In the Supreme Court of Bangladesh

High Court Division

(Civil Revision Jurisdiction)

Present:

Mr. Justice Jahangir Hossain

Civil Revision No. 2826 of 2008

In the matter of :

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

And

In the matter of :

Jahir Ahmed .....**.....Petitioner**

-Versus-

Nurul Islam and others

.....for the opposite parties

Mr. Nusrat Alam Chisty with

Mr. Ahsan Habib, Advocates

.....……..for the petitioner

Mr. Maqbal Ahmed, Advocate

…….for the Opposite parties

Judgment on 15.11.2020

By order 10.08.2008 the Rule was issued calling upon the opposite party No. 01 to show cause as to why the impugned judgment and order dated 01.07.2008 passed by the learned Additional District Judge, 1st Court, Chittagong in Miscellaneous Appeal No. 232 of 2007 reversing

that dated 02.10.2007 of the learned Joint District Judge, Potiya, Chittagong in Miscellaneous Case No. 62 of 2000 should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

Facts relevant for disposal of the Rule in a nutshell are that the opposite party No. 01 as petitioner/preemptor filed the original pre-emption Misc. Case vide No. 62 of 2000 before the Joint District Judge, Potiya, Chittagong within the ambit of section 24 of Non-Agricultural Tenancy Act by claiming him as co-sharer in the suit khatian as well as plot. In the said case the present petitioner was made as purchaser-pre-emptee. The claim of preemption right of the opposite party No. 01 was rejected by the trial court on contest in the aforesaid misc. case. The judge of the trial court stated in his judgment and order that though the opposite party No. 01 was a co-sharer in the suit khatian but he failed to prove regarding filing of the pre-emption case within the statutory period of limitation and he had no necessity over the suit land in question.

Thereafter, the opposite party No.01 as appellant preferred Misc. Appeal No. 232 of 2007 before the learned District Judge on the ground that the learned Judge of the trial court was wrong and not able to understand the facts and circumstances of the case as well as the oral and documentary evidence adduced by the parties. Preemptor further made assertion that he filed the case for the pre-emption right within the time from the date of his knowledge. But the trial court erroneously opined that the pre-emption miscellaneous case was barred by law of limitation and the suit land was not necessary for the pre-emptor.

Subsequently, the learned Additional District Judge, 1st Court, Chittagong allowed the said miscellaneous appeal by his judgment and order dated 01.07.2008 upon elaborate discussion and findings after reversing the judgment and order of the trial court. Against which the pre-emptee petitioner filed an application before this Court under section 115(1) of the Code of Civil

Procedure and obtained the present Rule with an order of stay by order dated 10.08.2008.

In support of the Rule Mr. M.A. Chisty along with Mr. Ahsan Habib, learned Advocates contends that B.S Khatian No. 1298 marked as Exhibit-I (Kha) itself shows that neither the pre-emptor nor his predecessor namely Komal Miah is a co-sharer in the suit land. The preemptor may be a co-sharer in the holding but not a co-sharer in the case land and as such he has no right to claim pre-emption over the suit land under section 24 of the Non-Agricultural Tenancy Act. The Appellate Court below failed to distinguish the provision of section 24 of the Non-Agricultural Tenancy Act with the section 96 of the State Acquisition and Tenancy Act. The impugned judgment and order passed by the Appellate Court is based on misconception of law which is occasioning failure of justice. In this contention he has referred to the decision held in the case of Md. Asad Ali-Vs-Golam Sarwar, reported in 11 ADC (AD)(2014) 562.

It is further contended that from exhibit 4, the case deed dated 07.06.1999, it is evident that

the suit land was sold to the strangers, namely Shamsul Alam and others through five sale deed Nos. 5782, 5785, 5787, 5788 on 30.12.1978 and 5763 dated 29.12.1979. The pre-emptee was a tenant in the suit land [small shop] of the said Shamsul Alam and others for a long time. Subsequently, on 07.06.1999 the present pre-emptee-petitioner purchased the land whereupon a development work was made by spending Tk. 82000/- and thus the preemptor's claim of preemption is barred by estoppel, weaver and acquiescence [Akhlasur Rahman-Vs- Safarullah, reported in 42 DLR 149].

It is further submitted that the preemptor has failed to prove his case exclusively of being co-sharer in the suit land. The Appellate Court should have considered that prima facie case of co-sharer is not enough to allow preemption [Hiran Chandra Dey Vs. Abdul Quyum, reported in 54 DLR(AD) 126].

The case deed was registered on 19.01.2000 [executed on 07.06.1999]and the preemption case was filed on 04.10.2000 after lapse of limitation period. The preemptor claims that he came to know

about the sale deed of the case land on 20.08.2000 from one Nurul Alam who as Pw-02 deposed that he told about the sale to the pre-emptor on 20.08.2000 in presence of many people but he could not remember a single name of those persons. Pw-02 also admitted in cross-examination that the preemptee-petitioner decorated the shop and set up a shutter-door. Of course, such repair of the shop could not be done secretly. From which it is clear that the preemptor was aware of the transfer of the suit land from the very beginning, but the Appellate Court failed to consider this point as the trial court did.

Mr. Chisty finally submits that the trial court rightly found that in another preemption case i.e Preemption Miscellaneous Case No. 61 of 2000, the same preemptor amicably settled the litigation. In such way the pre-emptor has relinquished his preemption right in the case holding as well as in the case land and such conduct of the pre-emptor clearly suggests that he has no necessity of the suit land for his peaceful enjoyment of other properties.

On the other hand Mr. Makbul Ahmed, learned Advocate appearing for the opposite party No. 01 submits that the registration of the disputed deed was made on 19.01.2000 but the preemptor-opposite party No. 01 came to know about the said registered deed on 20.08.2000 from one Nurul Alam. Thereafter, the preemptor filed the preemption case on 04.10.2000 within the period of limitation. It is further submitted that the preemptee admitted in cross-examination that the notice was not served as required under the law before purchasing the property by the disputed kabala. The preemptee is duty bound to prove by adducing proper evidence that the preemptor had the knowledge of such transfer from the very beginning of its transaction but there being no evidence on record in favour of the preemptee about the date of knowledge of the preemptor. Therefore, it cannot be said that the preemption case is barred by law of limitation. It is further contended that the preemptor has the necessity of the present case land and the Appellate Court also came to a conclusion stating that the filing of

this preemption misc. case is sufficient to prove that the suit land is necessary for the preemptor.

Learned Advocate lastly submits that there is no evidence on record that the preemptee has denied the date of knowledge of the preemptor regarding the transfer of the suit land and the right of preemption accrues after the transfer of the land and this statutory right cannot be taken away unless a clear case of waiver and acquiescence is made out on evidence. No such evidence has been produced by the preemptee-present-petitioner in the case. And as such the rule, issued by this Court, should be discharged for the ends of justice. In support of his arguments learned Advocate has referred to the decisions namely 46 DLR (AD) 187,14 BLD(AD)29 and 14 BLD(HC)563.

Heard the submissions of the learned Advocates of both parties and perused both the judgment and order of courts below and connected documents on record wherefrom it transpires that the litigation arose between the parties regarding

a registered deed vide No. 2824 dated 19.01.2000 of a shop land.

The claim of the preemptor is that he is a co-sharer in the suit land. On perusal of the R.S. Khatian, marked as exhibit No. 01, it appears that the said khatian holds only one plot number which is 2075. It is also evident from the written objection of the preemptee that prior to selling out of the shop land, the seller/vendor made several requests to the preemptor for purchasing the same. Taking such measures prior to sale by the vendor clearly indicates that the preemptor is a co-sharer in the suit plot.

Admittedly the disputed deed was executed on 07.06.1999 and registered on 19.01.2000. It is evident from Pw-1 i.e preemptor that he came to know about the transfer of the suit land on 20.08.2000 from one Nurul Alam. In course of cross-examination this Pw-01 has confirmed his above version. The said version of evidence has also been corroborated by pw-02 Nurul Alam stating that he provided information regarding sale of the suit land to the preemptor on 20.08.2000. It also

appears from evidence that thereafter the preemptor obtained certified copy of the disputed deed on 27.08.2000 AD and filed the preemption misc. case on 04.10.2000 within four months as laid down in section 24 of Non-Agricultural Tenancy Act. So there is no question of limitation barred by law as preemptor filed the preemption case from the date of his knowledge within the statutory period of limitation. And as such the question of serving notice upon him was not necessary to prove the limitation in filing the preemption case.

It is true that there must be conclusive evidence of waiver or acquiescence which arises when a person knowing that he is entitled to enforce some right, reglects to do so for such a long time that the other person opposing such right may fairly infer that he has waived or abandoned it.

In the present case, it is evident from disputed deed marked as exhibit-04 that earlier the suit land was transferred to the seller/vendor [pro-forma opposite party Nos.3-7] in the year

1978 by five registered deeds. Neither the preemptor nor any co-sharer of the suit land claimed the right of preemption regarding the said suit land transferred to the strangers, Mohammad Shamsul Alam and others [pro-forma opposite party Nos. 3-7] within the ambit of stipulated time even up to the last date of second time transfer of the suit land. The Indian Supreme Court in the case of Shi Adhu Behari Vs. Gajadhar Jaipara and others [1955] ISCR 70 endorsed the view of Mahmood, J of Allahabad High Court (7 all 775 Full Bench) saying that it is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land and that

> **"We agree with Mr. Justice Mohammad that the sale is a condition precedent not to the existence of the right but to its enforceability."**

But there is no evidence adduced by the preemptor in the trial court as to why he being a

co-sharer did not claim the right of preemption for the earlier transfer. Such silence of co-sharers of the suit land indicates that they had given up their interest over the suit land and encouraged the preemptee to purchase the same.

Admittedly the preemptee was enjoying the suit land for a long time as tenant and he had purchased the case land from his land-lord who were originally strangers of the suit land. After the above scenario, if the claim of the preemptor is allowed at this stage as co-sharer, the right of preemption of the co-sharer will continue to happen in every event of transfer of such preemption-right in future with no ending destination. And that is why, the question of estoppel, waiver and acquiescence, incorporated in the law by the legislature, has arisen in the instant case in hand. Our Apex Court in the case of Akhlasar Rahman Vs. Safarullah reported in 42 DLR(AD) (1990)189 held as follows;

> **"It is clear, therefore, that the facts proved in a particular case may give rise to waiver and acquiescence and a**

pre-emptor may be held to be estopped from enforcing his right of pre-emption. It is to be observed, however, that the statutory right will be denied to the pre-emptor only on proof of such combination of facts upon which a court of law can reasonably and validly make an inference of waiver and/or acquiescence. As no specific agreement is necessary for raising such plea, it is equally important to remember that any and every act touching the transaction in which the pre-emptor may have taken part or the mere fact of knowledge about the transfer or temporary unwillingness on his part to buy cannot debar him from claiming his right at the proper time. Essentially, therefore, it will be a question of proper inference from the facts proved in each particular case as to whether the plea of waiver and acquiescence exists validly or not."

The preemptor has to have positive case without any break of claim of preemption right unless a clear case of failure of such claim during interval of the first and last transfer is made out on evidence by him. In the present case the preemptor could not show by adducing evidence that he was in trouble at the time of transfer of the suit land to the strangers, Mohammad Shamsul Alam and others. And as such, the Appellate Court below based on misconception of law and having failed to address this point, allowed the appeal of the preemptor which is occasioning in failure of justice.

In every case it cannot be said that filing of the preemption case is sufficient to prove that the suit land is necessary for the preemptor-petitioner. Because he may have ill-motive to frustrate the peaceful transfer or to make harassment to the seller as well as buyer in order to gain over for the transfer. In the present case trial court in its judgment and order stated that the preemptor had amicably settled with other opposite parties about same nature of transfer in

Preemption Case No. 61 of 2000. It is also evident that the preemptee after buying the suit land made some development work on the suit land by spending Tk. 82000/- which claim of the premptee was not refuted in any way by the preemptor. It is also admitted by Pw-01 in course of cross-examination that he was an employee of a jute mill. It should be mentioned here that the preemptor having received notice from the office of this Court appeared in the instant case to oppose the Rule through his learned Advocate on 13.01.2009. Meanwhile, many years have elapsed without any appropriate steps taken by the parties concerned.

On perusal of the aforesaid aspects it suggests that the preemptor has relinquished his interest of preemption right once for all in the suit land. But his subsequent present claim is not justifiable because of the fact that the preemptee has been enjoying the suit land for many years even around 12 years after obtaining the instant Rule.

Having considered the contentions of learned Advocates of both parties, discussion and findings

made above and facts and circumstances of the case this Court finds merit in the Rule to interfere with the impugned judgment and order dated 01.07.2008 passed by the Additional District Judge, 1st Court, Chittagong. Therefore, the impugned judgment and order dated 01.07.2008 is hereby set aside.

In the result, the Rule is made absolute, however, without any order as to costs.

The order of stay granted earlier by this Court shall stand vacated.

Send down the lower court record along with a copy of this judgment and order at once.

[Jahangir Hossain,J]

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