**In the Supreme Court of Bangladesh**
**High Court Division**
**(Civil Appellate Jurisdiction)**

**Present:**

**Mr. Justice Md. Mozibur Rahman Miah**
**and**
**Mr. Justice Mohi Uddin Shamim**

**First Miscellaneous Appeal No. 144 of 2020**

**In the matter of:**

**Syed Yousuf Ali**
... Appellant-petitioner

**Versus**

David Suronjon Biswas
...Vendee-Opposite party
Syed Hemayet Ali and another
... Vendors-Opposite parties
Syed Azmad Hossain and others
.....Co-sharer-opposite parties

Mr. A. K. M. Badrudduza, Senior Advocate
with
Mr. Delwar Hossain, Advocate
...For the appellant-petitioner

No one appears
...For the respondent-opposite parties

**Heard on: 15th November, 19th November, 26th November and Judgment on 27th November, 2023**

**Mohi Uddin Shamim, J.**

This First Miscellaneous Appeal is directed against the judgment and order dated 02.02.2020 passed by the learned Joint District Judge, 2nd Court (In charge), Gopalgonj in Pre-emption

Miscellaneous Case No.04 of 2013 rejecting the pre-emption application filed under section 96 of the State Acquisition and Tenancy Act, 1950.

Facts necessary for disposal of the appeal, in short, are that, the pre-emptor-appellant as applicant filed Miscellaneous Case being No.04 of 2013 under section 96 of the State Acquisition and Tenancy Act, 1950 before the Court of learned Joint District Judge, 2nd Court (In charge), Gopalgonj stating *inter-alia* that the opposite party Nos.2 and 3, who are the full brother of the applicant sold 47 decimals of land vide sale deed No.3455 dated 02.10.2013 to the pre-emptee-opposite party No.1 out of 4 schedule mentioned in the said sale deed. The applicant is the co-sharer of the schedule Nos.2 to 4 of the sale deed by dint of inheritance, which has been mentioned in the schedule of the application. But the petitioner is not the co-sharer in the schedule No.1 of the sale deed. Therefore, he has no claim over 9 decimals of land mentioned in the said schedule No.1 of the deed. It is also stated that, the opposite party Nos.2 and 3 sold out 1.5 decimals of land in S. A. Plot No.575, S. A. Khatian No.552, D. P. Khatian No.270, Hal dag No.1063 but in

order to frustrate the right of the preemptor-petitioner, the opposite party Nos.1-3 fraudulently mentioned Khatian No.275 instead of Khatian No.552 in the deed in question. But the opposite party Nos. 2 and 3 handed over the possession of 1.5 decimals of land in S. A. plot No.575 of Khatian No.552. Moreover, the opposite party Nos.2 and 3 is not the owner of the S. A. Khatian No.275 as alleged and there is no plot No.575. The opposite party No.1 is a stranger in the schedule property of applicant (schedule Nos.2, 3 and 4 of the sale deed in question). Therefore, the preemptor-applicant is entitled to get pre-emption over 38 decimals of land (out of 47 decimals of land mentioned in the deed) as co-sharer.

On the other hand, the opposite party No.1 the pre-emptee contested the suit by filing written objection stating that, the suit land was sold within the knowledge of the applicant and initially the opposite party Nos.2 and 3 offered the petitioner for purchasing the property but he denied to purchase due to his financial constraint. Accordingly, in presence of the applicant, the said sale deed being No.3455 dated 02.10.2013 was registered. After

purchasing the land, opposite party No.1 spent huge amount of money by digging pond and construction of two houses and he also planted different types of trees and cultivated fishery. Therefore, the applicant is not entitled to get the said property by way of pre-emption. At the time of trial, the learned Joint District Judge, 2nd Court (in charge), Gopalgonj examined 02 witnesses as P.Ws 1 and 2 and the opposite party examined only one as of D.W. 1.

After conclusion of trial, the learned Judge of the trial Court dismissed the said Miscellaneous Case No.04 of 2013 vide judgment and order dated 02.02.2020.

Being aggrieved by and dissatisfied with the said impugned judgment and order dated 02.02.2020, the pre-emptor applicant as appellant preferred the instant appeal.

Mr. A. K. M. Badrudduza, the learned senior Advocate along with Mr. Delwar Hossain, the learned Advocate appears on behalf of the pre-emptor-appellant takes us through the memo of appeal, the impugned judgment and order and all other relevant documents exhibited therewith and at the very outset submits that, admittedly the pre-emptor petitioner is a co-sharer in the suit property

comprising 03 suit Khatians' by dint of paternal inheritance and co-sharer in Khatian No.552 by dint of paternal inheritance and recorded his own name but the learned Judge of the trial Court failed to appreciate the very aspect of the fact. He next submits that the opposite party No.1 is not a co-sharer of the property in question rather he is a stranger. But the learned Judge of the trial Court without considering this legal aspect of the facts dismissed the preemption application of the petitioner filed under section 96 of the State Acquisition and Tenancy Act, 1950 and as such the impugned judgment and order is not tenable in the eye of law and is liable to be set aside. He further submits that, the petitioner's land is not exceeding 4/5 'bighas' land therefore he filed the Preemption Miscellaneous Case within 15 days of registration of the kabala paying Tk.1,72,766/- as proportionate value of the demanded land of Kusumdia mouza and Tk.3,20,000/- for demanded land of Chapta Khalisakhali mouza in total Tk.4,92,766/- and Tk.1,23,192/- as compensation money at the rate of 25% and Tk.6049/- as simple interest on above said Tk.4,92,766/- for 56 days at the rate of 8% from the date of execution of the kabala till

the date of filing the Miscellaneous Case in total Tk.6,22,007/- vide chalan. However, the learned Joint District Judge, 2nd Court (in-charge), Gopalgonj committed error of law by rejecting the Miscellaneous Case which resulted in an error of decision occasioning failure of justice and he prays for set aside the impugned judgment and order. He also submits that, from 2nd schedule of the kabala deed, khatian No.275 is written in respect of Kusumdia mouza, whereas, no land of R.S. Plot No.575 is recorded in S.A. Khatian No.275 and there is no reason for such recording. In fact, the land of R.S. Plot No.575 is the land of S.A. Khatian No.552 writing the land of R.S. Plot No. 575 in S.A. Khatian No.275 is nothing but the tricky act of the writer in connivance with the opposite party Nos.1-3 and as such the impugned judgment and order is liable to be set aside. He further submits that, it is apparent from the deposition of the opposite party No.1 that a huge amount of money he has spent for digging pond, constructing house, planting trees and for the development of the property but he has not mentioned the amount of money spent in either the affidavit-in-opposition or in the oral deposition. Therefore, the

learned Joint District Judge, 2nd Court (in-charge), Gopalgonj measurably failed to understand that since petitioner was not co-sharer in the land of 1st schedule of the suit kabala and as such the judgment and order is liable to be set aside. The learned Advocate for the appellant has referred to decisions in the case of **Karimunnessa Begum Chowdhurani and others Vs. Nirnjan Chowdhury & another,** reported in **43 DLR (AD) 108,** in the case of **Tamizuddin Ahmed Vs. Guljan Bibi & others,** reported in **26 DLR 93** and in the case of **Deputy Commissioner and Chairman, District Fisheries Tender Committees & others,** reported in **53 DLR 183.** He lastly prays for allowing the appeal by setting aside the judgment and order of the trial Court.

No one appeared for the respondent-opposite parties to oppose the Rule but it appears from the record i.e. from the written objection filed in the suit at the time of trial and also appears from the case of the opposite parties from a plain reading of the judgment that the opposite party Nos. 2 and 3 sold 47 decimals of land in 04 schedules vide sale deed No.3455 dated 02.10.2013 but the petitioner-appellant filed Miscellaneous Case only for

preempting 38 decimals of land as mentioned in the schedule Nos.2-4 of the deed in question. However, there is no provision for part pre-emption.

It also appears that, the petitioner had every knowledge of the said sale since he was present in the sale negotiation process and at the time of registration of the sale deed. It also appears from the record that the pre-emptee respondent No.1 claimed that he spent a huge amount of money in developing the null land, a fishery firm by digging pond, constructing houses, planting trees. It also appears from the record that, the petitioner claimed the land of schedule No.2 as mentioned in the deed in question in plot No.575 of Khatian No.552 but in the said deed there is no existence of S.A. Khatian No.552. Therefore, the learned Joint District Judge, 2nd Court (in charge), Gopalgonj rightly dismissed the case and as such the instant appeal is liable to be dismissed.

We have heard the learned Advocate for the appellant-petitioner, perused the memo of appeal, the impugned judgment and order, the supplementary affidavit filed by the petitioner and all

other documents available therewith the records including the Lower Court Records (LCR).

On perusal of the record, it appears that out of 04 schedules mentioned in the deed in question the petitioner claimed 37 decimals of land in 03 schedules and categorically stated that, he is not a co-sharer of the land in schedule No.1 measuring an area of 09 decimals of land. The opposite party did not deny or controvert all the averments of the petitioner. Now question remains, whether the claim of the petitioner in 38 decimals of land in 03 schedules being schedule Nos.2-4 and out of 04 schedule measuring 47 decimals in total or whether it is to be treated as part pre-emption. It is evident from the record that, the respondent-opposite party Nos.2 and 3 sold 47 decimals of land in 04 schedules out of which the petitioner claims to preempt only 37 decimals of land in 3 schedule i.e. schedule Nos.2-4 as co-sharer but not schedule No.1 since he is not a co-sharer in that schedule. However, the opposite party No.1 did not deny the petitioner's averments. Therefore, in no way it can be said that the petitioner is claiming part pre-emption, because the petitioner has no right of pre-emption of 09

decimals of land which mentioned in the schedule No.1 in the deed in question since admittedly and evidently he is not a co-sharer of land in schedule No.1 and accordingly he has no right to preempt the same.

In view of the discussion made above, the finding of the learned Judge of the trial Court that the petitioner filed Miscellaneous Case for part pre-emption is not sustainable in law and the judgment referred by the learned Judge of the trial Court in the case of **Tamizuddin Ahmed Vs. Guljan Bibi & others,** reported in **26 DLR 93** is not applicable here in this case and the principle laid down here not applicable herein the facts and circumstances of the case. In this context, the principle laid down in the case of **Karimunnessa Begum Chowdhurani and others Vs. Nirnjan Chowdhury & another,** reported in **43 DLR (AD) 108** it was held that;

> *"Partial pre-emption-Five holdings were transferred by a single Kabala. The petitioner deposited consideration money for four holdings seeking pre-emption thereof. There was no difficulty in allowing him pre-emption of four holdings as pre-emption is holding-wise. Such pre-emption is not hit by the doctrine of partial pre-emption."*

Moreover, the petitioner in his pre-emption application very specifically and categorically mentioned that;

> "..... তর্কিত কবলার ১ নং তপশীল বর্ণিত জমার জমিত্ত মজহর ওয়ারশী স্বত্ত্ব শরিক না হওয়ায় উক্ত নং তপশীল বর্ণিত জমির বাবদ আইনসম্মতভাবে প্রিয়মশন করিবার অধিকারী না হওয়ায় উহা অত্র প্রিয়েমশন এর মোকদ্দমার দাবী হইতে বহির্ভূত রাখা হইল .....।"

So, considering all these facts and circumstances we can safely say that, claiming pre-emption over the land in 03 schedules out of 04 is not attracting the principle of part pre-emption. It is also very specifically supported by the principle laid down in the case of **Karimunnessa Begum Chowdhurani and others Vs. Niranjan Chowdhury & another,** reported in **43 DLR (AD) 108** and in the case of **Haji Tozzamol Ali Vs. Abdus Satter,** reported in **34 DLR (AD) 217** wherein their lordships held that;

> *"Partial pre-emption not allowed, where co-sharer tenant claims pre-emption contiguous land holder may pre-empt only that part which is contiguous to his land."*

This principle is squarely applicable in this case.

From the judgment, it appears that the learned Joint District Judge, 2nd Court, Gopalgonj refused to consider pre-emption of 1.5 decimals of land in S.A. plot No.575, S.A. Khatian No.552

(schedule 2 in the deed) on the ground that in the schedule of the application though S.A. Khatian No.552 was mentioned but in the deed in question there is no mention of the Khatian No.552 rather Khatian No.275 has been mentioned.

In this regard, the petitioner categorically mentioned that, the opposite party Nos.1-3, fraudulently, to defeat the right of the pre-emption of 1.5 decimals of land mentioned S.A. Khatian No.275 instead of 552, though the mouja and the plot number are the same, and the opposite party Nos.2 and 3 is not owner of any plot in S.A. Khatian No.275 and there is no plot being No.575.

We have very carefully scrutinized the lower Court's record along with all the exhibits. On perusal of the record and evidences, it appears that, the opposite party No.1 neither in his written objection nor in his oral deposition made before the Court denied the averments of the petitioner that the petitioner is the co-sharer by inheritance in the properties in question. From the deed in question, so far relates to the schedule No.2, S.A. Khatian has been mentioned as 275 and S.A. plot No.575. However, from S.A. Khatian No.552 which is marked as Ext.1 it appears that the

petitioner and the opposite party Nos.2 and 3 the (Vendors) also the co-sharer and in the said khatian, plot No.575 is included.

On the other hand, S.A. Khatian No.275 i.e. Exhibit No.1/Ga mentioned in the deed in question, it appears that, neither the petitioner nor his two brothers' i.e. opposite party Nos.2 and 3 not the owner of the said Khatian, even there is no mention of the said plot No.575.

From the above discussions, it appears that opposite party Nos.2 and 3 not being the owner of S.A. Khatian No.275 they had no scope to sale the alleged plot No.575 which is also not in the said khatian rather the opposite party Nos.2 and 3 is the owner of S.A. Plot No.575 of S. A. Khatian No.525.

In view of the above, we are of the view that the opposite party Nos.1 to 3 intentionally inserted the S.A. Khatian No.275 instead of S.A. Khatian No.552 to defeat the right of the pre-emption of the petitioner. This attempt of the opposite party Nos.1-3 is nothing but a colourable transaction. Therefore, we do not find any substance in the findings of the learned Judge of the Court below in this point.

Now with regards to the statutory deposition with the deed value, compensation money and the interest thereupon, it appears that, in the sale deed the valuation of 23.5 decimals of land (schedule No. 3) is at Tk.3,20,000/- and value of rest of the land of schedule Nos.1-4 is at Tk.1,80,000/- of the same mouza being Mouza No.53 Kusumdia. Though, the valuation of the land of schedule nos.1-4 (in the deed) has not been mentioned separately there, the petitioner rightly deposited the proportionate value of lands in schedule Nos.2 and 4 along with specific value of schedule No.3. Therefore, it cannot be said that the petitioner did not deposit appropriate valuation of the claimed land. It is to be also mentioned here that, the petitioner being not a co-sharer is not required to deposit the value of the land of schedule No.1 (in the deed). Therefore, the finding of the learned Judge of the trial Court in this regard as to non deposition of proper valuation of the land is not correct and not tenable in law. It further appears from the record that, the opposite party No.1 claimed that after purchasing the land in question, he spent a huge amount of money for development of the same but nowhere i.e. neither of his written

objections in the trial Court, nor in his deposition he mentioned how much money he spent. Therefore, the learned Judge of the trial Court rightly found that it is cannot ascertain how much money he spent in his development purpose. Even at the time of hearing, the learned Advocate for the opposite party No.1 did not mention the amount spent for development work. So we do not have any scope to ascertain the money spent for the development purpose. Accordingly, the opposite party No.1 is not entitled to get any amount of money for the purpose of alleged development of the land.

In the facts and circumstances and discussion made hereinabove, we find merit in the appeal.

As a result, the appeal is **allowed**; however, without any order as to costs.

The judgment and order dated 02.10.2020 passed by the learned Joint District Judge, 2nd Court (in charge), Gopalgonj is hereby set aside and accordingly, the pre-emption case is thereby allowed.

Let a copy of this judgment along with the lower court records (LCR) be sent to the learned Joint District Judge, 2nd Court (in charge), Gopalgonj forthwith.

**Md. Mozibur Rahman Miah, J.**

I agree.

**Syed Akramuzzaman**
**Bench Officer**