IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Hasan Foez Siddique, C. J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 196 OF 2009

(From the judgment and order dated the 27th day of July, 2006 passed by the High Court Division in Civil Revision No.104 of 2000).

Uzzal Sarker	:	. . . Appellant
	-Versus-	
Kutub Uddin and others	:	. . . Respondents
For the Appellant	:	Mr. Syed Mahmudul Ahsan, Advocate, instructed by Mr. Md. Taufique Hossain Advocate-on-Record
For the Respondents	:	Not represented
Date of hearing & judgment	**:**	**The 22nd day of August, 2023**

JUDGMENT

M. Enayetur Rahim, J: This civil appeal, by leave, is directed against the judgment and order dated 27.07.2006 passed by the High Court Division in Civil Revision No.104 of 2000 making the Rule absolute.

The facts, relevant for disposal of this appeal in brief, are that the appellant as the pre-emptor filed Miscellaneous (Pre-emption) Case No. 04 of 1994 in the Court of Assistant Judge, Barhatta at Netrokona under Section 96 of the State Acquisition and Tenancy Act, 1950 on the averments, *inter alia*, that total 0.69 acre land in plot No. 139, 0.33 acre land in plot No.28 and 0.21 acre land under Khatian No.65/71 within Mouza Pachruhi is the subject matter of the pre-emption case. The pre-emptor's father was a co-sharer of the Khatian. The respondent Nos.2-4 are full brothers and

they sold the scheduled property in favour of respondent No.1 without giving any notice of the sale to the co-sharer of the Khatian, and the pre-emptor came to know about sale on 24.02.1994 and after getting the certified copy of the deeds he came to know that 3 (three) exchange deeds were fraudulently created to avoid pre-emption and that the property of the plot No.28 is not the property of the respondent Nos.2-4 and since they had no title to sell the said land, hence the case for pre-emption.

Respondent No.1 as pre-emptee contested the case by filing a written objection denying the material averments made in the pre-emption petition contending, *inter alia*, that the said case was barred by estoppel, waiver and acquiescence, the pre-emptor-petitioner is the co-sharer of the scheduled property by way of purchase and also remains the owner of the contiguous land; the three brothers respondent Nos.2-4 are the owners of the scheduled property and all the brothers living in separate mess and their property was also separate by way of separation and mutation in the year 1977 and thus, the preemptor-petitioner is not a co-sharer of the suit property; transaction is not a sale and that opposite party Nos.1 and 2-4 for their own convenience exchanged their respective properties and if the transaction remained an out and out sale, in that events price would have not less than 30,000.00. The pre-emption was not maintainable since pre-emptor had no subsisting title in the property under preemption and though 0.10 acre land lastly belonged to his

brother but the same was also sold to one Arati Bala. A token price of 5,000.00 has been shown in the exchange deed and the cunning pre-emptor being greedy to become owner of 0.69 acre of land in a minimum price out of mala fide motive filed the case for pre-emption. The pre-emptee became co-sharer of the jote by purchase from co-sharer Abdul Gafur by registered deed on 29.03.1975 and 27.10.1979 and from defendant No. 2-4 on 15.02.1982 and by way of Ewaj dated 31.10.1990 and had been in possession of the suit holding since long and as such the case is liable to be dismissed.

During trial, the respective parties adduced both oral and documentary evidence.

The learned Assistant Judge, Barhatta, Netrokona allowed the pre-emption case by his judgment and order dated 27.02.1997. Being aggrieved, pre-emptee Kutub Uddin filed Miscellaneous Appeal No.17 of 1997, which was heard by the learned Subordinate Judge, 2nd Court, Netrokona, who by his judgment and order dated 01.08.1999 affirmed the order dated 27.02.1997 passed by the Assistant Judge, Barhatta, Netrokona.

Then the pre-emptee filed Civil Revision No.104 of 2000 before the High Court Division and obtained Rule, which upon hearing the parties was made absolute.

Being aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the pre-emptor filed Civil Petition for Leave to Appeal No. 1788 of 2007 before this Division. Accordingly, leave was granted on 14.02.2009.

Hence, the present appeal.

Ms. Syed Mahmudul Ahsan, learned Advocate appearing on behalf of the petitioner submits that the High Court Division committed error in holding that the alleged transfer is not a sale, but exchange and, that it interfered with the concurrent findings of fact the Court's below having no legal basis.

No one has appeared for the respondents.

We have considered the submissions of the learned Advocate for the appellant, perused the impugned judgment and order of the High Court Division as well as the Courts below and other connected papers on record.

In the instant case, the trial Court allowed the pre-emption and the Court of appeal below being the final Court of fact affirmed the judgment and order passed by the trial Court.

However, in revision the High Court Division held that the alleged transfer was not out and out sale but it was an exchange *(ewaj)* and, that the pre-emptor failed to prove that the alleged transfer was not a deed of *ewaj*, rather sale deed.

From the judgment and order of the trial Court, it transpires that the trial Court framed specific relevant issues including whether the case property was sold and the alleged deed is a sale deed or a deed of exchange.

The pre-emptee has claimed that the alleged deed is not a sale deed but a deed of *ewaj*, but the High Court Division most erroneously shifted the burden on the pre-emptor to proof the same. Section 103 of the Evidence Act clearly stipulates that burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. In this particular case, the pre-emptee has

claimed that the alleged deed is not a sale deed but a deed of *ewaj,* the onus is upon the pre-emptee to prove the same.

The trial Court on proper consideration of the evidence on record and relying on the case reported in 48 DLR(HC)137 came to a definite finding that the alleged transaction is an out and out sale, not exchange. Further the trial Court considering the evidence of PW-1 held that the alleged exchange had never been taken effect and said PW-2 also admitted that the alleged seller/transferor-pre-emptee did not hand over possession of 23 decimals of land, and he had been enjoying the property of seller/transferor-pre-emptee, so the finding of the trial Court is based on proper evidence on record that the alleged transfer is in fact a sale not exchange. The Court of appeal below being the final Court of fact affirmed the said finding of the trial Court.

In the case of **Muzaffar Ali Bepari vs Omar Ali and others,** reported in **1 BLC (AD) 25** it has been held that in case a reconveyance is for the purpose of defeating the right of pre-emption and that the reconveyance is a collusive one through the clandestine understanding between the buyer (pre-emptee) and the seller (original owner) and that the transfer is a colorable and sham transaction and that the pre-emptee, in fact, did not part with the possession of the land allegedly shown to have been reconveyed to the original owner, a reconveyance of the aforesaid nature would not affect the right of preemption.

Similar view has been expressed by this Division in the case of ***Afia Begum and others vs. Abdul Baset Mia and others,*** reported in ***58 DLR (AD)203*** and in the case of ***Harendra Nath Mahali Vs Ramesh Chandra Halder and others,*** reported in ***58 DLR (AD) 209.***

From the evidence, it reveals that to defeat the right of the pre-emptor the alleged transaction was made showing

exchange. The High Court Division measurably failed to appreciate this aspect and thus, miscarriage of justice has been occurred.

We are of the opinion that the High Court Division has committed serious error of law in passing the impugned judgment and order disallowing the pre-emption.

We find merit in the appeal. Accordingly, the appeal is allowed.

The judgment and order of the High court Division is set aside and the those of trial court is approve.

There will no order as to costs.

C. J.

J.

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