

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present:

**Mr. Justice Md. Mozibur Rahman Miah
and**

Mr. Justice Md. Bashir Ullah

First Miscellaneous Appeal No. 286 of 2007

In the matter of:

Mst. Lili Alam Khanam

---Pre-emptee-Appellant.

-Versus-

Tasar Uddin being died his legal heirs: 1(Ka) Md.
Shahabuddin and others.

--- Pre-emptor-Respondents.

Mr. Rehan Husain, Advocate

---For the Appellant.

Mr. Md. Shamsul Hoque Bhuiyan, Advocate

--- For the Respondent No-1.

Heard on 18.08.2024 and 19.08.2024

Judgment on: 25.08.2024

Md. Bashir Ullah, J

At the instance of the pre-emptee in Pre-emption Miscellaneous Case No.15 of 2006, this appeal is directed against the judgment and order dated 31.07.2007 passed by the learned Joint District Judge, Second Court, Gazipur allowing the pre-emption case directing the pre-emptee to handover the possession of the case land to the pre-emptor within 30 days.

This Court also vide order dated 28.08.2007 stayed the operation of the impugned judgment and order till disposal of the appeal.

The relevant facts leading to preferring the appeal are that the respondent as pre-emptor instituted Pre-emption Case No.1 of 2002

before the Joint District Judge, First Court, Gazipur, impleading the pre-emptee-appellant under section 96 of the State Acquisition and Tenancy Act, 1950 for pre-empt the case land.

The case of the pre-emptor in short is that the case land along with other land belonged to one Md. Sahar Ali as settled rayat and C.S. record was prepared in his name along with his four brothers Jamir, Jomir, Gotai and Ketai Miah in equal share. Sahar Ali died, leaving behind three daughters: Gadi Bibi, Tuki Bibi, Subjan Bibi and above named four brothers. They had owned and possessed 3.28 acres of land in ejmali. Ketai Mia died leaving behind three sons: Tasar Uddin (Pre-emptor), Ain Uddin Munshi and Asim Uddin. Thus the pre-emptor is co-sharer by inheritance in the case holding. Another co-sharer Gadi Bibi sold her 5 decimals of land of C.S. Plot No.139 to one Sabulla who sold the same to Samala Bibi. Thereafter, Samala Bibi on 25.10.1968 sold the same to Begum Rezia Khatun through registered deed No. 8775 who in her turn sold it to the pre-emptor on 16.05.1972 through registered deed No.5580. Thus, the pre-emptor became a co-sharer by inheritance and co-sharer by purchase in the case holding. The pre-emptor's homestead is situated in the south and in the west of the case land. The case land is necessary to enter the main road from his homestead. On 28.01.2002, the pre-emptor and his son Lehaj Uddin came to know that the case land has been transferred, when pre-emptee and some labourers were filling soil in the case land. Thereafter, he obtained the certified copy of deed No. 20220 on 30.01.2002 and finally came to know that the pre-emptee

purchased the case land from opposite party No.2 beyond their knowledge. Hence, the pre-emptor filed the case for pre-emption.

The Pre-emptee contested the case by filing written objection contending, *inter-alia*, that the case is not maintainable in its present form, there is no cause to bring the case and the case is barred by limitation. It is stated that one Shahar Ali, was the owner of 29 decimals of land appertaining to C.S. Khatian No.51, C.S. Plot No. 139 of Mouza Telipara, Joydebpur along with other land. He died leaving behind three daughters: Gadi Bibi, Tuki Bibi and Subjan Bibi as his heirs. Thereafter by metes and bounds among the three daughters, Tuki Bibi got 24 decimals of land and Gadi Bibi got rest 5 decimals of land in their Saham from case plot No.139 and Subjan Bibi got another plot. Accordingly, S.A. Khatian No.104 in respect of 24 decimals land has been prepared in the name of Tuki Bibi and S.A. Khatina No. 103 in respect of 5 decimals land has been prepared in the name of Gadi Bibi. Tuki Bibi transferred 24 decimals of land to her only daughter Jamir Jan Bibi through heba deed No. 6312 and handed over possession. Accordingly, R.S. Khatian No. 55 consisting of plot no. 219 has been prepared in her name in respect of the aforesaid 24 decimals of land and rest 5 decimals of land under C.S. Plot No. 139 corresponding to R.S. plot No. 218, R.S. Khatian No. 43 has been prepared in the name of Gadi Bibi. Jamir Jan Bibi sold 24 decimals of land to one Abdul Kadir through deed No. 7692 on 14.09.1968 and handed over possession of the case land to him. After demise of Abdul Kadir his 22 heirs sold the same to other two heirs Abdul Halim and Abdul Hakim through deed

No.13872 dated 11.12.1985. Thereafter by registered partition deed No. 7313 dated 29.06.1987, Abdul Hakim got the case land and sold 07.12 decimals of land to Lili Alam Khanam (Pre-emptee) through registered deed No. 20220 on 29.10.2001 with the knowledge of the pre-emptor. After purchase the pre-emptee filled up the land with 80 trucks of soil at a cost of Taka 48,000/- and in addition pre-emptee erected two tin shed rooms, a latrine with a tube well spending Taka 60,470/- and planted trees. The pre-emptee mutated the case land in her name and paid rent up to 1409 B.S. and as such the pre-emption case is liable to be dismissed.

The learned District Judge, Gazipur transferred the case from the Joint District Judge, First Court, Gazipur to the Joint District Judge, Second Court, Gazipur on 12.06.2006 by it's order No. 76/General and the case was renumbered as Pre-emption Case No.15 of 2006.

In order to dispose of the case the trial Court framed as many as three different issues.

In course of the trial, the pre-emptor examined 03(three) witnesses while pre-emptee examined 04 (four) witnesses and both parties adduced documentary evidence in order to prove their respective cases.

The trial court then after hearing the parties and on perusal of the pleadings allowed the pre-emption on contest against the opposite party No.1 and *ex parte* against the rest by judgment and order dated 31.07.2007. The trial Court directed the pre-emptor to deposit Taka 1,12,470/- as development cost immediately also directed the pre-emptee to hand over possession of the case land to the pre-emptor within 30 days.

Being aggrieved by and dissatisfied with the said judgment and order dated 31.07.2007 the pre-emptee as appellant then preferred this appeal.

Mr. Rehan Husain, the learned Advocate appearing on behalf of the pre-emptee-appellant submits that the pre-emptor's predecessor Tasar Uddin purchased 05 decimals of land out of 29 decimals in C.S and S.A plot no. 139 by registered deed dated 16.05.1972 from Rezia Khatun who purchased the same from the successive heirs of Gadi Bibi and before such purchase, CS and SA plot No.139 was separated between two sisters namely, Gadi Bibi (05 decimals under SA Khatian-103) and Tuki Bibi (24 decimals under SA Khatian 104) and moreover, RS Khatians were also separated as RS Khatian No. 43 (Plot No.218) and RS Khatin No. 55 (Plot No. 219) corresponding to SA Khatian No. 103 and 104 respectively and therefore, the pre-emptor's predecessor Tasar Uddin ceased to be co-sharer in the case holding.

The learned Counsel further submits that, Tuki Bibi transferred 24 decimals of land by way of Heba to Jamir Jan Bibi on 16.03.1966 and Jamir Jan Bibi sold entire 24 decimals of land on 14.09.1968 in favour of Abdul Kadir, who was a stranger in the case leading then on 11.12.1985 Abdul Kadir's heirs sold 24 decimals including the suit land to one Abdul Halim and Abul Hakim and thereafter by registered Partition Deed dated 29.06.1987 the entire suit land was transferred to A. Hakim and finally, A. Hakim sold 07.12 decimals (out of 24 decimals) of land to the pre-emptee-appellant, Mst. Lili Alam Khanam. Thus the suit land was already sold to stranger A.Kadir in 1968 and vendors of Tasar

Uddin failed to file pre-emption case against A.Kadir and therefore, the claim of pre-emptor is not sustainable in the eye of law.

He submitted that, one KBM Shamsul Alam, the husband of the pre-emptee-appellant transferred 6 ½ decimals of land from the eastern side of the case land to his wife by a registered Heba-Bil-Ewaz Deed No. 3498 dated 07.03.1996 and thus, the pre-emptee became the owner of a land contiguous to the suit land by heba and the pre-emptee and her husband are in possession of the case land and they have been enjoying the suit land. He further submits that since the pre-emptee-appellant is the contiguous landholder through heba from her husband, so, the status of pre-emptor and the pre-emptee is the same and the pre-emptee is not any stranger in the case holding and as such, the impugned judgment and order is liable to be set aside.

The learned Advocate further submits that, it is evident from the boundary of impugned deed no. 20220 that one K.B.M. Shamsul Alam has been residing in the eastern side of the case holding but he was not made a party in the pre-emption case and thus the case is not maintainable.

Mr. Husain goes on to submit that, the predecessors of the opposite party No.1 were the owners and possessors of the suit land and they sold it to strangers on various occasions since 1968 A.D and in this way, the pre-emptee purchased the contiguous land but this material aspect has not been considered by the Court below and as such the impugned judgment and order is liable to be set aside.

With such submission, the learned Counsel finally prays for allowing the First Miscellaneous Appeal by dismissing the pre-emption case.

Per contra, Mr. Md. Shamsul Hoque Bhuiyan, the learned Advocate appearing on behalf of the pre-emptor-respondents submits that the pre-emptee-appellant is a stranger and the deed in question, Exhibit-3(kha) shows that, the boundaries of the case land as shows that in the north T & T Road, in the south Tashar Uddin (pre-emptor), in the east K.B.M. Shamsul Alam and in the west Tashar Uddin (Pre-emptor).

He further submits that the pre-emptor purchased 5 decimals of land under SA Plot No.139 corresponding to R.S. Plot No.218 by deed No. 5580 dated 16.05.1972 (Exhibit II) where in the boundary it shows that Zahed Ali is in the north, the purchaser (Tasar Uddin) in the south, the purchaser (Tasar Uddin) in the west and Abdul Kader is in the east.

He next submits that, the pre-emptee did not exhibit any deed, or document to prove that KBM Shamsul Alam transferred his land in favour of the pre-emptee Lili Alam Khanam. He lastly submits that PWs 1, 2 and 3 proved the pre-emption case having no scope to interfere with the same and finally prays for dismissing the appeal.

We have heard the learned Advocates for both sides, perused the memorandum of appeal, impugned judgment and order passed by the trial Court, pleadings, evidence and other materials on record.

On going through the impugned deed No.20220 dated 29.10.2001 (Exhibit 3 kha) we find from the boundaries of the case land that in the north there is T&T Road, in the south, land of Tashar Uddin (pre-

emptor), in the east land of K.B.M. Shamsul Alam (husband of the pre-emptee) and in the west the land of Tashar Uddin (Pre-emptor) as well. So, it is evident from the above-mentioned boundary that, the case land is contiguous to the preemptor's land from the northern and eastern sides, where we do not find any land belonged to the pre-emptee-appellant, Mst. Lili Alam Khan in the schedule of the disputed deed under pre-emption.

Then on examining the evidence of PW 1, Md. Lehaj Uddin, we find that he in his deposition stated that, “নালিশী জমি তেলিপাড়া মৌজাধীন আর.এস.৫১ খতিয়ানভুক্ত ১৩৯ দাগেরসহ আর.এস. ২১৯ দাগের ৭.১২ শতাংশ জমি যাহা চালা কাটা সাইল জমি। উহার উত্তরে টি এন্ড টি এর রাস্তা, দক্ষিণে পশ্চিমে আমরা ও পূর্বে এ.বি.এম. শাসছুল আলম।”

When PW 2, Md. Akbar Ali (a neighbour) corroborated the above evidence who stated in his deposition that, “নালিশী জমি মজহরের বাড়ীর পূর্ব দিকে। উহা মজহরের বাড়ী সংলগ্ন। তাই নালিশী জমি মজহরের বেশী প্রয়োজন। নালিশী জমি মজহরের পৈতৃক সম্পত্তি। নালিশী জমি C/S ১৩৯ নং দাগ। নালিশী জমির উত্তরে টি এন্ড টি রাস্তা, দক্ষিণে তছর উদ্দিন (মজহর) পূর্বে শামসুল আলী পশ্চিমে মজহরের বাড়ী।”

Likewise, Pw 3, Md. Akkash Ali (a neighbour) also corroborated the evidence of PW 1 and 2, who stated that, “নালিশী জমির উত্তরে টি এন্ড টি রাস্তা, দক্ষিণে তছর উদ্দিন, পশ্চিমে তছর উদ্দিন পূর্বে জনৈক শামছুল আলম। নালিশী জমি তছর উদ্দিনের বেশী প্রয়োজন। কেননা ঐ জমির উপর দিয়াই তাহাকে মূল রাস্তায় যাইতে হয়। নালিশী জমির পার্শ্বেই তছর উদ্দিনের বাড়ি।”

On the contrary, OPW 1 to OPW 4 did not deny the position of the boundaries in their respective testimony as asserted by PW 1 to PW

3. Rather, OPW 1, KBM Shamsul Alam stated in his evidence that, নালিশী দলিলের তফসিলের চৌহদ্দিতে পূর্ব পাশে জমির পার্শ্ববর্তী মালিক হিসেবে আমার নাম কে.বি.এম. শামছুল আলম খান আছে।

It appears from the deed no. 5580 dated 16.05.1972 (Exhibit II) that, the pre-emptor, Tashar Uddin purchased 5 decimals of land from Begum Rezia Khatun from the case plot no.139 wherein the boundaries were described to the effect that in the north Jahad Ali, in the south purchaser, in the west purchaser by himself and in the east Abdul Kader and thus, it is evident from Exhibit 3 kha, Exhibit II as well as the evidence adduced by the PW 1 to PW 3 that the pre-emptor is a contiguous landholder in the case land.

The learned Counsel for the appellant argued that K.B.M Shamsul Alam transferred his land to his wife, the appellant, namely Mst. Lili Alam Khanam and thus, the pre-emptee became a contiguous landholder in the case land and being a contiguous landholder in the case land, the claim of pre-emptor does not stand and the appeal is liable to be allowed. But we cannot accept such argument raised by the appellant because record shows that, in support of such plea no deed or document was produced or adduced as any exhibit at trial, so mere plea or statement without proof does not help pre-emptee to substantiate her claim.

The record further shows that, pre-emptee purchased the case land on 29.10.2001 by registered deed no. 20220 and the pre-emptor came to learn about the transfer of the case land on 28.01.2002 when the pre-emptee was filling earth in the case land and after he obtaining certified

copy of the deed on 30.01.2002 he got definite knowledge and filed the pre-emption case on 05.02.2002 which is within time.

In the written objection, pre-emptee stated that she erected 2 (two) tin shed rooms and installed a tube well in the case land spending Taka 60,470/- and filled the case land by 80 trucks of soil, spending Taka 48,000/-. Considering such expenditure, the trial Court has rightly directed the pre-emptor to deposit Taka 1,12,470/- as development cost while allowing the pre-emption.

Today, just immediate before pronouncement of the judgment the learned counsel for the appellant submits that the pre-emptor- respondent transferred 12 decimals of land to Lehaj Uddin and Sahab Uddin by registered deed on 10.07.2006 through which the pre-emptor has ceased to be any contiguous landholder.

On the contrary, the learned Advocate for the pre-emptor- respondents submits that very fact has not been described in the pleadings having no scope to consider the said facts now.

However, since the said transfer has been made after filing of the pre-emption case in 2002 so that very fact cannot affect the right of pre-emption.

Given the above facts and circumstances, we do not find any illegality or impropriety in the impugned judgment and order which calls for no interference by this Court.

Resultantly, the appeal is dismissed however without any order as to costs.

The judgment and order dated 31.07.2007 passed by the Joint District Judge, Second Court, Gazipur is hereby affirmed.

The order of stay granted earlier stands recalled and vacated.

Let a copy of the judgment along with the lower Court's record be transmitted to the concerned Court forthwith.

Md. Mozibur Rahman Miah, J

I agree.

Aziz/abo