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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

Civil Revision No. 2808 of 2009

Md. Ali Akbar
----- The pre-emptor-appellant-petitioner
=Versus=
Al-Haj Mohammad Hasan and others.
---- The pre-emptee-respondent-opposite-parties

Mr. Md. Golam Noor, Advocate
----- For the petitioner
Mr. Abul Kalam Chowdhury, Advocate,
----- For the opposite-parties.

Heard on 06.02.2017, 07.02.2017 and
Judgment on 15.03.2017.

At the instance of the present pre-emptor (applicant)-appellant-petitioners, Md. Ali Akbar, this Rule has been issued calling upon the opposite-parties No.1-3 to show cause as to why the judgment and order dated 29.10.2008 passed by the District Judge, Noakhali in Civil Miscellaneous Appeal No.21 of 2005 affirming the judgment and order dated 24.03.2005 disallowing the Pre-emption Case No.48 of 2002 by the Senior Assistant Judge, Noakhlai should not be set aside.

The relevant facts for disposal of the Rule, inter alia, are that the present petitioner as an applicant filed the Miscellaneous Case No.48 of 2002 under section 24 of the Non-Agricultural and Tenancy Act, 1949 in the Court of the learned Senior Assistant Judge, Chatkhil, Noakhali

claiming for a right as a pre-emptor regarding the suit land described in the application.

The facts of the case of the applicant are inter, alia, that the case property is situated in the Noakhali Pourasova measuring 15 decimals appertaining to dag Nos.363 and 364 khatian No.66 in Mouza No.111, Uttor Fakirpur, Noakhali Sadar, Noakhali originally belonged to Rokabanu and her husband Rahim Uddin, who died leaving behind two sons Korban Ali and Basu Miah and a daughter Samrat Banu. The said Basu Miah created a deed of gift to transfer the land to his foster son Badu Miah. The said Samrat transferred her inherited land to Hossen Ali, the father of the applicant, on 25.03.1943. Subsequently, Korban Ali purchased 14 decimals of land and he died leaving behind his two sons Hossen Miah and Fazol Miah a daughter Ambia Khatun and second wife Meherun Nessa and also sons of Meherun Nessa namely Saidul Hoque, Abdul Haque and Anwar Hossain. The said Abdul Haque died leaving behind her mother and brothers and the property devolved upon the father of the present applicant in a single jama as the co-sharers. Accordingly, the record of rights in MRR khatian was published in the name of Hossen Miah and after his death the applicant acquired total 38 $\frac{11}{16}$ decimals of land by way of purchase as well as inheritance which latter on increase to 53 $\frac{1}{16}$ decimals of land in D.S. No.66 and MRR khatian No.80.

One Zakir Hossain Kamal acquired 1+ $2\frac{3}{5}$ decimals of land in plot No.363 of khatian Nos.34 and 66. The said Kamal created the transfer deed No.5645 dated 03.05.1988 in favour of the present opposite-party No.4 one Mohsen, son of Anwar Hossain (Ana Miah present opposite party No.5) by way of an exchange deed with the opposite-party Nos.1-3 on 03.03.1992 regarding the land measuring 6 decimals, but it was not an exchange deed rather, it was a sale deed without giving any prior notice to the co-owners. Abdus Jaher, who is the husband of the opposite-party No.3 came into the land for measurement on 24.04.2001, who claimed to have purchased the land. As per his declaration the present applicant came to know about the transaction by way of awaj, which has created a right as a pre-emptor under section 24 of the Act, 1949.

The case has been contested by the present opposite-party Nos.1-3 by filing a written objection and denying the statements made in the above application claiming the right under section 24 of Act, 1949. It is further contented that 9 decimals of land situated in dag Nos.363 and 364 of Mouza No.111 Uttor Fakirpur, P.S. Sadar, District-Noakhali belonged to one Zakir Hossain Kamal, who entered into an exchange deed with the present opposite-party No.5 by registering the awaj deed No.5645 dated 03.05.1988 and a separate khatian was prepared in the name of the opposite-party No.5 Humayun Kabir. Md. Mohsen exchanged 10 acres of land to the present opposite-party Nos.1-3 by a register deed of awaj being

deed No.2836 dated 02.03.1992 by acquiring their 30 decimals of land in order to exchange their respective land.

After obtaining the said deed by way of exchange the present opposite-party Nos.1-3 developed the land by filling the land by earth at a huge cost and also constructed a homestead thereupon. The present opposite-party Nos.1-3 have been in enjoyment and possession of the land through the tenants Jhangir Hossain and Anwar Hossain.

Both the parties submitted huge volume of documents in the case. After hearing the parties the learned Senior Assistant Judge, Chatkhil, Noakhali (on transfer from the learned Assistant Judge, Sadar Noakhali) and also considering the exhibits and the deposition of the witnesses dismissed the case by his judgment and order dated 24.03.2005. Being aggrieved the present petitioner as the appellant preferred the Misc. Appeal No.21 of 2005 in the Court of the learned District Judge, who after hearing the parties and considering the evidence disallowed the appeal by his judgment and order dated 29.10.2008. This revisional application has been filed under section 115(1) of the Code of Civil Procedure challenging the impugned order and the Rule was issued thereupon.

Mr. Md. Golam Noor, the learned Advocate appearing for the present petitioner submits that the petitioner as a co-sharer of the jote of the suit land but the present opposite-party Nos.4 & 5 Humayun Kabir and Md. Mohsen transferred the land measuring 15 decimals to the present opposite-party Nos.1-3 by way of sale deed without giving any prior notice required

under section 24 of the Non-Agricultural and Tenancy Act, 1949, as such, a right has been created in favour of the present petitioner as a pre-emptor but both the Courts below came to a wrongful conclusion by committing an error of law occasioning failure of justice. The learned Advocate also submits that both the Courts below committed an error of law regarding stipulated period of time for filing a case under the provision of section 24 of the said Act, which provides stipulated period of 4 months from the date of knowledge, therefore, the judgment and order passed by the Courts below are not sustainable under the provision of law, therefore, this Rule should be made absolute.

The learned Advocate also submits that the learned trial Court framed as many as 7 issues and decided 6 issues in favour of the present-petitioner, despite the fact, dismissed the case which has been non-application of mind and therefore, illegal. He also submits that the transfer of the suit land is an outright sale by the present opposite-party Nos.4 and 5 in favour of the opposite-party Nos.1-3, but the appellate Court bellow wrongly found that it is an exchange deed, therefore, the right of the petitioner does not come within section 24(II)(b) of the Act, 1949, which is a misconstruing the legal provision of law by the courts below.

The Rule has been opposed by the present opposite-party Nos.1-3.

Mr. Abul Kalam Chowdhury, the learned Advocate appearing with the learned Advocate Mr. Iqbal Kalam Chowdhury submits that the learned trial Court after considering the evidence adduced and produced by the

respective parties in support of their respective cases found that the miscellaneous case has been filed beyond the stipulated period under section 24 of the Act, 1949, as such, dismissed the case which was affirmed by the learned appellate Court below, but the present petitioner obtained the present Rule by misleading this Court, therefore, the Rule should be discharged.

The learned Advocate also submits that section 24 of the Act, 1949 requires a transfer by way of sale in order to create a right in the form of per-emption for a pre-emptor, but the deed No.2836 dated 03.03.1992 (Exhibit-‘2’ and Exhibit-‘Ga’) is manifestly a deed of exchange, therefore, no right has been created in favour of the present petitioner and this suit has been filed in order to cause suffering to the opposite-parties, as such, the Rule should be discharge.

The learned Advocate further submits that the petitioner and the present opposite-parties are residing close to each other for a long period of time and the present opposite-parties have constructed a homestead in the year of 1992 within the knowledge of the present petitioner, but this suit has been filed in the year of 2002, which is more than 9 years from the date of execution of the exchange deed, therefore, the case is barred under the statutory limitation period, as such, no interference is called for from this Court.

Considering the above submissions made by the learned Advocates appearing for both the respective parties and also considering the revisional

application filed under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and order passed by the appellate Courts below and also considering the materials in the lower Court record, it appears to me that a case has been filed by the present petitioner as an applicant claiming a right by way of pre-emptor regarding the suit property mentioned in the plaint under section 24 of the Non-Agricultural and Tenancy Act, 1949. It further appears that the present petitioner as the applicant has chosen this provision of law as the case property is situated within the Noakhali Pourasova and it is a homestead, therefore, a non-agricultural land.

Now the question is whether the present petitioner as the applicant-appellant could prove acquiring a right within the above provision of law or not ? In this regard, I have considered the deposition of the P.Ws and D.Ws who have been testified by describing the land as homestead and situated within the Pourasova. In this regard, section 24 of the Act, 1949 is a relevant law in this case which reads as follows:-

> "24.(1) If a portion or share of the non-agricultural land held by a non-agricultural tenant is transferred, one or more co-sharer tenants of such land may, within four months of the service of notice issued under section 23 and, in case no notice had been issued or served, then within four months from the date of knowledge of such transfer, apply to the court for such portion or share to be transferred to himself or to themselves, as the case may be."

The above law creates a right upon a non-agricultural land in favour of co-sharer tenant, if the land is transferred a party has a remedy within 4 months of any notice before such transfer or 4 months from the date of knowledge of such transfer. In the instant case Exhibit-‘Ga’ is a deed executed and registered on 03.03.1992. The case has been filed on 14.06.2001 which is much beyond limitation period of 4 months. However, the present petitioner claimed that he came to know about the said document through one of the opposite-parties on 20.04.2001. I have examined the documents and it appears to me that the date of knowledge as to the deed for transfer is not tractable, because the present petitioner had certain knowledge as soon as the present opposite-party Nos.1-3 started development of the land filling up by earth and constructing a homestead tin shed thereupon immediate after the deed. The petitioner has been residing nearby and the suit land has been developing for a long period of time and the knowledge of transfer could not be beyond the knowledge of the petitioner, as such, the petitioner as the applicant failed to prove his knowledge as the transfer as claimed.

Section 24(II)(b) strictly provided that section 24 would not be applicable in the case of a transfer of any land by way of exchange or partition. In this regard I have examined the document itself dated 03.03.1992, which has been executed by both the parties as exhibits 2 & ‘Ga’. From the plain reading of the deed it appears that it contains two schedules of lands being schedule ‘ka’ and schedule ‘kha’ which have been

owned by two different persons and the deed begins with " রায়তি স-ত্বর জমি-জমার এওয়াজ হেবানামা দলিলপত্র। প্রথম পক্ষের আনুমানিক মূল্য মং ১০,০০০/-(দশ হাজার)। প্রথম প-ক্ষর প্রাপ্ত ভূমির পরিমাণ মোট ১৫ (প-নর) শতাংশ। দ্বিতীয় প-ক্ষর আনুমানিক মূল্য মং ১০,০০০/-(দশ হাজার)। দ্বিতীয় প-ক্ষর প্রাপ্ত ভূমির পরিমাণ মোঃ ৩০ (ত্রিশ) শতাংশ।"

Besides, the above description containing in the document itself all the requirements of an exchange deed are present in this deed under the provision of section 118 of the Transfer of Property Act. A deed to be defined as the deed of exchange, it has to satisfy the requirements of section 118 of the Transfer of Property Act, which read as follows :-

> "**Exchange" defined**-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 the manner provided for the transfer of such property by sale."

The learned trial Court wrongly found that the deed can be considered as an exchange deed, eventhough, he decided to dismiss the suit filed by the present petitioner. In this regard I consider that there is a confusion as to the intention of the present opposite-party Nos.4 & 5 and the opposite party Nos.1-3, because the petitioner claimed that there are two deeds registered on the same deed, one exchange deed executed by and between the opposite party Nos.4 & 5 and opposite party Nos.1-3 which

bears a registration No.2836 dated 03.03.1992. Another sale deed was executed on 03.03.1992 between the present opposite-party No.6 namely Mesbahuddin Ahmed and the opposite-party No. 4 namely Md. Humayun Kabir regarding the land situated in different Mouja. It transpires that the land of the sale deed and exchange deed there are some connections. It appears to me that the land measuring 30 decimals exchange situated Mouja Ejbaliea was first exchange deed measuring 15 decimals of land situated Mouja Uttor Fakirpur by the register deed No.2836. Thereafter on the same date the land measuring 30 decimals was sold by the opposite-party Nos.4 & 5 to the opposite-party No.6 Mesbahuddin. I therefore, consider that the exchange deed is a valid deed and it cannot be a subject matter of a right as per section 24(II)(b) of the Non-Agricultural and Tenancy Act, as such no right has been created in favour of the present petitioner.

Regarding the limitation period I have discussed above and both the Courts below concurrently found that the case was filed in the year of 2001 claiming a right under section 24 arises from a deed dated 03.03.1992 which is certainly beyond the statutory period, therefore, the present petitioner is not entitled to get a benefit which is badly barred by limitation.

I am now inclined to consider the judgment and orders passed by the learned Courts below. The learned trial Court put his labour to pass a lengthy judgment, but not in a disciplined way as required from a trial

Court in such a case. However, the learned trial Court came to a conclusion to dismiss the case on the basis of the following findings :-

> "It has already been established from the above that the applicant was althrough aware of the impugned transfer but he has come into the instant case after a long lapse of more than 9 years and had slept over from exercising his right of pre-emption in respect of the land alienated by way of the impugned deed which cannot be, because the law of limitation certainly prescribes the time for filing cases/suits and as such the applicant is not entitled to unlimited period of time for setting up the instant case of pre-emption.
>
> Moreover, the facts and circumstances of the case have clearly constituted and made not a case of acquiescence and waiver. Therefore, the case is time barred and also barred by the principles of waiver and acquiescence. The points are so decided against the applicant. "

The learned appellate Court below concurrently found against the present petitioner and disallowed the appeal on the basis of the following findings :-

> "আপীলকারী/প্রার্থী মোঃ আলী আকবর মোকদ্দমা দায়ের করেছে ১৪/০৬/২০০১ খ্রিঃ তারি-খ। ঐ সময় জমা খারিজ পৃথক হ-য় গে-ছ এবং পৃথক খতিয়ান খোলা হয়েছে। তাই নালিশী সম্পত্তিতে মোকদ্দমা দায়েররের সময় আপীলকারী মোঃ আলী আকবর কো-ন শরীক প্রজা ছিল না। তার মোকদ্দমা স্পষ্টতঃ তামাদি-ত বারিত। নালিশী সম্পত্তি এওজবদল করা হ-য়-ছ। কিন্তু এটা যে একটি পৃথক কবলা দলিল এটি প্রমা-ণর জন্য প্রার্থীপক্ষ উপযুক্ত সাক্ষ্য প্রামাণাদি আদালতে হাজির করতে পারে নাই। বিজ্ঞ সহকারী জজ সঠিক এবং আইন সংগত ভা-বই বা-জ ৪৮/০২ (সা-বক নম্বর বা-জ

৬৬/২০০১) নং মোকদ্দমাটি তামাদিতে বারিত মর্মে সিদ্ধান্ত গ্রহণ করেছেন। ত-ব নালিশী দলিল বিক্রয় কবলা মূ-ল তার গৃহিত সিদ্ধান্ত সঠিক নয়। ”

In view of the above concurrent findings of the Court below after examining the documents and considering the evidence produced by the parties. I do not find that the learned appellate court below has committed any error of law to disallow the appeal by the impugned judgment and order. I am therefore, not inclined to interfere into the judgment and order passed by the learned appellate Court below.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is discharged.

The interim order of direction to maintain status-quo in respect of the suit land passed at the time of issuance of the Rule is hereby recalled and vacated.

The office is directed to communicate this judgment and order to the concerned court and also directed to send down the Lower Courts Records at once.