Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO. 3981 OF 2022.

IN THE MATTER OF:

An application under Section 115 (1) of the Code of Civil Procedure, 1908.

- AND -

IN THE MATTER OF:

Rifat Farzana

.....Petitioner.

-Versus-

Kazi Fokrujjaman and others

.....opposite parties.

Mr. Mohammad Wahidun Nabi, Advocate

.... for the petitioner.

Mr. Sheikh Farhadul Hoque, Advocate

..... for the opposite parties.

Heard on: 13.02.2024, 05.03.2024, 14.03.2024, 23.04.2024, 30.04.2024 and Judgment on: 14.05.2024.

On an application of the petitioner, Rifat Farzana under section 115(1) of the Code of Civil Procedure, 1908, the Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 22.05.2022 passed by the learned Additional District Judge, 1st Court, Khulna in Miscellaneous Appeal No.06 of 2021, allowing the appeal and thereby reversing the judgment and order dated 04.01.2021 passed by the learned Senior Assistant Judge Court, Sadar, Khulna in pre-emption Miscellaneous Case No.20 of 2010, (wrongly written as

Miscellaneous Case No.20 of 2020 in Rule) dismissing the same in favour of the pre-emptee respondent petitioner, should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the opposite party Nos.1-7, the pre-emptors, instituted pre-emption Miscellaneous Case No.20 of 2010 before the Court of learned Senior Assistant Judge Court, Sadar, Khulna for pre-emption of the case land, measuring 1.50 decimal of land, transferred by registered deed No.5077 dated 13.11.2008, contending, *inter-alia,* that the case property belonged to the predecessors of the pre-emptors and proforma pre-emptee No. 2, located within the Khulna City Corporation, in the Mouza of Boyra, as recorded in R. S. Khatian No.1419, measuring an area of 22.25 (twenty two point two five) decimal.

The proforma pre-emptee No. 2, Kazi Johirujjaman, without any knowledge and presence of the pre-emptors, created a transfer deed in the name of the pre-emptee petitioner No. 1. The pre-emptee petitioner No.1 claimed that she came to build a house in the case property on 06.03.2010 and then the pre-emptors questioned her and then she told him that she purchased the case land by registered deed. After that the pre- emptors searched the registry office and collected a certified copy on 07.03.2010 of the Registered Deed No.5077 dated

13.11.2008, pertained to a land area of 1.50 decimal, valued at Tk.32,000/- in favour of pre-emptee petitioner No.1 and the deed was recorded in the Balam Book on 05.01.2010. As such the pre-emptors have been compelled to file this case.

Initially the case was filed against the pre-emptee No.1, the present petitioner, who was then minor represented by her father, Sarder Shorab, but immediately after filing the case, the father of the minor of pre-emptee opposite party died. Then, on an application of her mother, she was appointed to represent the minor in this case. Thereafter, they file a written objection stating to the facts, *inter-alia,* that save and except the avernments made hereunder all other allegations of the application are deemed to be denied by these pre-emptee and the pre-emptors are put to strict proof thereof. There is no cause of action for this case or any case against these pre-emptees. The pre-emptors have no right or cause of action to file the case and hence cannot get any relief. The pre-emption case is bad for defects of parties, also barred by limitation, in addition, being barred by the principals of waiver, acquiescence and estoppel.

The pre-emptors are not co-sharer by inheritance in any manner. The pre-emptee No.1 is not an outsider purchaser. The actual facts of the case is that the land is an agricultural land of bilan category. The scheduled property belonged to the proforma pre-emptee No.2, located in District Khulna, within the jurisdiction of Police Station

Khalishpur (Sabek Doulatpur), in the Mouza of Boyra, identified under C.S. Khatian No.731, which later became 731/10 and which corresponded to S. A. Khatian No.685 and R.S.D.P. Khatian No.1419 with R.S.D.P. Dag No. 4739. The scheduled property was transferred by the proforma pre-emptee No.2 to pre-emptee No.1, the petitioner, with the adequate knowledge of the pre-emptors, through Registered Deed No. 5077 dated 13.11.2008, encompassing 1.50 decimal of land, with a deed value of Tk.32,000/- (Taka thirty two thousand) only, classified as bilan land. The pre-emptee No.1, the petitioner, developed the scheduled property by constructing a house for residential purpose.

As the property was categorized as agricultural and bilan land, the pre-emptor should have filed the case under section 96 of the State Acquisition and Tenancy Act, 1950. This would have required him to deposit 25% of the consideration money, along with an additional 8% interest accrued to date, cover all costs of registration. But the pre-emptor filed the case under Section 24 of the Non-Agricultural Tenancy Act, 1949 and only deposited a nominal 5% of the consideration money, which is a clear violation of the said provision. The pre-emptors were served the notice and also aware of the transfer of the suit land, only after the scheduled land was filled up with earth, out of greed the pre-emptors filed this case.

Thereafter, the trial Court framed the following five issues which are as follows:

১। ছায়েল/দরখাস্তকারী নালিশী জোতে সহ শরীক বা খরিদাসূত্রে শরীক কিনা ?

২। অত্র মামলা তামাদী আইনে বারিত কিনা ?

৩। অত্র মামলা পক্ষদোষে অচল কিনা ?

৪। অত্রাকারে ও প্রকারে অত্র মামলা চলে কিনা ?

৫। ছায়েল/দরখাস্তকারী নালিশী ভূমি অগ্রক্রয় করতে হকদার কিনা ?

At the time of trial, the pre-emptor examined one witness as P.W-1 and also exhibited some documents as Exhibit Nos.1 and 2 and the pre-emptee opposite party also examined one witness as O.P.W-1.

The trial Court, after hearing the parties and considering the facts and circumstances of the case and the evidence on record, rejected the said pre-emption application by its judgment and order dated 04.01.2021.

Being aggrieved by and dissatisfied with the impugned judgment of the trial Court the pre-emptor opposite parties filed Miscellaneous Appeal No.6 of 2021 before the learned District Judge, Khulna.

The said appeal was heard and disposed of by the learned Additional District Judge, 1st Court, Khulna, who after hearing the parties and considering the evidence on record, allowed the appeal and thereby set-aside the impugned judgment of the trial Court and allowed the pre-emption application by its judgment and order dated 22.05.2022.

Being aggrieved by and dissatisfied with the impugned judgment and order of the Appellate Court the pre-emptee No.1, as petitioner, filed this revisional application under Section 115(1) of the Code of Civil Procedure, 1908 and obtained the Rule.

Mr. Sheikh Farhadul Hoque, the learned Advocate enter appearing on behalf of the pre-emptor-opposite parties through vokalatnama to oppose the Rule.

Mr. Zahangir Alam, the learned Advocate along with Ms. Shamsun Nahar (Laizu) has initially appeared before the Court and make their submissions, followed by additional submissions from Mr. Bepul Bagmar, the learned Advocate appearing on behalf of the petitioner.

Mr. Zahangir Alam, the learned Advocate, submits that the trial Court, after proper consideration of the facts and circumstances of the case and the evidence on record, rejected the pre-emption case specially on two grounds; one is that the case land is null and as such the pre-emption case under Section 24 of the Non-Agricultural Tenancy Act is not maintainable and another is that the pre-emptor side failed to prove that they are the co-sharer of the case land, since the pre-emptor side did not exhibit any khatian and further that since the khatian has not been submitted as such it could not be decided whether the case is bad for defect of parties or not and the Court took view that in such a case the case is clearly bad for defect of parties, since one Rawshanara Begum was not included as a party. On the other hand, the Appellate Court, without considering the said facts, took view that though the land, in question, is null as it is located within the jurisdiction of Pouroshova, the pre-emption should lay under Section 24 of the

Non-Agricultural Tenancy Act, 1949. He further submits that the trial Court as well as the Appellate Court did not consider the vital facts that whether any development costs have been incurred in such a case he submits that it is the duty of the trial Court to inquire into the matter before starting the trial, provided under Section 24(3) of the Non-Agricultural Tenancy Act, 1949. The Appellate Court also did not consider the said vital facts of the case and on an application of the pre-emptee a local Advocate Commissioner was appointed and in support of their case, as regarding the development costs, the Advocate Commissioner submitted his report, whereas both the Courts did not consider the said vital facts regarding the development costs and as such the Appellate Court committed serious error in law resulting in an error in the decision occasioning failure of justice.

Mr. Bepul Bagmar, the learned Advocate adopted the submission of Mr. Jahangir Alam, advance his argument that after purchasing the suit premises, the petitioner now resided in the said the land. He further submits that the pre-emption case against the minor though represented by her father but immediately after filing the pre-emption case he died but the Court did not take any step to appoint the legal guardian but subsequently on an application of her mother, the Court passed an order and allowing her to represent the minor. Whereas as per Mahomedan Law the legal guardian has been classifying in Section 359 and 360 of DF Mulla’s Mahomedan Law and without fulfillment of

the said criteria the Court allow the mother to represent the minor, which is not a proper order. He further submits that though the same was passed by a competent Court but the law provides that the mother is not a legal guardian, in such a case, the representation of the minor from very initial stage is not permissible in the eye of law, as such, the impugned judgment should not be sustained and also the pre-emption case should not be sustained. As it is provided under sub-section 3 of Section 24 Non-Agricultural Tenancy Act, 1949, that the Court ought to have properly inquired the matter to determine whether any the development costs occurred in the said case land but the trial Court as well as the Appellate Court without any inquiry passed the impugned order and as a result he prayed for making the Rule absolute.

On the contrary, Mr. Sheikh Farhadul Hoque, the learned Advocate appearing on behalf of the pre-emptor opposite parties submits that the pre-emptors instituted the suit, following the procedure of law, against the minor, inserting the name of the father as to represent her in the case, so on that ground there is no question of maintainability of the case. He further submits that even after the death of the father, the legal guardian of the minor, on an application of her mother, she was allowed to represent the minor and there is no fault in the instant case provided under Order XXXII Rule 10 and 11 of the Code of Civil Procedure. He further submits that the question of null land in the Municipality area is not sustainable since, by the application

of the law, any land situated in the Municipal area whether null or homestead, the pre-emption case can be filed under Section 24 of the Non-Agricultural Tenancy Act, 1949. He further submits that the case of bad for defect of parties has already been cured by the pre-emptor petitioner in the appellate stage, inserting the name of the co-sharer of the suit land, in such a case, since the appeal is a continuation of the proceedings, no question of bad for defect of parties in the instant case. He further submits that regarding the development cost, the pre-emptee should raise the said question after receiving the notice provided under Section 24(3) of the Non-Agricultural Tenancy Act, 1949. But the pre-emptee never raised the said question and in support of their case no single evidence has been produced before the Court, in such a case, the Appellate Court rightly decided the said facts. He prayed for discharging the Rule.

I have heard the learned Advocates of both the sides, perused the impugned judgment of the Courts below and the papers and documents as available in the record. This is a case for pre-emption under Section 24 of the Non-Agricultural Tenancy Act, 1949. The pre-emptor opposite parties now claim that the said land since situated in the municipal area and without any notice to them, one of the co-sharer transferred the said land to the stranger pre-emptee and though the land was transferred in favour of a minor but all the procedure of registration was done by the father of the minor and thus

the pre-emptor filed the pre-emption case mentioning that the minor was represented by her father.

The pre-emptor claims that the land, in question was recorded in R.S Khatian No.1419, located in Khalishpur Police Station of Khulna City Corporation, measuring of .2225 acres and the said land was transferred to pre-emptee No.1, the petitioner, via registered deed No.5077 dated 13.11.2008, which pertains to 1.5 decimal of land. Upon discovering the details of this transfer, the pre-emptor filed the case within time on 18.03.2010 under Section 24 of the Non-Agricultural Tenancy Act, 1949.

The trial Court after consideration of the facts and circumstances of the case and the evidence on record adduced by parties, framed the issue of limitation as issue No.2 and decided that since the pre-emptor after knowing the transfer and procuring the certified copy of the impugned deed, filed the case within time, thus this case is not barred by limitation at all. Though the trial Court took view that the case is not barred by limitation and the Appellate Court also, after considering the said facts and circumstances of the case, upheld the trial Court's findings on the issue of limitation.

I have also examined the record, it appears from the record that from date of knowledge the case was filed within time. Since both the Courts after consideration of the evidence on record found that the deed, in question, was executed on 13.11.2008 and subsequently

registered under Section 60 of the Registration Act, on 07.03.2010 and as the pre-emptor filed the case on 18.03.2010, which falls within the time.

The trial Court, on disposal of the said issue, took view that though the pre-emptors claimed the said land as co-sharer but since the pre-emptors did not exhibit the S.A and R.S Khatian, as such, it could not be decided whether the pre-emptors are the co-sharer of the suit land or not. At the appellate stage the pre-emptors exhibit the B.R.S Khatian No.1419 as Exhibit-5 and the Appellate Court took view that on perusal of the said khatian it appears that all the pre-emptors are the co-sharer of the case land. Since the trial Court, after consideration of the facts and circumstances of the case, disposed the issue No.3 that since the pre-emptors did not include all the tenants of the khation as parties and the pre-emptor did not try to prove the same, as such, the trial Court took view that the case is bad for defect of parties. The Appellate Court, after consideration of the evidence on record and submitted BRS khatian, that the pre-emptor subsequently, made one of the co-sharer as pre-emptee opposite party thus none of the co-sharer was excluded from the case land and accordingly decided that the case is not bad for defect of parties.

I have also examined the aforesaid facts and the findings of the Courts below that there is no question of barred by limitation in the instant case, the pre-emptors are the co-sharer of the case land and the

case is not bad for defect of parties. The another issue framed by the trial Court whether the case is maintainable or not, the trial Court after consideration of the evidence on record took view that the impugned land is a null land and as such the case under Section 24 is not maintainable. But the Appellate Court after consideration of the facts and circumstance of the case took view that as the case land is situated in the Khulna Municipal area and as such the pre-emption is maintainable and the pre-emption case can be filed, whether the case land is null or homestead, if the land is situated in the City Corporation or Pourosava, as such, the case is quite maintainable under Section 24 of the Non-Agricultural Tenancy Act, 1949.

This matter has been settled in the case of *Abdul Khaleque Vs. Abdul Noor and others reported in 11 MLR (AD)-175.* Wherein our Apex Court held that:

> *"The land within the Municipal area in that case the land would assume the character of non-agricultural land even if the said land was for the purpose connected with agriculture. Since the land within the Municipality or in the urban area ultimately will be used for residential purpose in such situation an application seeking pre-emption in respect of the said land under section 24 of the Non-Agricultural Tenancy Act would be very much maintainable."*

Considering the aforesaid decisions and subsequent amendments to the law, all the land within the Municipal area, regardless of whether it is classified as null or residential should be subject to pre-emption under Section 24 of The Non-Agricultural Tenancy Act, 1949, rather than Section 96 of The State Acquisition and Tenancy Act, 1950.

The learned Advocate submits that the petitioner being a minor at the time of the trial could not get any proper assistance by her next friends. He further submits that as per provision of Section 359 and 360 of the DF Mulla's Mahomedan Law the father is the legal guardian of the minor, in absence of father, the legal guardians of the minor are mentioned in Section 359 as under:

(1) the executor appointed by the father's will;

(2) the father's father;

(3) the executor appointed by the will of the father's father.

But after the death of the father of the minor, the Court, without appointing any legal guardian to represent the minor, continued the trial then mother of the minor filed an application for addition of party and accordingly the Court allowed the same but did not consider the provision of law of the Guardians and wards Act, 1890 as well as the Mahomedan Law that the appointing authority of the guardian for the safety of the property of a minor is the learned District Judge.

But no such application was filed before the learned District Judge by the pre-emptee No.1 and learned the Assistant Judge allow the application for addition of party without considering the provision of law. Mr. Sheikh Farhadul Hoque, the learned Advocate submits that as per the provision of Rule 3 of Order XXXII of the Code of Civil Procedure, 1908, the guardian for the suit to be appointed by the Court for minor defendant and though the Court without appointing any guardian on an application of the pre-emptor but since the mother filed the application and accordingly the Court allowed the same, in such a case, though some procedural mistake has been occurred but since the minor after attained majority did not raise objection in trial stage as well as in the appeal, it is my view that at this stage the same can not be further considered that the minor has not been represented. It appears that as per Section 359 of the DF Mulla's Mahomedan Law, the legal guardians of the property are:

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father.

Now it is well settled principle that a mother is not the legal guardian of the property of her minor children and she is not authorized to act concerning that property. It also appears from the Section 360 of the Mahomedan Law that the guardian for the property

of the minor must be appointed by the Court. In the absence of the legal guardians as stipulated in Section 359, the duty of appointing a guardian for the protection and reservation of the minor's property is assigned to the judge, who acts on behalf of the state.

If any guardian is not present to protect the property of the minor then it is the Court who is assigned to appoint the legal guardian of the minor. In the instant case it is found that the petitioner did not take any step for the appointment of the guardian to represent the minor but on an application of the mother for addition of party, the Court allowed the same.

The provision of Rule 3 of Order XXXII of the Code of Civil Procedure, 1908 states that where the defendant is a minor, the Court, on being satisfied of the facts of his minority, shall appoint a proper person to be guardian for the suit for such minor. In the Rule it has been clearly mentioned that it is the duty of the Court to appoint a guardian though, in the instant case, the appointment was not made in accordance with law but it appears that when the minor reached the age of majority, she also did not raise any objection within the stipulated period even after the filing of this revisional application.

It also sates in the provision of Rule 4 of Order XXXII of the Code of Civil Procedure, 1908 that who may act as next friend or be appointed guardian for the suit and Rule 10 of Order XXXII states that on the retirement, removal or death of the next friend of a minor,

further proceedings shall be stayed until the appointment of a next friend in his place. Similarly Rule 11 States that where the guardian for the suit desires to require or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit and sub-rule 2 of Rule 11 States that where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

The learned Advocate submits that since the guardian of the minor has not been appointed in accordance with the procedure of law, in such a case, the continuation of the proceedings is void and the judgment passed by the Courts below should not be sustained.

However, considering the aforesaid provision it is my view that since the minor, after attained the age of majority, did not raise any objection regarding the continuation of the proceedings within the stipulated period and furthermore, initiated and she herself contested the appeal and also in this revisional application, in such a case, it is my view that the defect that arose during the trial, the same should not be considered for nullifying the entire proceedings, specially since the minor never claimed that she was not properly represented by the proper guardian or legal guardian and also contested the appeal.

The learned Advocate Mr. Bepul Bagmar further submits that both the Courts did not consider the vital issue regarding the development cost as outlined in Sub-section 3 of section 24 that the trial Court should inquire the vital facts of any case of development. Sub-section 3 of section 24 states that if such deposit is made, the Court shall give notice to the transferree to appear within such period as it may fix and to state what other sums he has paid in respect of rent for the period after the date of transfer or in annulling encumbrances on the property and also what other amounts, if any, have been spent by him, between the date of the transfer and the date of service of the notice of the application, in erecting any building or structure or in making any other improvement in the portion or share of the property transferred. The Court shall then direct the applicant, including any person whose application under sub-section (4) is granted, to deposit such amount actually paid or spent by the transferee together with interest at the rate of six and a quarter per centum per annum within such period as the Court thinks reasonable.

It is the mandatory provision for the Court to have inquired about the said matter from the very initial stage but it appears that the pre-emptee filed an application for appointment of the Advocate Commissioner to ascertain the development cost of the property and the Advocate commissioner submitted his report accordingly but it

appears that the trial Court did not consider the said vital facts as well as the Appellate Court also did not consider the same.

The learned Advocate submits that the petitioner now resided in the said land which was purchased legally and it is admitted that the Advocate Commissioner submits its report accordingly but the Court kept silent regarding the said report and did not pass any order to deposit the said amounts.

However, it is my view that it is better to direct the trial Court to reconsider the said matter by appointing an Advocate Commissioner afresh to the dispute and subsequently pass necessary order regarding the development costs. The petitioner side though claims to have expended Tk.1,00,000/-, but subsequently in the revisional application, they claim that they have built a residential house in the land, in such a case, it is my view that it is better to sent back the case on remand to consider the facts that whether any development costs have been incurred on the said land and to dispose of the case expeditiously. However, normally it is the settled principle that the remand should not be allowed frequently to fill up the lacunae but in the instant case, I have already found that the petitioner side tried to establish their case of development and accordingly Advocate commissioner was appointed and who submitted it’s report in favour of them but both the Courts did not consider the said facts.

In the case of *Additional Deputy Commissioner Revenue and Assistant Custodian Vested Property, Chandpur Vs. Tafurnessa wife of Ali Ahmed Mia and others reported in 41 DLR (AD)-124* wherein their lordship settled the principle that remand is not to be granted as a matter of course when registration was done under Section 60 of the Registration Act and the requirement of law was fulfilled, prayer for remand does not merit consideration as the defendants did not adduce any evidence to rebut the presumption attached to the registration made under law.

And in the case of *Md. Nazir Hossain Khan and another Vs. Md. Mujal Mollah being dead his heirs: Shahida Begum and others reported in 7 BLT (AD)-7* while also it has been settled that where two Courts below *concurrently found that the plaintiff failed to discharge the onus to prove that the impugned documents were obtained by fraud. How could an order of remand be made to fill up the lacunae left by the plaintiff himself.*

And in the case of *Attor Mia and another Vs. Mst. Mahmuda Khatun Chowdhury and others reported in 43 DLR (AD)78* wherein our Apex Court also decided that: *High Court Division, as a revisional court, was not justified to send the suit back on remand to the trial court for fresh decision on the evidence on record, without any direction to take additional evidence, when the court itself was competent to decide the issue involved as the evidence on record was complete.*

In the case of *Hossain Ahmed Chowdhury alias Ahmed Hossain Chowdhury and others Vs. Md. Nurul Amin and others reported in 47 DLR (AD)-162* that the suit being an old case of 30 years the remand order ought not to have been made so lightly without any justifiable ground for remand and in the case of our Apex Court sent back the case on remand to the High Court Division to dispose of the suit afresh considering the evidence which has available in the record.

Considering the aforesaid decisions and facts that the remand order should not be passed in usual course where there is sufficient evidence in the record. At the time of hearing of the case, initially, either side made submission that they will settle the matter regarding the development costs, outside of the Court but ultimately failed, since the property situated in the City Corporation and which was purchased in the year of 2008 and in the record it is found that some development was done in the said property but the Court did not consider the said facts thus it is my view that the aforesaid decision though settled that remand order should not be frequently passed but in the instant case it is better to sent back the case on remand since some facts stated by the petitioner are acknowledged by the Advocate Commissioner's report, in such a case it is my view that remanding the case is appropriate solely to resolve the dispute regarding development costs only, while upholding the order of pre-emption.

In the result, the Rule is disposed of. The impugned judgment and order dated 22.05.2022 passed by the learned Additional District Judge, 1st Court, Khulna in Miscellaneous Appeal No.06 of 2021, allowing the appeal and thereby reversing the judgment and order dated 04.01.2021 passed by the learned Senior Assistant Judge Court, Sadar, Khulna in pre-emption Miscellaneous Case No.20 of 2010 is hereby upheld. But the issue of development costs should be settled by the trial Court by taking evidence, considering the Advocate Commissioner's report as well as if any development has been incurred in the said land.

The trial Court is also directed to pass necessary order as early as possible preferably within 06 (six) months from the date of receipt of this order. To ascertain the facts and earlier Advocate Commissioner's report, the Court may again appoint an Advocate Commissioner afresh.

The order of stay granted earlier by this Court is hereby recalled and vacated.

Send down the Lower Court's Records at once.