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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 2184 of 2017

In the matter of:

Md. Rahim Uddin Gain
...Pre-emptee-petitioner
-Versus-
Md. Mozibar Rahman Molla and others
…Opposite parties

Mr. Md. Amimul Ehsan, with
Mr. Md. Ali Hassan, Advocates
...For the petitioner

Ms. Rona Nahrin, Advocate
....For the pre-emptor-opposite party No. 1

Heard on: 11.11.2024, 20.11.2024, 27.11.2024, 04.12.2024 and 05.12.2024
Judgment on: 10.12.2024

The pre-emption case being Miscellaneous Case No. 41 of 2004 filed under Section 96 of the State Acquisition and Tenancy Act, 1950 (S A & T Act) was rejected by the learned Senior Assistant Judge, Manda, Naogaon on 06.09.2010. Miscellaneous Appeal No. 115 of 2010 was allowed by the learned Joint District Judge, 2nd Court, Naogaon on 08.05.2017. Being aggrieved, the pre-emptee filed the instant civil revision and obtained Rule on 09.07.2017. The Rule has been contested by the pre-emptor-opposite party No. 1.

Section 96 of the S A & T Act was substituted by Act No. XXXIV of 2006. The instant pre-emption case was filed in 2004. Therefore, the former Section 96 shall apply to the case in hand.

The present opposite party No. 2 transferred the case land consisting of 20 decimals out of 80 decimals, nature of the land being a pond, to the pre-emptee-purchaser (present petitioner) by a registered deed of exchange No. 10532 dated 31.10.2004 for 12 decimals of the land which was 500 meters away from the case jote. The pre-emptor's case is that the deed of exchange was in fact a sale deed. The trial Court held that it was not a sale deed rather a deed of exchange and as such, the application for pre-emption of the case land was not maintainable under Section 96(10)(b). The trial Court further observed that the pre-emptor became a co-sharer in the case jote by dint of a registered heba-bil-ewaj deed No. 14832 dated 13.12.1978. The said heba-bil-ewaj deed was executed by the pre-emptor's father in favour of the pre-emptor and his brother (present opposite party No. 2) who sold the case land to the pre-emptee-purchaser. The trial Court held that the pre-emptor was not a co-sharer in the case jote. This was another ground for rejection of the pre-emption case.

The appellate Court below, on the other hand, held that the pre-emptor was a co-sharer in the case jote by inheritance and that the deed of exchange was a sale deed. The appeal preferred by the pre-emptor was allowed accordingly.

Now, the pre-emptee-purchaser is the petitioner before this Court. The learned Advocate appearing for the pre-emptee-purchaser submits that the pre-emptor was not a co-sharer in the case jote rather his interest accrued in the case jote by way of heba-bil-ewaj deed which does not confer co-shareship in the case jote. The next point argued by the learned Advocate is that the impugned deed of exchange was wrongly considered by the appellate Court below as a sale deed.

The learned Advocate appearing for the pre-emptor-opposite party No. 1 at the outset, candidly submits that the finding of the appellate Court that the pre-emptor was a co-sharer in the case jote by inheritance was wrong. The learned Advocate, however, submits that admittedly the pre-emptor became a co-sharer in the case jote by dint of heba-bil-ewaj deed executed by his father.

Now, the first question is whether pre-emptor became a co-sharer in the case jote whose right, title and interest accrued in the same by the heba-bil-ewaj deed. The former Section 96(1) states, "If a portion or share of a holding of a raiyat is transferred, one or more co-sharer tenants of the holding, may within four months of the service of the notice given under section 89, or, …". Under Section 96(5)(a)(i), the mode of accrual of interest in the case jote of a co-sharer tenant is of three types, namely (a) by inheritance, (b) by purchase and (c) tenant holding land contiguous to the land transferred. Section

96(5)(a)(i) concludes that the applicant or applicants shall have the prior right to purchase under this section in order which they have been mentioned above.

The learned Advocate appearing for the pre-emptor-opposite party No. 1 refers to the case of ***Elahi Boksa@ Hedo and another vs. Maqbul Hossain Sarker*** **and others,** 10 BLC 535 and submits that in the reported case the pre-emptee admitted in amended written objection that the pre-emptors are co-sharers in the case jote by deed of heba executed by their father. This Division held at para 14 of the reported case that admission of the pre-emptee establishes that the pre-emptors are co-sharers in the case jote and the findings of the Courts below that the pre-emptors are not co-sharers being contrary to the materials on record are not maintainable and are liable to be set aside. The learned Advocate submits that since a tenant can become a co-sharer in the case jote by dint of heba deed, in the case in hand, the pre-emptor has become co-sharer tenant of the holding based on the heba-bil-ewaj deed.

Upon perusal of the above-mentioned reported case, it appears that the main issue in the said case was whether the pre-emptors could prove their alleged dated of knowledge of sale and, on the other hand, whether the pre-emptees could prove that the pre-emption case was hit by the principle of waiver and acquiescence. In other words, whether the pre-emption case was time barred (para 16). The observations

made in the reported case as to becoming a co-sharer in the case jote by deed of heba based on the written admission of the pre-emptee, in my view, is not the *ratio* of the case. In the instant case, the pre-emptee in his written objection did not make such admission, rather denied the case of the pre-emptor. Admittedly, the pre-emptor became a tenant in the case jote by a deed of heba-bil-ewaj. The legal implication of heba-bil-ewaj deed for the purpose of pre-emption, therefore, requires a brief discussion.

In ***Liakat Ali Sheikh and others vs. Mahatabuddin and others***, 8 BLC 302, it was held:

> "It is a settled principle of law that a Hiba-bil-ewaz executed in favour of the donee in exchange of prayer mat, a cap and a copy of the Holy Quran is a document carrying no pecuniary consideration. This point has been made clear in the case reported in 11 DLR 353 of which I made mention earlier. In 20 DLR 433 it was held, "The word pecuniary means money and money alone. Therefore, the prayer mat, however valuable is not pecuniary consideration. Similar view appears to have been taken in the decision reported in 44 DLR 228".

Referring to the above-quoted decision, the learned Advocate appearing for the pre-emptee-petitioner submits that ownership of property obtained through heba-bil-ewaj deed is not a sale within the meaning of sale defined in Section 54 of Transfer of Property Act, 1882 which states that 'sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

The Transfer of Property Act has not defined the term ‘price’. Clause (10) of Section 2 of the Sale of Goods Act, 1930 has defined ‘price’ as the money consideration for a sale of goods. In the case reported in AIR 1967 SC 200, the Indian Supreme Court held that the presence of a money consideration is an essential element in a transaction of sale; if the consideration is not money, but some other valuable consideration, it may be an exchange or barter, but not a sale.

In view of the above discussions as to the meaning of heba-bil-ewaz and sale, it is crystal clear that heba-bil-ewaz does not fall within the meaning of sale and as such, the same does not come within the ambit of 3 categories of co-sharer tenant laid down in Section 96(5)(a)(i) of the S A & T Act. Admittedly, the pre-emptor is a co-sharer in the case jote, but his interest accrued in the same by dint of heba-bil-ewaz deed. Therefore, he has no *locus standi* to file the pre-emption case as co-sharer tenant of the case jote.

The next point is whether the impugned exchange deed No. 10532 dated 31.10.2004 was for all practical purposes an exchange deed or a sale deed. The appellate Court below held that the deed in question was in fact a sale deed. The appeal Court observed:

> “প্রথমেই আলোচনা করা যাক- নালিশী ১০৫৩২ নং দলিলটি out and out a sale deed কি না। ...নালিশী দলিলে পুকুরের ২০ শতক সম্পত্তির সহিত বিলের ১২ শতক সম্পত্তির বিনিময় দেখানো হইয়াছে। ১নং প্রতিপক্ষ ডি.ডব্লিউ-২ হিসাবে জেরায় স্বীকার করিয়াছেন যে, "যে জমি

আমাকে দেয় সেই জমি হতে নজিবরের (দাতা) বাড়ি হাফ কিলোমিটার দূরে। আমাদের এলাকার বাড়ির জমির দাম বেশী। বিলের জমির দাম কম।" নালিশী দলিল এবং প্রতিপক্ষ পক্ষের সাক্ষ্য পর্যালোচনায় দেখা যায় যে ২নং প্রতিপক্ষ কিসের স্বার্থে কি লাভের কারণে তাহার পুকুরের দামী ২০ শতক জমি ১নং প্রতিপক্ষকে ছাড়িয়া দিয়া তাহার বাড়ি হইতে হাফ কিলোমিটার দূরে বিলের জমি যাহা বছরের বেশী ভাগ সময় পানির নিচে থাকে এইরকম ১২ শতক সম্পত্তি বিনিময় করিবে তাহা বোধগম্য নহে। আইনের বিধান হইল বিনিময়কৃত সম্পত্তি বিনিময়ের উভয় পক্ষই বিনিময় মানিয়া লইয়া স্ব স্ব দখলে থাকিবে। কিন্তু অত্র মোকদ্দমায় প্রতিপক্ষের দাবীকৃত বিনিময় দলিলের দাতা মোঃ নজিবর রহমান মোল্যা প্রতিপক্ষ পক্ষে সাক্ষ্য প্রদান করিয়া বিনিময়ের বিষয়টি প্রতিষ্ঠিত করেন নাই। ১নং প্রতিপক্ষের বিনিময়কৃত ১২ শতক ডোবা জমির দখল ২নং প্রতিপক্ষ বুঝিয়া পাইয়াছেন কি না তাহা প্রমানিত হয় নাই। সুতরাং দলিলটি out and out a sale deed মর্মে আদালতের নিকট প্রতীয়মান হয়। বিজ্ঞ নিম্ন আদালত তাহার আলোচনায় নালিশী দলিলটি out and out a sale deed নহে মর্মে যে সিদ্ধান্ত প্রদান করিয়াছেন তাহা আদৌ যুক্তিযুক্ত ও সঠিক হয় নাই"।

Exchange has been defined in Section 118 of the Transfer of Property Act. Section 118 is quoted below:

> "118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exchange.
>
> A transfer of property in completion of an exchange can be made only in manner provided of the transfer of such property by sale."

Admittedly, the impugned deed No. 10532 dated 31.10.2004, on the face of it, is an exchange deed. Since the pre-emptor has challenged the said deed as being out and out a sale deed, the onus lies upon him to prove his contention as per Sections 101 and 103 of the

Evidence Act. In the instant case, none of the PWs, who were examined by the pre-emptor, supported his case on the point. On the other hand, OPW1 (pre-emptee) OPW2 and OPW3 categorically deposed that the respective parties took the possession of the properties which were exchanged by the impugned deed No. 10532 dated 31.10.2004. Therefore, I have no hesitation to hold that the appellate Court's finding that the impugned deed was an out and out a sale deed is based on misreading of evidence and also non-consideration of material evidence. Therefore, the judgment and order passed by the appellate Court below cannot be sustained in law and facts. This being the position, I find merit in the Rule.

In the result, the Rule is made absolute. The judgment and order dated 08.05.2017 passed by the appellate Court below are set aside and those dated 06.09.2010 rejecting the pre-emption case passed by the trial Court are affirmed.

Send down the L.C.R.

Mazhar, BO