Present:
Mr. Justice Md. Ruhul Quddus

Civil Revision No. 3791 of 2003

Major Md. Rafiqul Islam
...Petitioner
-Versus-
Ekhlasuddin since deceased substituted by his legal heiress/heirs Delwara Begum and others
...Opposite Parties

Mr. Md. Serajul Islam Bhuiyan, Advocate
é for the petitioner
No one appears for the opposite parties

Judgment on 7.3.2012

This Rule at the instance of a pre-emptee was issued on an application under section 115 (1) of the Code of Civil Procedure to examine the legality of judgment and order dated 6.3.2003 passed by the Joint District Judge, Second Court, Netrokona in Miscellaneous Appeal No.17 of 2001 allowing the same on setting aside those dated 12.3.2001 passed by Assistant Judge, Atpara, Netrokona in Miscellaneous (pre-emption) Case No.9 of 2000 rejecting an application for pre-emption under section 24 of the Non-Agricultural Tenancy Act, 1949.

Pre-emptor Eklasuddin since deceased filed Miscellaneous (pre-emption) Case No.26 of 1996 [renumbered as Miscellaneous

(pre-emption) Case No.9 of 2000] under section 24 of the Non-Agricultural Tenancy Act in the Court of Senior Assistant Judge, Netrokona on 29.6.1996 for pre-emption of a piece of land within Netrokona Pourashava as described in the schedule of pre-emption application.

Pre-emptorûs case, in substance, is that Jatindra Chandra Sarker and Shudhir Chandra Sarker, both sons of Rupchan Sarker sold 28 decimals of land to Abul Hossain Talukder by registered sale deed No.7581 dated 17.6.1978. After death of Abul Hossaqin Talukder, his two sons, namely, Abul Hashem and Abdus Salam inherited the same and transferred 6 decimals of land therefrom to the pre-emptorûs father Md. Helaluddin by registered sale deed No.4105 dated 27.3.1985. He had constructed a dwelling house on the said 6 decimals of land and was residing therein. The pre-emptor inherited the same from his father. He saw a stranger (pre-emptee) walking around the adjacent land on 27.5.1996. The pre-emptor approached him and in course of conversation, came to know that he (pre-emptee) had purchased the case land from opposite party No.2 Zahirul Huq and was planning to construct a house thereon. Despite the pre-emptor was willing to purchase the case land, opposite party No.2 without giving him any notice as a co-sharer had sold it to the stranger on 23.4.1996, thus the cause of action for filing the case arose.

Pre-emptee Major Md. Rafiqul Islam (herein petitioner) entered appearance and contested the case by filing a written objection denying

the material allegations of the application contending, *inter alia*, that before three years of the sale in question, he had purchased another 4½ decimals of land in adjacent plot No.239. Subsequently he purchased the case land for a consideration of Taka 75,000/= (seventy-five thousand) only. In both the deals, the pre-emptor himself was mediator, to which some local people, namely, Abdur Rahman of village Arrgaon, Nurul Islam of Paharpur, Hares Uddin, Naryan Chandra Sarker and Matiur Rahman of Nagra were the witnesses. The pre-emptor himself assured him (pre-emptee) that he would not go for pre-emption of the case land and advised him to show less consideration so that he could save some money. Because of such advice, the consideration was shown at Taka 25,000/= (twenty-five thousand) only. As he had purchased adjacent 4½ decimals of land earlier, he was not a stranger in the case land. Since the pre-emptor himself mediated the sale in question, the present case for pre-emption was barred by estoppel, waiver and acquiescence and as such was liable to be rejected.

Trial Court framed the issues, namely, whether the present case for pre-emption was maintainable in its present form; whether it was barred by limitation; whether it was bad for defect of parties; whether the pre-emptor was entitled to get an order of pre-emption as prayed for.

Pre-emptor himself deposed as P.W.1 and cited two other witnesses. He proved sale deed No.4104 dated 27.3.1985 of his father

as exhibit-1, his fatherûs via deed No.7581 dated 17.6.1978 as exhibit-2, the impugned sale deed No.2281 dated 23.4.1996 as exhibit-3, and the R.O.R Khatian in respect of the case land as exhibit-4. P.W.2 as an attesting witness to sale of 6 decimals of land to the pre-emptorûs father proved his signature on the sale deed (exhibit-1) as exhibit-5.

On the other hand, pre-emptee deposed as O.P.W.1 and cited three more witnesses as O.P.Ws.2-4 in support of his case. He adduced in evidence a draft proposal of R.S. Khatian No.519 in the name of Hemchandra Das (opposite party No.16) as exhibit-Ka, Mutated Khatian No.741 in the names of Sanjib Saha and Shubodh Chandra Saha (opposite party No.17), both sons of Surendra Chandra Saha as exhibit-Kha, another Mutated Khatian being No.348 in the name of Hafizur Rahman, vendor of the pre-empteeûs vendor as exhibit-Ga, draft proposal of R. S. Khatian No.526 in names of Abul Hashem and Abdus Salam, the vendors of the pre-emptorûs father as exhibit-Gha, a certified copy of the sale deed of his vendor Zahirul Huq as exhibit-Uma, and a certified copy of the sale deed of his vendorûs vendor Hafizur Rahman as exhibit-Cha.

During deposition of O.P.W.1, his adversary raised objection twice, but at the time of exhibiting the documents including exhibits-Ka, Kha, Ga and Gha, no objection was raised.

The Assistant Judge, after conclusion of trial, rejected the pre-emption application by his judgment and order dated 12.3.2001 on the grounds *inter alia*, that the case was bad for defect of parties, and

that the record in respect of the case land was mutated in name the vendor of pre-emptee's vendor. No objection against such mutation was ever raised by the pre-emptor and therefore, the pre-emption case under section 24 of the Non-Agricultural Tenancy Act would not lie.

Pre-emptor preferred Miscellaneous Appeal No.17 of 2001 before the District Judge, Netrokona against the said judgment and order dated 12.3.2001 on the grounds taken therein. The Joint District Judge, Second Court, Netrokona ultimately heard the appeal and allowed the same by judgment and order dated 6.3.2003 on the reasons that defect of party is not fatal in a case for pre-emption under section 24 of the Non-Agricultural Tenancy Act, and that the pre-emptee failed to prove that the subsequent mutation of record was duly done after service of notices upon the co-sharers. In such a case the mutation in the name of his vendor would not help the pre-emptee. Learned Judge of the appellate Court thus found the pre-emptor to be a co-sharer in the case land and since he had filed the pre-emption application within limitation and deposited the consideration money with compensation, allowed the appeal by his judgment and order dated 6.3.2003, challenging which the pre-emptee moved in this Court with the instant civil revision and obtained the Rule with an order of stay.

During pendency of the Rule, pre-emptor-opposite party No.1 Eklasuddin died and his legal heiress and heirs were substituted at the instance of the pre-emptee-petitioner. After such substitution, notices

upon all the substituted opposite party Nos.1 (a)-(e) have also been served, but none of them appears to contest the Rule.

Mr. Md. Serajul Islam Bhuiyan, learned Advocate appearing for the petitioner, submits that the lower appellate Court failed to understand the difference between land as contemplated under section 24 of the Non-Agricultural Tenancy Act and holding as used in the State Acquisition and Tenancy Act. The land within the meaning of section 24 of the Non-Agriculture Tenancy Act actually means a piece of land under joint ownership and possession.

Mr. Bhuiyan further submits that Hafizur Rahman, the vendor of pre-emptees vendor, had mutated the record in his name. The pre-emptors predecessors-in-interest Abul Hashem and Abdus Salam were possessing and enjoying their land separately and draft proposal of R. S. Khatian No.526 was also prepared in their names. In such a position, it cannot be said that the pre-emptor was a co-sharer in the case land. The documents namely, exhibits-Ka, Kha, Ga and Gha were adduced in evidence without any objection and both the Courts below passed their respective judgments taking those evidence into consideration.

In support of his contentions, Mr. Bhuiyan refers to the cases of Shah Alam Vs. Md. Shahidur Rahman, 55 DLR 214; Syed Sad Ali Vs. Bidhan Chandra Dev and others, 52 DLR 609 and Maulana Abdul Karim Vs. Nurjahan Begum and others, 38 DLR 361.

In 55 DLR 214 Sheikh Rezowan Ali, J speaking on behalf of a division bench of this Court observed:

> ñ *It will not be out of place to mention here that separation of jama or sub-division of a holding or tenancy distributing rent whether in the case of agricultural land under State Acquisition and Tenancy Act or in the case of non-agricultural land under Non-Agricultural Tenancy Act, takes place under section 117 (1) (c) of State Acquisition and Tenancy Act and the original co-sharers on such separation cease to be co-sharers as such and cannot apply for pre-emption on the ground of co-sharership. The principle is equally applicable in both the cases of agricultural and non- agricultural land."* (paragraph 12)

In 52 DLR 609 a single bench of this Court defined non-agricultural land as a piece of land without any partition or demarcation. In paragraph 5 of the judgment M A Aziz, J observed:

> ñ é *Under section 24 of the Non-Agricultural Tenancy Act, the pre-emptor has to be a co-sharer not only in the holding transferred but also a co-sharer in the land transferred. In the instant case the pre-emptor though a co-sharer in the jama, was not a co-sharer in the land (i.e shop) transferred to opposite party No.1 Bidhan Chandra Dev because of the fact that the shop transferred is well demarcated as per admission of the pre-emptor himself."* (paragraph 5)

In the case of 38 DLR 361 Mustafa Kamal, J (as his lordship then was) sitting in a single bench of the High Court Division observed:

ñ*When the pre-emptor is in* loco parentis *with the pre-emptees and negotiates the sale under pre-emption himself or the facts are such that his acquiescence in the sale can be safely concluded therefrom, the doctrine of estoppel comes in full play. The pre-emptor will be estopped from asserting his claim of pre-emption.*

His conduct will be a bar, even though he files his application for pre-emption within time and even though pre-emption is a statutory right." (paragraph 15)

In the present case, pre-emptor stated in his application that after purchasing 6 decimals of land, his father had constructed a dwelling house and they were residing therein. In his examination-in-chief, he (pre-emptor) stated that he was the owner of adjacent land. In cross-examination he stated that in the meantime the math parcha (meaning draft proposal of R.S. Khatian) was published. The case land appertained to R.O.R. (S.A) Khatian No.196, Plot No.237. The said Khatian was prepared in the names Odhir, Shudhir and Jatindra, all sons of Rup Chan. His another son Shurendra died, but P.W.1 could not say about his (Shurendraôs) heirs. P.W.1 further stated that the case land was vacant, no room was constructed thereon, but in the event of constructing boundary wall, he applied to appoint a surveyor for demarcation of the land.

P.W.2 Ibrahim Master stated that he was an attesting witness to the sale deed of the pre-emptorôs father (exhibit-1). He came to know about the sale in question from the pre-emptor, when the land was

being demarcated. He, however, proved his signature on the said deed as exhibit-5. P.W.3 Abdul Halim stated that he had his residence near to the case land. He heard about the sale in question after filing of the pre-emption case.

From the evidence of the P.W.1 as discussed above it appears that the pre-emptor was owner of the adjacent land. It means that he was not a co-sharer in the case land. The R. S. Khatian in respect of the land of his vendors was already published in their names. At the time of constructing the boundary wall he applied to appoint a surveyor for demarcation of the land i.e he was in knowledge of the sale in question, and that a boundary wall was constructed surrounding the case land.

The R.O.R. (S. A.) Khatian No.196 (exhibit-4) shows that Plot No.237 was comprising of 56 decimals of land, which belonged to Shurendra Chandra Dhupi, son of Kunjo Dhupi; Jatindra Chandra Dhupi, Shudhir Chandra Dhupi and Odhir Chandra Dhupi, all sons of Rup Chandra Dhupi. Abul Hossain Talukder, father of the predecessors-in-interest to the pre-emptorôs father, purchased 28 decimals of land in plot No.237 from two of them namely, Jatindra Chandra Sarker and Shudhir Chandra Sarker (vide exhbit-1), but no other S. A. recorded tenants or their heirs/heiresses were made parties in the pre-emption case. It is also not clear from the pre-emption application whether the vendors Jatindra Chandra Sarker and Shudhir Chandra Sarker extinguished their entire share in the case plot and

were no more necessary parties. Thus the pre-emption case definitely suffers from defect of parties.

Pre-emptee as O.P.W.1 stated that earlier he had purchased 4 ½ decimals of land in adjacent plot No.239. He had no way to approach the said land except the case land and that is why it was necessary for him to purchase the case land. The pre-emptor himself had advised him to purchase the case land. Before purchase, a negotiation was held in presence of the pre-emptor and the witnesses. O.P.W.1 further stated that Hafizur Rahman (vendor of his vendor) had mutated the record in his name. In support of his statements he adduced all necessary documents in evidence as already stated.

The present application was filed in 1996 i.e after completion of R.S. operations all over the country. The pre-emptee proved a draft of R.S. Khatian proposed in names of the vendors of pre-emptor's father. The pre-emptor also admitted in his evidence that in the meantime the *math parchas* were already published. But he suppressed the fact of publication of R.S. Khatians in the pre-emption application.

O.P.W.2 Md. Nurul Islam stated that at the time of sale in question he was present and the pre-emptor was also present there. There was no other way to reach 4½ decimals of land previously purchased by the pre-emptee. In cross-examination he stated that he was the nephew-in-law of the pre-emptee. He further stated that before purchase, a negotiation was held at the house of pre-emptor in the month of December, 1995. O.P.W.3 Abdur Rahman, an Imam of Avoy

Pasha Central Mosque stated that at the time of sale in question he and the pre-emptor, amongst others, were present. He also stated that the case land was the only way to go to the pre-emteeûs 4½ decimals of land. O.P.W.4 Haresh Uddin, a neighbour to both the parties stated that he was present at the time of sale in question. The case land was the only way to approach the pre-emteeûs land. In cross-examination he stated that a negotiation for sale took place at the house of pre-emptor. These witnesses (O.P.Ws.2-4) appear to be reasonable and reliable persons.

Thus the facts come out consistently from the evidence of the O.P.Ws. that there was no other way except the case land to approach the pre-emteeûs 4 ½ decimals of land, and that the pre-emptor himself mediated the sale in question and was present at the time of sale. His claim for pre-emption is, therefore, barred by estoppel and acquiescence.

There is another legal aspect to consider in this case. In his written objection, the pre-emptee did not state the facts of mutation of record in the names of previous co-sharers, draft proposal of R. S. Khatians in the names of his vendor or that of his adversary, although these were material and necessary for proper adjudication of issues involved in the present case. Without any such pleading, he adduced in evidence all the documents in support of mutation of record and draft proposals of R.S. Khatians. The pre-emptor also did not raise any objection thereto or take any ground to that effect in the memo of

appeal. Both the Courts below considered these documents. Since the mutated khatians are public documents and necessary for arriving at a correct decision in the case, the Court can take notice of these khatians and consider the same for arriving at a correct decision to meet the ends of justice.

The appellate Court in allowing the pre-emption took the plea that it was the obligation of pre-emptee to prove that the mutation of record was done after service of notices upon the co-sharers. Learned Judge missed the point that the pre-emptorûs father Md. Helaluddin purchased 6 decimals of land from Abul Hashem and Abdus Salam in 1985 (vide exhibit-1). But the record was mutated in 1979 in mutation case No.385 (IX-I) of 1978-79 at the instance Hafizur Rahman, the vendor of pre-empteeûs vendor Zahirul Huq (vide exhibit-Ga). Therefore, there was no question of service of notice upon the pre-emptor or his father. It is rather proved that even his father was not a co-sharer in the case land inasmuch as before purchase of 6 decimals of land by his father in 1985, the record in respect of the case land was mutated in the name of Hafizur Rahman, the vendor of pre-empteeûs vendor in 1979. Moreover, it was nobodyûs case that no notice was served upon the co-sharers at the time of mutation. It appears that two of the co-sharers namely, Sanjib Kumar Saha and Shubodh Kumar Saha (opposite party No.17) mutated the record in their names by filing mutation case No.760 (IX-1) of 1988-89 (vide exhibit-Ka). Admittedly the pre-emptorûs father constructed a dwelling house on his 6 decimals of land. The pre-emptor

also stated in his deposition that in the event of constructing boundary wall, he applied for appointment of a surveyor for demarcation of his land. Exhibit-Ka, the draft proposal of R.S Khatian No.519 in name of another co-sharer Hemchandra Das (opposite party No.16) shows that nature of his land was of homestead. It means that the land of every co-sharer was separate and demarcated.

Under the facts and circumstance of the case, and in view of the decisions cited, I do not find that the pre-emptor was ever a co-sharer in the case land within the scope of section 24 of the Non-Agricultural Tenancy Act. The appellate Court without considering the prempteeôs documentary evidence, which proved mutation of the record in names of the co-sharers, and the oral evidence which proved that the pre-emptor was present at the time of sale in question and mediated the same barring himself by estoppel and acquiescence, allowed the pre-emption case and thereby committed error of law resulting in an error in decision occasioning failure of justice. The Rule thus merits consideration.

Accordingly the Rule is made absolute. The judgment and order dated 6.3.2003 passed by the Joint District Judge, Second Court, Netrokona in Miscellaneous Appeal No.17 of 2001 is hereby set aside and those dated passed by the Assistant Judge, Atpara, Netrokona in Miscellaneous (pre-emption) Case No.9 of 2000 are restored.

Send down the lower Courtsôrecords.