

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

Present:

Mr. Justice Kazi Md. Ejarul Haque Akondo
and
Mr. Justice Mohi Uddin Shamim

First Miscellaneous Appeal No. 146 of 2021

In the matter of:

Memorandum of appeal from original
order.

And

In the matter of:

Md. Moslem Hawlader being dead his legal
heirs 1(a) Md. Kaisar Hamid and others
... Pre-emptor-appellants

Versus

Md. Hannan Mollah and others
... respondents

Mr. Khan Mohammad Moinul Hasan, Advocate
... for the pre-emptor-appellants

No one appears
..... for the respondents

Heard on 1st, 2nd & 11th July, 2024
Judgment on 25th July, 2024

Mohi Uddin Shamim, J.

This appeal is directed against the judgment and order dated
13.10.2020 passed by the learned Joint District Judge, 1st Court,
Madaripur in Miscellaneous Case No. 36 of 2010 dismissing the

application for pre-emption under section 24 of the Non-Agricultural Tenancy Act, 1949.

Facts necessary for disposal of the appeal, in short, are that the present appellant as pre-emptor instituted Miscellaneous Case No.36 of 2010 before the Joint District Judge, 1st Court, Madaripur for pre-emption of the case land under section 24 of the Non-Agricultural Tenancy Act, 1949 contending inter-alia that the suit property appertaining to S. A. Khatian Nos. 179 and 349, corresponding to R. S. Khatian Nos. 245 and 625 originally belonged to Ofazuddin Bepary, Afazuddin Bepary, Jamir Bepary, Jahura Bibi daughter of Afiluddin and Chutu Bibi daughter of Anaruddin. Ofazuddin Bepary transferred .74 acres of land to Sujai Hawlader (the applicant's father), A. Rashid Akon and A. Quader Akon by registered deed No.3012 dated 25.04.1953. Afazuddin Bepary died leaving behind two sons A. Latif and A. Samad and S. A. Khatian Nos. 179 and 349 were prepared in their names. A. Samad Bepary transferred .14 acres of land to Muhammad Sujai Hawlader and Kali Hawlader by registered deed No. 1134 dated 06.03.1963. S.A. 179 and 349 recorded owner Jahura Bibi died

leaving behind three sons namely Arefin Hawlader, Nazem Hawlader and Ajahar Hawlader and one daughter Majhu Bibi. Ajahar Hawlader died leaving behind two sons namely Motaleb Hawlader and Abu Taleb Hawlader, who transferred .39 acres of land from both the khatians to Sujai @ Sujaruddin Hawlader and Kalachan Hawlader by registered deed No.2850 dated 28.03.1970. R. S. recorded owner namely Baru Bibi died leaving behind one daughter namely Jamiron and Sister Chutu Bibi, after the death of Maju Bibi her daughter Chutu Bibi and daughter in law Jamiron received her share and on 14.10.1970 the said Chutu Bibi and Jamiron sold .24 acres of land to Mujai Hawlader by registered deed No. 4893. The owner of both khatians Jamir Bepary died leaving behind one son namely Falan Bepary who transferred .25 acres of land to Sujaruddin Hawlader (the applicants father) and Kalachan Hawlader by registered deed No.1119 dated 05.03.1963. Abdur Rashid Akon and Abdul Quader Akon transferred .40 acres of land to the applicant and his two brothers Abul Hossain Hawlader (Vendor) and Eskander Hawlader by registered deed No.2795 dated 09.07.1966. Thereafter, Sujai @ Sujaruddin Hawlader died leaving

behind the pre-emptor applicant, vendor opposite party No.2 Abul Hussain and Eskander Ali Hawlader and they applied for mutation of .7446 acres in their names through mutation case No. IX-P-30/2009-2010 and a separate Khatian bearing No .179/2 was opened. Owing to family dispute, the applicants brother Abul Hossain secretly transferred the suit property by registered deed No.3269 dated 15.10.2009 in consideration of Tk. 11,00,000/- to a stranger being pre-emptee opposite party No. 1 without giving notice to anyone. The deed was registered in the volume on 07.02.2010. The pre-emptor applicant having been aware from rumors as to the sale of the case property & got fully aware of the same on 16.02.2010 and after depositing requisite money filed this pre-emption application. Hence, the Miscellaneous case.

The case was contested by the pre-emptee-respondent No. 1 by filing written objection denying all the material allegations made in the application. The case of the pre-emptee No. 1 is that the vendor opposite party No. 2 approached the pre-emptor applicant to sell the suit property measuring .21 acres, but he refused to purchase the same and disclosed that he would not claim the suit

property further. Opposite party No. 2 thereafter, approached to the opposite party No. 3 with the proposal to sell the case property and he also refused to accept it. Lastly, the offer was made to the pre-emptee who ultimately purchased the property by deed No.3269 dated 15.10.2009 and got possession thereof by enjoying the same. The case is false and frivolous one and it was sought to be dismissed with cost. Later on the pre-emptee filed an additional written objection stating the fact of gift of .20 acres allegedly made by the pre-emptor to his sister and after the gift, the pre-emptor ceased to remain a co-sharer in the suit jote.

The learned Judge of the trial Court framed the following 05 issues to decide the case;

- i. whether the suit is maintainable?
- ii. whether the suit is barred by defect of parties?
- iii. whether the suit is barred by limitation?
- iv. whether the pre-emptor is a co-sharer to the suit land?
- v. whether the applicant is entitled to get the relief as prayed for?

At the trial the pre-emptor-appellant examined 3 (three) witnesses as P.Ws. and pre-emptee-respondent also examined 3

(three) witnesses as O.P.Ws. and both the parties also adduced some documentary evidence to prove their respective cases.

After hearing of the application and considering the evidence on record and the material facts of the case the learned Judge of the trial Court rejected the pre-emption application by its judgment and order dated 13.10.2020.

Being aggrieved by and dissatisfied with the judgment and order dated 13.10.2020 the pre-emptor as appellant preferred the instant First Miscellaneous Appeal.

Mr. Khan Mohammad Moinul Hasan, the learned Advocate appearing for the appellant upon taking us to the impugned order appended to the memo of appeal at the very outset submits that, the pre-emptor-petitioner-appellant in his plaint and deposition claimed that his father purchased 70.644 decimals of land through 5 registered sale deeds which had been exhibited as Exhibit Nos. 4-6, 8 and 11. In addition to that the pre-emptor-petitioner along with his two brothers purchased .40 decimals land through registered sale deed No. 2795 dated 09.07.1966 which is exhibited as Exhibit No. 7. The pre-emptor-petitioner inherited 20.184 decimals land

from his father and purchased 13.33 decimals land and in total 33.514 decimals land he had retained. The vendor opposite party respondent No. 2 also shared the same portion of land out of which he sold 21 decimals land to the pre-emptee opposite party respondent No. 1 and thus 12.514 decimals land remains to the hand of the vendor opposite party respondent No. 2. As the land is co-shared land without any demarcation by metes and bound, thus the pre-emption case is maintainable under section 24 of the Non-Agricultural Tenancy Act, 1949.

He further submits that the pre-emptor-petitioner appellant along with his brother Abul Hossain Hawlader (Vendor opposite party respondent No. 2) and Md. Eskander Hawlader mutated total 74.66 decimals land in their names through Mutation Case No. IX-P-30/2009-2020 vide Mutation Khatian No. 179/2 where the proportion of share was not mentioned. The said mutation Khatian was submitted by the pre-emptor-petitioner-appellant before the Trial Court but mistakenly not marked as Exhibit and the said Mutation Khatian No. 179/2 was admitted by the opposite party witnesses No. 3 who is the vendor opposite party respondent No. 2

in his cross-examination on 25.02.2015. The Mutation Khatian No.179/2 shows that the pre-emptor petitioner appellant, vendor opposite party respondent No. 2 and another brother Eskander Hawlader got 24.8866 decimals of land each. The vendor opposite party respondent No. 2 sold 21 decimals land out of 24.8866 decimals land to the pre-emptee opposite party respondent No. 1.

He next submits that the pre-emptor-appellant along with other co-sharers have right, title of 100.552 decimals of land which they acquired title through inheritance from their father and registered purchased deed but they got mutation of 74.66 decimals of land and in the latest B.R.S Khatian they got their names recorded in 60 decimals of land. The learned Judge of the Trial Court deliberately considered the B.R.S. Khatian as their title, instead of the deeds of title, which is an incorrect application of law.

He next refers the case of ***Abdul Mannan Bhuiyan and others Vs. Md. Nasir Hossain and others***, reported in ***18 BLC (AD) (2013) 44***, wherein their lordship's held that;

“ ... that SA and RS records were not an evidence of title and that a registered document would prevail upon the records of rights and that the registered document would

remain in enforce unless the same was cancelled by an appropriate civil Court.”

He submits that in the instant case the learned Judge of the Trial Court miserably failed to appreciate this settled principle laid down by our Apex Court and as consequence the trial Court turned up the case merit in wrong findings and it passed a wrongful judgment which is against the law.

He also submits that the pre-emptor-petitioner-appellant submitted certified copies of some purchased deeds which are marked as Exhibits, whereas, the pre-emptee - opposite party respondent No. 2 did not raise any question regarding the genuineness of those documents; hence they cannot be objected to at a later stage, and in support of this contention, he refers the case of *Joynal Abedin and others Vs. Mafizur Rahman and others*, reported in *44 DLR (AD) (1992) 162* wherein their lordship's held that;

“..... that the certified copies of certain kabuliyats were filed without calling for the original copies of the kabuliyats. The learned Single Judge of the High Court Division on a wrong consideration of section 66 of the Evidence Act left those out of

consideration treating them as inadmissible as that those documents were not admissible in the evidence as the originals were not called for. Mr. SR Pal, learned advocate appearing for the defendant appellant rightly argued that the documents having been filed and marked exhibit without any objection the question of inadmissibility of those documents cannot be raised at a subsequent point of time and the Court below including the learned Single Judge of High Court Division acted wrongly in not considering these kabuliyats Ext. D series and failed to consider the effect of these kabuliyats in the instant case. Thus, it can be safely said that non-consideration of these vital documents namely, the certified copies of the kabuliyats which were admitted into evidence without objection had materially affected the decision in the present case.”

The learned Advocate finally prays for allowing the appeal.

Though the matter has been appearing at the top of the daily cause list for hearing with the name of the learned Advocates for the appellants and that of the respondents since 12.06.2024 but till today none appeared for the respondent to oppose the appeal.

We have heard the learned Advocate for the appellants, perused the memo of appeal, the impugned judgment and order and other connected materials-on-record.

Having gone through the Judgment and Order of the learned Trial Court below, it appears that the issue no. 1 regarding maintainability of the suit under Section 24 of the Non-Agricultural Tenancy Act, 1949, the issue no. 2 regarding defect of parties, the issue no. 3 regarding limitation were all decided in favour of the pre-emptor-appellant and hence does not require further consideration by this Court at this stage.

With regards to issues no. 4 and 5, it appears that the learned Court below at the very outset has come to the conclusion that the pre-emptor was co-sharer to 60 decimals of land by virtue of B.R.S. records, but did not consider the deeds of title themselves in detail or observed which deed consisted for what portion of land. Rather, the Court below glossed over the same and concluded by virtue of B.R.S. Khatian no. 361 (Ext. Uma) that the pre-emptor's father was owner of 60 decimals land, hence the pre-emptor was co-sharer in 60 decimals of land only, without considering the additional title at

all. Unfortunately, this is a clear example of misreading and non-reading of cogent and material evidence on record, as the Ext. 7 Deed no. 2795 of 09.07.1966 shows that the pre-emptor-appellant along with his two brothers as co-sharer together purchased 40 decimals of land, and along with the 20.184 decimals inherited from his father, the pre-emptor appellant is entitled to total 33.514 decimals of land. The other exhibited deeds of title (Ext. 4-6, 8 and 11) should also have been considered in further detail.

Moreover, a mutation Khatian no. 179/2, though not marked as exhibit, was admitted by the OPW no. 3 in his cross examination, and the said Mutation Khatian pertaining to mutation case no. IX-P-30/2009-2010 shows that a total of 74.66 decimals of land was mutated together in the names of 3 (three) brothers, from where it can be determined that each brother was entitled to 24.8866 decimals of land by inheritance from where the vendor-respondent no.2 sold 21 decimals of land (out of 24.8866 decimals) to the opposite party-respondent no. 1, and since the land was not segregated by metes and bound, pre-emption should have been allowed.

It appears that the learned Trial Court disallowed the mutation case based on the B.R.S. Khatian no. 361 (Ext. Uma) only listing 60 decimals of land, as well as testimony of OPW-1 that the pre-emptor appellant gifted 20 decimals of land to his sister vide Deed of Gift no. 2937 dated 01.08.21 (Ext. Gha), basing his judgment on surmise and conjecture that the pre-emptor must have been co-sharer to only 20 decimals of land and had surrendered his share to his sister (by deed of gift) had ceased to be co-sharer, but failed to consider the material evidence on record, i.e. the Deeds of purchase of additional co-shared land together by the pre-emptor (Exhibits no. 4-6, 7, 8 and 11) and the opposite party no. 2 and another brother which show that there were additional co-shared un-demarcated land owned by the 3 (three) brothers, and hence the pre-emptor-appellant still remained a co-sharer, and as a result was entitled to pre-empt of the case land under Section 24 of the Non-Agricultural Tenancy Act.

Lastly, on a point of law, the learned Court below allowed the BRS Khatian to override exhibited deeds, which is not tenable in law as the Hon'ble Appellate Division in *Abdul Mannan Bhuiyan and*

others Vs. Md. Nasir Hossain and others, reported in 18 BLC (AD) (2013) 44, has settled that registered documents shall prevail upon record of rights as evidence of title, and such registered document will remain in force unless cancelled by appropriate civil Court. Additionally, the Appellate Division has also settled in *Joynal Abedin and others Vs. Mafizur Rahman and others, reported in 44 DLR (AD) (1992) 162* that certified copies when exhibited in evidence without objection cannot be questioned based on inadmissibility at a later stage, which are both squarely applicable in the present case and it is held that the learned Court below ought to have considered the Deeds of Title (Exhibits no. 4-6, 7, 8 and 11) and not based its Judgment on the Record of Right, i.e. the BRS Khatian (Ext. Uma) when deciding how much of co-shared land was owned by the pre-emptor-appellant.

Considering the discussion made hereinabove, scrutinizing the submission so advanced by the learned counsel for the appellant as well as the evidences on records we find substance in the appeal and we do not find substance in the judgment and order passed by the learned sub-ordinate Court below to be sustained in law.

And, accordingly the **Appeal is allowed** without any order as to cost.

Thus, the judgment and order dated 13.10.2020 passed by the learned Joint District Judge, 1st Court, Madaripur in Civil Miscellaneous Case No. 36 of 2010 is thereby set aside and as an inevitable consequence, the pre-emption case filed by the present pre-emptor-appellant is allowed.

Let a copy of this Judgment and Order along with the lower Court records be transmitted to the concerned Court at once.

Kazi Md. Ejarul Haque Akondo, J.

I agree.