

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Muhammad Abdul Hafiz

Civil Revision No. 921 of 2021

Md. Samsul Hoque alias Samsul
Pre-emptor-Respondent-Petitioner

-Versus-

Md. Mostakin and others
Pre-emptees-Appellants-Opposite Parties

Mr. Md. Abdul Wadud Bhuiyan,
Senior Advocate with
Mr. Rasheduzzaman Bosunia, Advocate
for the petitioner

Mr. Zaman Akter, Advocate
for the opposite parties

Judgment on: 17.7.2023

This Rule was issued calling upon the opposite party Nos. 1-12 to show cause as to why the impugned Judgment and Order dated 15.12.2020 passed by the learned Additional District Judge, Nilphamari in Miscellaneous Appeal No. 19 of 2016 allowing the appeal and thereby reversing the Judgment and Order dated 28.1.2016 passed by the learned Senior Assistant Judge, Soiyadpur, Nilphamari in Miscellaneous Case No. 10 of 2008 allowing the Pre-emption Case should not be set aside and/ or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioner being pre-emptor filed Miscellaneous Case No. 10 of 2008 in the Court of learned Senior Assistant Judge, Soiyadpur, Nilphamari praying for Pre-emption under section 96 of the State Acquisition and Tenancy Act stating inter alia that the case land of Lot No. 4 as described in schedule 'Ka' to the pre-emption application originally belonged to Basharatulla Bania and Abbas Ali in equal share and S.A. Khatian No. 58 was correctly prepared in their names. After the death of Abbas Ali, the petitioner, the opposite party Nos. 13-14 and predecessors of the opposite party Nos. 15-17 namely late Mohammad Ali got the case jote as the heirs of late Abbas Ali. Thus the pre-emptor-petitioner is a co-sharer by inheritance in the case jote. In spite of that pre-emptor-petitioner purchased 13 decimals of land from the son of Basaratullah by registered kabala deed No. 1934 dated 07.04.1991 and also purchased 16 decimals of land from another son of Basaratullah by registered kabala deed No.3644 dated 10.06.1990. The owners of the land as described in Lot No.1 were Manir Uddin, Jamar Uddin and Majibar Rahman; the pre-emptor-petitioner purchased $10\frac{3}{4}$ decimals of land from the owner of lot

No.1 namely Majibar Rahman through registered kabala deed No.1937 dated 23.02.1994 and the pre-emptor-petitioner also purchased 11 decimals of land from the owner of lot No.1 namely Eunos Ali son of Manir Uddin through registered kabala deed No. 6684 dated 18.08.1984 and in this way the petitioner is owner in Lot No.1 and co-sharer by purchase. The owners of Lot No.2 were Aser Mamud, Rahimuddin and Tarifan Bibi; the S.A. khatian No. 754 was prepared in their names. The land of plot Nos. 1853 and 1891 are in khatian No. 754 and the petitioner has land in plot No. 1908 which is contiguous to plot No. 1891. The owners of Lot No.3 were Kamasha Charan Roy, Barmani Mohan Roy, Keshob Chandra Roy and Bholu Mamud. The S.A khatian No. 115 was published in their names and there are three plots in that khatian and one of the plots is 1889 and the pre-emptor-petitioner has land in plot No. 1890 which is contiguous to plot No. 1889. In this way the pre-emptor-petitioner is co-sharer by purchase, co sharer by inheritance and contiguous land owner of the case jotes. The opposite party No. 12 transferred the case land to one Ashraf Ali who was the predecessor of opposite party Nos. 1-11 beyond the

knowledge of the pre-emptor petitioner through registered kabala deed No.4304 dated 07.12.2005 and subsequently the pre-emptor-petitioner came to know about the same on 04.02.2008 while the opposite party Nos.1-11 were trying to partition the case land of 'ka' schedule land, thereafter the pre-emptor by obtaining certified copy confirmed about the sale of the said case property and ultimately this petitioner as pre-emptor filed the instant pre-emption case by making the statutory deposit, impleading all the necessary parties.

The opposite party Nos.1-8 and 10-11 contested the case by filing a written objection denying all the material allegations of the pre-emption application contending inter-alia that the present case is not maintainable as per provision of section 96 of the State Acquisition and Tenancy Act, 1950 as the same is under Soiyadpur Puorashova and also contended that according to the amendment of the said law dated 20.09.2006, the petitioner's pre-emption right has been ceased as a co-sharer by purchase and contiguous land owner and as such the present pre-emption case is not maintainable in respect to Lot Nos. 1-3; that the land of Lot No.4 has been

purchased within the full knowledge of the pre-emptor-petitioner and after his death, the opposite parties are possessing the case land jointly and the opposite parties after purchasing the land made some development work through labour and due to that they have spent about 20,000/- Taka and prepared the land for cultivation and since the petitioner brought the instant case with some false statement the same is liable to be disallowed.

The learned Senior Assistant Judge, Soiyadpur, Nilphamari allowed the aforesaid Pre-emption Case by his Judgment and Order dated 15.12.2020.

Against the aforesaid Judgment and Order the pre-emptees as appellants filed Miscellaneous Appeal No. 19 of 2016 before the learned District Judge, Nilphamari which was transferred to the learned Additional District Judge, Nilphamari who passed the impugned Judgment and Order reversing the Judgment and Order dated 15.12.2020 passed by the Senior Assistant Judge, Soiyadpur, Nilphamari and hence the pre-emptor as petitioner moved this application under Section 115(1) of Code of Civil Procedure before this Court and obtained this Rule.

Mr. Md. Abdul Wadud Bhuiyan, learned Senior Advocate for the pre-emptor-petitioner, submits that during trial on recall the pre emptor as Pt.W.1 stated that " ১৯০৮ দাগের জমি পৈত্রিক, ১৮৯০ দাগের সম্পত্তি আমার কেনা। ১৮৮৯ এবং ১৮৯১ দাগের জমি লাগোয়া এবং নালিশী জমি" but the Appellate Court below without discussing and considering the above evidence on record passed the impugned judgment in a slipshod manner. He further submits that S.A Khatian No. 58 was correctly prepared in the name of Basharatullah Bania and Abbas Ali as equal owner of Lot No.4 of 'Ka' schedule land and after the death of Abbas Ali, the petitioner, the opposite party Nos. 13-14 and predecessor of the opposite party Nos. 15-17 namely late Mohammad Ali got the case jote as the heirs of late Abbas Ali and as such the Trial Court after examining Exhibit-1 rightly held that the petitioner is a co-sharer by inheritance in the case jote but the learned Appellate Court below without considering such material aspect refused pre-emption and as such committed an error of law resulting an error in the decision occasioning failure of justice. He then submits that learned Appellate Court below rejected the pre-emption case of the petitioner holding that the pre-emption case is

not maintainable as most of the plots of the case land are under the area of Saiyadpur Pourashova but it appears from the application that the petitioner filed the instant pre-emption case in respect of 13 decimals from plot No. 1908, 30 decimals from plot No. 1891, 22 decimals from plot No. 1889 and 14 decimals from plot No. 1890 and according to Gazette Notification dated 17.05.1998 since plot No. 1908 and 1891 are the land of rural area so there is no bar against filing of the pre-emption case under section 96 of the State Acquisition and Tenancy Act, 1950 but the learned Court of Appeal below failed to consider this provision of law and thus committed an error of law resulting an error in the decision occasioning failure of justice. He further submits that the Gazette Notification dated 10.05.1998 issued by the Ministry of Local Government, Rural Development and Co-operatives extending the area of Saiyadpur Pourashava it is seen that out of 4 case plots of land Plot No. 1889 and 1890 were included in Saiyadpur Pourashava, Plot No.1891 and 1908 remained plots of rural area. So, the pre-emption application under Section 96 of the State Acquisition and Tenancy Act is maintainable for Plot No. 1891

and 1908. So far as plot Nos. 1889 and 1890 are concerned, which were included in Municipal area, the application for pre-emption may be converted to an application under section 24 of the Non-Agricultural and Tenancy Act, because the petitioner fulfilled all the requirements of section 24 of the Non- Agricultural and Tenancy Act. In the case reported in 8 ALR 39 a Single Bench of High Court Division held as follows:

"It is settled proposition that the mention of a wrong provision or the omission to mention a provision which is the source of power will not invalidate an order where such power exists. The pre-emptor being co-sharer in the khatian is entitled to initiate a pre-emption proceeding under section 24 of the Non-Agricultural and Tenancy Act also. Hence the proceedings initiated by the pre-emptor may be treated as under section 24 of the Non-Agricultural and Tenancy Act. In the case of Col. Md. Hasmat Ali (retired) of Bangladesh Army Medical Service -Vs- Government of Bangladesh and another reported in 47 DLR (AD) 1 this view has been established "mention of wrong provision or the omission to

mention the provision which contains the source of power will not invalidate an order where source of power exists." (Para-18)

He next submits that since the petitioner is a co-sharer by purchase of plot No. 1890 situated in Saiyadpur Pourashava the application which has been filed may be converted into an application under section 24 of Non-Agricultural Tenancy Act, because the petitioner has fulfilled all the requirements of section 24 of the said Act and the application is maintainable in respect thereof. Since the petitioner is co-sharer by inheritance in the land of plot No. 1908 situated in rural area pre-emption case filed under section 96 of the State Acquisition and Tenancy Act is maintainable. Since the petitioner is contiguous land owner of case plot No. 1891 situated in rural area the pre-emption case under section 96 of the State Acquisition and Tenancy Act is maintainable in respect of this plot. He next submits that Section 96 of the State Acquisition and Tenancy Act was amended by the Act No. XXXIV of 2006 in 2006. But the deed under pre-emption was executed on 07.12.2005 and so the law in force on 07.12.2005 i.e., the former section 96 will be applicable in this case. Under former Section 96 of the State Acquisition and Tenancy Act, a person may file pre-emption application within four months of the service of notice given under section 89, or, if no notice has been served under section 89 within

four months of the date of knowledge of the transfer, may apply to the court for the portion or share to be transferred to himself or themselves. He next submits that Section 96(1) of the State Acquisition and Tenancy Act provides that the limitation for filing pre-emption case is four months from the date of registration of the document. So, the interpretation given by the Appellate Division is only for the purpose of counting the period of limitation for the purpose of filing the pre-emption case. In 42 DLR (AD) 123 it has been held, inter-alia, as follows:

"13. The question of law that the right of pre-emption accrues on the date of registration of the deed of sale when registration is compulsory had stood the test of time as is now a stare decisis is, as established precedent handed down by the past judges"

"14. We are thus left with no compulsive argument to depart from the past and initiate a break."

“15. The Trial Court and the lower Appellate Court correctly decided the issue of limitation.”

16. The Trial Court and the lower Appellate Court correctly decided the question of limitation.”

But a deed after registration, takes effect from the date of execution of the deed. It has been held in 44 DLR (AD) 176 that a document when registered will take effect from the date of execution. So the law which was in force on the date of the execution of the deed will govern pre-emption. In 44 DLR (AD) 176 it has been held, inter alia, as follows:-

“When the same vendor executes and registers two sale deeds in respect of the same suit land in favour of two different purchasers on two different dates, section 47 of the Registration Act, settles which one will prevail over the other. The sale deed

which was executed earlier but registered later in point of time will prevail over the sale deed executing later but registered later in point of time and the criterion in such cases for the purpose of determining when the sale takes effect is not the date of registration but the execution of the sale deed itself." The former section 96 of the State Acquisition and Tenancy Act which gives right to the tenant contiguous to the land transferred to pre-emption was available to the petitioner and as such the pre-emption application is maintainable. The view taken by the Appellate Court in this respect is correct. Since the deed was executed on 07.12.2005 and became effective from this date under section 47 of the Registration Act, the law in force on 07.12.2005 will be applicable in this case. So the right of pre-emption can be exercised under section 96 of the State Acquisition and Tenancy Act as was in force before amendment made by Act XXXIV of 2006. He lastly submits that in the facts and circumstances, and in view of the law applicable to the present pre-emption applicant, the application for plot No.1908 situated in rural area as co-sharer by inheritance is maintainable under section 96 of the State

Acquisition and Tenancy Act. The application for plot No. 1891 situated in rural area is maintainable as contiguous owner of land under section 96 of the State Acquisition and Tenancy Act. The application for plot No. 1890 situated in Soiyadpur Pourashava may be converted to an application under section 24 of Non-Agricultural and Tenancy Act and may be allowed as co-sharer by purchase. Thus the judgment and order of the appellate Court is not sustainable in law and pre-emption may kindly be allowed in respect of plot No. 1908, 1891 and 1890 as aforesaid.

Mr. Zaman Akter, learned Advocate for the pre-emptees-opposite parties, submits that during pendency of the pre-emption case pre-emptor filed an application for amendment of the pre-emption application. As per amendment application the pre-emptor amended the date of cause of action of the pre-emption case which is as follows; para 8 of the pre-emption application নালিশী ৪৩০৪ নং কবলা দলিল খানা ৬-৪-০৮ইং তারিখে ভলিয়ুম বইয়ের লিপিবদ্ধ হইয়াছে। এবং রেজিস্ট্রেশন আইন এ বিধান মতে ঐ তারিখে দলিল খানি রেজিস্ট্রী হইয়াছে বলে গৃহীত হইবে। Pre-emptor further amended the para 10 of the pre-emptor application which as follows: “গত ইং ৩০.৪.১১ তারিখে নালিশী দলিলের (৪৩০৪) জাবেদা নকল সংগ্রহের পর দেখা যায় যে দলিল খানা

৬.০৪.২০০৮ ভলিউম বহিতে উঠিয়াছে এবং উক্ত তারিখ হইতে অত্র মোকদ্দমার কারন উদ্ভব হইয়াছে।

The amended applications were allowed by the Order No. 36 dated 5.6.2011. However the learned Court examined two witnesses of the pre-emptor-petitioner and 3 witnesses of the pre-emptees opposite parties and after scrutinize the record allowed the pre-emption application then being aggrieved and dissatisfied with the Judgment and order passed by the Trial Court pre-emptees opposite parties filed a Miscellaneous Appeal before the learned District Judge which was subsequently transfer to the Court of learned Additional District Judge for hearing of Miscellaneous Appeal, learned Additional District Judge after hearing both the parties allowed the appeal and rejected the application under section 96 of State Acquisition Act 1950. On the ground that some portion of the land was brought under the Soiyadpur Pourashava vide Gazette Notification on 17-5-1998. So the application under 96 is not maintainable. He next submits that at the time of appeal hearing the pre-emptee opposite parties took two specific ground; firstly some portion of the case land was brought under the Pourashava vide Gazette Notification on 17.05.98, secondly after

amendment of 2006 the pre-emptor can not get any relief under section 96 of the State Acquisition and Tenancy Act 1950 since his right as contiguous land owner has been seized by the amendment dated 20.10.2006, in support of the appellants case the pre-emptees produced Gazette Notification dated 17-05-1998 as Additional evidence and further pointed out that amendment provision of 96 of the State Acquisition and Tenancy Act and the provision of Section 60 of the Registration Act. Mr. Zaman Akhter then submits that relevant amendment provision of section 96(1) read as under “96 Right of pre-emption” (1) it is portion or share of a holding of right is sold to a person which not co-sharer tenant in the holding one or more co-sharer tenants of the holding may within two months of the service of the notice given under section 89 or if no notice has been served under section 89 within two months of the date of the knowledge of the sale apply to the court for the said portion or share to be sold to himself or themselves. Provided that no application under the section shall lie unless the applicant; (a) a co-sharer tenant in the holding by inheritance and (b) a person to whom sale of the holding or the portion or sharer thereof, as the

case may be, can be, made under section 90. He then submits that provided further that no application under this section shall lie after expiry of three years from the date of rejection of the sale deed. He next submits that the statement of Pt.W.1 of the pre-emptor shamsul Huq “গত ৭/২/২০০৮ ইং তারিখে নালিশী দলিলের জাবেদা তুলে অবগত হই। ১৩/৩/২০০৮ ইং মোকদ্দমা দায়ের করি। না/দলিলটি গত ইং ৬/৪/২০০৮ তারিখে ভলিউমে উঠে similarly he amended the date of cause of action where he stated that “দলিল খানা ৬/৪/২০০৮ তারিখে ভলিউমে উঠিয়াছে এবং উক্ত তারিখে মোকদ্দমার কারন উদ্ভব হইয়াছে” so the Pt.W.1 admitted that the alleged deed No. 4304 was registered in the Balam book on 6.4.2008 so it is crystal clear the registered deed No. 4304 was registered under section 60 of the Registration Act on 06.4.2008 in this regard the context of the provision of section 60 may be read as follows: “certificate of registration after such of the provisions of sections 34,35,58 and 59 as apply to any document presented for registration have been complied with the registry officer shall endorsed thereon a certificate containing the word registration together with the number and page of the book in which the document has been copied.” Mr. Zaman Akhter then submits that such certificate shall

be signed, selected and dated by the Registry Officer and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsement referred to in section 59 have occurred as therein mentioned. He next submits that the pre-emptor-petitioner himself claimed in deposition that he is a contiguous land owner to the case plot 1891, 1889, 1910, 1853 and 1785 of Plot No.2 and 3 of the schedule. So it appears from the pleading and evidence on record that the pre-emptor petitioner has no right of pre-emption after amendment provision of section 96 of the State Acquisition and Tenancy Act, 1950 as well as the section of the Registration Act 1908. He also submits that since the rest plots were brought under the Joypurhut Pourashava vide Gazette Notification No. 17-5-1998. The pre-emptee petitioner should filed the application under section 24 of the Non-Agricultural Tenancy Act but the pre-emptor failed to do; so the learned Trial Court hopelessly failed to realise the legal consequence of section 60 of the Registration Act 1908 and the amended provision of section 96 of the State Acquisition and Tenancy Act, 1950 and arrived at a

wrong decision allowing the pre-emption. He lastly submits that it is well settled principle right of pre-emption accrued after registration not the date of execution, registration means after completion of registration procedure section 60 not the date of execution in this case amendment provision of section 96 came into operation on 1-2-2006 by Act No. XXXIV of 2006 and actual cause of action arose on 6.4.2008. So this pre-emption case as contagious land owner having not in existence on the date of cause as action. So the pre-emption case must be failed and rule is liable to be discharged.

Heard the learned Advocates for the parties.

Ultimately both the parties considering the facts and circumstances of the case mutually agreed that since the pre-emptor-petitioner is co-sharer by inheritance in the 13 decimals land of plot No. 1908 situated in rural area application in respect of the aforesaid 13 decimals land under Section 96 of the State Acquisition and Tenancy Act is maintainable and thus the pre-emptor will get 13 decimals land of plot No. 1908. On the otherhand the pre-emption application in respect of rest plots under Section 96 of the State Acquisition and Tenancy Act is not maintainable.

Accordingly, the Rule is made absolute in part.

The impugned Judgment and Order dated 15.12.2020 passed by the learned Additional District Judge, Nilphamari in Miscellaneous Appeal No. 19 of 2016 allowing the appeal and thereby reversing the Judgment and Order dated 28.1.2016 passed by the learned Senior Assistant Judge, Soiyadpur, Nilphamari in Miscellaneous Case No. 10 of 2008 allowing the Pre-emption Case is hereby set aside.

Send down the lower Courts record with a copy of the Judgment to the Courts below at once.