Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 4608 of 2014

A.K.M. Shafiqul Islam

…… Petitioner.

-Versus-

Md. Faijul Haque and others

…….Opposite parties.

Mr. A.K.M. Shafiqul Islam

……. In person.

Mr. Abul Kalam Azad, Advocate

.....For the Opposite parties

Heard and judgment on 28th February, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite party Nos. 1-2 to show cause as to why the impugned judgment and decree dated 04.06.2014 passed by the District Judge, Panchagarh in Other Appeal No. 23 of 2013 affirming those dated 16.04.2013 passed by the Senior Assistant Judge, Sadar, Panchagarh in Other

Class Suit No. 152 of 2011 dismissing the suit should not be set aside.

Petitioner as plaintiff filed the above suit under section 231 and 236 of the Mahomedan Law read with Order 20 Rule 14 of the Code of Civil Procedure for preemption against the opposite parties.

Plaint case in short, inter alia, that Gol Banu was the owner of 52 decimals of land of R.S. khatian No. 441, Dag No. 2857 under Mouza-Omarpur of P.S. and District Panchagarh. Who transferred it by Heba-bil-Ewaz Deed No. 2173 dated 10.05.2009 to the respondent No.3-5. Then they transferred the suit land to respondent No. 1-2. Vide kabala No. 436 dated 25.01.2010. The petitioner is the owner of the land in plot No. 2857 by purchase, which is the same plot i.e. the suit land. Petitioner is to go to his land of same plot No. 2857 by the road acrossing over the suit land, thus the petitioner is the 2nd Class pre-emptor as right of way and 3rd Class pre-emptor as an adjacent land owner. Opposite party Nos. 1-2 did not disclose the matter of sale and they did not possesses the suit land. The petitioner residing in Tangail District. On 31.07.2011 the petitioner came from Tangail and obtained the

alleged sale deed from Panchagarh Sub-registry Office and having learned the sale he at once went to the suit land and express his desire to purchase the suit land along with the witnesses and complied the formalities in accordance with Mohammedan Law. The petitioners willing to deposit the value of the deed as may be ordered by the court and hence instituted the suit. The opposite party Nos. 1-2 actually purchased the suit land by Tk. 82,000/-. But to prevent pre-emption it was mentioned Tk.1,86,000/- in the alleged kabala deed. The petitioner has right to deposit the actual consideration money.

Opposite party Nos. 1 and 2 contested the suit by filing written statement denying the plaint case alleging, inter alia, that the suit land in S.A. khatian No. 364 and R.S. khatian No. 441 of Mouza Omarpur, P.S. and district-Panchagarh was belonged to Ramjan Ali. He died leaving 3 sons and 5 daughters. Daughter Gol Banu became the owner of the suit land of R.S. khatian No. 441 dag No. 2857. She transferred the suit land to her son respondent Nos. 3-4 Abdul Kader, Md. Jakir Hossain and Haider Ali by Heba-bil-ewaj deed. Who transferred the suit land to the respondent Nos. 1-2 by kabala deed No. 256 dated 16.11.2011 at a

consideration money of Tk. 1,86,000/- and the contested respondent No. 1-2 are the nephew of Ramjan Ali by blood connection. Suit is false and is liable to be dismissed with costs.

During trial the following issues were framed.

i) Whether the suit is maintainable to its present form?

ii) Whether the plaintiffs is the co-sharer in the suit jote?

iii) Whether there is a bad for defect of parties of the suit property or not?

iv) Whether the suit is barred by limitation or not?

v) Whether the plaintiff is entitled to get a pre-emption or not?

By the judgment and decree dated 16.04.2013, the Assistant Judge dismissed the suit on contest

Challenging the said judgment and decree, petitioner preferred Other Appeal No. 23 of 2013 before the Court of District Judge, Panchagarh, who by the impugned judgment and decree dismissed the appeal and affirmed the judgment of the trial court and rejected the pre-emption case.

Challenging the said judgment and decree plaintiff petitioner obtained the instant rule.

Mr. A.K.M. Shafiqul Islam, in person drawing my attention to the plaint of the suit together with the impugned judgment submit that although the petitioner immediately after getting the knowledge about the impugned sale, upon complying all legal formalities instituted this suit for pre-emption on 31.07.2011under the Mahomedan Law and suit is not barred by law of limitation even then the court below upon misconception of law rejected the pre-emption case. He thus prays that the impugned judgment suffers from gross illegality, it may be set aside and the pre-emption may be allowed.

Mr. Abul Kalam Azad, the learned advocate appearing for the opposite party drawing my attention to a decision in the case of Jarfan Khan –Vs. Jabbar Meah reported in 10ILR Calcutta 383 submits that upon going through the plaint it will appear that the plaintiff did not mention as to when and how and where from they got information about the sale but thereafter on 31.07.2011 he went to the sub-registry office and collected the certified copy of the impugned sale deed and thereafter he called the witnesses in

the suit premises and complied talab-i-mowasibat and talab-i-ishhad together for compliance the legal requirement under section 236 of the Mahomedan Law, which is not inconformity with the law as been settled by the Calcutta High Court in referred decision and accordingly court below concurrently committed no illegality in rejecting the pre-emption case. He finally prays that since the impugned judgment contains no illegality and the rule contains no merits, it may be discharged.

Heard the learned Advocate and perused the L.C.R. and the impugned judgment.

This is a pre-emption case, filed under section 231 and 236 of the Mahomedan Law.

Section 236 of the Mahomedan Law provides that:

> "**236. Demands for pre-emption** No person is entitled to the right of pre-emption unless –
>
> 1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called talab-i-mowasibat

(literally, demand of jumping, that is, immediate demand): and unless

2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the talab-i-mowasibat had already been made, and has made a formal demand –

a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and

b) in the presence at least of two witnesses. This formality is called talab-i-ishhad (demand with invocation of witnesses)."

Talab-i-mowasibat and talab-i-ishhad are condition precedent for the exercise of the right of pre-emption. In this context in order to have a better understanding of the law under section 236 of the Mahomedan Law decision referred to here by the learned advocate for the opposite party may be looked into. In the said decision of the case of Jarfan Khan vs. Jabbar Meah

reported in 10 ILR Calcutta 383 a division bench of the High Court Division has observed that:

> "The plaint states that on hearing of the sale, in the presence of the public, the plaintiff stated his wish to buy, and then, very shortly afterwards, taking with him the price, Rs.47-4, went suitable witnesses to defendant No.1's residence and offered the money. He states that he is ready now to pay whatever price the Court may direct. Defendant No.1, in her written statement, alleged that the plaintiff had not performed the ceremonies of Talab-i-mowasibat and Talab-i-ishhad as he stated, and had not deposited the purchase-money with the plaint, and therefore plaintiff could not maintain the suit; the defendant No.1 before selling the land frequently offered plaintiff and his brother Abdul Meah and his nephew Macfruddi opportunities of exercising the right of pre-emption which they refused; also that the defendant No.2 had a superior right of pre-emption to plaintiff; and consequently defendant No.1 sold him

the property on the 23rd December 1879 by kabala. The kabala is filed. It is admitted that Rs. 47.4 was the price. The defendant No.2 supported these allegations. He, in his written statement, set forth that, after her husband's death, defendant No.1 had gone to her father's; subsequently she desired to sell this property, and therefore informed defendant No.2, and he desired to buy. Consequently 'in a public place in the presence of several person, on giving defendant a proper price, she executed a kabala in his favor. Plaintiff or his brother or his nephew at no time wished to buy the land."

The Munsif found at the out-set that plaintiff was not entitled to maintain this suit for the following reasons, on his own evidence without going into any other issues. Plaintiff's evidence, he held, showed that one day in Pous, when plaintiff came home, his wife told him that the land had been sold by defendant No.1 to defendant No.2; plaintiff thereupon entered his house, opened his chest, took

> out Rs.47.4, called the witnesses, proceeded to the premises and there cried a loud that he had a right of pre-emption, and would exercise that right; and then and there offered to defendant No.2 the refund of the purchase-money, which tender defendant No.2 refused. Plaintiff then went with the witnesses to defendant No.1's house, and there also plaintiff went through the same formal declaration of his rights. The Munsif held that, while all this was right enough, yet plaintiff had omitted to shout out his demand for the land the instant he heard about it from his wife's lips. this omission the Munsif held to be fatal, and so dismissed the suit."

Then their lordship further observed and held that:

> "Jamilan v. Latif Hossein (1) states: "The Talab-i-mowashibat may be, and constantly is, a private act which the purchaser against whom the right is claimed has no power of questioning or refuting; and the Talab-i-shad is the only public act connected with the claim to pre-emption, of which

the purchaser has necessarily any cognizance." The Talab-i-shad must take place with the least practicable delay. It has clearly taken place on the present instant with the least practicable delay. Bailie's Digest states page 484; "The Talab-i-mowashibat, or immediate demand, is first necessary, then the Talab-i-shad or demand with invocation, if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest his immediate demand, it would suffice for both demands, and there would be no necessity for the other." It appears to me that the above quotation covers the present case, and that the demand made in the presence of witnesses and of the premises within some minute, perhaps half an hour at the outside, after hearing of the sale, is the sort of Talab-i-

mowashibat which renders unnecessary any subsequent Talab-i-shad. It seems to me that plaintiff not only made this demand in the presence of witnesses on the premises, but his demand was answered by the purchaser from a neighbouring bari, and that plaintiff then promptly went off to the vendor’s residence (some distance off), and in the presence of witnesses made demand of her. It seems that all the necessary formalities have been gone through; the question is, were they commenced and concluded with sufficient promptitude? I think the commencement is the only really debatable point; it cannot be contended that, when once commenced, all the necessary formalities were not promptly and continuously gone through. Mona Singh v. Mosrad Singh, (1) lays down that the net of going into one's house to get the money before making demand is a delay which forfeits the pre-emptor's title. The words used by Macnaghten are: "It is necessary that the person claiming this right should declare his intention

of becoming purchaser immediately on hearing of the sale." In a ruling, Jadu Singh v. Rajkumar (2), Komp, J., remarks: "There is no absolute necessity for the pre-emptor to make the Tulub-i-mowashibat in the presence of witnesses. It is usually done in the presence of witnesses, in order that the pre-emptor may be provided with proof in case the purchaser should deny the demand." This seems no me to indicate as permissible a reason- able delay for the purpose of getting witnesses before the demand is made.

But in Ram Charan v. Nabrir Mahton (3) it has been held that where the pre-emptor heard the news of the sale at his own house, which was adjacent to the lands whereof pre-emption was claimed, and then went from his own to the land in dispute, and then made the demand, the delay, though very short, forfeited the right.

Page 569, Vol. III, of the Hedaya, states: "If the man claim his skuffa in the presence of the

company amongst whom he may be sitting when he received the intelligence, he is the shuffee, his right not being invalidated unless he delay asserting it till after the company have broken up, because the power of accepting or rejecting the shuffa being established, a short time should necessarily be allowed for reflection in the same manner as time is allowed to a woman to whom her husband has given the power of choosing to be divorced or not." This passage was quoted with ap- provalin Amjad Hossein v. Kharag Sen Sahu (4).

It seems to me that if this is a correct statement of the law then the plaintiffs are well within the law in the present case. I think the above opinion is not in conflict with the ruling in Ali Muhammad v. Taj Muhammad (5) where twelve hours delay in making the first demand was considered excessive. I must hold that in the present case the formalities required by law have been commenced and gone through with sufficient expedition.

The second defendant appealed to the High Court on the ground that the Judge was wrong in holding that formalities prescribed by Mahomedem law had been complied with.

Baboo Jogesh Chunder Dey for the appellant.

Baboo Juggut Chunder Banerjee for the respondent.

(1) 5 W. R., 203.

(2) 4 B. L. R. A. C. 171; 13 W. R., 177.

3) 4 BL R. A. C., 216; 13 W. R., 259.

(4) 4 B. L. R. A. C., 203; 13 W. R., 299.

(5) I. L. R., 1 All., 283.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.-This is a case of pre-emption. The Munsiff held that the plaintiff was not entitled to succeed because he had not, in compliance with the requirements of Mahomedan law, per- formed the ceremony of Tulub-i-mowashibat. The Munsiff says in his judgment: "The plaintiff on hearing this," that is, on hearing the fact of the sale from his wife,

"entered his house, opened his chest, took Rs. 47-4, called the witnesses, proceeded to the premises, the subject of sale, and there cried aloud the following words: 'That he has the right of pre-emption to purchase the said land and he shall exercise the said right, let the defendant No. 2 receive the refund of the consideration money and make over the land to him (the plaintiff).' The defendant No. 2 refused to accept the offer, on which the plaintiff went with the witnesses to the place where the defendant No. 1 was residing, and there also the plaintiff performed the said ceremony, that is, ceremony of Tulub-i-shad. Now, it is clear that immediately upon hearing of the sale of the property the plaintiff did not make the demand or perform the ceremony of Tulub-i-mowashibat. At page 481 of Baillie's Digest of Mahomedan Law, there is the following passage, in which the law on the subject is stated: "By Tulub-i-mowashibat is meant that when a person who is entitled to pre- emption has heard of a sale he ought

to claim his right immediately on the instant (whether there is any one by him or not), and when he remains silent without claiming the right, it is lost;" and then is given the instance of a person reading a letter in the beginning or middle of which the information as to the sale is contained. If he wait till he finish the whole letter without making the Tulub-i-mowashibat the right of pre-emption is lost. The Judge quotes and relies upon a passage from the same work, p. 484, which is as follows: "The Tulub-i-mowashibat or immediate demand is first necessary, then the Tulub-i-shad, or demand with invocation, if at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands and there would be no necessity for the other." Now the facts of the

present case do not fall within the meaning of the passage last quoted. The plaintiff did not, on hearing of the sale, immediately call witnesses to attest the immediate demand. He made a delay, went into the house, got the money, and then called the witnesses, and this being so, it is clear that the case is not one to which the second quotation from Mr. Baillie's work would apply. We may refer to the cases of Mona Singh v. Mosrad Singh (1) and Ram Charan v. Narbir Mahton (2), which have been cited by the vakeel for the appellant, as instances of what is required by the law in conformity with the first of the above extracts from Mr. Baillie's work. We think that in the present case the requirements of the law have not been complied with. "

Now let us see what has happened in the instant case. In the plaint in paragraph 6 and 7, it has been stated that:

"৬। দাবীকৃত ভূমি প্রিয়েম্পশান হইলে সরকারের নির্দিষ্ট সরকারের নির্দিষ্ট সীমার উর্দ্ধে হইবেনা। দাবীকৃত ভূমির সংলগ্ন একই দাগের পশ্চিম পার্শ্বে বাদীর জমি রহিয়াছে। যাহা ১-২নং ক্রেতা বিবাদী তাহাদের খরিদা নালিশী

১নং তফশীলের দলিলের ৫ম পৃষ্ঠার ১১ লাইনে স্বীকার করিয়াছে। বাদী দাবীকৃত ভূমির সংলগ্ন ভূমির মালিক বিধায় এবং নালিশী জোতে খরিদ সূত্রে শরীক বিধায় প্রিয়েম্পশান করা একান্ত আবশ্যক। অন্যথায় বাদীর ভূমির দখল পরিচালনা করিতে বিশেষ অসুবিধার সৃষ্টি হইবে। ১-২নং বিবাদী দাবীকৃত ভূমিতে আগন্তক বটে। দাবীকৃত জোতের ভূমিতে ১-২নং বিবাদী কোন প্রকার শরীক নহে। বাদী দাবীকৃত ভূমি বিক্রয়ের বিষয় কিছুদিন পূর্বে লোকমুখে জানিতে পারিয়া টাঙ্গাইল হইতে আসিয়া বিগত ইং ৩১/০৭/১১ তারিখ মোতাবেক বাংলা ১৬ই শ্রাবন ১৪১৮ রবিবার পঞ্চগড় সদর সাব রেজিঃ অফিস হইতে নালিশী কবলার সহি মুহুরী নকল হাতে পাইয়া তাহা পাঠক্রমে সঠিক ভাবে জানিতে পারেন। বাদী টাঙ্গাইল জেলায় বসবাস করায় ইতিপূর্বে নালিশী বিক্রয়ের বিষয়ে অবগত হন নাই। নালিশী ভূমি বাদীর বিশেষ প্রয়োজন হেতু অত্র প্রিয়েম্পশান আদেশ প্রাপ্ত হওয়ার দাবীতে অত্র আদালতের আশ্রয়ে আসিয়া নিরুপায় হইয়া অত্র মোকদ্দমা দায়েরে বাধ্য হইলেন।

৭। বাদী বিগত ৩১/০৭/১১ইং তারিখ মোতাবেক ১৬ ই শ্রাবন বাংলা রবিবার বিকালে স্বাক্ষী ১) রিয়াজুল, পিতা-মৃতঃ শাহ্ মোহাম্মদ, সাং-লাঠূয়াপাড়া, থানা ও জেলা পঞ্চগড় ২) জুন্নুন রজবী, পিতা-মৃতঃ মাহাবুবুর রহমান, সাং আমতলা, থানা ও জেলা - পঞ্চগড়, ৩) শাজাহান, পিতা-মোকছেদ আলী, সাং- জগদল, থানা ও জেলা-পঞ্চগড় ৪) সানাউল্লাহ, পিতা-মৃতঃ ইয়াছিন আলী, সাং-ভাবরঙ্গী, থানা ও জেলা- পঞ্চগড় সহ

নালিশী আর.এস ২৮৫৭ নং দাগের জমিতে যায় এবং মুসলিম আইনের ২৩৬ ধারায় বর্ণিত আনুষ্ঠানিকতা অর্থাৎ তলব-ই-মৌসিবত বা লম্ফঝম্ফ দিয়া হকসাফা বা অগ্রক্রয় করিবার প্রথম দাবী করে। অতঃপর তলব-ই-ইশাদ বা ২য় দাবীর অর্থাৎ ২ জন স্বাক্ষীর উপস্থিতিতে অগ্রক্রয়ের জন্য অগ্রক্রয় অধিকার দাবী করে। বাদীর পক্ষে জুন্নুন রজবীও পর পর ঐ ২টি দাবী করে। যাহাতে বাদীর অনুপস্থিতিতে সে স্বাক্ষ্য দিতে পারে অর্থাৎ প্রথমে লম্ফঝম্ফ দিয়া আমি বলি যে, এই জমিতে আমি আমার হকসাফা বা অগ্রক্রয় দাবী করিতেছি। তৎপর আমার পক্ষে আমার ম্যানেজার স্বাক্ষী জুন্নুন রজবীও লম্ফঝম্ফ দিয়া বলে যে, বাদীপক্ষে আমি এই জমি হকসাফা বা অগ্রক্রয়ের দাবী করিতেছি। তৎপর বাদী ২য় দাবী করিয়া বলে যে, ১-২নং বিবাদী নালিশী এই জমি খরিদ করিয়াছে। আমি ইহার সাফি বা অগ্রক্রয়ের অধিকারী। আমি কিছুক্ষন পূর্বেই সাফার অধিকার দাবী করিয়াছি এবং আবারও করিতেছি। অতএব আপনারা ইহার স্বাক্ষী থাকুন। তৎপর স্বাক্ষী জুন্নুন রজবীও বলে যে, নালিশী জমি ১-২নং বিবাদী খরিদ করিয়াছে। আপনারা ইহার স্বাক্ষী থাকুন। উল্লেখ্য যে, ২টি দাবী একত্রে করিতে আইনত কোন বাঁধা নাই এবং বাদীপক্ষে তাহার ম্যানেজার বা অন্য কেহ এরুপ দাবী করিতেও আইনতঃ কোন বাধা নাই। নালিশী ভূমি সংলগ্ন বাদীর ভূমি এবং নালিশী জমির উপর দিয়া বাদীর যাতায়াতের পথ। সে কারনে বাদী মুসলিম আইনের ২৩১ ধারার বিধান অনুযায়ী ২য় শ্রেনীর এবং ৩য় শ্রেনীর হকসাফা বা অগ্রক্রয়ের অধিকারী।"

Upon going through the plaint it appears that plaintiff although did not mention from whom and when got the knowledge of sale but on 31.07.2011 coming from Tangail, went to the Sub-registry Office, Panchagarh, he collected the certified copy of the impugned sale deed and then he called witness 1. Riazul, 2. Junnun Rajabi, 3. Shajahan, 4. Sanaullah and went to the suit land and demanded for pre-emption on complying a talab-i-mowasibat and talab-i-ishhad together in the presence of witness. Law does not allow the pre-emptor the space of time, which he has spend for making a confirmation of the sale and to make his demand by way of talab-i-mowasibat and talab-i-ishhad as been decided by the Calcutta High Court in 10ILR 383. Talab-i-mowasibat, which is the first condition precedent i.e. the demand for pre-emption is to be made immediately on receiving information of the sale as per Clause 1 of section 236 of the Mahomedan Law and this assertion of demand can be made confirm thereafter after having done the talab-i-ishhad either in the presence of the buyer or the seller, or on the premises which are the subject of sale, and in presence at least of two witnesses. Wherein in the instant case from nowhere in the four corner of the

proceedings, it can be noticed that the petitioner pre-emptor has made his demand by way of disclosing the talab-i-mowasibot immediately after getting the information of sale rather he has disclosed in the plaint that he got to know about the sale deed few days before from the local people and then without making a demand by way of talab-i-mowasibot, he went to the Panchagarh Sub-registry Office on 31.07.2011 and collected the certified copy of the sale deed and then called the witnesses and made both demands i.e. talab-i-mowasibat and talab-i-ishhad together in presence of the witnesses. Accordingly it can safely be said that the requirements of law of the condition precedents as been revealed from section 236 of the Mahomedan Law, before claiming the pre-emption was not been complied with. The court below thus correctly found that the fact disclosed in the plaint as well as the witnesses can well be a good case for pre-emption under S.A &T Act but not a case under section 231/236 of the Mahomedan Law and accordingly pre-emption cannot be allowed in the absence of legal requirements under law.

Having regards to the above law, fact and circumstances of this case, I am of the opinion that both the courts below

committed no error of law in rejecting the pre-emption case and the impugned judgment thus contains no illegality.

I do not find any ground to interfere in the instant rule.

In the result, the rule is discharged and the judgment and decree passed by the court below is hereby affirmed.

Send down the Lower Court Record along with the judgment at once.