

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 5435 of 2023

Subhash Chandra Mondal and another
... Petitioners

-Versus-

Subrata Pandey and others
...Opposite-parties

Mr. Mintu Kumar Mondal with
Mr. Nemai Chandra Roy, Advocates
...For the petitioners

Mr. Laxman Biswas, Advocate
...For the opposite-party No. 1.

Heard on 04.07.2024, 09.07.2024

and Judgment on 10th and 11th July, 2024.

In this application under Section 115(4) of the Code of Civil Procedure, by granting leave to revision to the petitioners, Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 12.07.2023 passed by the learned District Judge, Barishal in Civil Revision No. 08 of 2023 allowing the same and thereby reversing the judgment and order dated 05.01.2023 passed by the learned Senior Assistant Judge, Uzirpur, Barishal in Miscellaneous (Sani) Case No. 07 of 2022 (arising out of Miscellaneous Case No. 30 of 2012 Preemption) rejecting the application for restoration of the Miscellaneous (Sani) Case No. 07 of 2022 which was dismissed for default should not be

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

Shorn of unnecessary details, fact of the case lies in a very narrow compass. The petitioners, as preemptor, filed Miscellaneous Case No. 30 of 2012 in the Court of Senior Assistant Judge, Uzirpur, Barishal, seeking pre-emption against the opposite-party No. 1 along with others, as co-sharer by inheritance in the case property. As per Order No. 10 dated 05.06.2013 summon notices were duly served upon the opposite-parties, but none of them appeared before the trial court. Consequently, the case was heard ex parte on 15.07.20213 and by order dated 01.12.2013 the case was dismissed by the trial court.

Being aggrieved, the preemptors, filed Miscellaneous Appeal No. 08 of 2014 before the learned District Judge, Barishal. Eventually, the appeal was heard and disposed of by the learned Joint District Judge, 3rd Court, Barishal on transfer who by the judgment and order dated 29.09.2018 allowed the appeal on contest and sent back the Miscellaneous Case No. 30 of 2012 to the trial court on remand for fresh trial after affording opportunity to the parties. Thereafter, the lower court received the records from the

appellate court on 28.10.2018 and after arrival of records the order was seen by the learned Advocate for the opposite-party-respondents on 30.10.2018 and by order dated 22.11.2018 the case was fixed for taking step on 17.01.2019, but the pre-emptors failed to take step as per direction of the court. Consequently, the case was dismissed for default on 19.02.2019. Thereafter, the pre-emptors filed Miscellaneous Case No. 19 of 2019 under Order 9 Rule 4 of the Code for restoration of the case on 09.09.2019 at a delay of 202 days. The trial court allowed the miscellaneous case by its order dated 01.10.2019 and fixed on 17.01.2019 for step and thereafter, among other dates the trial court finally fixed the case for ex parte hearing and vide order dated 31.10.2021 allowed the case granting pre-emption.

The pre-emptors filed an application praying for having sale deed registered through court, which was allowed and finally fixed on 22.03.2022 for execution and registration of the sale deed in favour of the pre-emptors. By this time the opposite-parties filed Miscellaneous Case No. 07 of 2022 under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure on 20.02.2022 for setting

aside the ex parte decree. The court after hearing accepted the application directing issuance of notice upon the pre-emptors and stayed all further proceedings of Miscellaneous Case No. 30 of 2012 till disposal of Miscellaneous Case No. 07 of 2022.

During pendency of the Miscellaneous Case No. 07 of 2022 the preemptee filed Miscellaneous Appeal No. 30 of 2022 before the learned District Judge, Barishal against the ex parte judgment and order dated 31.10.2021, wherein the lower court records were called for. The appellate court heard the Miscellaneous Appeal No. 30 of 2022 and after hearing by the judgment and order dated 23.08.2022 dismissed the appeal holding that before filing of the appeal, the appellant-preemptee, filed Miscellaneous Case No. 07 of 2022 before the trial court praying for setting aside the ex parte judgment and order dated 31.10.2021. But the appellant instead of pursuing the Miscellaneous Case No. 07 of 2022 filed earlier seeking same relief, unfortunately, filed this appeal against the same judgment and order before the appellate court. The appellate court observed that since the miscellaneous case pending before the learned trial court the preemptee ought not to have filed appeal and directed the appellant

to get the Miscellaneous Case No. 07 of 2022 heard and disposed of pending before the trial court and sent the records to the trial court who received the same on 15.09.2022 and fixed the Miscellaneous Case No. 07 of 2022 for hearing on 17.10.2022. On the date fixed the preemptee-applicant did not take step, consequently, Miscellaneous Case No. 07 of 2022 was dismissed for default. On the following day the pre-emptor filed an application for proceeding with the Miscellaneous Case No. 30 of 2012. The prayer was allowed. Thereafter, the preemptee filed an application under Section 151 of the Code of Civil Procedure on 02.11.2022 praying for restoration of the miscellaneous case by setting aside the order of dismissal. Said application was heard by the court on 05.01.2023 and rejected the same. Thereafter, executed the sale deed and registered the same on 26.02.2023. Against the order dated 05.01.2023 the preemptee preferred Civil Revision No. 08 of 2023 before the learned District Judge who after hearing by the impugned judgment and order dated 12.07.2023 allowed the same and restored Miscellaneous Case No. 07 of 2022 in its original number and position by setting aside the order dated 05.01.2023 passed by the trial court. At this juncture, the petitioners moved this Court by filing

this application under Section 115(4) of the Code seeking leave to revision and obtained the present Rule and order of stay.

Mr. Mintu Kumar Mondal with Mr. Nemaï Chandra Roy, learned Advocates appearing for the petitioners submit that Pre-emption Case No. 30 of 2012 was at the first instance dismissed by the trial court after hearing ex parte. Thereafter, the pre-emptors preferred Miscellaneous Appeal No. 08 of 2014 before the learned District Judge, Barishal which was heard and disposed of by the Joint District Judge, 3rd Court, Barishal on transfer, wherein, the preemptee-purchaser appeared and contested the appeal though he did not appear before the trial court. He submits that the appellate court after hearing by its judgment and order dated 25.09.2018 allowed the appeal on contest and sent back the case to the trial court for hearing afresh affording opportunity to both the parties to get the application amended and to file written objection and adduce evidences in support of their respective claim. After disposal of Miscellaneous Appeal No. 08 of 2014 lower court records arrived and received by the trial court on 28.10.2018. After arrival of records, in usual course it was informed to the learned Advocate of

the purchaser-preemptee who represented the preemptee before the appellate court named Advocate Mr. Sadesh Chandra Roy.

The trial court fixed the case for taking step on 22.11.2018, but the pre-emptor did not take step in the case as directed by the court. Consequently, the case was dismissed for default in the absence of both the parties. Thereafter, the preemptors filed an application under Order 9 Rule 4 of the Code of Civil Procedure and got the case restored by the order dated 09.09.2019 with cost of Tk. 500/-. The trial court fixed on 17.11.2019 for taking step and then on 16.01.2020 for ex parte hearing. Among other dates finally, the trial court heard the case ex parte and by its judgment and order dated 31.10.2021 allowed the case, granting pre-emption in favour of the petitioners.

He submits that the preemptee filed Miscellaneous Case No. 07 of 2022 under Order 9 Rule 13 for setting aside the ex parte judgment and decree dated 20.02.2022 after long time. During pendency of miscellaneous case, the preemptee, filed Miscellaneous Appeal No. 30 of 2022 on 09.06.2022 against the judgment and order dated 31.10.2021 wherein, lower court records were called for.

He argued that the preemptee most cunningly suppressed the fact of contesting the Miscellaneous Appeal No. 08 of 2014 before the appellate court in his application for setting aside ex parte judgment and filing of Miscellaneous Case No. 07 of 2022. At the time of hearing of the appeal when the matter was brought to the notice of the court, the appellate court by its judgment and order dated 23.08.2022 dismissed the appeal directing the preemptee-appellant to get the Miscellaneous Case No. 07 of 2022 heard and disposed of before the trial court as it was filed earlier to miscellaneous appeal against the same judgment and order.

He argued that the preemptee was fully aware of the fact of pendency of Pre-emption Case No. 30 of 2012 and about Miscellaneous Case No. 07 of 2022 filed by him. But after arrival of lower court records he did not take any step as per direction of the appellate court to get the miscellaneous case heard and disposed of, consequently, the same was dismissed for default on 17.10.2022. Thereafter, the preemptee-opposite parties filed an application under Section 151 of the Code, praying for restoration of the Miscellaneous Case No. 07 of 2022 which was opposed by the preemptors. The trial

court after hearing by its order dated 05.01.2023 rejected the same. Thereafter, the preemptee filed Civil Revision No. 08 of 2023 before the learned District Judge, Barishal who heard the matter and after hearing by the impugned judgment and order dated 12.07.2023 allowed the same restoring the miscellaneous case. But in the judgment and order under challenge the revisional court failed to appreciate the provisions of law and very negligent conduct of the preemptee, as such, committed an error of law in the decision occasioning failure of justice.

Mr. Laxman Biswas, learned Advocate appearing for the opposite-party No. 1 submits that summon notices of Pre-emption Miscellaneous Case No. 30 of 2012 was not served upon the preemptee-opposite parties, as such, he could not appear before the trial court. However, the trial court after hearing dismissed the same ex parte finding that the case is not maintainable under Section 96 of the State Acquisition and Tenancy Act. Thereafter, the preemptors, preferred Miscellaneous Appeal No. 08 of 2014 before the learned District Judge, Barishal wherein, the preemptee, as respondent, appeared and contested the same. But in the said appeal learned

appellate court considering submissions of both the parties allowed the appeal and sent back the case to the trial court for fresh trial. After disposal of the appeal, the preemptee changed his lawyer and awaiting notice from the court, but as per order of the court no step was taken by the preemptors for service of summon notices upon the opposite-parties. Because of non service of summon upon preemptee he could not appear before the trial court and file written objection. In his absence, the trial court took the matter for hearing ex parte and allowed the pre-emption in favour of the preemptor by its judgment and order dated 31.10.2021. Thereafter, when the preemptee came to know about ex parte judgment and order filed Miscellaneous Case No. 07 of 2022 for setting aside the ex parte judgment.

Subsequently, on the advice of the learned Advocate the preemptee also filed Miscellaneous Appeal No. 30 of 2022 before the learned District Judge, Barishal in which lower court records was called for, consequently, proceeding in Miscellaneous Case No. 07 of 2022 remained suspended till disposal of the appeal. He submits that at the time of hearing of the appeal when it has come to the notice of the appellate court, the appellate court without touching

merit of the case, directed the preemptee-appellant to get the Miscellaneous Case No. 07 of 2022 heard and disposed of, as it was filed earlier to filing of the appeal. Thereafter, the trial court ought to have informed the fact of arrival of records before the trial court to the concern lawyer for the parties, but it was not informed to any of the conducting lawyers of both the parties, as appearing from order No. 15 dated 15.09.2022. By the said order Miscellaneous Case No. 07 of 2022 was fixed for hearing on 17.10.2022 as first date. On the date fixed the petitioners in Miscellaneous Case No. 07 of 2022 could not take any step for hearing the same, as the fact of arrival of records has not been communicated to the petitioner through his lawyer. The trial court, to secure ends of justice ought to have adjourned the matter for certain time directing the office to inform the fact of arrival of the records or could have issued a notice to show cause to the petitioner as to why miscellaneous case shall not be dismissed for default. But on the very day of fixing hearing, the trial court dismissed the miscellaneous case for default. On the following day the preemptors filed an application to take the Pre-emption Case No. 30 of 2012 for further proceedings. The court allowed the application and fixed on 20.11.2022 for step. Thereafter,

the preemptee-petitioner filed an application on 02.11.2022 under Section 151 of the Code of Civil Procedure, praying for re-calling the order dated 17.10.2022 and restoring the miscellaneous case in its original number and position. Said application was fixed for hearing on 05.01.2023 and after hearing the trial court rejected the same. Then the preemptee, filed Civil Revision No. 08 of 2023 wherein, the revisional court allowed the revision restored the Miscellaneous Case No. 07 of 2022.

He submits that if the preemptee found guilty of serious negligence, the trial court will reject the application and in that case the preemptor will not be prejudiced. It is merely an opportunity given to the preemptee to get the Miscellaneous Case No. 07 of 2022 heard and disposed of on merit considering all the evidences to be led by both the parties, as such, the revisional court committed no error in the decision occasioning failure of justice.

Heard the learned Advocates of both the sides, have gone through the revisional application, application for pre-emption, judgment and order passed in Miscellaneous Appeal No. 08 of 2014, ex parte judgment and order passed in Miscellaneous Case No. 30 of

2012, application in Miscellaneous Case No. 07 of 2022 filed under Order 9 Rule 13 of the Code, Judgment in Miscellaneous Appeal No. 30 of 2022 and the impugned judgment and order passed by both the courts below.

Fact of the case, as stated earlier need not be repeated again. It is a fact that present petitioners, as preemptors, filed Miscellaneous Case No. 30 of 2012 praying for pre-emption of the case property against the opposite-parties. In the said miscellaneous case, the opposite-parties did not appear consequently, the case was heard ex parte and after hearing, the trial court rejected the same. Thereafter, the preemptors preferred Miscellaneous Appeal No. 08 of 2014 wherein, the opposite-parties purchaser pre-emptee appeared and contested the appeal. The appellate court after hearing by judgment and order dated 25.09.2018 allowed the appeal and sent back the case to the trial court on remand for fresh trial affording opportunities to both the parties to contest the same. After arrival of lower court records the trial court informed the same to the learned Advocate for the respondent named Mr. Sadesh Chandra Roy. The preemptee-opposite parties did not appear before the trial court in

Miscellaneous Case No. 30 of 2012 and the petitioner also did not take any step for service of summons upon them afresh.

Since the opposite-parties did not appear and filed written objection, in usual course, the trial court fixed the matter for ex parte hearing and ultimately, by its judgment and order dated 31.10.2021 the case was allowed ex parte, allowing pre-emption. After passing ex parte judgment and order the preemptee-purchaser came with an application under Order 9 Rule 13 of the Code praying for setting aside judgment and order which was duly registered as Miscellaneous Case No. 07 of 2022 and the preemptee-purchaser ought to have pursued the said miscellaneous case and get the same heard and disposed of as earlier as possible. In the said miscellaneous case without any delay preemptors filed written objection in due time and after filing written objection the trial court fixed the case for hearing on 18.05.2022. On the date fixed both the parties filed hajira, but on the prayer of applicant-preemptee hearing was adjourned as last chance fixing 16.06.2022. In the meantime, the petitioner in Miscellaneous Case No. 07 of 2022 instead of getting the miscellaneous case heard and disposed of, for the reason best

known to him filed Miscellaneous Appeal No. 30 of 2022 against the same judgment and order passed by the trial court, wherein, the lower court records were called for, because of this situation hearing of Miscellaneous Case No. 07 of 2022 could not be taken up by the trial court. The preemptee-petitioner pursued Miscellaneous Appeal No. 30 of 2022 before the appellate court, wherein, the preemptors as respondents appeared and got the appeal heard. The appellate court while dismissing the appeal observed and held that the preemptee-petitioner suppressed the fact of filing Miscellaneous Case No. 07 of 2022 before the trial court for setting aside the same judgment and order and thereafter, filed the instant Appeal No. 30 of 2022 and also observed that said miscellaneous case was fixed for hearing on 16.06.2022, but could not be, heard as the lower court records called for by this court, such act of the preemptee-purchaser is an abuse of the process of law and killing the valuable time of the court and observed that since the miscellaneous case is pending before the learned trial court, the preemptee-purchaser ought not to have come before the appellate forum and by doing so he has committed error of law and on those finding appeal was dismissed. Thereafter, the preemptee-petitioner ought to have taken step before the trial court in

Miscellaneous Case No. 07 of 2022 as the said case was fixed for hearing on 16.06.2022 as last chance.

It appears from the order sheets that after arrival of lower court records from appellate court it was not communicated to the learned Advocate for the preemptee-purchaser or to the preemptors by the concern Sherestha of the court. Because of this situation the preemptee-purchaser took a plea that since the order was not communicated to him through his lawyer he could not take step in Miscellaneous Case No. 07 of 2022. In normal course of practice after receipt of records from higher court, the trial court ought to have informed the fact of arrival of lower court records to the concern Advocate for the parties. But in the instant case, the trial court failed to take notice that the Sherestha did not comply with the same. However, considering the fact and circumstances of the instant case in its entirety I find that the preemptee-purchaser adopted dilatory tactics in various ways; for the first instance in not appearing before the trial court in Miscellaneous Case No. 30 of 2012 and allowing to proceed the case upto ex parte hearing and passing a judgment and order allowing pre-emption in favour of the

preemptors. Thereafter, filed Miscellaneous Case No. 07 of 2022 on 20.02.2022 after about 4 months of passing ex parte judgment and order. Non communication of arrival of lower court records by the trial court to the learned Advocate for preemptee-purchaser is a technical irregularities, but it has a legal implication as decided by this Court in various cases. However, conduct of the purchase-preemptee is worst of the highest order and he has adopted various tactics taking advantage of irregularities of the court below.

In view of the situations as narrated above, to ensure justice, I have gone through the judgment and order of the revisional court. Upon perusal of the judgment and order under challenge, I find that from starting of the proceeding upto ending of revision, the litigation between the parties has not been finally adjudicated upon though the preemptee-purchaser got sufficient opportunity as observed by the appellate court. The impugned order passed by the revisional court restoring Miscellaneous Case No. 07 of 2022 affording opportunity to the preemptee-purchaser to get the miscellaneous case heard and disposed of does not mean that whole relief of the subject matter has been given to the preemptee-purchaser.

Admittedly, Miscellaneous Case No. 30 of 2012 seeking pre-emption of case property was filed by the pre-emptors against the deed of gift. Definite case of the pre-emptors is that to avoid and frustrate the claim of the petitioners the seller brother purposely executed and registered a deed of gift instead of deed of sale. Whether, the transaction is a gift or a sale deed has not yet been determined by the trial court giving opportunity to prove the same by the opposite party-purchaser. Therefore, though I find the preemptee-purchaser is a guilty of serious negligence, but by the impugned judgment and order the revisional court has not committed any error in the decision occasioning failure of justice calling interference by this Court.

Taking into consideration the above, to ensure justice and get the miscellaneous case adjudicated upon by the Court as to whether he was prevented by sufficient cause from appearing in Miscellaneous Case No. 30 of 2012 the order passed by the learned District Judge, Barishal is maintained.

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

The trial court is hereby directed to dispose of the Miscellaneous Case No. 07 of 2022 within 02(two) months from the date of receipt of this judgment and order positively without allowing any unreasonable adjournments to the parties, in particular, to the applicant in miscellaneous case.

Order of *stay* granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.