

**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 Appeal No. 05 of 2012

In the matter of:

Golder Jahatap Uddin and another

.....Defendants-appellants

-Versus-

Md. Abdul Bari and another

.....plaintiffs-respondents

Mr. Md. Nurul Amin, Senior Advocate with

Mr. Ahmed Nowshad Jamil, Advocate with

Mr. S. M. Tarikul Islam, Advocate with

Ms. Sayeda Shoukat Ara, Advocate with

Mr. Md. Zumma Amin, Advocate

.... For the defendants- appellants

Mr. Mohammed Faridul Islam, Advocate with

Ms. Nilufar Yesmin, Advocate with

Ms. Saleha Begum, Advocate with

Mr. Md. Abbas Uddin, Advocate with

Mr. Formanul Islam, Advocate

..... For the plaintiffs-respondents

Heard on 29th & 30th April, 6th, 12th, & 21st May, 2024

Judgment on: 12th June, 2024

Mohi Uddin Shamim, J.

This First Appeal, at the instance of the defendants-appellants, is directed against the judgment and decree dated 25.08.2011 (decree signed on 06.09.2011) passed by the learned Joint District Judge, 1st Court, Khulna in Title Suit No.1593 of 2008 allowing the pre-emption under Mohammedan Law.

Facts necessary for disposal of the appeal, in brief, are that .35 acres of land under S. A. Khatian No.383 originally belonged to Sudhisthir Saha (4 Anna), Bashanta Kumar Saha (4 Anna), Durgacharan Saha (5 Anna), and Horshid Kumar Saha (9 Anna). Sudhisthir Saha died, leaving behind his only son, Sudhir Kumar Saha, who sold .05 acres to A. K. M. Abdul Latif by sale deed No.769 on 12.01.1983. Horshid Kumar Saha sold .0125 acres to Sudhir Kumar Saha on 03.12.1980. Bashanta Kumar Saha died, leaving behind his son, Anil Kumar Saha, who sold .03 acres to Sudhir Kumar Saha by sale deeds Nos.11 and 492. Sudhir Kumar Saha, now owning .1008 acres of land, mutated the same land in his name in Mutation Khatian No.383/2. Subsequently, Sudhir Kumar Saha sold .05 acres to defendant No.3 Md. Nur-Un-Nabi by Sale Deed No.770 dated 12.01.1983. The names of A. K. M. Abdul

Latif and Md. Nur-Un-Nabi were recorded in R. S. plot No.3670 of R.S. Khatian No.495, each owning .05 acres. A. K. M. Abdul Latif died, leaving behind three sons (the plaintiff, defendant No.3, Abdul Hadi) and one wife Nurun Nahar as his legal heirs. Abdul Hadi and defendant No.3 sold .0333 acres to the plaintiff, making him a co-sharer by inheritance and purchase.

On 30.09.2008, around 10:00 am, the plaintiff was plucking coconut when defendant Nos.1 and 2 forbade him, claiming that they had purchased the suit land with a house. The plaintiff immediately and loudly declared his intention to pre-empt, in the presence of his family members (wife, 2 daughters and 2 son-in-laws) and neighbors. Subsequently, on 06.10.2008, certified copy of the sale deed was collected by the plaintiff's wife and daughter from concerned registry office. Defendant Nos.1 and 2 are not co-sharers in the suit land, entitling the plaintiff to pre-emption.

The defendants contested the suit by filing written statement, claiming that the suit is not maintainable in its present form and manner, barred by limitation, and suffers from defect of parties and by estoppels, waiver & acquiescence. They asserted that Sudhistir Saha had

two sons, Profulla Kumar Saha and Sudhir Kumar Saha, who sold land to various parties, including the defendant No.1. The defendant No.1, being an officer of Krishi Bank, took a loan, constructed a building and mortgaged the land to Krishi Bank. The original sale deed dated 22.09.1997 was deposited in the bank, and a photocopy was submitted in the suit. The defendants claimed that the plaintiff is not a co-sharer and did not perform "Talab-i-Muwasibat" and "Talab-i-Ishhad" according to Mohammedan Law.

On the above pleadings of the parties, the learned Judge of the trial Court framed the following issues in the suit:-

1. whether the suit is maintainable in its present form and manner
2. whether the suit is barred by limitation
3. whether the suit is defect of parties
4. whether the plaintiff is the co-sharer of the suit land
5. whether the plaintiff observed or fulfilled all the ingredients of "*Talab-i-Muwasibat*" or "*Talab-i-Ishhad*"
6. whether the plaintiff can get decree

During trial of the suit, the plaintiff examined 03 witnesses, while the defendants examined 05 witnesses of their respective cases. After hearing the parties and the learned Joint District Judge, 1st Court,

Khulna decreed the suit by his judgment and decree dated 25.08.2009, against which the defendant Nos.1 and 2 as appellants preferred the instant First Appeal being No.05 of 2012 before the Hon'ble High Court Division.

Being aggrieved by and dissatisfied with the said judgment and decree, the plaintiffs as appellants preferred this appeal.

Mr. Md. Nurul Amin, learned Senior Advocate appearing with Mr. Ahmed Nowshad Jamil, learned Advocate for the appellants at the very outset submits that, the plaintiff failed to perform the formalities of pre-emption under Mohammedan Law as prescribed in Section 236 of Mulla's Mahomedan Law. Specifically, he contended that the plaintiff did not properly execute "Talab-i-Muwasibat" and "Talab-i-Ishhad." The counsel emphasized that the plaintiff did not produce any neutral witnesses to corroborate the performance of "Talab-i-Ishhad" and pointed out contradictions between the plaintiff's statements in the plaint and his oral evidence. For instance, while the plaint stated that the pre-emption was declared at 10:00 a.m., the witness P.W.2 mentioned a different time, creating inconsistencies. Additionally, the counsel argued that Zakir Hossain, who was supposed to be present

during "Talab-i-Muwasibat," gave conflicting testimony about his presence.

The counsel further submitted that the plaintiff failed to explicitly reference the performance of "Talab-i-Muwasibat" when making "Talab-i-Ishhad," which is required under Section 236(2) of Mulla's Mahomedan Law. He cited the case of Md. Lokman Mondal Vs. Amir Ali Mondal and others, 21 DLR 211, which held that failing to reference the first demand during the second demand is fatal to a pre-emption claim. He argued that the plaintiff is not entitled to pre-empt as he did not meet this requirement.

Additionally, the counsel contended that the defendants, by virtue of their purchase and subsequent sales, are co-sharers of the suit land as defendant no.2 is the wife of the defendant no.1. Hence, the plaintiff cannot pre-empt the whole portion of the land when one co-sharer sells to another co-sharer. The learned counsel also argued that the trial court misread the evidence and misconstrued the documents, leading to an erroneous judgment, and therefore, the learned counsel for the appellant prays for impugned judgment to be set aside and the appeal allowed.

Mr. Mohammed Faridul Islam, the learned Advocate appearing on behalf of the respondents at the very outset submits that, Islamic law is not the restricted law of the land. Islamic law is a Muslim personal law which can be invoked even by Hindu. The law has been developed by the decision of competent courts in different countries from time to time and it is necessary to take into consideration those previous decisions by said Courts as the authority and legal explanation of pre-emption i.e. *Shufa*.

The respondent's counsel contended that the suit was filed within the legal timeframe, making it maintainable and not barred by limitation. He emphasized the plaintiff's status as a co-sharer of the suit land through inheritance and purchase, which entitles him to the right of pre-emption. The counsel maintained that the plaintiff's actions and evidence fulfilled all necessary legal requirements for pre-emption.

He further submitted that the necessary ingredients of pre-emption, namely Shafi Sharik (co-sharer), "Talab-i-Muwasibat," "Talab-i-Ishhad," and Talab-i-Tamlik (filing a suit to establish the pre-emption claim), should be considered together. He argued that if a suit is not instituted after making "Talab-i-Muwasibat" and "Talab-i-Ishhad," the

intention to pre-empt should not be executed. The intention of the pre-emptor, clearly established in this case, should be taken into consideration.

The counsel described how the plaintiff declared his intention to pre-empt when prohibited from plucking coconuts by the purchaser, Jahatab Uddin, at around 10:00 am. This declaration fulfilled "Talab-i-Muwasibat." He further argued that "Talab-i-Ishhad" was completed simultaneously in the presence of witnesses. The plaintiff and the witnesses consistently testified about the immediate declaration of intent to pre-empt, thereby fulfilling both demands.

Referring to several case laws, the counsel argued that the presence of witnesses during "Talab-i-Muwasibat" suffices for both demands, as stated in *Abdul Mozid Vs Qamaruddin*, 1945 1, and *Imamuddin Vs Muhammad Raisul Islam*, 1930 AIR 1931 Allahabad 736. He contended that the technical defects should not undermine the substantive rights of the pre-emptor. The plaintiff's actions, including the immediate and clear declaration of intent in the presence of witnesses, fulfill the requirements of both "Talab-i-Muwasibat" and "Talab-i-Ishhad."

The counsel argued that combining "Talab-i-Muwasibat" and "Talab-i-Ishhad" is permissible, citing decisions in *Musammat Nathu and others Vs. Shadi*, 1915 AIR 28, and *Mt. Mahbooban Vs. Mt. Fatima Begum*, 52 A.A. 167. He emphasized that the plaintiff's clear expression of intention to pre-empt, witnessed by others, was sufficient to meet the legal requirements.

He concluded by asserting that the plaintiff-preemptor successfully proved the case, and relief should not be refused for technical or formal defects. He referred to decisions in *Rokeya Begum Vs. Md. Nurul Absar*, 9 MLR (AD) 285, and *Abdul Hamla Kazi Vs. Abdul Jabbar Jamadar*, 28 DLR (SC) 68, which held that technicalities should not impede the dispensation of justice. The counsel also cited *Ajjur Rahman Barbhuiya Vs. Haji Moshaid Ali Laskar*, A.I.R 1991 GAUHATI 66, emphasizing that the right of pre-emption should not be nullified by hypertechnical interpretations. Hence, on those grounds, the learned Advocate for the respondents prayed for dismissing the appeal.

We have considered the submissions so advanced by the learned Advocates for the appellants and that of the respondents at length. We

have also gone through the impugned judgment and decree and all the documents so appended in to the paper books.

Upon careful consideration of the submissions of the learned counsels and the evidence on record, it appears that the plaintiff made an immediate declaration of his intention to pre-empt ("Talab-i-Muwasibat") upon learning about the sale. This declaration was made in the presence of witnesses, including family members and neighbors, aligning with the requirements outlined in Section 236 of Mulla's Mahomedan Law.

The testimonies of P.W-1, P.W-2, and P.W-3 corroborate the plaintiff's claim that "Talab-i-Muwasibat" was performed immediately and loudly in the presence of witnesses. P.W-1 stated in his examination-in-chief and cross-examination that he declared his intention to pre-empt as soon as he was informed of the sale. P.W-2 and P.W-3 also testified consistently, confirming that they witnessed the plaintiff's declaration.

The appellants' counsel argued that the plaintiff did not properly perform the pre-emption formalities and failed to produce neutral witnesses. However, this argument does not hold up against the

established legal principles as the requirement for neutral witnesses is not explicitly mandated under Mohammedan Law; rather, the presence of any credible witnesses is sufficient. The defendant-appellant has failed to shake the credibility or veracity of the witnesses at trial, and hence consistent testimonies of the plaintiff's witnesses fulfill the requirement under Mohammedan Law.

The appellants' counsel also pointed out contradictions in the testimonies regarding the timing and manner of the demands. However, minor discrepancies in witness testimonies are not uncommon and do not necessarily undermine the overall credibility of the evidence. The essential fact remains that the plaintiff made an immediate declaration of his intention to pre-empt, which was witnessed and corroborated.

Moreover, the legal precedents support the simultaneous fulfillment of "Talab-i-Muwasibat" and "Talab-i-Ishhad" when witnesses are present during the initial declaration. Cases such as *Abdul Mozid Vs Qamaruddin*, 1945 1, and *Imamuddin Vs Muhammad Raisul Islam*, 1930 AIR 1931 Allahabad 736, emphasize that the presence of witnesses during the immediate demand suffices for both demands.

The plaintiff's actions indicate that both requirements were properly fulfilled.

The appellants' counsel's argument that the suit is barred by limitation and that the plaintiff is not a co-sharer also fails. The evidence clearly shows that the suit was filed within the legal timeframe, and the plaintiff's status as a co-sharer through inheritance and purchase is well established.

The contention that defendant No.2 is not a stranger to the land merely because she is the wife of defendant No.1 is also without merit. Pre-emption rights under Mohammedan Law are determined by co-ownership or neighborhood relationships, not by marital status. Therefore, the plaintiff's right to pre-empt the sale remains valid.

Based on the evidence presented and the legal principles discussed, it is clear that the plaintiff has successfully fulfilled all the necessary formalities for pre-emption under Mohammedan Law. The plaintiff's immediate declaration of intent, supported by consistent witness testimonies, meets the requirements for both "Talab-i-Muwasibat" and "Talab-i-Ishhad." The arguments presented by the appellants' counsel, which focus on technical deficiencies, lack of

neutral witnesses, and minor discrepancies in testimonies, do not undermine the validity of the plaintiff's claim.

The learned trial court found that the plaintiff had successfully met all the formalities required for pre-emption under Mohammedan Law. The court noted that the plaintiff made an immediate declaration of his intention to pre-empt the sale ("Talab-i-Muwasibat") upon learning about it, in the presence of witnesses. This was followed by a formal demand ("Talab-i-Ishhad"), also made in the presence of witnesses. The trial court also established that the plaintiff is a co-sharer of the suit land through inheritance and purchase, and that the suit was filed within the legal timeframe, making it maintainable and not barred by limitation. The court dismissed the arguments presented by the defendants regarding technical deficiencies and lack of neutral witnesses, concluding that the plaintiff had fulfilled all necessary legal requirements for pre-emption. We find no legal or factual faults with the said Judgment and Order and as such find no reason to interfere with the same.

Accordingly, the appeal is **dismissed** with no order as to costs.

Thus, the judgment and decree dated 25.08.2011 (decree signed on 06.09.2011) passed by the learned Joint District Judge, 1st Court, Khulna in Title Suit No.1593 of 2008 allowing the pre-emption under Mohammedan Law is hereby affirmed. Order of stay, status quo or injunction if there any is, hereby, recalled and vacated.

Send a copy of this judgment along with the Lower Court Record (LCR) to the Court concerned at once.

Kazi Md. Ejarul Haque Akonda, J.

I agree