

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

Present:

Mr. Justice S. M. Saiful Islam

Civil Revision No. 5117 of 2022

IN THE MATTER OF:

An application under section 115(1) of the
Code of Civil Procedure. (Against Order)

And

IN THE MATTER OF:

Molzer Hossain

---- Pre-emptor-OP-Petitioner.

-versus-

Md. Abdur Rashid Mia and others.

---- Pre-emptee-Appellant-Opposite Parties.

Mr. H. M. Borhan Uddin with

Mr. Liton Datta, Advocates

--- For the Petitioner.

Mr. Md. Abdul Mannan Bhuyean with

Mr. Sujit Kumar Chatterjee and

Mr. Shaheen Khan, Advocates

--- For the Opposite Party No. 1.

Heard On: 14.01.2026, 15.01.2026,
29.01.2026, 10.02.2026 and 19.02.2026.

Date of Judgment: 22.02.2026.

S. M. Saiful Islam, J.

This Rule was issued upon an application under section
115(1) of The Code of Civil Procedure 1908, calling upon the

opposite party Nos. 1 -11 to show cause as to why the judgment and order dated 10.10.2022 passed by the learned Additional District Judge, 3rd Court, Narayanganj, in Pre-emption Miscellaneous Appeal No. 18 of 2016, allowing the appeal and thereby reversing the judgment and order dated 24.05.2016, passed by the learned Joint District Judge, 2nd Court, Narayanganj, in Pre-emption Miscellaneous Case No.31 of 2009 should not be set aside and/ or such other or further order or orders passed as to this Court may deem fit and proper.

Facts relevant for the disposal of this Rule is that the Petitioner as pre-emptor filed Pre-emption Miscellaneous Case No. 31 of 2009 in the court of Joint District Judge, 2nd Court, Narayanganj against the pre-emptee- opposite party and others praying for preemption of the case land under section 24 of the Non-Agricultural Tenancy Act, 1949. Pre-emptor-Petitioner's case in short is that Sahamuddin, Ohijuddin, Nasar Uddin, Jorimon, Kalai and Ibrahim were recorded tenant in SA *Khatian* No. 13 (RS 445 *Khatian*) of Dighiborab Mouja under PS-Rupganj, District- Narayanganj. Ohijuddin died leaving three sons Ali Hossain, Goljar Hossain, Moljar Hossain (petitioner) and two daughters Marium and Hosne Ara. Thus petitioner Moljar Hossain is co-sharer by inheritance in this *Khatian*. Opposite Party Nos. 2-11 transferred the suit land to opposite

party No. 1 by *kabla* dated 19.01.2009, behind the back of the petitioner. The suit land is necessary to the petitioner for his dwelling and movement. The petitioner came to know about the transfer on 12.07.2009 when the opposite party No. 1 was measuring the land and tried to enter into the possession. The petitioner got the certified copy of the deed on 16.07.2009 and on 20.07.2009 he requested the opposite party No. 1 to return him the suit land by taking back the purchase value of the land. But the opposite party No. 1 refused to return the suit land to the petitioner. Thereafter the petitioner filed the preemption Misc. Case No. 31 of 2009 praying for pre-emption of the suit land under section 24 of the Non-Agricultural Tenancy Act, 1949.

Kabla purchaser opposite party No. 1 contested the case by filing written objection contending *inter alia* that the vendor opposite parties owned and possessed the suit land by mutating their names in a separate holding, that he purchased the land with five houses on it and has been possessing the same by mutating his name and by separating the holding, that the petitioner is not co-sharer in the suit *Khatian*. For these reasons opposite party No. 1 prayed for dismissal of the Miscellaneous Case.

Learned trial Court by the judgment and order dated 24/05/2016 allowed the Pre-emption Miscellaneous Case. Learned trial Court held that the petitioner was a co-sharer in the

suit land and it was clearly proved. Trial Court further held that, for mutation and separation of a *jama*, notice must be given to the other co-sharers and in the present case, there was no proof that such notice was served upon pre-emptor-petitioner as co-sharer. Trial Court found that the pre-emption petition was not bad for defect of party and it was not barred by the principle of estoppel, waiver and acquiescence. Accordingly, learned trial Court allowed the Pre-emption petition by the aforesaid judgment.

Against that judgment and order, the opposite party No. 1 preferred Pre-emption Miscellaneous Appeal No. 18/2016 before the Court of District Judge, Narayanganj. That Appeal on transfer was heard by the learned Additional District Judge, 3rd Court, Narayanganj. Learned Appellate Court allowed the appeal by the impugned judgment and order dated 10.10.2022. Learned Appellate Court held that the suit land was previously separated from the main holding by mutation and splitting up of *jama* and the petitioner was no more a co-sharer in the suit land. Appellate Court further held that the Miscellaneous Case was bad for defect of party as the sister of the petitioner named Marium had not been impleaded as party in the pre-emption case. For these reasons learned Appellate Court allowed the appeal reversing the judgment of the trial Court. Being aggrieved from that judgment

and order, petitioners filed this revisional application and obtained the Rule.

Mr. H. M. Borhan Uddin along with Mr. Liton Dutta, the learned Advocates, appearing on behalf of petitioner, submits that the judgment of the learned Appellate Court is based on misreading and non consideration of the evidence on record. The Appellate Court below committed an error of law in passing the impugned judgment resulting in an error in the decision occasioning failure of justice. The petitioner has been possessing the suit land by erecting a factory in it and the suit land is necessary for his factory. OPW- 2 has admitted it. Opposite Party No. 1 has mutated the land without serving any notice upon the petitioner. Decision of the Appellate Court regarding defect of party is not correct. Such *plea* of defect of party should have to be raised at the earliest possible opportunity. Learned Advocate further submits that the instant pre-emption case is case under section 24 of the Non-Agricultural Tenancy Act, 1949 and to pre-empt land under the provisions of that section, petitioner has to be co-sharer in land and not co-sharer of holding. So the separation of *jama* is not a clog to pre-emption under section 24 of the Non-Agricultural Tenancy Act, 1949. For these reasons learned Advocate for the petitioner prayed for making the Rule

absolute. In support of his contention he referred to the cases reported in 73 DLR (AD) 54, 26 BLD (AD) 53, 27 BLT (AD) 4.

On the other hand, Mr. Md. Abdul Mannan Bhuyean appearing on behalf of the opposite party submits that the learned Appellate Court has rightly allowed the appeal and thereby reversed the judgment of the trial Court. Petitioner is not a co-sharer in the suit land because the suit *jama* has been split up long before the pre-emption case. Previous to the disputed *kabla*, the suit land was transferred for two times. But the petitioner has not prayed for pre-emption against those transfers. According to the provisions of section 103 of the Evidence Act, the onus is upon the petitioner to prove that notice of mutation case and split up of *jama* was not served upon him. But the petitioner has failed to prove it by cogent evidence. According to the provisions of section 114(e) of the Evidence Act, the court may presume that all the official acts have been duly performed. For these reasons learned Advocate for the opposite party No. 1 prayed for discharge of the Rule. In support of his contention he referred to the cases reported in 18 ADC 530, 8 MLR (AD) 153, 23 BLT (AD) 7, 35 DLR (AD) 230, 6 BLC (AD) 41, 4 MLR (AD) 129.

Heard the learned Advocates for both the parties. Perused the impugned judgment and order, revisional application and annexures therewith and the lower Court records.

On perusal of the impugned judgment of the learned Appellate Court, it appears that the learned Appellate Court allowed the appeal reversing the judgment of the trial Court mainly on two grounds- firstly, the Pre-emption Miscellaneous Case is bad for defect of party and secondly, the petitioner ceased to be a co-sharer in the suit *jama* because of mutation and splitting up of that *jama* previously to the Pre-emption Miscellaneous Case.

Regarding the first point, learned Appellate Court held that the daughter of the recorded tenant Ahijuddin named Marium had not been impleaded as party and thus the case was bad for defect of party. On perusal of the deposition of the petitioner (PW- 1) it appears that PW- 1 admitted in his cross examination, “ওহিদ উদ্দিন মারা গেছে। তার ৩ ছেলে ২ মেয়ে মরিয়ম ও হোসনেয়ারা। আমি অত্র মামলায় মরিয়ম ও হোসনেয়ারাকে অত্র মামলায় পক্ষ করিনি। সাহাবুদ্দিনের ৪ ছেলে ১ মেয়ে। সাহাবুদ্দিনের মেয়েকে অত্র মামলায় পক্ষ করিনি।”

On perusal of the record, it appears that the daughter of R S recorded tenant Ohijuddin named Marium and the daughter of another R S recorded tenant Sahamuddin named Moyna have not been impleaded as party in the Preemption Miscellaneous Case. Learned Advocate for the petitioner submits on this point that the question of defect of party is to be raised at the earliest possible opportunity and the opposite party has not raised that point and

has not mentioned her name in the earliest possible opportunity and in the Appellate stage such objection cannot be raised. Learned Advocate for the petitioner relied on the decision of the case of *Abdur Rashid Sarker Vs. Sree Dines Chandra Das* [26 BLD (AD) 53]. In that case, the Apex Court held that where the pre-emptees did not supply the names of the persons whose names he put to the pre-emptor during cross examination in reply to the interrogatory served on him, he was debarred from raising the question of defect of parties at that stage of the proceeding after replying to the interrogatory served on him earlier. But on perusal of the lower court record, it appears that the Pre-emptor-Petitioner never served any interrogatory upon the Pre-emptee Opposite Party No. 1 to supply the names of the necessary parties. So the decision of our Apex Court reported in 26 BLD (AD) 53 does not seem to be relevant or applicable to the present case. Moreover, that Marium is the full sister of the Preemptor-Petitioner. It is not desirable that the Pre-emptee-Opposite Party will have to remind the preemptor the name of his full sister to implead her as party because her name must be within the knowledge of the preemptor and it is duty of the pre-emptor to implead all co-sharers as party to the pre-emption proceeding. On this point, I am of the opinion that the findings of the learned

Appellate Court is correct and appropriate and consequently the Pre-emption Miscellaneous Case is bad for defect of parties.

Regarding the second point, learned Appellate Court has held that previous to the transfer of the suit land to *kabla* purchaser opposite party No. 1, the suit land was transferred for twice and after those transfer, the suit land was mutated in the name of the purchasers and the *jama* was then splitted up and the pre-emptor is no longer a co-sharer in suit *jama*. On perusal of Exhibits- “স” and “এ” it appears that the suit land was transferred by the heirs of SA/RS recorded tenant Shahamoddin on 30/04/1974 to Hanif Mia and Montaj Uddin in two *kablas*. On perusal of Exhibit- Jha (ঋ) series, it appears that the suit land was then mutated in the name of Montajuddin and Hanif Mia and by splitting the *jama*, a new *Khatian* (*Khatian* No. 13/1) was opened in their names through mutation and *Jamakharij* Case No. 1783/53-54. On perusal of exhibit number- Uma (ঊ) it appears that Montajuddin and Hanif Mia transferred the suit land to Faijuddin, his wife Johra Khatun and their son Subed Ali by registered *kabla* dated 16.03.1985. On perusal of Exhibit Ja (ঋ) series, it appears that the suit land was then mutated in the name of Johra Khatun, Subed Ali and other heirs of Faijuddin and by splitting the *jamaa*, new *Khatian* (*Khatian* No. 2171) was opened in their names through the mutation and *Jamakharij* Case No.

3043/2004-2005. On perusal of the disputed *kabla* dated 19/01/2009 [Exhibit- “1” and Exhibit- “Cha”] it appears that the suit land has been described as follows in the schedule of that *kabla*:

“খতিয়ান নম্বর: নিজ প্রজাই ১৭১ নং-সি. এস. ২৮ নং এস. এ. ১৩ নং, আর. এস. ৪৪৫ নং বর্তমান খারিজা ২১৭১ নং খতিয়ান ভুক্ত। যাহার জোত ২১৭২ নং।” Thus it appears that the suit land appertains to current *Khatian* number 2171 and on perusal of Exhibit- Ja (জ) it appears that the pre-emptor is not a co-sharer of that *Khatian*. Through these documentary evidences, it is proved that the pre-emptor is not a co-sharer in the suit *jama*.

Learned trial Court has held that the Pre-emptee-Opposite Party had failed to prove that the notices of that mutation cases were duly served on the co-sharers and therefore the right of pre-emption would not be perished by such mutation and *jamakharij*. But if the pre-emptor claims that notice of those mutation cases were not duly served upon the co-sharers, then under section 103 of the Evidence Act, the onus is upon him to prove that such notices were not served. But the pre-emptor did not take any step or adduce any evidence to prove it, nor he filed any objection case to cancel that mutation and splitting the *jama*. The trial Court also did not call for the record of the mutation case to verify whether notices were served or not. In such context,

findings of the trial Court regarding non service of the notice of the mutation cases is not appropriate and not tenable in law. Similar view was taken by our Apex Court in the case of *Dr. Md. Forman Ali Vs. Nizamuddin* [26 BLC (AD) 52].

Learned Advocate for the petitioner finally submits that the pre-emptor petitioner filed the application for pre-emption under section 24 of the Non-Agricultural Tenancy Act, 1949 and according to the provisions of that section, if a co-sharer tenant owns a portion of land in any plot, he is to be treated as co-sharer in the entire plot even if the land of that plot is recorded in more than one *Khatian*. In support of his contention, learned Advocate refers to the cases of *Selina Gulshan Vs. Mashiar Rahman* [73 DLR (AD) 54], *Aminullah Vs. Serajul Haque* [65 DLR (AD) 82], *Mrs. Mahabuba Rashid Vs. Afruja Khanam* [27 BLT (AD) 04]. But it may be mentioned here that in the petition for pre-emption, the petitioner has not claimed himself as co-sharer in the suit plot. In that pre-emption petition, the petitioner has claimed himself as co-sharer in the suit *jote*. In the petition for pre-emption, the petitioner has stated, “অত্র মোকদ্দমার মজহর পৈত্রিক ওয়ারেশ সূত্রে নালিশী জোতের ভূমিতে পরস্পর সহ শরীক প্রজা হিসাবে মালিক থাকিয়া ভোগ দখল করিয়া আসিতেছে।”

It may be mentioned here that in the SA 13 *Khatian*, there are four plots and in the RS 445 *Khatian*, there are as many as

nine plots [Exhibits- 1 & 2]. It is nowhere mentioned in the pre-emption petition that in which plot the petitioner possesses his portion of land. It is also not clearly mentioned in the pre-emption petition that the pre-emptor is a co-sharer in the suit plot [i.e. SA Plot No. 139, RS Plot No. 264.] Pre-emptee- Opposite Party claims that the Pre-emptor-Petitioner has married the daughter of the recorded tenant Sahamoddin and he resides in the house of his father in law Sahamoddin. PW- 3 Sahadat admitting the fact has stated in his cross-examination- “মোলজারের পিতার নাম অহিজউদ্দিন এবং তার (অহিজের) ভাইয়ের নাম সাহামুদ্দিন। এই খতিয়ানে সাহামুদ্দিনের বাবার জমি আছে। সাহামুদ্দিনের মেয়ের জামাই মোলজার। সাহামুদ্দিন ও মোলজার একই বাড়িতে থাকে। সাহামুদ্দিনের বাড়ি মোলজার ছোট বেলা থাকে।” Thus it is clear from the deposition of PW- 3 that the petitioner Moljar resides in the house of his father in law who is a recorded tenant of the SA/RS *Khatian* and it is difficult to ascertain that which property the petitioner possesses as heir of his father and which property he possesses on behalf of his father in law.

Side by side learned Advocate for the opposite party No. 1 has referred to the cases of *Kabir Ahmed Choudhury Vs. Sreemoti Shukla Bhowmic* [18 ADC 530], *MD. Mojibar Rahman Vs. Lajtan Nessa* [23 BLT (AD) 07], *Alfazuddin Vs. Abdur Rahman and Others* [8 MLR (AD) 153] where it has been held by our Apex Court that by opening separate *Khatian* upon

splitting up of the *jama* of the land sought to be pre-empted, the pre-emptor loses his right of pre-emption under section 24 of the Non-Agricultural Tenancy Act, 1949. In the case of *Kabir Ahmed Choudhury Vs. Sreemoti Shukla Bhowmic* [18 ADC 530] our Apex Court held,

“In the background of the discussion made herein above, we are of the view that because of the opening separate *Khatian* upon splitting up of the *jama* of the land sought to be pre-empted in the name of the pre-emptors disentitle them from exercising the right of pre-emption. If this is a fact then certainly the pre-emptors ceased to be co-sharers and debarred from claiming pre-emption.”

In the case of *MD. Mojibar Rahman Vs. Lajtan Nessa* [23 BLT (AD) 07] our Apex Court held, “the admitted position being that the pre-emptor is not a co-sharer tenant in the two SA *Khatians* out of which the case land was transferred, he cannot get order of pre-emption under section 24 of the Non-Agricultural Tenancy Act as the *Khatian* being found already separated before the sale.” In the case of *Alfazuddin Vs. Abdur Rahman and Others* [8 MLR (AD) 153] our Apex Court held that, co-sharership in a tenancy of non-agricultural land ceases through two different ways- One is partition of the land and the other is separation of the tenancy by splitting up the *jama*

Khatian and thus separation of tenancy/*jama Khatian* disentitles the petitioner from the right of pre-emption.

In view of the discussions made above, it is found that a separate *Khatian* was opened regarding the suit land by splitting up of the SA and RS *jama* and such new *Khatian* (SA 13/1, RS 2171) was opened long before the disputed sale dated 19/01/2009 [Exhibits- “Ja” and “Jha”] and accordingly the petitioner is no longer a co-sharer in the suit *Khatian*. The suit *jama* was splitted for twice and the Pre-emptor-Petitioner never raised any objection against such splitting up of the *jama*. The learned Advocate for the Pre-emptor-Petitioner submitted at the time of hearing of this revisional application that even though the petitioner is not regarded as co-sharer in the suit *jama*, he is a co-sharer in the suit plot and thus he is co-sharer in land as required by section 24 of the Non-Agricultural Tenancy Act. But on perusal of record, it appears that in the petition for pre-emption, the petitioner has not claimed himself as co-sharer in the suit plot and in that pre-emption petition, he has claimed himself as co-sharer in the suit *jote*. Moreover the pre-emption miscellaneous case is bad for defect of parties. Learned Appellate Court considering all these issues, has rightly allowed the appeal reversing the judgment and order of the trial Court. In the instant case, the Appellate Court has not committed any error of law in

passing the impugned judgment and order. So, the impugned judgment and order of the Appellate Court does not call for any interference.

Considering the facts and circumstances, I find no merit in the Rule. So, the Rule is liable to be discharged.

In the result, the Rule is discharged without any order as to costs.

Records of the Courts below be sent to the concerned Court at once with a copy of the judgment.