

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.3499 OF 2017

In the matter of:

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

And

Md. Ramiz Uddin being dead his legal heirs-
Mosammot Meherun Nessa and others

... Petitioners

-Versus-

Sree Somir Ranjan Sarkar and others

... Opposite parties

Mr. Md. Faruque Ahammed with
Mr. A. Mannan Bhuiyan,

Mr. Omar Faruq, Advocates

.... For the petitioners.

Mr. Provir Neogi with

Mr. Sumon Ali, Advocates

.... For the opposite party No.1.

Heard on 31.10.2024 and Judgment on 09.12.2024.

This Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and order dated 22.08.2017 passed by the learned Joint District Judge, 3rd Court, Cumilla, in Miscellaneous Appeal No.32 of 2013 affirming the judgment and

order dated 10.03.2013 passed by the learned Senior Assistant Judge, Debidwar, Cumilla allowing Pre-emption Case No.20 of 1998 should not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that opposite party No.1 as petitioner instituted above case under Section 96 of the State Acquisition and Tenancy Act, 1950 for pre-emption against registered kabala deed dated 18.01.1998 executed by opposite party No.2 in favour of opposite party No.1 transferring $8\frac{2}{3}$ decimal land as described in the schedule to the plaint.

It was alleged that the petitioner was co-sharer by inheritance in the above holding but the opposite party No.1 a stranger. The petitioner did not get any notice of above transfer and he has filed this case after getting a certified copy of the impugned document on 16.03.1998.

Opposite party No.1 contested the case by filing a written statement alleging that he was in lawful ownership and possession in 48 decimal land including disputed $8\frac{2}{3}$ decimal by purchase. After recent land survey opposite party No.2 disclosed that he has purchased 8.23 decimal land from the disputed plot No.70 from one Anukul Chandra Deb and claimed title on the basis of above purchase. Opposite party No.1 wanted to obtain a nadabipatra from opposite party No.2 for the disputed land but due to good relation with opposite

party No.1 he obtained the impugned sale deed without payment of any consideration money.

At trial petitioner examined 1 witness and documents of the petitioner were marked as Exhibit Nos.1-5 and opposite party examined 1 witness and documents of the opposite party No.1 were marked as Exhibit Nos.'Ka' to 'Cha'.

On consideration of the facts and circumstances of the case and evidence on record the learned Senior Assistant Judge, Cumilla allowed above case and granted pre-emption to the petitioner.

Being aggrieved by above judgment and order of the trial Court opposite party No.1 preferred Miscellaneous Appeal No.32 of 2013 to the District Judge, Cumilla which was heard by the learned Joint District Judge, 3rd Court, Cumilla who dismissed the appeal and affirmed the judgment and order of the trial Court.

Being aggrieved by and dissatisfied with above judgment and order of the Court of Appeal below above appellants as petitioners moved to this Court and obtained this Rule.

Mr. Md. Faruque Ahammed, learned Advocate for the petitioners submits that the impugned kabala deed was not in fact a deed of sale but it was a deed of repurchase of 8.23 decimal land which in fact opposite party No.1 purchased 48 decimal land including above disputed land long before. But opposite party No.2 having raised claim

of title on the basis of purchase from one Anukul Chandra Deb opposite party No.1 obtained impugned kabala deed without any consideration money to avoid future complication. But the learned Judges of both the Courts below have failed to appreciate above aspect of the case and most illegally treated above impugned kabala deed (Exhibit No.'Kha') as a sale deed which is not tenable in law. The learned Advocate further submits that in the schedule of the impugned kabala deed Khatian Number has been mentioned to be DP 39 which is a separate khatian and admittedly petitioners are not a co-sharer in above khatian. To get an order of pre-emption a pre-emptor must continue to be a co-sharer till disposal for the case for pre-emption and he must not lose his co-sharership during continuation of above proceedings. If the pre-emptors co-sharership in the disputed holding is extinguished before final conclusion of the pre-emption proceedings then the pre-emption must be denied. In support of above submission the learned Advocate refers to the case law reported in 66 DLR (AD) 2014 Page-157. Above DP Khatian must be treated as split up of S.A. Khatian No.7 under Section 35 of the Evidence Act, 1872 and it must be held that the petitioner did not continue to be a co-sharer in the disputed holding before conclusion of the pre-emption proceeding. The learned Judge of the Court of Appeal below has failed to appreciate above materials on record and most illegally and without an independent assessment of evidence on record dismissed the appeal and affirmed the flawed and

unlawful judgment and order of the trial Court which is not tenable in law.

On the other hand Mr. Probir Neogi, learned Advocate for opposite party No.1 submits that admittedly petitioner was a co-sharer by inheritance in the disputed holding and opposite party No.1 a stranger to the same and this case for pre-emption under Section 96 of the State Acquisition and Tenancy Act, 1950 was filed within the statutory period of limitation. The learned Judges of both the Courts below on analysis of evidence on record concurrently held that the impugned kabala deed dated 18.01.1998 (Exhibit No.4) was a deed of sale and above findings being based on evidence on record this Court in its revisional jurisdiction cannot interfere with above findings. As far as the split up of the disputed holding and creation of a separate khatian in the name of the opposite party No.1 is concerned, learned Advocate submits that DP Khatian means draft publication khatian which mentions of a stage of preparation of the survey khatian and unless and until a khatian is finally published in the gazette notification that cannot be taken into judicial consideration. Since this case was filed before creation of a separate B.S. Khatian and before alleged splitting up of the disputed holding even if a new khatian is created during pendency of this case that will not in any way affect the merit of this case. On consideration of above facts and circumstances of the case and evidence on record the learned Judge of the Court of Appeal below rightly

dismissed the appeal and affirmed the judgment and order of the trial Court which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It is admitted that the petitioner was a co-sharer by inheritance in the disputed holding comprising Plot No.70 S.A. Khatian No.7 and opposite party No.1 is a stranger to the same and this case under Section 96 of the State Acquisition and Tenancy Act, 1950 was filed within the statutory period of limitation.

The only ground taken by the opposite party at trial has been stated at Paragraph No.11 of his written objection. It has been alleged that opposite party No.2 claimed title in disputed $8\frac{2}{3}$ decimal land on the basis of purchase from one Anukul Chandra Deb and to avoid future complication opposite party No.1 obtained impugned registered deed from opposite party No.2 without any monetary consideration. Since impugned kabala deed dated 18.01.1998 (Exhibit Nos.4 and Kha) is not a deed of sale the same was not subject to pre-emption under Section 96 of the State Acquisition and Tenancy Act, 1950.

It turns out from impugned document dated 18.01.1998 that the same has been designated as a sale deed and due to want of money opposite party No.2 sold $8\frac{2}{3}$ decimal land to opposite party No.1 for a

consideration of Taka 6,000/-. There is nothing in above document to show that above deed was not a sale deed or no monetary consideration was paid. Opposite party No.1 is a party to above written and registered instrument, as such, he cannot raise any claim against any written term of above document in the absence of an allegation of fraud or error. In the written objection opposite party No.1 did not claim that above impugned kabala deed was obtained by fraud or the same was erroneously written as a kabala deed. As such above claim of the opposite party No.1 that Exhibit No.4 was not a sale deed is not at all tenable in law.

Moreover, on consideration of evidence on record the learned Judges of both the Courts below concurrently held that Exhibit No.4 was a deed of sale and above findings of the Courts below being based on evidence on record this Court cannot in its revisional jurisdiction interfere with above findings of facts.

It is true that in Exhibit No.4 that Plot No.70 has been mentioned rightly but instead of S.A. Khatian No.7 Draft Publication Khatian or DP Khatian No.39 was mentioned D.P. or Draft Publication a stage of preparation of survey khatian when objections are invited and addressed and thereafter a record of right is finalized and published in the official gazette. Before publication in the gazette a new khatian does not enjoy the legal status attributed to a record of right.

It is admitted that B.S. Khatian No.39 has been finally published in the name of opposite party No.1 for 48 decimal land in 2017 long after the institution of this case.

I have carefully gone through case law referred to above by the learned Advocate for the petitioners in support of his submissions as to cessation co-sharership of the pre-emptor. In above case the pre-emptor himself transferred all his land in the disputed holding which made him a non co-sharer in above holding before conclusion of the trial pre-emption case. But in this case the petitioners did not transfer his land in the disputed holding. The draft separate khatian of the disputed land was published after filing of this case and above land survey was concluded by gazette notification after conclusion of trial. As such preparation of above B.S. Khatian splitting up the holding shall not disentitle the petitioner from getting pre-emption. The facts and circumstances of the case referred to above by the learned Advocate for the petitioners is quite distinguishable from those of this case in hand and above case law is not at all applicable in this case.

In above view of the materials on record I am unable to find any illegality or infirmity in the impugned judgment and order passed by the learned Joint District Judge affirming the judgment and order of the trial Court nor I find any substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection is liable to be discharged.

In the result, the Rule is hereby discharged. The order of stay granted at the time of issuance of the Rule is hereby vacated.

However, there is not order as to cost.

MD. MASUDUR RAHMAN
BENCH OFFICER