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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 1297 of 2017

Md. Rowson Alam
...Pre-emptor-petitioner
-Versus-
Md. Moshiur Rahman and others
…Opposite parties

Mr. Ashfaqur Rahman, with
Ms. Mosroj Jharna Shathi, Advocates
...For the petitioner

Mr. Fahad Mahmood Khan, Advocate
.....For the opposite party Nos. 1-5

Heard on: 22.10.2024, 28.10.2024 and 01.12.2024
Judgment on: 10.12.2024

Miscellaneous Case No. 28 of 2005 under Section 96 of the State Acquisition and Tenancy Act, 1950 (S A & T Act) for pre-emption of the case land was allowed by the learned Assistant Judge, Debhata, Satkhira on 12.01.2012. Miscellaneous Appeal No. 10 of 2012 was allowed by the learned Joint District Judge, 2nd Court, Satkhira on 19.02.2017 and the pre-emption case was rejected. Thereafter, the pre-emptor filed the instant civil revision and obtained the Rule on 10.04.2017.

The Rule has been contested by the pre-emptee opposite party Nos. 1-5.

It is admitted by the parties that the pre-emptor was the co-sharer tenant in the case jote, the pre-emptees are strangers and the conditions laid down in Section 96 of the S A & T Act were complied with at the time of filing the case. The only issue raised in the instant civil revision is whether the separation of the case jote by publication of the relevant B.S. khatian during pendency of the appeal or instant Rule takes away the pre-emptor's right of pre-emption. In other words, whether the interest of the pre-emptor subsists in spite of separation of the case jote after disposal of the original case. This issue did not arise at the trial stage for the reason that the case jote was separated after conclusion of the trial. The trial Court allowed the pre-emption case.

The appellate Court below observed that during the pendency of the appeal, a separate B.S. khatian being No. 3759 was published by which the case jote was split up and thus, the pre-emptor ceased to be a co-sharer tenant in the case jote which under the S.A. khatian was a compact block. The appeal Court allowed the appeal and rejected the pre-emption case on this point only relying upon the cases reported in 19 DLR (SC) 36, 35 DLR (AD) 305, 35 DLR 295, 50 DLR (AD) 97, 54 DLR 181 and 13 MLR (AD) 143.

During the course of hearing of the instant Rule, the learned Advocate appearing for the pre-emptor-petitioner filed a supplementary affidavit annexing Bangladesh Gazette published on 21.01.2021 (Annexure-1). It appears from Annexure-1 that the relevant B.S. khatian was finally published on 05.11.2020 after issuance of instant Rule. This fact has been admitted by the contesting opposite parties. In view of the admitted facts, the position is that the case jote was split up by publication of a separate B.S. khatian No. 3759 on 05.11.2020 during pendency of the civil revision.

The learned Advocate appearing for the pre-emptor-petitioner submits that subsequent separation of the case jote by publication of a new khatian during the appeal or revision does not take away the pre-emptor's right of pre-emption which existed at the time of filing the pre-emption case. The learned Advocate appearing for the pre-emptee-opposite parties, on the other hand, argued the subsequent separation of the case jote during the appeal or revision takes away the pre-emptor's right of pre-emption. The learned Advocates of both sides refer to several case laws in support of their arguments. In order to assess the arguments, the reported cases require an in depth analysis.

The case of ***Chandra Kumar Maladas vs. Abdul Motaleb and others***, 19 DLR (SC) 36 arose out of a pre-emption application under Section 26F of the Bengal Tenancy Act, 1885. Leave to appeal was

granted to consider whether after setting aside of the auction sale the High Court was justified in allowing pre-emption of the said sale and whether the doctrine of *lis pendens* applied to a pre-emption case. It was held that a co-sharer means a person whose interest subsists throughout the course of the application to pre-empt and not to a person who held such interest in the beginning, but lost it before its disposal. It was further held that equally a fresh interest acquired at a later stage cannot be tacked on to the interest held in the beginning, but lost during the pendency of the application. The appeal was allowed.

The case of ***Md. Mafizuddin Patwari and others vs. Abdul Hakim Miazi and others,*** 33 DLR (AD) 305 arose out of a pre-emption case under Section 26F of the Bengal Tenancy Act. In this case, the trial Court rejected the pre-emption case on the ground that there had been a valid subdivision of the jama and the pre-emptor was no longer a co-sharer. Appeal was allowed holding that the subdivision was not done legally. The High Court discharged the Rule. Leave was granted to consider the question whether an order of sub-division of tenancy under Section 88A of the Bengal Tenancy Act without proper compliance with the proviso (a) to sub-section (1) of the said section is without jurisdiction and can be treated to be so by a Civil Court in a collateral proceeding. The answer was in negative and the appeal was allowed. 19 DLR (SC) 36 was followed and applied in

33 DLR (AD) 305. In the instant case, the appellate Court below relied on 19 DLR (SC) 36 and 33 DLR (AD) 305.

The learned Advocate appearing for the pre-emptor-petitioner submits that upon a meticulous analysis of the cases reported in 19 DLR (SC) 36 and 33 DLR (AD) 305, it would appear that the *ratio* laid down in 19 DLR (SC) 36 is distinct from that of 33 DLR (AD) 305. The decision reported in 19 DLR has merely discussed about a case of subsisting interest in a given fact where the pre-emptor's own land was pre-empted by other co-sharers of the said holding and, thus, there was no subsisting interest. In the said case, the pre-emptor also acquired some fresh interest during pendency of the said case and the same was also negated by the Supreme Court. 19 DLR has laid down the principle known as doctrine of 'subsisting interest'. The decision reported in 33 DLR (AD) 305 has no nexus with doctrine of subsisting interest rather the said decision is related with the issue of sub-division of holding in a given fact where jama was separated long before publication of the latest record i.e. revisional record.

The learned Advocate further submits that doctrine of 'subsisting interest' is distinct from the that of 'separation of jama' or 'sub-division of holding'. The scope of 19 DLR (SC) 36 and 33 DLR (AD) 305 so far it relates to the application of doctrine of subsisting interest had been examined in ***Abdul Hakim (Md) vs. Md. Nazrul Islam and others***, 66 DLR (AD) 157 wherein the pre-emptor

voluntarily transferred his entire land at revisional stage which is tantamount to abandonment of his right and, hence, his conduct was sufficient to trigger the doctrine of subsisting interest and, thus, there was no subsisting interest for continuing the said pre-emption case. The learned Advocate submits that in the instant case the jama was neither separated long before initiation of the pre-emption case [33 DLR (AD) 305] nor the pre-emptor accrued any fresh interest during pendency of a pre-emption proceedings [19 DLR (SC) 36] nor the pre-emptor transferred his entire land [66 DLR (AD) 157]. Thus, the reported cases are distinguishable from the facts and circumstances of the instant case.

The learned Advocate of the pre-emptor-petitioner finally submits that the pre-emptor-petitioner has no role to play in the matter of initiation and final publication of the B.S. khatian. With the passage of time, the government on its own decides to conduct survey for updating the change of ownership and for the purpose of collection of land revenue as per the provision of the S A & T Act. Therefore, the final publication of the BS Khatian during pendency of a pre-emption proceeding cannot frustrate or take away the statutory legal right or a vested legal right of a pre-emptor to pre-empt the case land. Such final publication of the B.S. record-of-rights pending final adjudication of a pre-emption proceedings is clearly hit by the doctrine of *lis pendens* and cannot take away the legal right accrued by the petitioner as

decided in ***Md. Abdur Rouf and others vs. Ahmuda Khatun and others***, 1 BCR (AD) 194 = 33 DLR (AD) 323.

The case reported in 1 BCR 1981 (AD) 194 arose out of an application for pre-emption under Section 24 of Non-agriculture Tenancy Act. The learned Advocate of the petitioner vehemently argues that the observations and *ratio* laid down in the reported case support his argument that the pre-emptor's right to pre-emption cannot be taken away by subsequent separation of the case jote by the publication of the B.S. khatian in which the pre-emptor has no role to play. It was argued by the respondents in the reported case that during the pendency of the application for pre-emption the record of right was changed in the name of Sakina Bai. As a result of the mutation so effected by the respondents, the appellants ceased to have any subsisting interest in the disputed land for the reason that the order of sub-division is binding upon the appellants. It was further argued that the appellants' case was hit by the doctrine of *lis pendens* inasmuch as the petition for mutation was filed on July 18, 1974 which is long after the pre-emption proceedings initiated by the appellants. It was held in 1 BCR (AD) 194:

> "In the present case the respondents initiated the mutation proceedings during the pendency of the pre-emption case and the order obtained by them has affected the appellants' right of preemption which accrued earlier than the

> proceedings for mutation initiated by the respondents. We are, therefore, of the view that the respondents' dealing with the disputed property which resulted in the sub division of the holding is hit by the doctrine of *lis pendens*. Such sub-division of the holding does not constitute a bar for the exercise of the right of pre-emption by the appellants".

It appears from the above-quoted observations that the case was decided on the doctrine of *lis pendens* as laid down in Section 52 of the Transfer of Property Act, 1882 following a sub-division of jama based on mutation proceeding under Sectioin 117 of the S A & T Act. Section 52 of the Transfer of Property Act runs as follows:

> "52. During the pendency in any Court in Bangladesh, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as, it may impose."

One of the ingredients of the doctrine of *lis pendens* is that in order to apply the principle, the property in question must be 'transferred' or 'otherwise dealt with' by any party to the suit or proceedings. The word 'transferred' means such transfers as are

contemplated by the Transfer of Property Act, such as sales, gifts, mortgages, leases, exchanges etc. The expression ‘otherwise dealt with’ may include any transaction which is not a transfer of any of the kinds mentioned above but such dealing must actively involve anyone of the parties to a pending suit which may have some consequences on their rights upon which the Court was to adjudicate. Mutation as a result of an order of sub-division of a tenancy effected under Section 117(1)(c) of the S A & T Act falls within the expression ‘otherwise dealt with’ [1 BCR (AD) 194]. The proposition of law laid down 19 DLR (SC) 36 was not disputed in 1 BCR (AD) 194. However, the question in the latter case was different *i.e.*, whether the appellants ceased to be co-sharers if it is established that the jama in question was split up behind the back of the appellants. It is already noted that in 1 BCR (AD) 194 the Appellate Division considered the facts that mutation proceeding under Section 117 of the S A & T Act was initiated during pendency of the pre-emption case and as such, the sub-division of the jama is hit by the doctrine of *lis pendens* and the same does not constitute a bar for exercise of the right of pre-emption.

In the instant case, the land sought to be pre-empted was identified in the schedule of the pre-emption application by giving the relevant S.A. khatian and the D.P. khatian No. 513. It shows that the pre-emptor was aware of the fact that the Government had already taken steps to revise the record-of-rights under Section 144 of the S A

& T Act. The publication of the draft khatian (D.P. khatian) was the initial step towards the final publication of the B.S. khatian by which the case jote would be split up. Having been aware of the consequence of publication of the D.P. khatian, the pre-emptor filed the pre-emption case. Eventually, the case jote was finally split up during pendency of the instant Rule by publication in Gazette notification of the B.S. khatian although the appeal Court below relied upon the publication of the B.S. khatian No. 3759 which was presumably published for public inspection under rule 33 of the Tenancy Rules, 1955. Therefore, the pre-emptor ceased to be a co-sharer in the case jote before final disposal of the pre-emption case. The law declared in 19 DLR (SC) 36 that the pre-emptable interest must subsist from the beginning till disposal of the pre-emption case applies to the fact and circumstances of the case in hand. The law declared in 1 BCR (AD) 194 has no manner of application to the case in hand inasmuch as in the reported case, the case jote was sub-divided following a mutation under Section 117 of the S A & T Act, the proceedings of which was initiated during pendency of the pre-emption case which is hit by the doctrine of *lis pendens*. In the case in hand, the case jote was split up following publication of a revised khatian *i.e.* the B.S. khatian under Section 144 of the S A & T Act and as such, the doctrine of *lis pendens* does not apply to the case.

Before parting with the judgment, two more cases cited by the learned Advocate of the pre-emptor-petitioner require discussion. In ***Abid Ali vs. Maleka Khatun and others***, 1985 BLD 277, which arose out of an application for pre-emption under Section 24 of the Non-agricultural Tenancy Act, 1948, a single Bench of the High Court Division held that the separation of jama in favour of the opposite party No. 1 having been created subsequent to the impugned transfer, the separation in favour of the opposite party No. 1 cannot affect the petitioner's right to pre-emption. The case of ***Abdul Hakim (Md) vs. Md Nazrul Islam and others***, 66 DLR (AD) 157 arose out of a pre-emption proceeding under Section 96 of the S A & T Act. The trial Court dismissed the pre-emption case. The appeal was allowed. During pendency of the revision before the High Court Division the pre-emptor sold out his entire interest in the case jote by a registered deed. The High Court Division held that by selling out the entire interest in the case jote the pre-emptor ceased to be a co-sharer in the case holding and as such, had lost his right to pre-empt. The Appellate Division applied the *ratio* laid down in 19 DLR (SC) 36 and 33 DLR (AD) 305 and upheld judgment of the High Court Division.

The above-mentioned two cases, in my view, do not support the case of the pre-emptor-petition, rather the principle that the pre-emptable interest must subsist till final disposal of the pre-emption case reaffirmed in 66 DLR (AD) 157 supports the case of the pre-

emptee. The doctrine of *lis pendens* applied in 1 BCR (AD) 194 in the given facts and circumstances has no manner of application to the instant case. This being the position, the Rule fails.

In the result, the Rule is discharged. The pre-emption case is rejected.

Send down the L.C.R.

Mazhar, BO