

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.5438 of 2022

In the matter of:

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

And

Mohammad Hossain Chowdhury being dead his heirs
and successors- Iqbal Hossain Chowdhury and others
... Petitioners

-Versus-

Md. Rajib Hossain and others

... Opposite parties

Mr. Nazmul Hassan Rakib, Advocate

... For the petitioners.

Mr. Tasmia Prodhan, Advocate

... For the opposite party No.1.

Heard and Judgment on 16.01.2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party Nos.1-2 to show cause as to why the impugned judgment and order dated 25.09.2022 passed by the Additional District Judge, 2nd Court, Cumilla in Miscellaneous Appeal No.49 of 2019 dismissing the appeal and thereby affirming the judgment and order dated 21.07.2019 passed by the learned Senior Assistant Judge, Laksham Court, Cumilla in Pre-emption No.49 of 2010 dismissing the case of pre-emption should not

be set aside and/or pass such other or further order or as to this Court may seem fit and proper.

Facts in short are that the petitioner as petitioner instituted Pre-emption Case NO.49 of 2010 under Section 24 of the Non Agriculture Tenancy Act, 1949 for pre-emption of $24\frac{1}{2}$ decimal land transferred by registered deed of exchange dated 22.07.2010 by opposite party Nos.1 and 2.

It was alleged that the petitioners are co-sharers by inheritance and opposite party No.1 is a stranger to the disputed holding and opposite party No.2 sold disputed $24\frac{1}{2}$ decimal land to opposite party No.1 without service of notice upon the petitioners. To deprive the petitioners from his lawful right of pre-emption above transfer deed was designated as a deed of exchange but in fact above document was a deed of sale.

Opposite party No.1 contested the case by filing a written objection alleging that he exchanged his 10 decimal land of "Ka" schedule of above deed of exchange with opposite party No.2 in lieu of disputed $24\frac{1}{2}$ decimal land and they got possession of their respective exchanged land and they are in peaceful possession of above land. Above deed was not a deed of sale.

At trial petitioners examined 3 witnesses and documents of the petitioners were marked Exhibit Nos.1-3. On the other hand opposite party No.1 examined 2 witnesses and his documents were marked as Exhibit Nos."Ka" and "Ka-1".

On consideration of facts and circumstances of the case and evidence on record the learned Senior Assistant Judge dismissed the case.

Being aggrieved by above judgment and order of the trial Court above petitioners as appellants preferred Miscellaneous Appeal No.49 of 2019 to the learned District Judge which was heard by the learned Additional District Judge, 2nd Court who dismissed above appeal and affirmed the judgment and order of the trial Court.

Being aggrieved by and dissatisfied with above judgment and order of the Court of Appeal below above appellants as petitioners moved to this Court with this revisional application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

Mr. Nazmul Hossain Rakib, learned Advocate for the petitioners submits that by the impugned deed of exchange marked as Exhibit No.3 opposite party No.2 has transferred disputed $24\frac{1}{2}$ decimal Viti land to opposite party No.1 and opposite party No.1 transferred his 10 decimal agricultural land and above unusual and unequal quantity of

land transferred by the parties clearly show that above document was a colourable deed of exchange to defeat the right of pre-emption of the petitioners. The learned Judge of the Court of Appeal below miserably failed to appreciate the true spirit and meaning of Section 92 of the Evidence Act, 1872 and most illegally held that the petitioners were legally incompetent to challenge the character of above deed of exchange and claim the same as a deed of sale. Two witnesses of above deed (Exhibit No.3) gave evidence as PW2 and PW3 respectively and both of them have consistently and corroboratively stated that money was the consideration of above document and the same was in fact a deed of sale. On consideration of above facts and evidence on record the learned Judge of the Court of Appeal should have held that Exhibit No.3 was in fact a deed of sale but the same was fraudulently designed as a deed of exchange and accordingly allowed the appeal and the pre-emption case. But the learned Judge of the Court of Appeal below failed to appreciate above materials on record properly and most illegally dismissed the appeal and Affirmed the flawed judgment and order of the trial Court which is not tenable in law.

On the other hand Ms. Tasmia Prodhan, learned Advocate for the opposite party submits that undisputedly the impugned deed is a registered deed of exchange (Exhibit No."Ka" and Exhibit No.3) and by

above document opposite party No.1 has transferred disputed 24.5 decimal lands and opposite party No.2 transferred his 10 decimal land. Petitioners submit that opposite party No.2 was the rightfgul owner ande possessor of $24\frac{1}{2}$ decimal land of "Kha" schedule of above deed. There is no allegation that opposite party No.1 did not have any title and possession in above 10 decimal land or opposite party No.2 did not get possession in above 10 decimal land or opposite party No.2 did not get possession and ownership of above 10 decimal land of opposite party No.1. In cross examination PW2 has stated that he was not present at the time of talk of sale or writing of above exchange deed. The claim of PW3 that the disputed $24\frac{1}{2}$ decimal land was sold for Taka 10,00,000/- is beyond the pleadings. On the contrary PW2 has admitted that on the basis of above deed of exchange opposite party No.2 has mutated her name for 10 decimal land of "Ka" schedule.

On consideration of above facts and circumstances of the case and materials on record the learned Judges of both the Courts below have concurrently held that above deed (Exhibit Nos.3 and "Ga") was in fact a deed of exchange and not a deed of sale and above findings of the Courts below being based on evidence on record this Court cannot in its revisional jurisdiction interfere with above findings of facts.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record including the pleadings, judgments of the Courts below and evidence adduced by the parties at trial.

It is also admitted that the petitioners are co-sharer by inheritance and opposite party No.1 is a stranger to the disputed holding and above case of pre-emption was filed within the statutory period of limitation. It is admitted that opposite party No.2 was the rightful owner and possessor of disputed $24\frac{1}{2}$ decimal of Kha schedule of the impugned deed (Exhibit No.3) and opposite party No.1 was the owner and possessor of 10 decimal land of "Ka" schedule of impugned deed of exchanged.

Section 24(1B) of the Non-Agricultural Tenancy Act, 1949 excludes a deed of exchange from the purview of pre-emption under Act. As mentioned above the impugned deed of transfer dated 22.07.2010 has been designated, prepared executed and registered as a deed of exchange and not as a deed of sale. The petitioners claim that opposite party No.2 in fact transferred disputed $24\frac{1}{2}$ decimal land to opposite party No.1 by sale but to defeat the right of pre-emption fraudulently prepared above deed as a deed of exchange.

The petitioners have claimed that the consideration of above deed (Exhibit No.3) was money not 10 decimal land of opposite party No.1. But the petitioners did not make any specific mention in the plaint the amount of consideration money of above sale. In above deed of exchange (Exhibit No."Ka") $24\frac{1}{2}$ decimal land of opposite party Nos.2 and 10 decimal land of opposite party No.1 were exchanged and the deed was valued at Taka 2,00,000/- for the purpose of registration. The petitioners did not challenge above valuation of disputed $24\frac{1}{2}$ decimal land. On the contrary the petitioners have accepted Taka 2,00,000/- valuation of disputed $24\frac{1}{2}$ decimal land at Paragraph No.10 of the plaint. In a deed of exchange the consideration of the land is another land not money. As mentioned above in the impugned kabala deed there are two schedules "Ka" schedule of 10 decimal land of opposite party No.2. While giving evidence as OPW1 opposite party No.1 has stated that pursuant to above exchange opposite party No.2 got possession of his 10 decimal land and she is in possession of the same. PW2 Nurul Islam has admitted in his cross examination that opposite party No.2 has mutated her name for above 10 decimal land. PW3 Nazrul Islam has stated in his cross examination that opposite party

No.2 has mutated her name for the land she acquired pursuant to above exchange.

It is true that two witnesses of above deed of exchange (Exhibit No."Ka") gave evidence as PW2 Nurul Islam and PW3 Nazrul Islam and in their respective evidence they stated that money was the consideration of disputed $24\frac{1}{2}$ decimal land. But in his cross examination PW2 Nurul Islam has stated that he was not present at the time of talk of above sale or at the time of reading over above deed. On the other hand PW3 Nazrul Islam stated that in his presence Taka 10,00,000/- was paid as consideration of above $24\frac{1}{2}$ decimal land but his above evidence is beyond pleadings and not supported by any other evidence.

The petitioners have utterly failed to prove by legal evidence that above document was in fact a deed of sale and to defeat the right of pre-emption of the petitioners the same was designated as a deed of exchange and the learned Judge of the Court of Appeal on correct appreciation of above materials on record has rightly dismissed the appeal and affirmed the lawful judgment and order of the trial Court which calls for no interference.

I am unable to find any infirmity or illegality in the impugned judgment and order of the Court of Appeal below nor I find any substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection is liable to be discharged.

In the result, the Rule is discharged.

However, there will be no order as to costs.

Send down the lower Court's record immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER