

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 4346 OF 2004

IN THE MATTER OF:

An application under section 115(1) of the
Code of Civil Procedure.

-And-

IN THE MATTER OF:

Enamul Haque being dead his legal heirs: 1-
19.

--- Pre-emptor-Petitioner(s).

-Versus-

Jamal Uddin and another.

--- Pre-emptee-Opposite Parties.

Mr. Abdul Kalam Chowdhury with
Mr. Iqbal Kalam Chowdhury, Advocates

--- Petitioner(s).

Mr. Sarwar-E-Deen with
Mr. Pronoy Kanti Roy, Advocates

---For the Opposite Party No. 1.

**Heard on: 02.02.2023, 14.02.2023 and
22.02.2023.**

Judgment on: 15.03.2023.

At the instance of the present plaintiff-petitioner, Enamul Haque being dead his legal heirs: 1-19, Nurjahan Begum and others, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party No. 1 to show cause as to why the judgment and order dated 08.08.2004 passed by the learned Joint District

Judge, Court No. 2, Noakhali in the Miscellaneous Appeal No. 71 of 2002 allowing the appeal and thereby reversing the judgment and order dated 03.07.2002 passed by the then learned Assistant Judge, Hatiya, Noakhali in the Miscellaneous Case No. 10 of 2000 should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the petitioner as the preemptor filed the Miscellaneous Case No. 10 of 2000 in the court of the learned Assistant Judge, Hatiya, Noakhali for claiming preemptor's right under section 96 of The State Acquisition and Tenancy Act, 1950 against the sale deed No. 570 dated 20.02.2000 by Haji Mazharul Hoque in favour of the opposite party No. 1, Jamal Uddin.

The application under section 96 of the Act, 1950 contains that Haji Mazharul Hoque was the owner of 2 decimals land in Diara Plot No. 2001 of Diara Khatian No. 330 D. P. Khatian No. 294 corresponding to M. R. R. Plot No. 4539 M. R. R. Khatian No. 223 situated at Mouza- Burir Char, Police Station- Hatiya, District- Noakhali who sold 1 decimal land out of 2 decimals of land on 07.06.1994 and subsequently registered kabala deed No. 26 dated 04.01.1997 in favour of the present preemptor-petitioner, as such, the petitioner became a co-sharer. The said

Haji Mazharul Hoque subsequently sold 1 decimal land to the opposite party No. 1 by the registered sale kabala deed No. 573 dated 20.02.2000 and the petitioner never received any notice as a co-sharer-petitioner. However, the petitioner came to know about the said registered kabala deed on 29.03.2000. The petitioner and Haji Majharul Haque filed Title Suit No. 46 of 1999 in the court of the learned Assistant Judge, Hatiya for evicting the present opposite party No. 1 who was the purchaser-stranger, as such, he accrued a right of preemption.

The present opposite party No. 1 contested the suit by filing a written statement contending, *inter alia*, that he purchased the case land from Abul Kalam alias Kalu vide registered kabala sale deed dated 09.03.1989 and constructed a shop thereon. The said Haji Majharul Islam claimed the title of the suit land that the petitioner purchased the case land by a registered kabala from him. He also contended that the land is a Viti (ভিটি) of Chowmuhani Bazar, Hatiya, Noakhali, thus, it was a nonagricultural land and the suit is barred by law and there are different Khatians being M. R. R. Khatian No. 223 and also recorded as Diara Khatian No. 6 at Mouza- 58/35, Surjamukhi.

He also denied that the preemptor was a co-sharer of the case land.

After hearing the parties the learned Assistant Judge, Hatiya, Noakhali came to a conclusion to allow the preemption case filed by the present petitioner by passing the judgment and order dated 03.07.2002. Being aggrieved the present opposite party No. 1 preferred the Miscellaneous Appeal No. 71 of 2002 in the court of the learned District Judge, Noakhali which was subsequently transferred to the learned Joint District Judge, Court No. 2, Noakhali for hearing who after hearing the parties and considering the evidence allowed the appeal and thereby reversing the judgment of the learned trial court.

This revisional application has been filed challenging the legality of the judgment and order passed by the learned appellate court below and the Rule was issued thereupon.

Mr. Abul Kalam chowdhury, the learned Advocate, appearing along with the learned Advocate, Mr. Iqbal Kalam Chowdhury, on behalf of the petitioner(s), submits that the case land was in former M. R. R. Khatian No. 2231 of Mouza- Burir Char and later on it was recorded in Diara Khatian No. 330 of Mouza Surjamukhi and in the said Diara Khatian was only 2

decimals land in plot No. 2001 which was recorded and admittedly petitioner is a co-sharer as the purchaser of 1 decimal and rest 1 decimal was sold by Haji Mazharul Hoque to the opposite party by Case Kabala and there was no other co-sharer in the said Diara Khatian No. 330 i.e. exhibit 1 and vendor of Case Kabala was no longer co-sharer after selling by Case Kabala and so there was no co-sharer left in case holding No. 330, as such, there left no necessary party in the case and the learned court below committed an error of law resulting an error in decision occasioning failure of justice.

This matter has been appearing in the daily cause list for hearing for a long period of time but no one appears to oppose the Rule during the hearing of this Rule. However, Mr. Sarwar-E-Din, the learned Advocate, along with the learned Advocate, Mr. Pronoy Kanti Roy, appear today to oppose the Rule.

Mr. Sarwar-E-Deen, the learned Advocate, appearing along with the learned Advocate, Mr. Pronoy Kanti Roy on behalf of the opposite party No. 1, submits that as per provision of section 96(2) of The State Acquisition and Tenancy Act, 1950 all the remaining tenants of the holding lands contiguous to the land transferred and the transferees are the parties to the

application. The object of sub-section (2) is to have all the co-sharer tenants or all the tenants holding lands contiguous to the land transferred before the court for proper and complete adjudication in accordance with law. The learned appellate court below was justified in holding that the Miscellaneous Case suffered from a defect of parties to give full effect to the statutory provision, as such, all the necessary parties must be impleaded because the relief can not be given in the absence of such parties.

The Bangladesh Government was made a party as to the statutory provision of section 20 of The State Acquisition and Tenancy Act, 1950, wherein, the Government claimed that the suit property is a shop in a Hat-Bazar. However, upon several requests of this court, none of the Attorney General's Office came to assist the court with any information or any document as to whether the land is within the periphery of Hat-Bazar. It is an absolute failure on the part of the Government despite several explanations and desire from the court to the Government due to such failure, the Attorney General's Office utterly expressed their incapability to assist the court.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed by the present petitioner under section 115(1) of the Code of Civil Procedure along with the annexures therein, particularly, the impugned judgment and order passed by the learned appellate court below and also perusing the relevant documents available in the lower courts record, it appears to this court that the present petitioner as a preemptor under the provision of section 96 of the Act, 1950 on the ground that suit land was sold to the opposite party No. 1 on 20.02.2000 being exhibit- 7 without serving any notice as per the requirements of the law or the matter of sale was not within the knowledge of the petitioner. However, subsequently, the preemptor-petitioner came to know about the kabala deed and after obtaining a certified copy of the said deed from the registry office filed the suit claiming the right of preemption.

The said suit was contested by the opposite party No. 1 as the preemptee-purchaser contending that admittedly the suit land was purchased from Haji Mazharul Hoque by the deed No. 573 dated 20.02.2000 and a Photostat copy of the said deed has been exhibited as Exhibit- 'B'.

In view of the above factual aspects, it appears to this court that the suit land was sold by Haji Majharul Haque in favour of the present preemptor-petitioner. Now, the question is whether there was any notice served or not to other co-sharers before selling the said land or the date of knowledge as to the sale by the said deed. Regarding the matter of notice, there is no evidence provided by the present opposite party No. 1 as the preemptee-purchaser. However, the law provides an alternative option for filing a suit on the basis of the suit as a preemptor on the basis of the date of knowledge of the sale deed by the preemptor before filing a suit. In the instant case the evidence provided by the petitioner that he came to know subsequently about the kabala deed and confirmed himself after obtaining a certified copy of the registered sale kabala deed being No. 573 dated 20.02.2000 which has been exhibited as being Exhibit- '7' and Exhibit- 'B' the photostat copy of the original provided by the opposite party No. 1.

In view of the above, the preemptor has succeeded to prove that the vital requirement of section 96 of the Act, 1950 has been satisfied by the preemptor-petitioner.

Regarding the matter of co-ownership of the land, the present preemptor-petitioner could prove that he has been an ownership of the land of the same jote (জোত) and Khatian (খতিয়ান). In this aspect an additional evidence has been adduced by the present preemptor-petitioner during the hearing of this Rule and another Bench of this court passed an order on 28.01.2021 by making the certified copy of Diara Khatian (দিয়ারা খতিয়ান) No. 330 as an additional evidence and which marked as Exhibit- 1(a). Accordingly, the preemptor-petitioner could prove that he has been a co-sharer within the same jote.

Now I am going to examine the judgment of the learned courts below:

The learned trial court came to a conclusion for allowing the preemption right under section 96 of the Act, 1950 on the basis of the following findings:

...“It is admitted that the case land belonged to Mazharul Haque and the petitioner is the sharer over the case land by way of purchase.

The opposite party No. 1 has failed to prove that the case land is non-agricultural land. So, I think the petition of the petitioner is filed correctly under section

96 of S. A. and T. Act- 1950 which is corroborated by the OPW- 2 that the case land is plane land.”...

On the other hand, the learned appellate court below came to a wrongful conclusion to allow the appeal on the basis of the following findings:

...“পূর্ব্বি উল্লিখ করা হইয়াছে যে, প্রার্থীপক্ষ জোত্রর এম.আর.আর. বা দিয়ারা খতিয়ানভুক্ত সকল শরীককে পক্ষভুক্ত করিয়াছে কিনা তাহা প্রমাণ আঁসি নাই। প্রতিপক্ষর দাবি মত্রিই কাজী মমতাজুল করিম্র একাধিক ওয়ারিশ পুত্র আছে। কিন্তু মোকদ্দমায় তাহাদিগকে পক্ষভুক্ত না করিয়া শুধুমাত্র কবলা গ্রহিতা প্রতিপক্ষ জামাল উদ্দিনকে এবং গণপ্রজাতন্ত্রী বাংলাদেশ সরকারকে যথাক্রমে ১ ও ২ নং প্রতিপক্ষভুক্ত করা হয়।”...

After examining the conflicting decisions of the learned courts below, I am of the opinion that the learned trial court committed no error of law and fact as to the claim of the preemption right by the petitioner, whereas, the appellate court below committed an error of law by concluding the appeal by allowing and thereby reversing the judgment and order dated 03.07.2002 passed by the learned Assistant Judge, Haiya, Noakhali in the Miscellaneous Case (preemption) No. 10 of 2000. As such, I consider that the impugned judgment and order passed by the learned appellate court below is not sustainable

under the provisions of law. Accordingly, I am inclined to interfere upon the impugned judgment and order passed by the learned appellate court below.

In view of the above, I am inclined to interfere upon the impugned judgment and order passed by the learned appellate court below, as such, this is a proper case for interference by this court.

Accordingly, I find merit in the Rule.

In the result, the Rule is hereby made absolute.

The judgment and order dated 03.07.2002 passed by the learned Assistant Judge, Hatiya, Noakhali in the Miscellaneous Case No. 10 of 2000 allowing the preemption case is hereby affirmed and maintained.

The interim direction passed by this court to maintain *status quo* by the parties in respect of the suit land and the same was extended from time to time is hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower courts' records along with a copy of this judgment and order to the learned courts below immediately.