

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

Present:

Mr. Justice Md. Miftah Uddin Choudhury

First Miscellaneous Appeal No.89 of 2013

In the matter of:

Amena Siddika

... Petitioner

-Versus-

Rabeya Akhter Khanom and others

... Respondents

Mr. Md. Zakir Hossain, with

Mr. A.K.M. Bodruddoza, Advocates

... For the appellant.

Mr. Maqbul Ahmed, with

Mr. Ranjan Kumar Chakravorty,

Mr. Zafar Alim Khan, Advocates

... For the respondents.

**Heard on 29.09.2013, 07.11.2013, 17.11.2013,
19.11.2013 and 20.11.2013.**

Judgment on 21.11.2013.

This appeal has been preferred by the purchaser pre-emptee-appellant against the judgment and order dated 08.01.2013, passed by the learned Joint District Judge, First Court, Narasingdi, in Pre-emption Miscellaneous Case No.06 of 2010 allowing the prayer for pre-emption under Section 96 of the

State Acquisition and Tenancy Act made by the pre-emptors-respondents.

The respondents pre-emptors instituted the case for pre-emption under Section 96 of the State Acquisition and Tenancy Act in respect of $32\frac{1}{2}$ decimals of land out of 47 decimals appertains to R.S. Plot Nos.1083 and 1084 under R.S. Khatian No.500 corresponding to S.A. Khatian No.717 of Mouza Virindi, under Police Station and District-Narsingdi. The pre-emptor's claim in brief that the case land alongwith other lands belonged to Sultan Uddin Khan having jote right, C.S. Khatian No.649 in respect of that land was prepared in his name. While Sultan Uddin Khan had been enjoying and possessing the same became father of Siraj Ullah Khan, Kabur Ullah Khan, Jamir Ullah Khan, Atik Ullah Khan, Sabur Ullah Khan and Ketub Ullah Khan. Out of them Sabur Ullah Khan and Ketub Ullah Khan died in their childhood. The said Sultan Uddin Khan transferred $32\frac{1}{2}$ decimals of land of C.S. Plot No.600 to his wife Mojahara @ Majehara as gift by executing a deed, and as such the S.A. Khatian No.717 in respect of the said land was prepared

jointly in the names of said Mojahara Khatun @ Majehara Khatun and with other co-sharers. Out of the entire land of C.S. Plot No.600 R.S. Khatian No.1083 was prepared in respect of 7 decimals R.S. Khatian in respect of said two plot were prepared correctly in the name of said Mojehara Khatun alone. Out of that land Mojehara Khatun transferred $33\frac{1}{2}$ decimals of land by executing a deed of gift dated 26.11.1973 to her grand sons the pre-emptee No.3 Asam Ullah Khan, Pre-emptee No.4 Aziz Ullah Khan and their brother Nasir Uddin Khan by her deceased son Kabur Ullah Khan and she remain in possession and enjoyment of the rest measuring $14\frac{1}{2}$ decimals. While she had been enjoying and possessing said $14\frac{1}{2}$ decimals of land died leaving behind 2 sons Siraj Ullah Khan and Jamir Ullah Khan with other grand children. After her death, by amicable partition Siraj Ullah Khan alone got aforesaid $14\frac{1}{2}$ decimals in his share and he had been residing thereon by constructing residential huts. Siraj Ullah Khan while had been enjoying and possessing said $14\frac{1}{2}$ decimals of land died leaving

behind the pre-emptor No.1 Rabeya Akter Khanom as his wife and other pre-emptors as his children. The pre-emptors have been residing in southern part of land appertains to R.S. Plot No.1084. The land of the disputed plot recorded in ejmali in R.S. Khatian No.500. The aforesaid Jamir Ullah Khan died leaving behind the pre-emptee Nos.5-9 Janu, Runu, Jhinu, Lipa and Atik Ullah, that Atik Ullah died leaving behind the pre-emptee Nos.10-13 named Soyab, Shahid, Dipa and Khuki. The pre-emptee Nos.3 and 4 named Asam Ullah Khan and Aziz Ullah Khan and their brother Nasir Ullah transferred the case land to one Golam Kibria by registered kabala dated 10.01.1978. They made such transfer secretly, but subsequently it was disclosed. Since that transferred land is adjacent to their residence and for their convenience of movement it was necessary, but for financial disability they could not purchase the same after discloser of such transfer and for their convenience they made it purchased by the pre-emptee No.2 Alhaj Rowshan Ara Khan by Kabala dated 16.10.1978. Now they (pre-emptors) attained the ability to purchase the same, but the pre-emptee No.2 Alhaj Rowshan Ara Khan without any

notice to them transferred the pre-empted land to the pre-emptee No.1 Amena Siddika. Such transaction was made collusively and secretly without any notice to them, otherwise they ought to have purchased the same. The said land was transferred at a consideration of Tk.6,00,000/- (six lacs) and as co-sharer by inheritance they prayed for pre-emption after depositing Tk.6,00,000/- (six lacs) alongwith the other cost as required by the law. The pre-emptee purchaser is a stranger in the pre-empted holding and she is not owner of any land contiguous to the pre-empted land. In the southern side of the pre-empted land residence of them (pre-emptors) is situated and it is necessary for them. The said transfer was made by executing a registered kabala dated 11.11.2009 and after knowing about such transfer they obtained the certified copy of the deed of such transfer on 06.01.2010 and instituted the case within the period of limitation. That the pre-empted land was illegally mutated in the name of pre-emptee No.2 Alhaj Rowshan Ara Khan vide Mutation Case No.1448 of 2006-07 by order dated 26.08.2007 without any notice to them. About such mutation proceeding they

were not at all informed and as such that mutation was illegal and collusive and obtained beyond the scope of law provides in Section 117(C) of the State Acquisition and Tenancy Act, and that is not binding upon them.

The purchaser pre-emptee No.1 named Amena Siddika opposed the prayer for pre-emption by filing written objection denying the material averments and stating that the pre-emptors have got no cause of action to file the case, the prayer for preemption is not maintainable under Section 96 of the State Acquisition and Tenancy Act, barred by waiver, estoppel and acquisition, as well as by limitation, suffers from defect of parties. It is further stated that admittedly Majehara Khatun was owner of the land appertains to R.S. Plot Nos.1083 and 1084 alongwith other lands, the R.S. Khatian No.500 was prepared in her name, and while she had been enjoying and possessing the pre-empted land transferred the same by executing a deed of Heba-bil-ewaz dated 26.11.1973 to Aman Ullah Khan, Azizur Rahman Khan and Nasir Uddin Khan and handed over its possession. While they had been enjoying and possessing the same by executing a kabala dated

10.11.1978 transferred the case land to Golam Kibria within the knowledge of the pre-emptors, while the said Golam Kibria had been enjoying and possessing the his purchased land sold the same by executing a kabala dated 16.10.1978 within the knowledge of the pre-emptors to Alhaj Rawshan Ara Khan and handed over possession. The pre-emptors or none of their predecessors, did not raise any objection against such transfer nor they filed any pre-emption case. After such purchase Alhaj Rawshan Ara Khan within the knowledge of the pre-emptors mutated her purchase land in her name and by opening a separate Khatian by order dated 26.08.2007 passed in Mutation Case No.1448 of 2006-07 had been paying rents to the Government. The said mutation was made within the knowledge of the pre-emptors. For want of money said Rawshan Ara Khan proposed to sale the pre-empted land to the pre-emptors and other co-sharers, but since the pre-empted land is not necessary the pre-emptors and their co-sharers denied to purchase and said that in case of purchase by somebody else they would have no objection. Thereafter the said Alhaj Rawsahn Ara Khan requested the pre-emptor Nos.2-4

for making arrangement of the sale of the pre-empted land. On her request the pre-emptee No.1 agreed to purchase the same with assurance that in case of purchase by her they would have no objection and they will never pray for any pre-emption. Thereafter in presence of the pre-emptors and at their mediation sitting in the house of the pre-emptors and in presence of the pre-emptee Nos.1 and 2 the value of the land was fixed at Tk.6,00,000/-(six lacs), the said amount paid by the purchaser was counted by the pre-emptee No.2 himself, and after such counting he handed over that amount to the vendor pre-emptor No.2 Alhaj Rawshan Ara Khan on 10.11.2009. On the next day i.e. on 11.11.2009 the kabala was executed and registered. The pre-emptor Nos.2-3 were supposed to sign that kabala as witnesses, but cunningly they avoided and by making false claim made the prayer for pre-emption. In presence of the pre-emptors the vendor pre-emptee handed over possession of the pre-empted land to the purchaser pre-emptee on 12.11.2009 and since then she has been enjoying and possessing the same by growing crops therein. Previously the same land was transferred for more

then one occasion and in respect of the same a separate khatian was open in the name of the vendor the pre-emptee. That the pre-emption proceeding is not maintainable and liable to be rejected.

After hearing the parties the learned Joint District Judge, First Court, Narshindi by the impugned judgment and order dated 08.01.2013 allowed the prayer for pre-emption finding with others that pre-emptors are co-sharers by inheritance in the pre-empted holding and they made the prayer for pre-emption within time and are entitle to get pre-emption as per the provision of law.

Being aggrieved by and dissatisfied with the impugned judgment and order the purchaser pre-emptee Amena Siddiqa preferred this appeal.

Mr. Md. Zakir Hossain, alongiwth Mr. A.K.M. Bodruddoza, Advocates appear for the purchaser pre-emptee/appellant and on the other side Mr. Moqbul Ahmed, alongwith Mr. Jafor Alim Khan, and Mr. Ranjan Chakrabarti, Advocates appeared for the pre-emptors-respondents.

Mr. Md. Zakir Hossain, learned Advocate appearing for the appellant submits that admittedly

the pre-emptors or their predecessors were co-sharers in the pre-empted holding, but now they are no more co-sharers for admitted separation of joma by the mutation proceeding mentioned above. Moreover, admittedly at first the pre-empted land was transferred to Golam Kibria by a kabala dated 10.01.1978. At the time of such transfer the pre-emptors or their predecessors did not raise any objection nor made any prayer for pre-emption. Thereafter while the said Golam Kibria had been enjoying and possessing the pre-empted land sold the same by executing a kabala dated 16.10.1978 to Alhaj Rawshan. In the occasion of that sale the pre-emptors or none of their predecessors did not raise any objection nor made any prayer for pre-emption. Admittedly said Alhaj Rawshan Ara Khan had been enjoying and possessing the pre-empted land for long time up to 2009 till its transfer by the pre-emptd kabala dated 11.11.2009 and it is also admitted that the sold land had been mutated in the name of said Alhaj Rawshan Ara Khan on 26.08.2007. After such separation of joma or opening of a new Khatian and payment of rent vide that separate khatian the pre-emptors can not claime them as co-

sharers in the pre-empted holding. Moreover, for not raising any claim of pre-emption since long time about 35 years the present claim of the pre-emptors is barred by waiver, estoppel, and acquiescence. In last 35 years the pre-emptors did not claim for pre-emption for the case that they were unable to make payment of the value, but now they became able and sought for pre-emption. Such claim can not be entertained as per the provision of law provides in Section 96 of the State Acquisition and Tenancy Act or under any other law of the land in respect of pre-emption. In support of his such contention Mr. Zakir Hossain cited the decisions in the cases of, Iqbal Hossain Talukder Vs. Md. Joynal Abedin Talukder and others reported in 55 DLR 604, Shah Alam (Md.) Vs. Md. Shahidur Rahman and others reported in 55 DLR 214, and also an unreported judgment of the Appellate Division of this Court dated 20.07.2010 passed in Civil Appeal No.300 of 2003.

In reply of his such argument Mr. Maqbul Ahmed, appearing for the respondents pre-emptors submits that admittedly in January, 1978, pre-emptor's co-sharer transferred the pre-empted land to Golam

Kibria and it is also admitted that Golam Kibria sold the same to Alhaj Rawshan Ara Khan. The said second transfer was not for the interest of Alhaj Rawshan Ara Khan but for convenience of the pre-emptors. As per the pre-emptors their residence is situated in a land adjacent to the pre-empted land and for their movement from and to their residence the pre-empted land is necessary for them. But the transfer by their co-sharer to Golam Kibria in January 1978 was made secretly without their knowledge and without any notice to them. They had the right to sought for pre-emption, but for their inability to make payment of the value they did not sue for pre-emption, rather for their convenience they made it purchased by their relation Alhaj Rawshan Ara Khan for their use. Though said Alhaj Rawshan Ara Khan purchased but she as relation allowed them to use the pre-empted land. Subsequently after 35 years without their knowledge she transferred the pre-empted land to the appellant. Such transfer was made secretly and collusively without any notice to them, otherwise they ought to have purchase the same since by this time they attain the ability to purchase the pre-

empted land which is necessary for them. For their movement from and to their residence it is required by them. Hence, they sought for pre-emption by depositing the required money. Though the pre-empted land had been mutated in the name of Alhaj Rawshan Ara Khan by the above numbered Mutation Case No.1448 of 2006-07 but that case was not legal one for want of service of notices upon them as per Section 117(C) of the State Acquisition and Tenancy Act. The said mutation proceeding is illegal and not binding upon them. For such illegality separation of joma as made in the instant case will not be effective and they will be treated as co-sharers in the disputed holding. He further submits that for not raising any objection or for not making any prayer for pre-emption at the time of transfer in January 1978 by their co-sharers to Golam Kibria and in October 1978 by Golam Kibria to Alhaj Rawshan Ara Khan their right of pre-emption can not be barred by estoppel, waiver and acquiescence or by limitation since they are till co-sharers in the pre-empted holding. They did not sought for pre-emption or raised objection to sale or not made attempt to purchase the pre-

empted land for their inability to make payment of the value, but now they became able to make payment and after 35 years they legally made the prayer for pre-emption on the new cause of action arose in 2009. That cause of action is separate one and they are legally entitled to sue for pre-emption on the new cause of action as they made in the instant case. He further submits that allowing prayer for pre-emption is discretion of the Court and as such the Court below considering necessity and requirement of the preemptors allowed their prayer finding that they are till co-sharers in the pre-empted holding and their claim of pre-emption is not barred by limitation, nor by the principle of estoppel, waiver and acquiescence. In support of his such contention Mr. Md. Maqbul Ahmed cited the decisions in the cases of, Most. Kohinoor Begum Vs. Abdul Khaleque reported in 11 BLT (AD) 172, Fajar Uddin Vs. Moijuddin and others reported in 44 DLR (AD) 62, Haji Aktaruzzaman Vs. Jagannath Paul and another reported in 17 DLR 384, Abdur Rouf and others Vs. Ahmuda Khatoon reported in 1981 BLD (AD) 269, Chandra Kumar Maladash Vs. Abdul Mutaleb and others reported in 19 BLD (SC) 36, Begum Asia

Rahman Vs. Abdul Bashir Bhuiyan reported in 26 DLR (SC) 58, Jodoy Chandra Mali Vs. Abdul Khaleque and others reported in 27 DLR (AD) 114, Asir Uddin Sheikh Vs. Siraj Uddin Talukder and others reported in 30 DLR 75.

I have heard the learned Advocates, gone through the record, and the decisions cited by the learned Advocates of both the sides. On perusal of materials on record it appears that Alhaj Rowshan Ara Khan had been enjoying and possessing the pre-empted land since October 1978 after purchasing the same from Golam Kibria who purchased the same land from admitted co-sharer of the pre-emptors in January 1978. As per the pre-emptors at the time of transfer by their co-sharer to Golam Kibria they were unable to make payment of value of the case land though it was claimed that such transfer was made collusively. For their inability they did not sought for any pre-emption, but for their convenience on their request their relation Alhaj Rowshan Ara Khan purchased the same from Golam Kibria in October 1978 after possessing the same for 9 months by him. As per the pre-emptors the said Alhaj Rawshan Ara Khan is their relation. The

pre-empted land is adjacent to their residence and for their movement to and from their residence the same is necessary. For them their relation Alhaj Rowshan Ara Khan on their request and at their instance purchased the same. Now their said relation Alhaj Rowshan Ara Khan without offering the pre-empted land to them secretly and collusively sold the same to the purchaser pre-emptee without any notice to them though by this time they attain the ability to purchase the said land even at the cost of 6,00,000/- (six lac) though they failed to make payment of 8,000/- (eight thousand) in 1978 by which Golam Kibria purchased the same. The question remains whether the said plea or story of purchase by their relation Alhaj Rowshan Ara Khan for their convenience on their request and at their instance is believable. At the same time the pre-emptors also claiming that they are till co-sharer by inheritance in the disputed holding or in same joma even after separation of the same. As per them by the admitted mutation proceeding the joma was separated but the said mutation proceeding is illegal because it suffers from the defect of non service of notices upon them

or upon all co-sharers as it required under Section 117(C) of the State Acquisition and Tenancy Act. The said mutation or separation of joma is not binding upon them as being illegal, as such till they are co-sharers by inheritance as their predecessors in the disputed holding. But apparently the said separation of joma or order of mutation is still in existence. It has not been set aside or cancelled by any higher authority. Even the pre-emptors did not take any step to get it cancelled. As such, it is difficult to hold that the joma has not been separated rather it is apparent that the joma has been separated before two years of purchase by the pre-emptee. The another question raised by the pre-emptee that the pre-emption proceeding is barred by estoppel, waiver and acquiescence. On perusal of the decisions cited by the learned Advocates of both the sides I find such question was discussed in the decisions reported in 11 BLT and 44 DLR as cited above. In those decisions their lordships of the Appellate Division expressed the view that such claim is barred by estoppel, waiver and acquiescence. I do not find any reason to differ

with such view, rather I am inclined and bound to follow the same. As per those decisions the decisions about the question of acquiescence and waiver, differs and varied on different circumstances. In deciding such question the circumstances should be considered by the Court. The other decisions cited above do not appears to me as so relevant because the pertinent question in this case is nothing but the question of waiver, estoppel, as well as separation of joma. In the circumstances mentioned above, it appears that before 35 years the co-sharers of the pre-emptors transferred the pre-empted land to Golam Kibria in January 1978 without any objection from them and they did not sue for pre-emption. In October 1978 the said Golam Kibria transferred the same to Alhaj Rowshan Ara Khan who had been enjoying and possessing the same for last 35 years. As per the pre-emptors the said Alhaj Rawshan Ara Khan is their relation and for their convenience they made it purchased by her. But now they are alleging that their said relation transferred the same to the appellant without any information to them. So, their claim of relationship with Alhaj Rowshan Ara

Khan or purchase of the pre-empted land by her for their convenience is not believable at all. Rather it appears to me that they tried to claim the right of pre-emption as of their luxury which is not permitted by the law. I hold the view that the right of pre-emption is a special right permitted by the laws, like The State Acquisition and Tenancy Act, The Non Agricultural Tenancy Act, or The Mohammedan Law. But none of those laws allow any such luxury to make such prayer for pre-emption after 35 years on the plea that at the first occasion of transfer they were unable to purchase and now they became able. In the instant case the cause of action for pre-emption arose in 1978 and since 1978 up to 2009 the preemptors did not pray for pre-emption. But in 2009, after the third transfer by Alhaj Rowshan Ara Khan to the appellant they sought for pre-emption on the plea that till they are co-sharers in the pre-empted holding since the separation of joma made in favour of Alhaj Rowshan Ara Khan in 2007 is illegal for want of service of notices as mentioned above. I have already observed above that the separation of joma is till in force and after such separation the

pre-emptors have no reason to claim themselves as co-sharers in the pre-empted holding. Hence, they have no right to sought for pre-emption.

Accordingly, this appeal is hereby allowed. The impugned judgment and order dated 08.01.2013 passed by the learned Joint District Judge, First Court, Narasingdi, in Miscellaneous Case No.06 of 2010, is hereby set aside.

However, there is no order as to cost.

Send down the lower Court's records immediately.

MASUD
B.O.