IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

First Miscellaneous Appeal No. 49 of 2018
with
(Civil Rule No. 366 (FM) of 2022)

In the matter of:

Sree Dilip Kumar Biswas, son of late Satish Chandra Biswas of village- Tarora, Post Office- Goalbathan, Police Station and District- Magura, present address: 19/1, Larmini Street Wari, Police Station- Sutrapur, District- Dhaka-1203.

… Appellant

-Versus-

Md. Amirul Islam (Shelly), son of late Abdul Mazid (1) Advocate of village- Haspatal Para, Magura, Police Station and District- Magura and others.

…Respondents

Mr. Shasti Sarker with
Mr. Laxman Biswas, Advocates

…For the appellant-petitioner

Mr. Mustafa Niaz Muhammad, Senior Advocate with
Mr. Md. Ekramul Islam, Advocate

…For the respondent-opposite-party no. 1

Heard on 13.02.2024 and 28.02.2024.
Judgment on 28.02.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J.

Since the facts and point of law involved in the appeal and that of the rule are intertwined, they have heard together and are being disposed of by this common judgment.

At the instance of the pre-emptee in Pre-emption Miscellaneous Case No. 03 of 2006, this appeal is directed against the judgment and order dated 11.11.2015 passed by the learned Joint District Judge, 1st Court, Magura in the said Miscellaneous Case allowing the same.

The case of the respondent-pre-emptor in short is that:

An area of 77 decimals of land originally belonged to one, Surendranath Biswas and accordingly, his name was recorded in C.S. Khatian No. 577. After the demise of that Surendarnath Biswas, his only son Jitendranath Biswas became the owner of the property left by his father. Subsequently, Jitendranath Biswas by way of registered deed of *patta* dated 26.01.1955 transferred 2(two) decimals of land in favour of the predecessor of the pre-emptor, Abdul Mazid and two others. Subsequently, Abdul Mazid died leaving behind 6(six) sons and 1(one) wife who have been made as pre-emptor and opposite-party nos. 3-8 and accordingly, the pre-emptors became the co-sharer in C. S. Khatian No. 577. Thereafter, Surendranath Biswas gifted 12 decimals of land from C. S. Plot No. 4407 in favour of his daughter, Charu Shila and son-in-law Mohendra Nath Mitra. Since they have no issue for which they adopted a son named, Sudhir Kumar Bhattacharjee and transferred 12 decimals of land by oral gift and S. A. record was prepared in his name. It has further been stated that, the S.A. recorded tenant Sudir Kumar, subsequently

transferred 12 decimals of land in favour of Niva Rani Sarker, the opposite-party no. 2 vide a will dated 21.12.1980. Subsequently, that very Niva Rani Sarker by registered sale deed dated 15.09.2005 transferred the case land that is, 12 decimals to the pre-emptee-purchaser. The pre-emptor had no knowledge about the transfer but on 05.10.2005 after obtaining certified copy of the said sale deed, he became aware of the disputed transfer and filed the pre-emption case under section 24 of the Non-Agricultural Tenancy Act.

On the contrary, the present appellant who is the pre-emptee-purchaser contested the said case by filing a written objection contending *inter alia* that, the land of C.S. Plot No. 4407 appertaining to C. S. Khatian No. 577 was subsequently recorded in S.A. Khatian Nos. 553, 554 and 555 and 2 decimals of land was recorded in S. A. Khatian No. 554 in the name of the predecessors of the present pre-emptors and the case land measuring 12 decimals of land was prepared in the name of the predecessor of the present pre-emptee in S.A. Khatian No. 555 out of a single S. A. plot that is, S. A. Plot No. 4407. In the aforesaid way, the pre-emptor is not any co-sharer in S. A. Khatian No. 555. It has further been stated that, though in the disputed sale deed, there has been clear mention about the preparation of disputed S.A. Khatian No. 555 but the pre-emptor has not described the above fact in the entire petition of pre-emption. It has been concluded that, 77 decimals of land in C.S. Khatian No. 577 appertaining to C.S. Plot No. 4407 has subsequently been prepared as 12 decimals in S.A. Khatian No. 555, 2 decimals of land in S. A. Khatian No. 554 and 63 decimals of land in S. A. Khatian No. 553. Since the pre-

emptor is not any co-sharer in disputed S. A. Khatian No. 555 so the pre-emption case filed is not maintainable.

In order to dispose of the said Miscellaneous Case, the learned Judge of the trial court framed as many as 3(three) different issues and the pre-emptor examined two witnesses and produced several documents which were marked as exhibits- "1-5" while the pre-emptee-appellant examined himself as OPW-1 and produced two different documents which were marked as exhibits- 'A' and 'B'. The learned Judge of the trial court then upon considering the materials and evidence on record vide impugned judgment and order allowed the Pre-emption Case holding that, though the khatians have been separated by subsequent record but since the plot remains same, so the pre-emptor has not been ceased to be any co-sharer in the case land relying on the decision reported in 65 DLR (AD) 82.

It is at that stage, the pre-emptee as appellant came before this court by preferring this appeal. After preferring the appeal, the pre-emptor filed an application for injunction on which this court vide order dated 13.04.2022 issued rule and directed the parties to maintain status quo in respect of the possession and position of the suit land initially for a period of 6(six) months which was lastly extended on 05.04.2023 for another 1(one) year which then gave rise to Civil Rule No. 366 (FM) of 2022.

Mr. Shasti Sarker, the learned counsel appearing for the appellant-petitioner upon taking us to the memorandum of appeal and the impugned order and that of the application for injunction vis-à-vis the documents appended thereto at the very outset submits that, since the pre-emptor is

not any co-sharer in S.A. Khatian No. 555 so he is not entitled to pre-empt the case land.

The learned counsel in his second leg of submission also contends that, since none of the parties in S. A. Khatian Nos. 554 or 555 has made any party in the pre-emption case so the pre-emption case itself is bad for defect of parties.

The learned counsel by referring to the impugned judgment and order also contends that, though the parties to the pre-emption case produced several documents yet in the entire judgment, the learned Judge has failed to discuss any of the evidence resulting in he has arrived at a wrong finding.

The learned counsel by refuting the decision so relied upon the learned Judge of the trial court reported in 65 DLR (AD) 82 next contends that, that very judgment is not applicable in the facts and circumstances of the instant case as the said judgment has also taken into consideration in the decision subsequently reported in 9 LM (AD) 284 (the learned counsel so cited) where it has been held that, moment a khatian is separated, the co-sharer of earlier khatain will cease to be any co-sharer in the subsequent khatian and therefore, the decision so relied upon by the learned Judge of the trial court is totally distinguishable with the facts and circumstances of the instant case.

The learned counsel by referring to the partition deed dated 06.02.1945 (Exhibit-‘4’) also contends that, as per the partition deed amicably executed among the co-sharer of C.S. recorded tenants, the pre-emptor has also ceased to be any co-sharer in the case land and that very

proposition has been settled in the decision reported in 9 LM (AD) 284 and on that count as well, the judgment passed by the learned Judge of the trial court cannot sustain.

The learned counsel lastly contends that, since there has been no description in the entire petition of pre-emption as well as in the schedule thereof in regard to S. A. record let alone the co-sharers thereof so the pre-emption case merely basing on C. S. record only mentioned in the schedule of the pre-emption petition cannot lie and therefore, the decision so relied upon by the pre-emptor-respondent will not be applicable in the facts and circumstances of the instant case and finally prays for allowing the appeal and discharging the rule obtained by the pre-emptor-respondent.

On the contrary, Mr. Mustafa Niaz Muhammad, the learned senior counsel appearing for the pre-emptor-respondent no. 1 submits that, since C. S. Plot No. 4407 is still there in the S. A. Plot number so mere preparing three S. A. Khatains out of single C. S. Khatian No. 577, the pre-emptor will not be ceased to be a co-sharer in the case land and therefore, the learned Judge of the trial court has rightly relied upon the decision reported in 65 DLR (AD) 82 while allowing the pre-emption.

The learned counsel to intensify his such submission also placed his reliance in the decision reported in 73 DLR (AD) 54 and by reading paragraph no. 7 thereof further contends that, similar point has also been raised in the said cited decision, and the Appellate Division came to a finding that, in spite of separating khatian if the plot number remains same, the pre-emptor will be treated as co-sharer in the case land.

To refute the submission of the learned counsel for the pre-emptee-appellant in regard to defect of parties, the learned counsel then placed his reliance in the decision reported in 45 DLR (AD) 86 and contends that, apart from the purchaser other co-sharers in case land is not any necessary party but if any party ever raises objection with that regard, he/she can be made party in the pre-emption proceeding but for not impleading any co-sharer of any khatian in the pre-emption case, it will not be barred under order I, rule 10(2) of the Code of Civil Procedure.

The learned counsel by referring to the amicable partition deed also contends that, still as per the said partition deed, the pre-emptor is co-sharer in the case land and therefore, mere having separate khatian in subsequent S.A. Khatian, the co-sharership of the pre-emptor will not ceased and the learned Judge has rightly passed the impugned judgment and order.

The learned counsel by refuting the submission so placed by the learned counsel for the pre-emptee-appellant on the decision reported in 9 LM (AD) 284 next contends that, in the said decision though decision of 65 DLR (AD) 82 has been mentioned but in conclusion that very decision has not been taken into consideration and therefore, the said decision will not be applicable in the facts and circumstances of the instant case and finally prays for dismissing the appeal and making the rule absolute.

We have considered the submission so advanced by the learned counsels for the pre-emptee-appellant and that of the pre-emptor-respondent no. 1. We have very meticulously gone through the petition of pre-emption, the disputed sale deed as well as the evidence and materials

on record available before us. On going through the petition of pre-emption as well as the written objection filed thereagainst, we find that, in the entire pre-emption petition, there has been no mention in regard to subsequent S. A. record which has admittedly been recorded both in the name of the predecessor of the pre-emptor as well as the predecessor of the pre-emptee-appellant. However, in the written objection, the pre-emptee-appellant has given a vivid description with regard to the subsequent record prepared in the name of the predecessor of both the pre-emptor and the pre-emptee-appellant as well as other S. A. recorded tenants whose name major portion of land of C. S. Khatian no. 577 appertaining to C.S. Plot No. 4407 has been recorded that is, in S.A. Khatian No. 553. We also find that, after filing written objection by the pre-emptee-appellant, the pre-emptor brought an amendment to the said petition for pre-emption negating the recital so made in the deed of partition dated 06.02.1945 and then very consciously the pre-emptor has opted not to describe anything about the preparation of S.A. record so prepared in the name of his predecessor as well as the predecessor of the present pre-emptee.

However, on earlier occasion when we found that, there has been no description with regard to S. A. Khatian in the body of the petition of pre-emption as well as in the schedule thereof, the learned counsel for the pre-emptor-respondent no. 1 then took adjournment and then filed an application for taking into evidence of certain documents under order XLI, rule 27 of the Code of Civil Procedure. We have gone through the said application in particular, photocopy of the S. A. Khatian No. 554,

information slip thereof and that of information slip as regards to S.A. Khatain No. 555, *dakhila* as well as other information but since neither in the petition of pre-emption nor in the testimony of the pre-emptor's witness there has been any assertion with regard to preparation of S.A. records and those documents produced, so invariably we cannot take into account of those documents as of additional evidence under order XLI, rule 27 of the Code of Civil Procedure. Accordingly, we find no substance in the said application and hence, the same is rejected.

Now in order to adjudicate the instant appeal, we would like to confine our discussion and observation keeping ourselves within the ambit of the co-sharership in the case land which is the crux of the dispute among the parties. It is the sole contention of the learned counsel for the pre-emptor that though C.S. Khatian No. 577 was subsequently recorded in three separate S.A. Khatians bearing Nos. 553, 554 and 555 and the name of the predecessors of the pre-emptors was recorded in S. A. Khatian No. 554 so they (pre-emptors) will be regarded as co-sharer in the case land since 77 decimals of land has been recorded in a single plot number that is, plot no. 4407 though in three separate S. A. Khatians and therefore, they are co-sharer in the case land. But in absence of any assertion to that effect, in the petition of pre-emption or any evidence led, we cannot take that assertion for adjudicating the instant appeal even in the four corners of the impugned judgment the learned Judge of the trial court has willfully shrugged off such case rather made some observation which is totally extraneous to the pleadings of the parties when he out of the blue, placed his reliance in the decision reported in 65 DLR (AD) 82

but that very decision will never be made applicable in absence of any assertion to that effect but such legal lacuna has not been taken by the trial court.

Furthermore, we have perused the decision reported in 73 DLR (AD) 54 but the facts so described therein is totally distinguishable with the present one.

Moreover, the said cited decision relates to making separate khatian on the back of mutation thereof but the case in hand, the khatian has not been separated rather new khatian has been prepared on the heels of subsequent land survey record so that very decision has got no manner of application in the facts and circumstances of the instant case.

Furthermore, on going through the written objection filed by the pre-emptee-appellant, we also find that, soon after purchasing the case land by way of disputed sale deed, he mutated his name in the khatian and subsequent record that is, B.S. record has also been prepared in the name of the pre-emptee-appellant. So all those very vital facts have clearly been sidetracked by the learned Judge of the trial court while allowing the pre-emption case.

Regard being had to the above facts and circumstances, we don't find any iota of substance in the impugned judgment and order which is liable to be set aside.

Accordingly, the appeal is allowed.

The judgment and order dated 11.11.2015 passed by the learned Joint District Judge, 1st Court, Magura in Miscellaneous Case No. 03 of 2006 is hereby set aside.

Since the appeal is allowed, the connected rule being Civil Rule No. 366 (FM) of 2022 obtained by the pre-emptor-respondent is thus discharged.

The order of status quo granted at the time of issuance of the rule stands recalled and vacated.

Let a copy of this judgment be communicated to the learned Joint District Judge, 1st Court, Magura forthwith.

At the fag-end of the judgment, the learned counsel for the pre-emptor-respondent submits that, the documents so have been annexed with the application filed for taking additional evidence in particular, Annexure-'B', 'C', 'D' and 'D-1' thereof may be taken back by replacing the photocopy of the same.

The prayer is allowed.

The learned counsel for the pre-emptor-respondent is permitted to take back the said annexure by replacing the same with photocopy duly attested by him.

Mohi Uddin Shamim, J.

I agree.

Abdul Kuddus/**B.O**.