

Bench:

Mr. Justice Bhishmadev Chakrabortty

Civil Revision No. 416 of 2011

with

Civil Revision No. 417 of 2011

Selina Begum

..... petitioner

-Versus-

Md. Shahidullah and others

..... opposite parties

Mr. Md. Sumon Ali with

Mr. Nabil Ahmed Khan, Advocates

..... for the petitioner

(in both the Ruels)

Mr. Md. Imam Hasan with

Mr. Md. Shahinul Islam, Advocates

..... for opposite party 1

(in both the Ruels)

Judgment on 03.07.2025

In both the Rules the parties are same and common question of fact and law are involved, therefore, these have been heard together and are being disposed of by this Judgment.

In Civil Revision 416 of 2011 the Rule at the instance of the pre-emptee was issued calling upon opposite party 1 to show cause as to why the judgment and order of the Additional District Judge, Court 2, Gazipur passed on 12.10.2010 in Miscellaneous Appeal 59 of 2006 dismissing the appeal affirming the judgment and order of the Joint District Judge, Additional Court, Gazipur passed on 23.05.2006 in Pre-emption Miscellaneous Case 08 of 2005 allowing the case for pre-emption should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

In Civil Revision 417 of 2011 Rule was issued at the instance of the same pre-emptee calling upon same opposite party to show cause as to why the judgment and order of same date of same Additional District Judge passed in Miscellaneous Appeal 58 of 2006 dismissing the appeal affirming the judgment and order of the same Joint District Judge passed on 23.05.2006 in Miscellaneous Case 7 of 2005 allowing the case for pre-emption should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

Facts relevant for disposal of the Rules, in brief, are that the pre-emptor filed Pre-emptor Miscellaneous Case 81 of 1996 in the Court of Assistant Judge, Gazipur against the pre-emptee and others which was subsequently transferred to the Court of Joint District Judge, Additional Court, Gazipur and renumbered as Pre-emption Miscellaneous Case 08 of 2005. In the case the pre-emptor stated that he is a co-sharer of the land of CS khatian 25 corresponding to SA khatian 69 and RS khatian 131 of *mouja* Bhuna, police station Joydebpur, district Gazipur by way of purchase and inheritance. His father Rabiullah Munshi and his sons and daughters including the pre-emptor purchased some lands from the original recorded tenant Brindabon and others on 06.11.1959; from Jogandra son of Balaram on 03.07.1972 and from Prem Das Sundari Roy and Paritosh Chandra Roy on 02.04.1972 and has been owning and possessing the land as co-sharer of the khatian. RS khatian was prepared the name of the pre-

emptor's father. His father died leaving behind 4 sons and 3 daughters. The pre-emptee is not a co-sharer in the suit khatian and plot in question but he is a stranger purchaser. The vendors sold out 2.22 acres of land to the pre-emptee on 13.04.1996 without serving any notice upon the pre-emptor as required by the law. The mutation and separation of *jama* in the name of Hazrat Ali, the predecessor of the vendors of pre-emptee is collusive, fraudulent, inoperative and created. The *jama* was not separated as per the provisions of section 117 (1)(c) of the State Acquisition and Tenancy Act, 1950 (the SAT Act). The land in question is adjacent to his homestead and requires for his free movement. The pre-emptor went to Joydebpur Sub-registry Office and obtained a certified copy of the sale deed on 24.11.1996 and having definite knowledge filed the case on 30.11.1996 under section 96 of the SAT Act for pre-emption of the disputed land. Subsequently the pre-emptor by amendment turned it into a case under section 24 of the Non-Agricultural Tenancy Act, 1949 (the Act, 1949).

The pre-emptee, petitioners herein, filed written objection denying the material allegations made in the application for pre-emption. He stated that the pre-emptor is not a co-sharer in the khatian in question. Md. Hazrat Ali, father of the pre-emptee's vendors purchased 3.56 acres of land from the heirs of CS, SA and RS recorded tenants through two separate sale deeds dated 03.07.1972. He opened a separate new khatian 69/kat in Mutation and Separation

Case 347/72-73. He paid ground rent in respect of the suit land and had been owning and possessing the same. Subsequently Hazrat Ali died and his heirs at the direct mediation of the pre-emptor on 02.08.1995 entered into an agreement for sale with the pre-emptee for entire share of 3.56 acres at consideration of Taka 10,78,000/-. The pre-emptee paid Taka 2,00,000/- as earnest money and got possession of the land. The vendors then received balance amount of consideration money but failed to obtain sale permission from Court because of some minor vendors. Subsequently opposite parties 2-6 sold their share of 2.22 acres to the pre-emptee through a registered *kabala* dated 13.04.1996 showing consideration of Taka 2,00,000/-. At the advice of pre-emptor the pre-emptee developed the land raising up it by cutting soil worth about Taka 5,00,000/-. Thereafter, at the advice of the pre-emptor another *kabala* was registered on 01.11.1996 in respect of .4450 acres of land showing low price. The pre-emptor with ill motive and bad intension to file the instant cases did not put his signatures in the sale deeds. The pre-emptee thereafter within the knowledge of the pre-emptor entered into an agreement for sale of suit land with another person on 19.06.1996 at Taka 2,50,000/- per bigha. The pre-emptor's father Rabiullah and others tried to grab the property for which the vendors' predecessor Hazrat Ali filed Petition Case 734A of 81 and another case being No. 16(11)80 with Joydebpur police station. Rabiullah Munshi, father of the pre-emptor filed pre-emption cases 93 and 94 of 1980 against Hazrat Ali, the father of the

pre-emptee's vendors in respect of the same suit land when he purchased it. The aforesaid cases were dismissed. At the mediation of pre-emptor and with his full knowledge the vendors sold the disputed property to the pre-emptee. In the premises above, the case for pre-emption would be dismissed.

In pre-emption Miscellaneous Case 73 of 1996 which was subsequently transferred and renumbered as Miscellaneous Case 7 of 2005, the pre-emptor sought pre-emption in respect of another *kabala* dated 01.11.1996 for .4425 acres of land bringing similar allegation as made in the previous case for pre-emption. The pre-emptee-petitioner also resisted the said case by filing written objection as stated herein before.

The trial Court framed following issues to adjudicate the matter in dispute:

1. *Whether the application for pre-emption is maintainable in the present form?*
2. *Whether the pre-emptor is a co-sharer in the jote?*
3. *Whether the case is bad for defect of parties?*
4. *Whether the application is barred by limitation?*
5. *Whether the application is barred by principles of waiver, acquiescence and estoppel?*
6. *Whether the pre-emptor is entitled to any other relief?*

The trial Court heard both the cases analogously. In the trial of the cases, the parties examined 3 witnesses each. The documents produced by the pre-emptor were exhibits-1-5 series while the documents of the pre-emptee were exhibits-A-I(i)/1. However, the Joint District Judge decided all the material issues against the pre-emptee and allowed both the cases, against which the pre-emptee preferred two separate appeals before the District Judge, Gazipur. The Additional District Judge, Court 2, Gazipur upon hearing dismissed the appeals and affirmed the judgments passed by the trial Court. In this juncture, the pre-emptee approached this Court and obtained these Rules.

Mr. Sumon Ali, learned Advocate for the petitioner in both the Rules taking us through the materials on record, the grounds taken in the revisional applications and the supplementary affidavits submits that the Courts below found that the pre-emptor still is a co-sharer of the *jote* or khatian and is entitled to get pre-emption but such finding is contrary to the materials on record. He submits that Hazrat Ali, the predecessor of the vendors of pre-emptee purchased the suit land from its recorded tenant in 1972 and mutated his name through a Mutation and Separation Case in 1973. Thereafter he himself and subsequently his heirs, the vendors of the pre-emptee paid rent in respect of the purchased land in the separated khatian till transfer of the same to the pre-emptee. The predecessor of the vendors of pre-emptee paid ground rent separately in respect of his share till the present transfer.

But both the Courts below found that no separate *jote* was opened by Hazrat Ali as per law and the pre-emptor is still a co-tenant of the disputed khatian. He then submits that the predecessor of pre-emptee's vendor Hazrat Ali and Rabiullah, father of the pre-emptor fought in various civil and criminal cases. Rabiullah filed Pre-emption Cases 93 and 94 of 1980 against Hazrat Ali in respect of the same land but lost. Therefore, Rabiullah's son, the pre-emptor cannot reopen the issue by filing the present pre-emption cases on subsequent transfers. He then refers to the supplementary affidavits sworn on 09.2.2011 and the case of Abdul Hakim (Md) vs. Md. Nazrul Islam and others, 66 DLR (AD) 157 and submits that the certified copy of the mutation khatian and information slip are Annexures-A and A1 to the supplementary affidavit. This Court can consider Annexure-A, the certified copy of the mutation khatian being a public document. The aforesaid documents prove that *jama* in the name of Hazrat Ali has been separated duly. He then refers to the cases of Ahmed Hossain and others vs. Basharat Ali and others, 32 DLR (AD) 54 and Shree Monoranjan Banik and another vs. Shree Nitha Ranjan Karmaker and others, 39 DLR (AD) 75 and submits that as per the materials on record the *jama* has been separated by the father of the vendors of pre-emptee as required under section 117 (1)(c) of the SAT Act. A civil Court is not competent to ignore the order on the ground of finding some irregularity in the same in dealing with a case for pre-emption. He finally refers to the case of Dr. Md. Forman Ali Miah vs.

Nizamudddin and others, 26 BLC (AD) 52 and submits that while the pre-emptee claimed that the *jama* has been separated through a mutation case and submitted a copy of document in support of the claim, the burden of proof that it was not separated duly was shifted upon the pre-emptor. But the pre-emptor did not take any step to prove it. Both the Courts below have gone wrong in law and fact and allowed the cases for pre-emption which is required to be interfered with by this Court in revision. The Rules, therefore, would be made absolute.

Mr. Md. Imam Hasan, learned Advocate for pre-emptor opposite party 1 in both the Rules on the other hand opposes the Rules and supports the judgments passed by the Courts below. He submits that both the Courts concurrently found that *jama* was not separated in compliance with the provisions of section 117(1)(c) of the SAT Act. It is settled position of law that a subdivision of a holding is not legally valid unless it is effected by written order issued by a Revenue Officer duly authorized under the law following issuance of prior notice to the co-sharers. He refers to the provision of rules 4, 8(4), 23(1)(h), 24, 24(2) and 24(3) of the Tenancy Rules, 1954 (Rules, 1954) and rules 13, 14, 75, 90 and 92 of Government Estates Manual, 1958 (Manual, 1958) and submits that in case of mutation and separation of *jama* the authority has to maintain 3 registers. Register I is to be maintained in the office of Deputy Commissioner (Collector); register II is to be maintained in office of Tahsilder and register IX is to be maintained by

the Assistant Commissioner of land (AC land). As per the provisions of rules 4, 8(4), 23 and 24 of the Rules, 1954 and section 143 of the SAT Act, the aforesaid registers are to be maintained properly and updates of any *jama* is to be noted by the concerned officers. According to the provisions of Rules 14 and 75 of the Manual, 1958 all updates arising out of sub-division must be recorded in register I. Under rule 90 of the Manual, 1958 the Revenue Officer will maintain the update in register I and record a corresponding note in the office of AC land in register IX and a copy of it is to be forwarded to the Tahsilder under rule 91 who will then update it in Register II and as per rule 92 the amendment entered into register II is to be verified by Gazetted Officers and Circle Revenue Officer. Relevant entries concerning subdivision must be retained in register IX and as per provisions of section 143 of the SAT Act any change of the holding must be reflected and recorded in the Collector's record of rights maintained in the district level in register I. In the instant case, the information slips submitted by the pre-emptor exhibit-5 series prove that the *jama* was not separated. The separation, if any, was a mere paper work and not valid in the eye of law for not following the provisions of the aforesaid law without serving any notice upon the co-sharers required under section 117(1)(c) of the SAT Act and maintaining the updates in the Register. Mr. Hasan refers to the cases of Golam Mostafa vs. Begum Rokeya Khandaker and others, 53 DLR 232; Rokeya Begum vs. Md. Nurul Absar, 9 BLC (AD) 169; Tofazzal

Hossain (Md) and others vs. Momtaz Begum and others, 52 DLR 223; Md. Abdur Rouf and others vs. Mahmuda Khatun and others, 33 DLR (AD) 323; Government of Bangladesh, represented by the Secretary, Ministry of Land, Dhaka and others vs. M Anwar Hossain and others, 16 BLC (AD) 155; Md. Ershad Ali and another vs. Sree Rampada Das and others, 10 MLR 1 and relied on the principle laid therein that without following the procedure of law separation of *jama* cannot be treated as valid. He adds that the evidence of DW 3 further proves that the *jama* or holding or khatian was not separated. Therefore, the pre-emptor is still a co-sharer of the *jote* or holding and as such the Courts below correctly allowed the cases for pre-emption. He then submits that *ratio* of the case reported in 26 BLC (AD) 52 is quite distinguishable with the present one. He finally refers to the cases of Selina Gulshan Ara Gul Hasna vs. Mashiur being dead his legal heirs: 1(Ka) Asmaul Husna and others 73 DLR (AD) 54 and Harunur Rashid being dead his heirs: Mrs. Mahbuba Rashid and others vs. Afruza Khanam and others 15 ADC 20 and submits that if a co-sharer tenant owns a portion of the land in any plot he is to be treated as co-sharer in entire plot, even if the land of that plot is recorded in more than one khatian. Therefore, the present pre-emption cases under section 24 of the Act, 1949 is well maintainable. Consequently, the Rules having no merit would be discharged.

I have considered the submissions of the learned Advocates for both the sides, gone through the materials on record, the provisions of law and *ratio* of the cases cited by the parties.

The cases were for pre-emption under section 24 of the Act, 1949 for transfer of *viti* lands to the pre-emptee through two registered *kabalas*. In the pre-emption applications the pre-emptor contended that his father Rabiullah Munshi and his offsprings purchased land from the suit khatian and became co-sharers. After the death of his father he became a co-sharer in the khatian by inheritance. On the contrary the pre-emptee in the written objection contended that Hazrat Ali, predecessor of the vendors of pre-emptee purchased a part of the khatian measuring 3.56 acres in 1972 through two registered *kabalas*. In Mutation and Separation Case 347 of 72-73 he mutated his name, opened a new khatian and paid rent as per his share. Thus the predecessor of the pre-emptor or he himself lost the co-sharership in the khatian or *jote* in 1973. The pre-emptor contended that *jama* was not separated in compliance with the provisions of sections 117(1)(c) of the SAT Act, 1950 because no notice was served upon the co-sharers as required by the law. The entry of separation of *jama* was not recorded in volumes I, II and IX as per the provisions of tenancy Rules, 1954 and Manual, 1958. It is found that at the very initial stage of the cases with other documents the pre-emptee submitted a copy of mutation and separation khatian in the trial Court through feristi. It is found from exhibit-C series that Hazrat Ali, the predecessor to pre-

emphree's vendors paid rent to the government in respect of his share measuring 3.56 acres and there is an endorsement of taking fees for mutation in the first payment made in 1973. Although in evidence the other documents of the pre-emphree were marked as exhibit-C series but the mutated khatian was not exhibited. It is found that OPW 3, an Assistant Officer of land in evidence stated, “পর্যায় সাথে রেজিস্ট্রারের মিল আছে।” প্রঃ (). But the fact remains that it was not marked as exhibit. The aforesaid document bears the signature of Tahsilder of Joydebpur Tahsil office. Before issuing these Rules, the petitioners filed supplementary affidavits on 09.02.2011 in both the Rules annexing the certified copy of the mutated khatian which contains the seals and signatures of concerned officers as required by the law. It is found from annexure-‘A’ that AC land of Joydebpur passed order on 26.02.1973 mutating the name of purchaser Hazrat Ali in respect of 3.56 acres of land and opened a separate khatian. While the pre-emphree submitted a copy of the aforesaid document in the trial Court to show that *jama* was separated and led evidence to that effect, it was incumbent upon the pre-emptor under section 103 of the Evidence Act to call for the volume from the concerned office to prove that *jama* was not separated in compliance with the provisions of section 117 (1)(c) of the SAT Act. The aforesaid principle has been settled by our apex Court in the case of Dr. Forman Ali Miah vs. Nizam Uddin and others, 26 BLC (AD) 52. But mysteriously the pre-emptor without doing so collected some information slips exhibit-5 series to prove

that the *jama* was not separated. I have scrutinized those information slips exhibit-5 series. I find there that the pre-emptor collected information through those slips in a *zig zag* way about non service of notice only to make out a case that *jama* was not separated as per law. But he did not dare to call for the volume from office of AC land. In case of any mutation and separation of *jama* the record of such entry or amendment is to be maintained in registers I, II and IX i.e., in the office of Collectorate (Deputy Commissioner), Tahsilder and AC land respectively. If mutation is done and *jama* is separated as per the provisions of section 117(1)(c) of the SAT Act, a copy of it is to be maintained in the office of tahsilder as per Munaua, 1958. The tahsilder accordingly maintained the record of mutation in the name of the Hazrat Ali, the predecessor of pre-emptee's vendors on the basis of the order passed by AC land and accordingly he issued Annexure-A, copy of which was submitted in the trial Court. In the evidence OPW 3, the Tahsilder, who brought the Register from his office in support of the mutation case proved the parcha which tallies with the Register. His evidence to the effect that the page of the volume do not contain the signature of the Revenue Office in no way helps the pre-emptor because the Tahsilder maintains Register II on receipt of a copy of order of mutation from AC land. Such copy must not contain the signature of the Revenue Officer. I have carefully gone through the cases referred to by Md. Imam but I find that *ratio* laid in those

cases do not match this case considering the facts upon which the principle has been laid therein.

Moreover, it is admitted by the parties that the pre-emptor's father Rabiullah Munshi filed pre-emption cases 93-94 of 1980 in the Court of First Munsif, Dhaka against transfer of same land in 1972 to Hazrat Ali, father the pre-emptee's vendors. It is found in exhibits-F and F1 that the cases were dismissed for non prosecution on 17.7.1981. In view of the above position, it is clear that the pre-emptor's father filed the aforesaid cases in the year 1980 while co-sharers transferred the land of *jama* or khatian to Hazrat Ali, the predecessor of the vendors of the pre-emptee. But after 16 years this pre-emptor, the son of Rabiullah filed the instant miscellaneous cases for pre-emption on subsequent transfers by the heirs of Hazrat Ali. The right to pre-emption by co-sharer Rabiullah or the present pre-emptor, if any accrued in 1972 while the land was transferred by the original owners to Hazrat Ali. Rabiullah exercised his right of pre-emption by filing cases but subsequently did not proceed with those and as such the cases were dismissed for non-prosecution. Therefore, his son, the present pre-emptor cannot claim pre-emption on subsequent transfers by the heirs of Hazrat Ali. The present miscellaneous cases for pre-emption is found barred by principles of *estoppel* and *waiver*. Where the pre-emptor's father did not proceed with the cases filed against the predecessor of the vendors of pre-emptee for selfsame land, the present pre-emptor is estopped by the

conduct of his father to file these cases for pre-emption. Principle of *estoppel* by order of Court shall also apply here. Therefore, the trial Court committed serious error of law in deciding the issue whether the cases are barred by principle of *estoppel* and *waiver* in favour of the pre-emptor which was affirmed by the appellate Court. These luxurious cases for pre-emption cannot be allowed by granting pre-emption in the form of equitable relief to the pre-emptor, who has waived and lost his right of pre-emption by his act and the act of his predecessor-in-interest. The Courts below ought to have decided the issue of *waiver* and *estoppel* against the pre-emptor also and dismissed the cases and by not doing so committed error of law resulting in an error in such decisions occasioning failure of justice.

In the premises above, I find merit in both the Rules. Accordingly, the Rules are made absolute. No order as to costs. The judgment and orders passed by the Courts below in the miscellaneous cases and appeals are hereby set aside. The pre-emption cases, therefore, are dismissed.

Communicate this judgment and send down the lower Court records.

Rajib