

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present

Madam Justice Kashafa Hussain

Civil Revision No. 1820 of 2016

Mahfuja Begum

.....petitioner

-Versus-

Abdul Aziz and others

..... Opposite parties

Mr. Md. Khalilur Rahman with

Mr. Md. Mahbubur Rashid, Advocates

..... For the petitioner

Mr. A.K.M Enayetullah Chowdhury, Adv.

..... For the Opposite Parties

Heard on: 16.05.2023, 28.05.2023,
29.05.2023, 06.06.2023 and

Judgment on 12.06.2023

Rule was issued calling upon the opposite parties Nos. 1-3 to show cause as to why the impugned Judgment and order dated 08.03.2016 passed by the learned Special Judge, Comilla in Miscellaneous Appeal No. 73 of 2011 allowing the appeal and reversing the judgment and order dated 04.07.2011 passed by the learned Joint District Judge, 2nd Court, Comilla in Preemption Case No. 29 of 2003 allowing the case should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The instant petitioner as pre-emptors filed the Pre-emption Case being Preemption Case No. 73 of 1984 subsequently renumbered as Preemption Case No. 29 of 2003 in the court of

Joint District Judge, 2nd Court, Comilla praying for preemption impleading the instant opposite parties as preemtees in the suit along with others. The trial court upon framing issues, adducing evidences and taking depositions etc. allowed the case the preemption case by judgment and order dated 04.07.2011. Being aggrieved by the judgment and order passed by the trial court dated 04.07.2011, the preemtees opposite parties in the case filed Miscellaneous Appeal No. 73 of 2011 which was heard by the Special Judge, Comilla. The Appellate court upon hearing both parties allowed the appeal by its judgment and order dated 08.03.2016 and thereby reversed the order of the trial court earlier. Being aggrieved by the Judgment and order of the appellate court the preemptor as petitioner filed the instant civil revisional application which is presently before this court for disposal.

The preemptors case inter alia is that the original owner of 0.42 acre land along with 0.15 acre case property was one Mohoram Ali Dhupy who subsequently died leaving behind one son namely Amir Ali Dhupy and five daughters namely Piarjan Bibi, Easha Bib, Ramon Bibi, Maherjan Bibi and Mirsa Bibi; That aforesaid piarjan Bibi, Easa Bibi and Maherjan Bibi jointly transferred their shares to one Abdul Alim and one Abdul Quayum on 16.03.1964 and delivered possession thereof; that the

aforesaid Ramon Bibi also transferred her share to one Most. Badorar Nessa on the same date. That the aforesaid Mirsa Bibi also transferred share to Mahfuza Begum(Pre-emptor Petitioner) and Mursheda Begum, opposite party No. 47 on 16.03.1964 and delivered possession thereof. That further case of the petitioner is that the aforesaid purchaser Most. Badorer Nessa subsequently died leaving behind one Husband Moulavi Abdul Wahid two sons namely Abdul Alim & Abdul Quayum and three daughters namely Momtaz Begum, Mahfuja Begum and Mursheda Begum and thus they had been owning and possessing case land along with other lands as co-sharer but aforesaid Moulavi Abdul Wahid behind the back of the petitioner and other co-sharer transferred 0.15 acres of land to the third party stranger Abdul Aziz, Md. Najir Ahmed and Md. Monjil Ahmed vide two sub Kabala deeds on 05.04.1982 and 10.04.1982 respectively for which present petitioner as plaintiff filed pre-emption case being No. 73 of 1984 (renumbered as 29 of 2003) against the stranger purchaser Abdul Aziz, Md. Nazir Ahmed and Md. Monjil Ahmed and others. That during pendency of the case subsequently and purchaser Abdul Aziz and two others transferred the case land vide three sub-kabala deeds being Nos. 9247 dated 30.09.2002, deed No. 9294 dated 09.10.2002 and deed No. 2953 dated 09.05.2007 to Umme Salma, Habibur

Rahman, Abu Bakkar Siddique, Abul Kalam Azad, Abu Zafor, Abu Syed & Zahidur Rahman (Shumon). That subsequently the said purchasers were inserted to the plaint of the preemption Case No. 29 of 2003 as opposite party Nos. 49-55. Hence the case.

That the opposite party Nos. 1-3 contested the suit by filing written objection contending, inter-alia, that the case is not maintainable in its present form and manner, case is bad for defect of parties, case is barred by limitation and principle of estoppel, waiver and acquiescence. That the specific case of the preemptee opposite party No. 1-3 is that the preemptor was not owner in possession as well as co-sharer of the case jote. That the father of the pre-emptor purchased the case land along with other land in the years 1964 vide several deeds as Benami transaction from the daughters of Mohoram Ali Dhupy. That at the time of purchase of the case jote the age of the preemptor petitioner was about 5/6 years. That the said benami transaction has been made by the vendor infavour of the preemptor petitioner only for depriving the government's income tax as well as other taxes. That further case of the opposite party No. 1-3 is that the predecessor of the pre-emptor petitioner after purchasing the case jot had been owning and possessing the same on behalf of his minor sons & daughters and wife. That

Mohoram Ali Dhupy died leaving behind one son and five daughters but only son Amir Ali became owner in possession of disputed two plots but the opposite party No. 4 purchased the case land through some colorable deeds of transfer from the daughters of said Mohoram Ali Dhupy. That subsequently on request of predecessor of the opposite party Nos. 13-14 and 19-23, Abdul Hamid Amir Ali, his wife and their minor son transferred 12 decimal land from plot No. 208 and thus the opposite party No. 4 became owner in possession of total 39 decimals of land from aforesaid two plots and established a Petrol Pump by name and style M/S Abdul Wahid and sons' by filling earth therein. That it is further stated that wife of the opposite party No. 4, Badorer Nessa was never owner in possession of the disputed land by way of purchase or inheritance. As a matter of fact she was the benamder of opposite party No. 4. That while the opposite party No. 4 had been owning and possessing the purchased land, government acquired 12 decimals of land. That the opposite party No. 4 subsequently transferred 30 decimals land along with the aforesaid petrol pump to the opposite party No. 1-3 in the year 1982 vide two sub-kabala deeds within the knowledge of the pre-emptor petitioner and her brothers. That actual price of the case land was Tk. 3,00,000/- (Three lac) but opposite party No. 4 purchased

four stamps of Tk. 1,10,000/- (one lac ten thousand) out of ill motive, as such, the case ought to be rejected with cost.

The trial court framed issues, witnesses were examined by both sides and both parties produced documents marked as exhibits.

Learned Advocate Mr. Md. Khalilur Rahman along with Mr. Md. Mahbubur Raman appeared for the petitioner while Mr. A.K.M. Enayetullah Chowdhury represented the opposite party.

Learned Advocate Mr. Md. Khalilur Rahman for the pre-emptor petitioner submits that the trial court upon correct appraisal of facts and law came upon its finding but the appellate court upon total misinterpretation of law reversed the judgment of the trial court and therefore the judgment of the trial court be upheld and the judgment of the appellate court be set aside. He submits that the trial court correctly allowed the case mainly adjudicating on the issue of benamder which claim was raised by the preemptee. He submits that the claim of Benami transaction could only have been vindicated by the father of the preemptor who was supposed to be the actual purchaser in the Benami transaction. He submits that the opposite party mainly relying on the issue of Benami Transaction claims that the preemptor's father is the actual co-sharer of the case land. He contends that the trial court correctly found that although the preemptee's

claim that the preemptor's father is the actual owner and the preemptor is only a benamdar, but however the preemptor's father was not examined as witness although he was alive when the suit was filed. He submits that the trial court correctly found that only the person who is supposed to have purchased in benami could have claimed that the apparent purchaser in a sale deed is a benamdar in reality. He submits that therefore the trial court correctly found that the question of benamdar does not arise in this case.

He next contends that it is clear from the records that no notice under Section 89 of the State Acquisition and Tenancy Act, 1950 was issued upon the preemptor before sale of the land. He submits that the preemptor in her deposition clearly stated that she was abroad at the time and she had no knowledge of the sale. He submits that in spite of her being abroad within statutory time she filed the case.

He next submits that the trial court correctly found that the preemptor is a co-sharer both by purchase and inheritance and is therefore a legitimate co-sharer. He contends that it is clear that the preemptor could not show any evidence of benami transaction in the records but however the appellate court upon total misconception relying on the issue of benami only allowed the appeal and caused serious injustice to the preemptor. He

submits that the appellate court ignoring all the other vital factors inter alia upon ignoring that fact the preemptor is also a co-sharer by inheritance overlooked these relevant factors and unjustly allowed the appeal. He contends that the appellate court failed to apply its judicious mind to the fact that the person who could claim that the transaction was benami was the father of the preemptor but however the father did not raise any objection at any stage of the case. He submits that the appellate court cited a decision in 35 DLR (AD) 1983 page 334 wherein the principle was held that:

“In a proceeding for preemption under Section 96 of the State Acquisition and Tenancy Act⁵, the court is not required to entertain the question whether the vendor was benamdar of the person seeking preemption.”

He points out that although the appellate court cited this decision, but strangely enough it overlooked the underlying principle held in the judgment. He contends that the appellate court upon wrong finding allowed the appeal and thereby wrongly dismissed the case. He concludes his submissions upon assertion that the appellate court upon total misapplication of

mind came upon its conclusion therefore the judgment of the trial court be upheld and the judgment of the appellate court ought to be set aside and the Rule be made absolute for ends of justice.

On the other hand learned Advocate Mr. A.K.M. Enayetullah Chowdhury for the opposite party opposes the Rule. He submits that the trial court came upon a wrong finding but the judgment of the appellate court was correctly found that the preemptor is not entitled to preemption. The learned advocate however did not make much substantive argument on the issue of benamdar nor any other argument on the merits. He concludes his submissions upon assertion that the appellate court correctly came upon its findings allowing the preemption and the judgment of the appellate court need not be interfered with in revision and the Rule bears no merits and ought to be discharged for ends of justice.

I have heard the learned Advocates from both sides, also perused the application and materials on records including both the judgments of the courts below. In adjudicating the instant case the significant issue that calls for determination and ascertainment is whether the preemptor is a co-sharer or not. The preemptor claims and that he is co-sharer both by way of inheritance and by way of purchase by sale deeds. The preemptees claim that although it appears from the sale deed that

the preemptor purchased the land but however the preemptees claim that the preemptor was a minor only and she was only a benamdar in the sale deed for her father. It may be significant to note that although the preemptee claims that the preemptor's father purchased the land in benami and the preemptee is not a co-sharer in the land, since the father is the co-sharer, but however the preemptor's father did not ever object to the preemption case nor did he object to his daughter's claim of being co-sharer although he was a party to the case and he was alive at the time of filing of the suit. Needless to state that the person who could have raised objection as to the daughter being the benamdar was the father therefore it goes without saying that the preemptees could not prove that the preemptor was a benami only in the sale deed nor could they prove that the preemptor's father was the actual owner.

Moreover the preemptors also claim that he is a co-sharer by purchase and inherence. There is no specific denial by the preemptees against the claim of preemptor being co-sharer by inheritance.

It is also revealed that no notice was issued under Section 89 of the State Acquisition and Tenancy Act, 1950. The preemptor claims that she was abroad and she had no knowledge of the sale deed and she filed the case within the statutory time

after gaining knowledge. The preemptee could not specifically controvert these statements in the oral evidences of the preemptor. However the appellate court strangely enough did not look into any of these significant factors.

It is also brought to this Bench's notice that the appellate court cited 35 DLR (AD) 1983 but however the appellate court did not rely on the principle in the case.

I have however examined the 35 DLR (AD) 1983 page 334 in the case of Ashwini Kumar Vs Hari Mohan. The relevant portion is reproduced hereunder:

“In a proceeding for preemption under Section 96 of the State Acquisition and Tenancy Act, the court is not required to entertain the question whether the vendor was benamdar of the person seeking preemption.”

Such being the principle of our Apex Court which is binding on all therefore the preemptee raising the question of benami in the preemption case is totally misplaced. The issue of benami could have been brought in a separate appropriate case if any party was so advised ever. However the instant case being a preemption case the question of benami cannot be raised by any parties.

Therefore under the facts and circumstances and foregoing discussions made above and upon hearing the submissions from both sides and relying upon the decision of 35DLR (AD) 1983 page 334 case, I am of the considered view that the trial court correctly allowed the case but the appellate court upon non consideration of the law and misapplication of mind allowed the appeal and erroneously reversed the judgment of the trial court and therefore the judgment of the appellate court needs interference with in revision.

In the result, the Rule is made absolute and the judgment of the appellate court dated 08.03.2016 passed by the learned Special Judge, Comilla in Miscellaneous Appeal No. 73 of 2011 is hereby set aside and the judgment of the trial court dated 04.07.2011 passed by the learned Joint District Judge, 2nd Court, Comilla in Preemption Case No. 29 of 2003 be upheld.

Send down the Lower Court's Record at once.

Communicate the order at once.

Shokat (B.O)