

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

Civil Revision No. 2074 of 2015.

IN THE MATTER OF:

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

A N D

IN THE MATTER OF:

Nazrul Islam

..... defendant-appellant-Petitioner.

-Versus –

Md. Abdul Momin and others

..... opposite parties.

Mr. Md. Azizul Hoque, Advocate

..... for the petitioner

Mr. Md. Omar Farook, Advocate

..... for the opposite party No.1

Heard On: 16.02.2022,22.02.2022

and Judgment on: 26.01.2022.

On an application of the petitioner Nazrul Islam under Section 115(1) of the Code of Civil Procedure the Rule was issued calling upon the opposite party Nos.1-3 to show cause as to why impugned judgment and order dated 29.01.2015 passed by the Additional District Judge, Deolia Court, Chattogram in Miscellaneous Appeal No.09 of 2004 allowing the appeal and thereby reversing the judgment and order dated 01.12.2003 passed by the Senior Assistant Judge, Rangunia Court, Chittogram in Miscellaneous Case No.32 of 2002 rejecting the

pre-emption 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 necessary for disposal of the Rule, in short, is that the opposite party No.1 as pre-emptor filed Miscellaneous (pre-emption) Case No.10 of 2002 in the Court of Senior Assistant Judge, Rangunia Court, Chattogram against the opposite party No.1 under Section 96 of the State Acquisition and Tenancy Act, 1950 claiming that he is a co-sharer by purchase in the case land. And the opposite party No.2 of the pre-emption case transferred the land to the opposite party No.1 who being a stranger of the case land. The pre-emptor petitioner came to know the transfer of the case land on 24.06.2002 and finally determining that the transfer of the land after obtaining the certified of the deed on 30.06.2002 that the opposite party No.1 transferred the property on 17.01.2002 and thus instituted the case within the stipulated period of limitation inserting the name of the petitioner as opposite party No.3 claiming that on 24.06.2002 the opposite party No.1 tried to dispose the pre-emptor-petitioner from the case land with the help of opposite party No.3 the present petitioner of the revision. Hence the case.

The opposite parties entered appeared to contest the case. Subsequently the opposite party No.3 the present petitioner filed an application for maintainability of the pre-emption case claiming that the opposite party No.1 though purchased the land on 17.01.2002 but the said opposite party No.1 again transferred the land in favour of opposite party No.3 through registered deed No.1570 dated 25.04.2002 and pre-emptor filed Miscellaneous Case No.71 of 2002 on 24.06.2002 wherein

the opposite party No.3 the present petitioner also appeared and stated the said facts that he purchased the land on 25.04.2002 and claiming that the said deed was registered before 66 days of filing the pre-emption case and as such the pre-emptor has extinguished his right of pre-emption against the opposite party No.1 and since the pre-emptor did not file the pre-emption case against the opposite party No.3 the present petitioner, the pre-emption case is not maintainable.

The trial Court after hearing the parties and considering the facts and circumstance of the case rejected the pre-emption application on the grounds of maintainability by its judgment and order dated 01.012.2003.

Against the said judgment and order of the trial Court the pre-emptor opposite party No.1 in this revisional application preferred Miscellaneous Appeal No.9 of 2004 before the District Judge, Chattogram. The said appeal was transmitted to the Court of Additional District Judge, Deolia Adalat, Chattogram. Who after hearing the parties and considering the facts and circumstance of the case and the provision of law allowed the said appeal and restored the pre-emption case to its file and number and directed the trial Court to dispose of the same in accordance with law by its judgment and order dated 29.01.2015.

Being aggrieved by and dissatisfied with the impugned judgment of the appellate Court the opposite party No.3 filed this revisional application under Section 115 (1) of the Code of Civil Procedure and obtained the Rule.

Mr. Md. Omar Farook the learned Advocate enter appeared on behalf of the opposite party No.1 and subsequently since the opposite party No.1 died on 25.07.2020 he filed an application for addition of party in the form of substitution of the deceased opposite party No.1 Md. Abdul Momin through fresh vokalatanama and the said application was allowed by this Court and the heirs of the Md. Abdul Momin has been substituted on 31.01.2021.

Mr. Md. Azizul Hoque, the learned Advocate appearing on behalf of the petitioner submits that impugned judgment of the appellate Court is not a proper judgment of reversal. He submits that the trial Court after considering the facts and circumstance of the case found that the opposite party No.1 transferred the property in favour of opposite party No.3 the present petitioner before filing the pre-emption case and as such the pre-emptor lost his pre-emption right at the time of filing the pre-emption case. He further submits that the trial Court elaborately discussed the facts and the material on records and the law took view that the pre-emptor had definite knowledge that the case land was transferred long before 66 days of filing the pre-emption case whereas without seeking any prayer against the opposite party No.3, he filed the case against the opposite party No.1 and as such the pre-emption case is not maintainable which is a right findings but the appellate Court without considering the said provision of law wrongly opined that the pre-emption case is quite maintainable which the appellate Court committed serious error in law resulting in an error in the decision occasioning failure of justice. He prayed for making the Rule absolute.

On the contrary, Mr. Md. Omar Farook, the learned Advocate appearing on behalf of the pre-emptor opposite party No.1 submits that the appellate Court rightly passed the impugned judgment. He further submits that the appellate Court after consideration of the facts and circumstance of the case opined that since the case land was purchased by the opposite party No.1 and the pre-emptor should file case against him the said findings of the appellate Court is a proper finding. He further submits that the trial Court though cited the decision reported in 37 DLR (HCD)-324 which is not applicable in the instant case since the facts of the cited case is a quite difference from this case since in the cited case the transferee returned back the case land in favour of the vendor and as per provision of 96 of the State Acquisition and Tenancy Act that if the purchaser transferred the land in favour of the vendor then the pre-emptor extinguishing his right of pre-emption and if the land returned back in favour of the vendor before pre-emption then he retain his co-sharer ship of the said land. But in the instant case the opposite party No.3 the present petitioner of the revisional application was not a co-sharer of the case land he was admittedly an stranger of the case land as such the cited decision is not applicable in the instance case and the trial Court wrongly relying upon the said decision. The learned Advocate in support of his case also cited two decisions reported in 35 DLR (HCD)-238 and 50 CWN-807.

He lastly submits that in pre-emption case the trial Court though has right to dispose of the pre-emption case on the ground of maintainability and in such a case the trial Court ought to have framed

the main issues that whether the pre-emptor is the co-sharer, the pre-emptee is the stranger and the pre-emptor filed the case within the stipulated period of limitation and whether the case is bad defect of parties and also can framed issue whether the pre-emption case is against the provision of sub-section 10 of Section 96 of the State Acquisition and Tenancy Act. But in instant case the trial Court without considering the said material facts and discussing anything only considering that since the purchaser the opposite party No.1 transferred the property in favour of the opposite party No.3 and pre-emptor made him a party as opposite party No.3 and as such took view that pre-emptor has knowledge about the transfer which is not a proper finding since without taking evidence the same cannot be considered and submits that the appellate Court rightly passed the impugned judgment restoring the pre-emption case to its originally file and number. He prayed for discharging the Rule.

I have heard the learned Advocates of both the side, perused the impugned judgment of Courts below the papers and documents as available on the records.

This is a case for pre-emption under Section 96 of the State Acquisition and Tenancy Act. The pre-emptor opposite party No.1 here claimed that he was a co-sharer by purchase and the pre-emptee No.1 was an stranger who purchased the land from opposite party No.2 on 24.06.2002 and came to the said transfer while the pre-emptee No.1 tried to take possession of the said land with the help of opposite party

No.3 and thereafter on procuring the certified copy of the said deed filed the case within the stipulated time as prescribed.

It appears that the pre-emptor claimed that he was a co-sharer of the case land by purchase and the pre-emptee No.1 was an stranger and the pre-emptee No.1 did not claim that he is not an stranger. Even he did not contest the case but the opposite party No.3 contested the case. It is not a matter that who may be a proper party or not in the pre-emption case the same should be considered by the trial Court after framing the issue of the case.

In the instance case it is found that the case land was transferred in favour of opposite No.1 through registered deed on 17.01.2002 and the pre-emptor claimed that he came to know the said transferred on 24.06.2002 and obtaining the certified copy on 12.07.2002 and filed the case on 16.07.2002. From the aforesaid statement of facts it is clear that the pre-emptor filed this case within the stipulated of limitation from the date of knowledge the same should be consider by the trial Court.

In disposal of the issue of limitation the court only should consider whether the deed was registered as provided under Section 60 of the Registration Act and case was filed within time and the pre-emptor succeed to prove his date of knowledge and filed the case within the stipulated time from the date of knowledge and all the issue should be considered by taking evidence.

The next question is that the opposite party No.3 claimed that the pre-emptor has knowledge that the case land was transferred in favour of opposite party No.3 the present petitioner. The opposite party No.3

filed Title Suit No.69 of 2002 dated 01.07.2002 wherein he claim that he purchased the land from the opposite party No.1 on 25.04.2002 and the pre-emptor appeared in the said case on 08.07.2002 so he had definite knowledge about the transfer of the case land. It is found that the opposite party No.3 the present petitioner did not claim that he was the vendor of the case land and the case land already returned back in favour of him in such a case the citation of the trial Court, the decisions of the case *Md. Abbas Ali Vs. Md. Osman Ali reported in 37 DLR (HCD)-324* is not applicable in the instant case since the facts of that case is quite different from the aforesaid case, since in the cited case the fact is that the pre-emptee No.1 transferred the property in favour of the vendor and Court thus decided that since the property returned back in favour of the pre-emptee the vendor and he was a co-sharer of the case land in such a case the pre-emptor extinguished his right of pre-emption against the co-sharer of the case land and this is the principle of the cited the case. But the trial Court did not consider the said vital facts of the case.

It is also my view that as per provision of Section 96 of the State Acquisition and Tenancy Act normally the Court should not be disposed of the case only on the ground of maintainability though the Court has power to dispose of the case on the grounds of maintainability. The trial Court ought to have consider the mandatory provision laid down in Section 96 whether pre-emptor is a co-sharer of the case land, whether the pre-emptee is an stranger, whether the case was filed within the stipulated period provided under Section 96 and whether that case is

bad for defective parties or any bar provided under sub-section 10 of Section 96 of the State Acquisition and Tenancy Act. In such a case the Court ought to have framed the issues and should dispose of the same in accordance with law.

If the Court desire to dispose of the case on the ground of maintainability in such a case the said facts also should be considered as per provision of evidence Act and the parties has right to adduce evidence and Court ought to have considered the evidence in disposal of the said facts framing issues.

We have already considered that the decision cited by the trial Court is not applicable in the instant case since the opposite party No.3 the present petitioner had claimed that he was also a co-sharer and the transferee returned the case land to the vendor.

Having considered the discussion as above it is my view that the appellate Court rightly passed the impugned judgment and the findings of the appellate Court cannot be said error in law resulting in an error in the decision occasioning failure of justice.

Considering the facts and circumstance of the case, and the discussions as made above, I find no merit in the Rule.

In the result, the Rule is discharged without any order as to cost. The impugned judgment and order dated 29.01.2015 passed by the Additional District Judge, Deolia Court, Chattogram in Miscellaneous Appeal No.09 of 2004 allowing the appeal and thereby reversing the judgment and order dated 01.12.2003 passed by the Senior Assistant

Judge, Rangunia Court, Chittogram in Miscellaneous Case No.32 of 2002 is hereby upheld.

However, the trial Court is directed to dispose of the pre-emption case as early as possible preferably within 06 (six) months from the date of receipt of this order in accordance with law considering the provision of law and the discussion as made above.

The order of stay granted earlier by this Court is hereby recalled and vacated.

Send down the lower Court's record at once.

Obayedur, B.O.