

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

First Miscellaneous Appeal No.319 of 2009 with
Civil Rule No. 696(F.M.) of 2009

IN THE MATTER OF:

Md. Delowar Hossain

í í Appellant

-Versus-

Md. Hanif Bhuiyan and others

í .. Respondents

Mr. Mahbubey Alam for

Mr. Md. Zakir Hossain, Advocate

í í í for the appellant

Mr. Golam Rabbani for

Mr. Swapan Kumar Mitra, Advocate

í . for the respondent No.1

Heard on: 24.04.2011, and

Judgment on: 03.05.2011

Present:

Mr. Justice Shahidul Islam

And

Mr. Justice Md. Rais Uddin

Shahidul Islam, J:

1. This Appeal has been presented by the pre-emptee No.1 as against the judgment and order dated 17.09.2009, passed by the learned Joint District Judge, 1st Court, Dhaka in Pre-emption Miscellaneous Case No.18 of 2007, allowing pre-emption under section 24 of the Non Agricultural Tenancy Act.
2. Facts relevant for disposal of the appeal are that the case land is measuring an area of about $2\frac{1}{4}$ katha of land, appertaining to C.S.

Khatian No.9609, C.S. Plot No.88, R.S. Plot No.476, belonged to Hanif Khan. There was a tin shed and brick made homestead standing upon the case land. Hanif Khan sold the land including the homestead in favour of pre-emptor and pre-emptee Nos.2 and 3 by 3 kabala deeds dated 11.5.1983 being kabala deed No.3173, 3174 and 3175 (exhibit 2 series). The plot number in those 3 deeds were wrongly written as plot Nos.474 and 475 and accordingly Hanif Khan by a deed of rectification dated 17.02.1987 rectified those 3 deeds and in place of plot Nos.474 and 475, the plot No.476 was inserted. The pre-emptor and pre-emptee Nos.2 and 3 are brothers from the womb of two mothers. After purchase they started possessing the case land and homestead jointly. Thereafter they constructed a 6(six) storied building covering the entire land and started possessing jointly by living and also by letting out to the tenants.

3. It is the pre-emptor's case that during possessing jointly, the pre-emptee Nos.2 and 3 transferred their share in the case land and part of building by registered kabala deed being No.5093 dated 29.6.2003 and being No.5095 dated 29.6.2006 in favour of pre-emptee No.1 transferring in total 272 Ajutangsha of land and part of building standing thereon along with gas line, water line and electricity line. It is the pre-emptor's case that no notice of transfer was served upon him as required under section 23(4) of the Non Agricultural Tenancy Act and he came to know about the deed on 12.01.2007 and got the

certified copy of the deed on 05.02.2007 and thereafter instituted the pre-emption case on 26.02.2007 claiming him to be a co-sharer of the case land and claiming the pre-emptee No.1 to be a stranger purchaser. It is his further case that the holding remains intact and no mutation took place before transfer.

4. The pre-emptee submitted written objection and contested the pre-emption case contending inter alia, that the pre-emptee Nos.2 and 3 mutated their share in 2005 dated 20.3.2005 and thereafter transferred the case land along with building in favour of the pre-emptee No.1 and as such the co-sharership of the pre-emptor was ceased to exist. He also mutated his name and paid rent separately. The pre-emption case was barred by limitation and the pre-emptor knew about the transfer. The pre-emption case was not maintainable in its present form.
5. Upon the pleadings of the parties the learned Joint District Judge, 1st Court, Dhaka framed the following issues:-
 - (i) Whether the pre-emption case is maintainable in its present form?
 - (ii) Whether the pre-emption case is barred by limitation?
 - (iii) Whether the pre-emption case is liable to be allowed?
 - (iv) What more relief the pre-emptor is entitled to get?
6. At the trial the pre-emptor examined 3 witnesses and the pre-emptee examined 2 witnesses. The documents of pre-emptors namely a power of attorney deed giving power to his wife to depose before the

court was marked as exhibit-1. The certified copy of the kabala deeds dated 11.5.1983 were marked as exhibit- 2 series. The deed of rectification dated 17.02.1987 rectifying the kabala deed dated 11.5.1983 was marked as exhibit-3. The deeds under pre-emption dated 29.6.2006 transferring part of the case land along with part of building by the pre-emptee Nos.2 and 3 in favour of pre-emptee No.1 was marked as exhibit-4 and 4(Ka). The R.S. Khatian No.1097 was marked as exhibit-5. The copy of the receipt showing payment of tax with the City Corporation for the case holding was marked as exhibit-6.

7. On the other hand, the pre-emptee No.1 examined 2 witnesses and his documents namely the kabala deed dated 11.5.1983 showing purchase by Gias Uddin Bhuiyan pre-emptee No.2 and Md. Hanif Bhuiyan pre-emptee No.3 vide kabala deed dated 3173 and 3174 were marked as exhibit- Ka and Ka(1). The kabala deed under pre-emption being No.5093 and 5094 dated 29.6.2006 were marked as exhibit- Kha and Kha(1). Two khatians being No.1097/1 and 1097/2 were marked as exhibit- Ga and Ga(1). One duplicate carbon receipt was marked as exhibit- Gha. Two rent receipts dated 23.4.2006 were marked as exhibit- Gha(1) and Gha(2). Other two rent receipts were marked as exhibit-Gha(3) and Gha(4). Some electricity bills and wasa bills were marked as exhibit- Uma series.

8. Upon considering the evidences on record the learned Joint District Judge, 1st Court, Dhaka allowed the pre-emption case by the impugned judgment and order dated 17.09.2009.
9. Being aggrieved by the impugned judgment and order dated 17.09.2009 the pre-emptee No.1 has preferred this Appeal.
10. Mr. Mahbubey Alam appeared with Mr. Md. Zakir Hossain, the learned advocates for the appellant and Mr. Golam Rabbani appeared with Mr. Swapan Kumar Mitra, the learned advocates for the respondents.
11. Mr. Mahbubey Alam, the learned advocate taking us through the impugned judgment of the court below formulated the following points for assailing of the impugned judgment and order:-
 - (a) Referring to section 2(4) of the Non Agricultural Tenancy Act, he submitted that pre-emption under section 24 of the Non Agricultural Tenancy Act is not available against any homestead. Elaborating his submission he argued that within the definition of the Non Agricultural land for the purpose of exercising the right of pre-emption, a co-sharer tenant is estopped from purchasing any homestead. He submitted that although the 3 brothers purchased the case land by 3 independent deeds but thereafter constructed a 6 storied building upon the case plot and as such that became a homestead and the homestead is exempted from pre-emption under section 24 of the Non Agricultural Tenancy Act.

- (b) Secondly he submitted that vide exhibit- Ga and Ga(1), the pre-emptee Nos.2 and 3 got their names mutated and separated their holdings. Two holdings were opened being Nos.365/5 and 367/5 and as such the co-sharership of the pre-emptor was ceased to exist at the time of seeking pre-emption. He further submitted that the pre-emptee Nos.2 and 3 paid rent separately and as such the mutation effected in 2005 was acted upon and in support of his contention he submitted that exhibit- Gha and Gha(1) are two rent receipts showing payment of rent. He submitted that whenever the mutation has been effected ceasing co-sharership of the pre-emptor, the case was not at all maintainable and the court below erred in law in not considering exhibit- Ga, Ga(1), Gha and Gha(1).
- (c) Thirdly he submitted that the pre-emption case was barred by limitation but the court below failed to consider the question of limitation. He further submitted that the pre-emptee took positive pleadings in his written objection that jama was separated but that was not controverted by the pre-emptor. He further submitted that if the pre-emption case is allowed, the citizen, residing in Dhaka city would be in difficulty to purchase apartment. He further submitted that the pre-emptee No.1 purchased 5 apartments and as such the pre-emption case is not maintainable and the impugned judgment and order is

liable to be set aside and the appeal is liable to be allowed and the pre-emption case is liable to be dismissed.

In support of his contention Mr. Mahbubey Alam relied upon the case of S.M. Nasirul Haque vs. Omar Faruque Chowdhury and others, reported in 54 DLR (HC) 181 and the case of Shah Alam (Md) vs. Md. Shahidur Rahman and others, reported in 55 DLR(HC) 214 and the case law of Syed Sad Ali vs. Bidhan Chandra Dev and others, reported in 20 BLD (HC) 343.

12. Mr. Golam Rabbani, the learned advocate on the other hand, by citing the case law of S.M. Basiruddin vs. Zahurul Islam Chowdhury and another, reported in 35 DLR (AD) 230 submitted that Section 2(4) of the Non Agricultural Tenancy Act defines that the land which is used for the purpose not connected with agriculture or horticulture and includes any land which is held on lease for purposes not connected with agriculture or horticulture irrespective of whether it is used for any such purpose or not, but does not include a homestead to which the provision of section 182 of the Bengal Tenancy Act, 1885 apply when a raiyat or an under- raiyat holds his homestead otherwise than as part of his holding within the same village or any village contiguous to that village, his status in respect of his homestead shall be that of a raiyat or an under-raiyat according to the status of the landlord of the homestead, and the incidents of his tenancy of such homestead shall be governed by the provisions of this Act, applicable to raiyats or under-raiyats, as the case may be.

He submitted that the structure which has been raised upon the case land does not come within the ambit of section 182 of the Bengal Tenancy Act, 1885 and as such the submission made by Mr. Mahbubey Alam the learned advocate for appellant is not tenable in law. He further submitted that 3 brothers, the pre-emptor and the pre-emptee Nos.2 and 3 jointly purchased $2\frac{1}{4}$ kathas of land including a homestead from Hanif Khan and thereafter erected a 6 storied building jointly and started possessing jointly. In course of possession the pre-emptee Nos.2 and 3 transferred their share to the pre-emptee No.1 without serving any notice upon the pre-emptor and as such the pre-emption case is maintainable. Secondly he submitted that separation of jama under section 117 of the State Acquisition and Tenancy Act, in case of agricultural land is quite distinguishable from the case of exercising pre-emption under section 24 of the Non Agricultural Tenancy Act. He submitted that in the case of pre-emption under section 24 of the Non Agricultural Tenancy Act it is to be looked into as to whether the case plot has been split up or divided. In section 96 of the State Acquisition and Tenancy Act, the question of taking away the right of pre-emption on account of separation of holding is not applicable in a case under section 24 of the Non Agricultural Tenancy Act. He submits that the right of pre-emption exists in favour of a co-sharer of the transferred land if any share of the land is transferred to any stranger. He submitted that the

case law referred to above by the learned council for the appellant have got no manner of application in the instant case. Thirdly he submitted that no case of separation or jama has been proved by the pre-emptee. There is not a single document available on record before the court that any mutation case was started or any mutation case was allowed as per section 117 of the Non Agricultural Tenancy Act. He submitted that the jama has been remaining intact till now and as such the trial court after being satisfied has allowed pre-emption. With these averments he prayed for dismissal of the appeal.

13. Upon going through the pleadings of the parties as well as after considering the submission of the learned advocates of both the parties, we need to frame the following issues:-

- (i) Whether the pre-emption case under section 24 of the Non Agricultural Tenancy Act is permissible in law against a transfer, transferring a part of common land and part of a building by a co-sharer in favour of a stranger in view of the definition of "non agricultural land" within the meaning of section 2(4)(a) of the Non Agricultural Tenancy Act?
- (ii) Whether any mutation was effected between the pre-emptor and the pre-emptee Nos.2 and 3 before transferring a part of the case land along with part of structures in favour of the pre-emptee No.1 (a stranger) taking away the right of pre-emption of the pre-emptor?

- (iii) Whether there took place any mutation and the exhibit- Ga and Ga(1) are mutated khatian as claimed by the pre-emptee No.1?
- (iv) Whether any rent was paid separately after the alleged mutation was effected vide exhibit- Ga and Ga(1)?
- (v) Whether the impugned judgment and order are sustainable in law?

14. Let us take up the issue No.1 for discussion and disposal.

It is admitted that Hanif Khan was the owner of the case land and there was a homestead and shops upon the case land. It is admitted that Hanif Khan transferred about $2\frac{1}{4}$ kathas of land (case land) in favour of pre-emptor and his two brothers the pre-emptee Nos.2 and 3 vide 3 kabala deeds dated 11.5.1983 being Nos.3173, 3174 and 3175. It is also admitted that in those 3 kabala deeds, the plot Nos.474 and 475 were wrongly written in place of plot No.476 and thereafter Hanif Khan by a deed of rectification vide exhibit-3 rectified those three deeds and the 3 brothers started possessing the homestead jointly. Admittedly the 3 brothers constructed a 6 storied building upon the land covering an area of 2 katha 3 chatak of land. Admittedly the pre-emptee Nos.2 and 3 by two kabala deeds dated 29.6.2006 transferred their share measuring in total 272 Ajutangsha out of 408 Ajutangsha and a part of building standing thereon vide exhibit- Kha and Kha(1) in favour of the pre-emptee No.1 and

thereafter the litigation was started at the instance of pre-emptor who filed Miscellaneous Case No.18 of 2007 seeking pre-emption against the transferred land and building made vide exhibit- Kha and Kha(1).

15. It is the pre-emptor's case that he was not served with any notice as required under section 23 of the Non Agricultural Tenancy Act and after coming to know of the transfer on 12.01.2007 he submitted the pre-emption case within limitation. But it is the case of the pre-emptee No.1 that the pre-emptee Nos.2 and 3 got their jama separated in 2005 and the pre-emptor was ceased to be a co-sharer tenant in the case land and structure as well standing on the case land.

16. Section 24 of the Non Agricultural Tenancy Act provides the provision for exercising the right of pre-emption by a co-sharer upon any land transferred in favour of stranger. The section runs thus:-

"24(1) If a portion or share of the non-agricultural land held by a non-agricultural tenant is transferred, one or more co-sharer tenants of such land may, within four months of the service of notice issued under section 23 and, in case no notice had been issued or served, then within four months from the date of knowledge of such transfer, apply to the court for such portion or share to be transferred to himself or to themselves, as the case may be.

(11) Nothing in this section shall apply to-

- (a) a transfer to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase, or

- (b) a transfer by exchange, or partition; or
- (c) a transfer by bequest or gift including heba but excluding heba-bil-ewaz for any pecuniary consideration in favour of the husband or wife of the testator or the donor of or any relation by consanguinity within three degrees of the testator or donor, or
- (d) a wakf in accordance with the provisions of the Muhammadan Law, or
- (e) a debutter or any other dedication for religious or charitable purposes without any reservation of pecuniary benefit for any individual."

17. Section 23 sub-section (4) of the Non Agricultural Tenancy Act provides the provision as to how a land is to be transferred which runs thus:-

"(1) í í í í í í í í í í í í í í í í í í í

(2) í í í í í í í í í í í í í í í í í í í ..

(3) í í í í í í í í í í í í í í í í í í í ..

(4) If the transfer of a portion or share of such land be one to which the provisions of section 24 apply there shall be filed notices giving particulars of the transfer in the prescribed form together with process fees prescribed for the service thereof on all co-sharer tenants of such land who are not parties to the transfer."

18. In the definition clause as given in section 2(4) of the Non Agricultural Tenancy Act, the "non agricultural land" has been defined in the following manner:-

"2(4) Non-agricultural land means land which is used for purposes not connected with agriculture or horticulture and includes any land which is held on lease for purposes not connected with agriculture or horticulture irrespective of whether it is used for any such purposes or not, but does not include-

(a) a homestead to which the provisions of section 182 of the Bengal Tenancy Act, 1885 (VIII of 1885) apply,

(b) land which was originally leased for agricultural or horticultural purposes but is being used for purposes not connected with agriculture or horticulture, without the consent either express or implied of the landlord, if the period for which such land has been so used is less than twelve years, and

(c) land which is held for purposes connected with the cultivation or manufacture of tea:

Provided that where an order has been made under section 72 converting a parcel of land which is non-agricultural land into a tenancy to which the provisions of this Act apply such land shall be deemed to be non-agricultural land;"

19. Mr. Mahbubey Alam submitted that right of pre-emption upon a homestead transferred has been made debarred under section 2(4)(a) of the Non Agricultural Tenancy Act. Upon a close and careful

perusal of the said section, it appears to us that only in the case, where the homestead comes within the meaning of section 182 of the Bengal Tenancy Act, 1885 if transferred that shall not be pre-empted under section 24 of the Non Agricultural Tenancy Act. Section 182 of the Bengal Tenancy Act, 1885 runs thus:-

"Homesteads. When a raiyat or an under-raiyat holds his homestead otherwise than as part of his holding within the same village or any village contiguous to that village, his status in respect of his homestead shall be that of a raiyat or an under-raiyat according to the status of the landlord of the homestead, and the incidents of his tenancy of such homestead shall be governed by the provisions of this Act applicable to raiyats or under-raiyats, as the case may be."

20. Upon a careful perusal of the said provision, it appears that the homestead in a raiyati holding has been defined in section 182 of the Bengal Tenancy Act and if any such homestead is constructed upon any raiyati holding that will not come within the definition of non-agricultural land. In that case pre-emption shall lie under section 96 of the State Acquisition and Tenancy Act. In the instant case the case land is situated in the heart of Dhaka city, at Wari and as such the land under pre-emption along with structure does not come within the meaning of homestead as described in section 182 of the Bengal Tenancy Act and as such the argument made by Mr. Mahbubey Alam does not stand. Section 24 of the Non Agricultural Tenancy Act is found to be made applicable in the instant case and

accordingly the issue No.1 is decided affirmatively in favour of the pre-emptor. We hold that pre-emption is maintainable under section 24 of the Non Agricultural Tenancy Act as against the transfer made vide exhibit- Kha and exhibit- Kha(1).

21. Now let us take up the issue No.II as to whether any mutation was effected between the pre-emptor and the pre-emptee Nos.2 and 3 before transferring a portion of the case land along with part of common building in favour of the pre-emptee No.1, taking away the right of the pre-emption of the pre-emptor?
22. As per the pre-emptee No.1 the mutation took place in March 2005 and two separate holdings were opened. Exhibit- Ga and Ga(1) are the mutated khatians as claimed by Mr. Mahbubey Alam. We have examined the exhibit- Ga and Ga(1). Exhibit- Ga and Ga(1) are not the certified copy of any khatian. Upon perusal of exhibit- Ga and Ga(1), it appears that a printed form of a khatian was collected and that printed form was filled up inserting the names of Gias Uddin Bhuiyan and Md. Hossain Bhuiyan. In the left hand side column of the form the following notes have been written:-

"Jote No.58/3, S.A. Dag 476." That was compared by Nazir cum cashier, Kotwali Circle, Dhaka who signed the same on 06.4.2005. The right hand side column of the form has been signed by Bhumi Upa Sahakari Karmakarta, Sutrapur Bhumi Office, Dhaka and signed on 03.4.2005. Similarly the exhibit-Ga was prepared upon a printed form and that was signed by Bhumi Upa Sahakari Karmakarta,

Sutrapur Bhumi Office, Dhaka and in left hand side it was compared by Nazir cum cashier, Kotwali Circle, Dhaka."

23. Section 117(1)(c) of the State Acquisition and Tenancy Act provides the provision for sub division of holding and restriction thereon. Under the said provision it is the function of the Revenue Officer for making any sub division at his own affords or on receiving any application of any party and notifying the other co-sharer. In the instant case no record from Revenue Officer's office was called for before the trial court at the trial to show that any mutation case was started and the pre-emptor was made a party in that case or any notice was served upon the pre-emptor. Exhibit- Ga and Ga(1) does not contain any reference of mutation case as well as any reference of allowing mutation. Exhibit- Gha is the duplicate carbon receipt prepared in the name of pre-emptee No.1 which got no manner of application in the instant case as because he is the pre-emptee No.1. Two rent receipts were produced before the court alleging effective mutation which was marked as exhibit- Gha(1) and Gha(2). From Exhibit- Gha(1) it shows that the payment was made against the original holding being M.R.R. Khatian No.1097. No mutated khatian was mentioned in the rent receipt. By exhibit- Gha(1) and Gha(2) it appears that rent was paid on 23.4.2006 separately by Md. Hossain Bhuiyan and Gias Uddin Bhuiyan. Have there been any mutation in March 2005 they would not have paid rent on the original holding. Exhibit- 7 is the certified copy of the order sheet of Title Suit No.56

of 2005 dated 06.6.2006. From exhibit it shows that the said title suit was decreed and the defendant No.3 of the suit named Md. Selim Uddin Bhuiyan was directed to hand over possession of the case land to the plaintiff. From the decree it shows that three brothers, the pre-emptor and the pre-emptee Nos.2 and 3 jointly instituted the suit on 15.3.2006 against Hasan Uddin Bhuiyan, Shahin Uddin Bhuiyan and Selim Bhuiyan for evicting them from the suit holding being no.3 Kaptan Bazar. Had there been any mutation or separation of jama before filing the pre-emption case, the three brothers would not have instituted the suit jointly on 15.3.2006. Exhibit- 7(Ka) is the decree passed in Title Suit No.56 of 2005. From exhibit- 7 and 7(Ka), it is proved beyond doubt that the fact of separation of jama vide Exhibit- Ga and Ga(1) are the subsequent product for the purpose of defence as against the pre-emption case. No jama was separated, as it appears from exhibit- 7 and 7(Ka). From the schedule of the deed under pre-emption it appears that the case land was transferred mentioning C.S. Plot, S.A. Plot and R.S. Khatian. There is although a reference of a Namjari khatian but the O.P.W.1 could not prove the fact that any notice was issued upon the pre-emptor for filing mutation case. From the deed under pre-emption it further appears that a part of case plot and a part of building was transferred the description whereof runs thus:-

"মহল্লা : কাপ্তান বাজার দাগ নম্বর : সি, এস- ৪৮(আটচল্লিশ) নং, এস,এ- ৪৭৬ (চারশত ছিয়াত্তর) নং আর, এস- ৬০৪ (ছয়শত চার) নং, সিটি জরী-প- ৯৪ (চুরানব্বই) নং দাগ রকম বাড়ী ভূমি পরিমান

১২০০ অযুতাংশ ইহার কা-ত ৩৬২ অযুতাংশ ইহার কা-ত আমি অত্র দলিল দাতার খরিদা ১৩৬ (এরশত ছত্রিশ) অযুতাংশ ভূমি ও তদস্থিত ছয়তলা পুরাতন পাকা দালা-নর অংশ সহ ও গ্যাস লাইন, পানির লাইন, বিদ্যুৎ লাইন ও যতযাবতীয় স্বত্বলভ্য হকহুকু ইত্যাদি সহ অত্র দলিল সাফ বিক্রিত ব-ট। যাহা ঢাকা সিটি কর্পোরেশন-নর ৩নং কাঞ্চান বাজার হোল্ডিং-য়র সম্পত্তি বিক্রিত ব-ট।

ভূমি অফি-সর নাম/বিবরণঃ সহকারী কমিশনার ভূমি কোতয়ালী সা-কর্ল অধীন স্থানীয় তহশীল অফি-স আদায় হয়।" (underlining by us).

The sketch map in the deed under pre-emption has been shown as under:-

"সম্পত্তির চৌহদ্দির বিবরণঃ

| | |
|-------------------------|--|
| উত্ত-র- হাজী আবুল হো-সন | দক্ষি-ন- ২নং কাঞ্চান বাজার হোল্ডিং-য়র বাড়ী |
| পূ-র্ব- চলাচ-লর রাস্তা | পশ্চি-ম- সুইপার প্যা-সস ও রোস্তম সরদার |

হস্তান্তরিত সম্পত্তির হাত নকশা :



উঃ
|
দঃ

24. From the recitals of the deed under pre-emption, it appears that by those two deeds an area of 272 Ajutangsha along with part of building without mentioning any separate plot or area has been transferred. The pre-emptee No.1 could not produce any document before the court showing partition of the case land and building standing thereon or any separation of land upon amicable partition. From the recitals of the deeds under transfer vide exhibit- Kha and Kha(1) it has been proved beyond doubt that the land sold vide exhibit- Kha and Kha(1) were in ejmali possession of the pre-emptor

and the pre-emptee Nos.2 and 3 jointly and ejmali part of ejmali land and building has been sold by the deeds under pre-emption vide exhibit- Kha and Kha(1). In a case of pre-emption under section 24 of the Non Agricultural Tenancy Act, the pre-emptor should prove that he is a co-sharer to the land transferred. In the instant case the pre-emptor has been able to prove from exhibit- Kha and Kha(1) along with the exhibit-3 that he is a co-sharer in the land transferred. Since no separate apartment number has been mentioned in the transfer deed, the argument set forth by Mr. Mahbubey Alam the learned advocate for pre-emptee that if pre-emption is allowed the selling of apartment in Dhaka city would be affected does not lie. From the recital of the deeds under pre-emption it is proved that common land of the pre-emptor as well as of the pre-emptee Nos.2 and 3 has been transferred in favour of the pre-emptee No.1. As such the pre-emption under section 24 of the Non Agricultural Tenancy Act is available in as much as no mutation took place as claimed by the pre-emptee No.1. Accordingly the issue No.2 is decided negatively as against the pre-emptee No.1. We hold that no mutation took place as claimed by the pre-emptee and the case land and holding remained intact.

Already we have seen that exhibit- Ga and Ga(1) are not copy of the mutated khatian nor any khatian. Those have been procured by collecting printed form and by writing by some body else. It is the Revenue Officer who holds exclusive power to mutate or sub divide

any jama. It is not the business of the Bhumi Upa Sahakari Officer to mutate any land or to allow any mutation.

25. In view of the above, we are constrained to hold that no mutation took place vide exhibit- Ga and Ga(1) or vide exhibit- Gha and Gha(1) and the jama remained intact. It is to be noted here that no document was produced before the court showing any partition if effected between the 3 brothers and no sketch map was produced to show that the building constructed upon the case land were separated for 3 brothers.
26. In view of the above, the decision referred to above by the learned council for the appellant does not have any manner of application in the instant case. In the case of Md. Abdur Rouf and others vs. Ahmuda Khatun, reported in 33 DLR (AD) 323, it was held that in a mutation case for split up of a Jama notice of the mutation not having been served on the co-sharers and mutation been effected behind their back in law that is not valid splitting up of the Jama and as such the co-sharers have not lost their right of pre-emption under section 24 of Act XIII of 1948. The same case law is equally applicable in the instant case. Already we have seen that notice under section 23(4) of the Non Agricultural Tenancy Act was not served upon the pre-emptor and nothing was produced before the court showing service of notice before getting the alleged split up of jama if any.

27. In view of the above, we are constrained to hold that jama remained intact and the co-sharership of the pre-emptor in the land remained intact and the right of pre-emption did not cease to exist on the strength of exhibit- Ga and Ga(1).

Now let us take up the question of limitation. The land under pre-emption was transferred by pre-emptee Nos.2 and 3 on 29.6.2006. The kabala deeds were indorsed in the volume on 28.8.2008 in volume No.172 and another in volume No.130. The pre-emption case was filed on 26.02.2007. So the case was filed before completion of registration under section 60 of the Limitation Act and the registration was completed during pendency of the pre-emption case. In view of the above, the case is not barred by limitation.

28. From the facts and circumstances and the discussions made above, we do not find any illegality with the impugned judgment and order, allowing pre-emption. Accordingly, we do not find any merit in the appeal.

29. In the result, the appeal is dismissed however, without any order as to costs.

30. In view of the result of the appeal, the connecting rule being Civil Rule No.696(F.M.) of 2009 is discharged however, without any order as to costs.

Send down the lower court records at once.

Md. Rais Uddin, J:

I agree.