emptees it appears that the pre-emptors had voluntarily abandoned their known right. There are cogent evidence reflecting the pre-emptors conduct which clearly established the abandonment of such right. It was argued by the pre-emptor respondents that the right of pre-emption could accrue to the pre-emptors only after sale of the land by the vendor, and thus they could not be said to have waived it by their refusal to purchase the case land before its actual sale to the pre-emptors . The right of pre-emption can be waived even before sale, by express refusal to purchase the

case land or by conduct reflecting clearly that the pre-emptors were not interested in its purchase. It is to be pointed out here that cases of pre-emption are no exception to the rule of estoppel to be found in section 115, Evidence Act.

Considering the aforesaid facts and circumstances, we find substance in the appeal.

Thus, the appeal is allowed. The judgment and order passed by the High Court Division and the appellate Court are hereby set aside.

C.J.

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The 10th November, 2020.

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