

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

Present:

Mr. Justice Md. Bashir Ullah

CIVIL REVISION NO. 3540 OF 2017

IN THE MATTER OF:

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

And

IN THE MATTER OF:

Juni Bala Shill, being dead, her heir Shomvo Charan Sharma

... Vendor-Opposite Party –Appellant-Petitioner.
-Vs-

Hridoy Mohan Shil and others

... Pre-emptors-Respondents-Opposite Parties.

Mr. Md. Mozammel Hossain, with

Mr. Md.Moniruzzaman Rana, Advocates

...For the petitioners

Mr. Mohammad Alamgir Kabir, Advocate

...For the opposite party Nos.1 to 3

Heard on:21.10.2025, 22.10.2025 and 23.10.2025
Judgment delivered on: 26.10.2025.

Md. Bashir Ullah, J.

At the instance of the opposite party no. 2 in Pre-emption Miscellaneous Case No. 42 of 2008, this rule was issued calling upon the opposite party nos. 1-3 to show cause as to why the Judgment and Order dated 22.02.2016 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in the Miscellaneous Appeal No. 30 of 2011 so far as it relates to remanding the case for re-trial and judgment and order

dated 18.04.2011 passed by the learned Senior Assistant Judge, Sadar Cox's Bazar in Miscellaneous Case No. 42 of 2008 allowing the pre-emption case should not be set aside and/or such other or further order or orders be passed as to this Court may seem fit and proper.

At the time of issuance of the Rule, the operation of the impugned judgment and order dated 22.02.2016 was stayed for a period of 01(one) year which was further extended on 21.10.2018 for another 01(one) year, however, no further step was taken by the petitioner to extend the earlier order of stay.

Facts leading to the issuance of the Rule, in short, are that the Opposite Party Nos. 1 to 3 as pre-emptors instituted Pre-emption Miscellaneous Case No. 42 of 2008 in the Court of the Senior Assistant Judge, Cox's Bazar under section 96 of the State Acquisition and Tenancy Act, 1950. The case of the pre-emptors, in short, is that, the case land has been recorded under B. S. Khatian Nos. 90 and 91 and the pre-emptors are the recorded co-sharers therein by inheritance from their father Surendra Shil. They are also contiguous land owners of the case land. On 03.09.2008, a serious altercation arose between the pre-emptors and the original vendor and her son concerning a boundary dispute. During that altercation, the original vendor and her son disclosed that she had sold some *ejmali* land under B.S. Khatian Nos. 90 and 91 to the pre-emptee and intended to deliver possession to the purchaser.

Upon learning this, the pre-emptors went to Cox's Bazar on 04.09.2008 and made inquiries regarding the disputed *kabalas*. On 18.09.2008, upon receiving certified copies of the *kabalas*, they came to know that the vendor had sold 1.60 acres of land under B.S. Khatian Nos. 90 and 91 to the pre-emptee at Taka 2,71,000.00 only by 2(two) separate registered deeds being Nos. 1841 and 1842 both dated 21.09.2005. The pre-emptors alleged that they were unaware of the said transfers prior to obtaining the certified copies and that out of previous enmity, the vendor had secretly transferred the case land to the pre-emptee without giving any prior notice to the co-sharers, and at an inflated price, intending to defeat their right of pre-emption. The possession of the case land has not been delivered to the purchaser, and the case land remained under *ejmali* possession of the vendor and co-sharers. The pre-emptee neither paid rent, mutated his name nor made any development on the case land. Consequently, the pre-emptors filed the pre-emption case under Section 96 of the State Acquisition and Tenancy Act, 1950.

The vendor-opposite party No. 2 contested the case by filing written objection, contending *inter alia* that the case is barred by limitation, principles of waiver, estoppel and acquiescence and the petitioners had no *locus standi* and the case is not maintainable due to defect of parties.

It is further stated that, she intended to gift her property to her only son Shamvo Sharma Shil and accordingly she requested her close relative, the pre-emptee namely Robi Chandra Shil and his uncle Shukumar Shil to assist in preparing and registering the said Deed of Gift. However, they fraudulently executed and registered two deeds being Nos. 1841 and 1842 both dated 21.09.2005 in favour of the pre-emptee. The vendor Juni Bala Shil could not read the deeds and failed to understand the contents and the name of transferee as she was an ignorant and illiterate lady. She neither sold the land to the alleged vendee nor delivered possession of the said land or received any consideration. Upon learning of the fraud, she filed Other Class Suit No. 519 of 2009 in the Court of Senior Assistant Judge, Cox's Bazar for cancellation of said fraudulent sale deeds against the pre-emptee (vendee) which was decreed on compromise on 20.10.2009, cancelling both the sale deeds. Thereafter the vendor transferred the case land to her only son Shomvo Shil on 05.11.2009 by registered deed No. 1693 and Shamvu mutated his name in Mutation Khatian No. 614 vide Mutation Case No. 293(II)/2009-2010. Hence, she prayed for dismissal of the pre-emption case.

The trial Court framed as many as 7(seven) different issues and in course of the trial 3(three) witnesses were examined in favour of the pre-emptor to prove their case and 1(one) witness was examined on behalf of the opposite party.

Upon hearing the parties and on perusal of the pleadings the learned Senior Assistant Judge, Sadar Court, Cox's Bazar allowed the pre-emption case by judgment and order dated 18.04.2011.

Against the said judgment and order the predecessor of the present petitioner preferred an appeal being Miscellaneous Appeal No. 30 of 2011 before the District Judge, Cox's Bazar. On transfer, the same was heard by the learned Joint District Judge, 1st Court, Cox's Bazar and upon hearing both the parties allowed the appeal by its Judgment and Order dated 22.02.2016 but remanded the case to the trial Court for re-trial, giving both parties opportunity to take proper steps.

Being aggrieved by and dissatisfied with the order dated 22.02.2016 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Miscellaneous Appeal No. 30 of 2011, the petitioner preferred this Civil Revision before this Court and obtained Rule and order of stay.

Mr. Md. Mozammel Hossain learned Advocate assisted by Mr. Md. Moniruzzaman Rana, learned Advocate for the petitioner submits that the impugned judgments and orders passed by the Courts below are ex facie illegal and the trial court arrived at the wrong decision allowing the pre-emption case and though the appellate court allowed the appeal rightly but committed error of law in remanding the matter to the trial Court.

He argues that the trial and appellate courts failed to apply their judicial minds properly in passing the impugned judgments and orders and as such committed an error of law in the decision occasioning failure of justice.

The learned counsel contends that the possession was never delivered and the deeds pre-empted were never acted upon and the sale deeds were subsequently declared void by a competent civil Court by compromise decree, hence the *kabalas* are not any how pre-emptable and as such the pre-emption case is not tenable in the eye of law based non-acted-upon deeds.

He further submits that though the appellate court has rightly allowed the appeal and rightly observed that the decree in the title suit would govern the pre-emption case. The decree is still unchallenged and there is no opportunity to transfer the decreed land in title suit as those pre-empted deeds are void and baseless and taking all the issues in favour of the appellants but at the operating part of the judgment the learned appellate court remanded the case to the trial Court which is not only contrary to his earlier decision but also not tenable in the eye of law and as such thereby committed error of law resulting in an error in the decision occasioning failure of justice.

The learned counsel contends that the sale deeds executed in favour of the pre-emptee-vendee, Rabi Chandra were declared illegal by a competent court, so there was no sale and hence the question of

pre-emption is immaterial and subsequently Juni Bala Shil transferred the case land to her son Shomvo Charan Sharma by deed no.1693 dated 5.11.2009 and no possession was handed over to the pre-emptee-vendee, Rabi Chandra Shil by the predecessor of the petitioner, Juni Bala Shil.

The learned counsel further contends that the pre-emptors-opposite parties did not file any appeal against the compromise decree passed by the learned Senior Assistant Judge, Sadar Court, Cox's Bazar in Other Class Suit No. 519 of 2009 and hence the Judgment and Order dated 18.04.2011 passed by the learned Senior Assistant Judge, Sadar Court, Cox's Bazar in Pre-emption Miscellaneous Case No.42 of 2008 and the Judgment and Order dated 22.02.2016 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Miscellaneous Appeal No. 30 of 2011 so far as it relates to remanding the case for re-trial, are liable to be set aside.

He next submits that the decision cited by the learned counsel appearing on behalf of opposite party nos. 1 to 3 has no manner of application in the facts and circumstances of the instant case. Because the cited decision is related to a deed of re conveyance but in the instant case, there is no existing deed as the deeds under pre-emption were declared null and void by a competent court.

With those submissions, the learned counsel finally prays for making the Rule absolute.

Per Contra, Mr. Mohammad Alamgir Kabir, the learned Advocate appearing for the pre-emptors-opposite party nos. 1 to 3, submits that the pre-emption case was filed within limitation.

He further submits that the pre-emptee-purchaser appeared in the case upon receipt of the summons and he filed an application for rejection of the application under Order 7, Rule 11 of the C.P.C., but the same was rejected. Subsequently, Juni Bala appeared and filed *vokalatnama* on 23.07.2009.

He further submits that during the pendency of the pre-emption case, opposite party no.2 of the pre-emption case, in collusion with opposite party no.1 filed an Other Class Suit being no. 519 of 2009 for cancellation of the instrument which was impugned in the pre-emption, but the preemptors were not made a parties or pro-forma defendants in the aforesaid suit and no intimation was given to the preemptor, even to the Court.

He further submits that the petitioner in collusion with each other filed a *solenama* within 45 days of the suit and earlier the defendant no. 1, Rabi Chandra Shill filed a written statement denying the allegation of fraud. The petitioners committed a chain of fraud. The opposite party did not come with clean hands. In support of his contention, the learned counsel referred to the decision passed in ***Most. Nurun Nahar Begum Vs. M. Abu Mohammad and others***, reported in 13 MLR (AD) 287 regarding a subsequent deed during the

pendency of the pre-emption case. The appellate Court failed to discuss the evidence, facts and circumstances of the case and the same is totally non-speaking one.

He submits that the compromise decree was obtained by the pre-emptee and vendor collusively to defeat and frustrate the pre-emption case which amounts to a fraud and such fraud vitiates everything. This principle means that any judgment, order or proceeding obtained by fraud is considered invalid and does not exist in the eye of law.

He contends that if the pre-emption is defeated in this way, a floodgate will be opened to frustrate future pre-emption cases and the pre-emptors have every right to get relief from the Court and therefore the Court should interfere with the judgment and order.

With those submissions, the learned counsel finally prays for discharging the Rule.

I have heard the submissions of the learned Advocate for both sides, perused the Civil Revision, and impugned orders passed by the trial and appellate Court and other materials on record.

It transpires from the record that Juni Bala Shil, the original vendor, is the stepmother, and Shamvo Charan Shil is the stepbrother of the pre-emptors. It is an admitted fact that there existed longstanding enmity between the stepbrothers. In view of such strained relations, Juni Bala Shil intended to gift her property to her

only son, Shamvo Shil, and accordingly entrusted her close relatives to assist in the preparation and registration of a deed of gift. However, taking advantage of her illiteracy and ignorance, they fraudulently executed and registered two deeds, being Deed Nos. 1841 and 1842, both dated 21.09.2005, in favour of the pre-emptee. The vendor, being an illiterate lady, was unable to read the contents of the deeds and she neither sold the land nor delivered possession thereof, nor received any consideration in respect of the said transactions. Upon becoming aware of the fraudulent acts, she instituted a suit for cancellation of the said sale deeds against the pre-emptee, which was ultimately decreed on compromise on 20.10.2009, thereby cancelling both sale deeds. The aforesaid facts were duly corroborated by the testimony of OPW-1, Moheshar Sharma. However, the learned Senior Assistant Judge, Sadar Court, Cox's Bazar, failed to properly appreciate and evaluate these material facts and evidence on record.

It appears from the application of Pre-emption Miscellaneous Case No. 42 of 2008, it is stated that "নালিশী জমি অদ্যাবধি বিক্রেতা প্রতিপক্ষ ও তৎপুত্র শম্বুশীল অত্র শরীকদার-প্রার্থীকানের সহিত এজমাতে দখলে রহিয়াছে। ক্রেতা প্রতিপক্ষ দখল না করায়, নামজারী না করায়, কবলার কথা প্রকাশ না পাওয়ায়, প্রার্থীকান দীর্ঘকাল কবলা সম্পর্কে অন্ধকারে ছিলেন। ১ নং প্রতিপক্ষ শরীকদার অবধারিত হইলে প্রার্থীকান স্বীয় অংশ শান্তিতে ভোগ দখল করিতে পারিবে না, সদা সর্বদা সীমা ঠেলাঠেলি লাগিয়া থাকিবে।"

Petitioner Witness No. 1, Nirmal Chandra Shil corroborated the said statement in his examination-in-chief stating that, "বি. এস ১০ ও ১১ নং খতিয়ানে আমরা রায়ত। নালিশী জমির চারপাশে আমাদের জমি আছে।.....১ নং প্রতিপক্ষের বাড়ী নালিশী জমি হতে ১০ কি.মিঃ দূরে। সে জমির দখল পায়নি। দলিলের সনাক্তকারী সুকুমার বিক্রেতার বেয়াই। ১ নং প্রতিপক্ষ জমির দখল পায়নি ও খাজনা দেয়নি।" In cross-examination he deposed that, "জুনিবালা বি. এস, ১০ খতিয়ানের জমি নিজে চাষ করে। এই চলতি বছরও বিরোধী ১০ ও ১১ নং খতিয়ানের জমি জুনিবালা চাষ করে। বিরোধী খতিয়ানে আমি ১নং প্রতিপক্ষের চাষাবাদ করা দেখি নাই আমি।"

Petitioner Witness Nos. 2 and 3, Bibu Bhushan Shil and Kamal Hari Shil in their examination-in-chief also admitted that Juni Bala possesses the case land.

It also appears that deed Nos. 1841 and 1842 under pre-emption were executed on 21-09-2005 in favour of pre-emptee, Rabi Chandra Shil but the possession of the case land was not handed over and mutated in the name of the pre-emptee till the filing of the pre-emption case, that is on 16-10-2008 creates serious doubt.

Thus, in view of the above, it is proved that the vendee-pre-emptee never obtained possession of the case land and accordingly the deeds under pre-emption were never acted upon.

The record shows that the vendor-opposite party no. 2-petitioner Juni Bala as plaintiff instituted Other Class Suit No. 519 of 2009 on 06-09-2009 and the same was decreed on 20-10-2009. Consequently,

deed nos. 1841 and 1842 both dated 21-09-2005 under pre-emption were cancelled and the vendor got back the case land by the compromise decree. The deeds under pre-emption stood not pre-emptable. Juni Bala filed a written objection in the Pre-emption Case on 10-01-2010, stating about the cancellation of deed nos. 1841 and 1842 both dated 21-09-2005 under pre-emption and decree dated 20-10-2009. Upon learning such information, the pre-emptors filed a better statement on 20-04-2010. But they did not file any appeal or take any measure against the cancellation of deeds under pre-emption. Since the land sought to be pre-empted was never transferred to the pre-emptee and deeds under pre-emption did no longer exist so the trial Court cannot allow the pre-emption. In this regard, reliance may be placed upon the decision passed in *Sanaullah Vs. Abdus Satter Sheikh and others*, reported in 8MLR(AD)45. In view of the above, the appellate court in its judgment and order rightly observed:

“এতে মনে হয়েছে অপর ৫১৯/০৯ নং মামলায় সোলে ডিক্রি মূলে তর্কিত ১৮৪১ ও ১৮৪২ নং দলিল বাতিল করা হয়েছে। সেই ডিক্রি এখনো বহাল আছে। হতে পারে সেটা বেআইনী বা প্রতারণামূলকভাবে হাসিল করা হয়েছে। কিন্তু, সেই ডিক্রি বাতিল না হলে তর্কিত দলিল দ্বয়ের ভিত্তিতে অগ্রদ্রয়ের সুযোগ নেই। কারণ (Competent Court) এ আদেশ বাতিলকৃত দলিল দ্বয়ের জমি অগ্রদ্রয়ের মাধ্যমে হস্তান্তর করার আইনগত ভিত্তি নেই। উক্ত দলিলদ্বয় আইনের দৃষ্টিতে বর্তমানে অস্তিত্বহীন। কাজেই অস্তিত্বহীন দলিলের গর্ভে বা তপশীলে উল্লেখিত জমিরও

কোন অস্তিত্ব আইনের দৃষ্টিতে নেই। সুতরাং অপর ৫১৯/০৯ মামলার ডিক্রির বিরুদ্ধে প্রতিকার না অর্জন করে অত্র মামলায় হকসফির প্রতিকার পেতে পারেনা।”

A deed which has been cancelled by a competent Court ceases to have any legal existence and cannot form the basis of a claim of pre-emption.

So, the findings and observations made by the trial court in its Judgment and Order to the effect that, “ সুতরাং সাব্যস্ত করা হল যে, অপর ৫১৯/২০০৯ মোকদ্দমায় নালিশী কবলাদলিলদ্বয় বাতিল সংক্রান্তে অর্জিত সোনেডিক্রী প্রার্থীকগনের উপর বাধ্যকর নয় এবং উক্ত ডিক্রীমূলে নালিশী দলিলদ্বয় বাতিল হওয়া সংক্রান্ত আদেশ অত্র মোকদ্দমার উপর বাধ্যকর নয়।” - are not tenable in the eye of law.

The learned counsel appearing on behalf of the pre-emptor contends that the pre-emptors were not made parties and no intimation was given by the opposite party no. 2 of the pre-emption case regarding Other Class suit no. 519 of 2009 and since the pre-emptors were stranger to the suit so they could not file any appeal. However, I find no substance in the submission made by the learned counsel. The pre-emptors knew about the compromise decree on 10-01-2010 when the vendor, Juni Bala filed a written objection in the Pre-emption Case. Moreover, the pre-emptors had ample opportunity to prefer an appeal against the decree. A stranger to a suit or a proceeding is not prohibited from filing an appeal. In this regard, the Apex Court held in

the case of *H.M. Saya and Co. Vs. Wazir Ali Industries Ltd. And Habib Bank Ltd*, reported in 21 DLR (SC) (1969)50:

“A stranger to a suit or a proceeding is not prohibited by the Code of Civil Procedure from filing an appeal from an order passed therein. It is true that there is no express provision permitting such party to prefer an appeal against such an order. ... If the decree or order appealed from adversely affects a person, he should be permitted to challenge the same in appeal even if he was made a party to the original suit or proceeding. ”

It appears that the Appellate Court set aside the judgment and order of pre-emption on merit. So, there is no ground to send the case on remand when the evidence on record is sufficient to decide the matter finally. The lower appellate court had every right to accept or reject the findings of the trial court and come to its own findings on the basis of the evidence already on record but instead of doing so the learned judge has thought it appropriate to remand the case for re-trial, which is very unfortunate. In the case of *Begum Sayada Murguba Khatun Vs Dewan Shafiur Reza Chowdhury and anohter*, reported in 30 DLR(1978)179, wherein this Court held:

“Mere disagreement with the findings of the trial Court is no ground for the appellate Court to send a case on remand when the evidence on record is sufficient to decide the matter finally.”

Further in *Attor Mia and another Vs Mst. Mahmuda Khatun Chowdhury*, reported in 43 DLR(AD) (1991) 79, wherein the Apex Court held:

“Unnecessary and totally inexplicable order of remand entails hardship, agony of a fresh hearing, delay, additional expenditure ...”

It is well settled that a remand order is not to be made as a matter of course. When there is sufficient evidence on record, remand of a case to the trial court for a fresh hearing is not called for. In *Dr. Rezia Khatun Vs Bhanu Guha and another*, reported in 1986 BLD(AD) 135, wherein the Apex Court held:

“The long time of judicial decisions is to the effect that the remand order should be avoided as far as possible and even the Privy Council in some cases observed that indiscriminate order of remand is tantamount to shirking the responsibility.”

Regard being had to the above facts and circumstances and the decisions, I do not find any substance in the Judgment and Order dated 18-04-2011 passed by the learned Senior Assistant Judge, Sadar Court, Cox's Bazar in Miscellaneous Case No. 42 of 2008 and the Judgment and Order dated 22.02.2016 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Miscellaneous Appeal No. 30 of 2011 so far as it relates to remanding the case for re-trial and those are liable to be set aside.

Accordingly, the rule is made absolute, however, without any order as to cost.

The Judgment and Order dated 18-04-2011 passed by the learned Senior Assistant Judge, Sadar, Cox's Bazar in Miscellaneous Case No. 42 of 2008 is hereby set aside and the pre-emption is rejected. The Judgment and Order dated 22.02.2016 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Miscellaneous Appeal No. 30 of 2011 so far as it relates to remanding the case for re-trial is hereby set aside.

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

The trial Court is directed to refund the deposited money to the pre-emptor, if any.

Let a copy of this judgment along with the Lower Court's Record be communicated to the court concerned forthwith.

Md. Ariful Islam Khan
Bench Officer