

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

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 1813 of 2023

IN THE MATTER OF :

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

-And-

In the Matter of:

Sadhan Kumar Paul and others

...Preemptor-Petitioners

Versus

Haji Md. Atiar Rahman and others

...Preemptee-Opposite parties

Mr. Md. Sabur Khan, with

Mr. Muhammad Ahsan Habib, Advocates

... For the petitioners

Mr. Md. Abdul Awal, Advocate

... For the Opposite Party No. 1

Judgment on: 04.03.2026.

Md. Riaz Uddin Khan, J:

At the instance of the pre-emptors this Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 31.01.2023 passed in Miscellaneous Pre-emption Appeal No. 46 of 2022 passed by the Additional District Judge, 1st Court, Kushtia allowing the appeal and upon reversing the judgment and order dated 30.05.2022 passed by the Senior Assistant Judge, Sadar, Kushtia in Miscellaneous Case No. 05 of 2012 should not be set aside and/or such other or further order or orders should not be passed as to this Court may deem fit and appropriate.

Facts in a nutshell for disposal of this Rule is that the petitioners instituted the suit for pre-emption under section 96 of State Acquisition and

Tenancy Act, 1950 before the Senior Assistant Judge, Sadar, Kushtia and the same was registered as Miscellaneous Case No. 05 of 2012 contending *inter alia* that the land measuring 29 decimals out of 3.55 acres of R.S. Khatian No. 1459 was owned and possessed by Tulshi Rani who sold 29 decimals land of the dag no. 13213 under RS Khatian No. 1459 by a deed of sale No. 6315 dated 21.06.2005 to her three sons Aboni Kumar Paul, Bolai Kumar Paul and Jogodish Chandra Paul. Then, by mutating their names in the land they were paying rents. Thereafter, Jagodish Chandra Paul died leaving behind two sons, the petitioners. As such they are co-sharer by inheritance on the holding. In the meantime, the Opposite Party Nos. 2 & 3 without serving any notice sold out 19.33 decimals land by a Deed of Sale being No. 6616 dated 24.08.2011 to the pre-emptee opposite party no.1 who disclosed the information about the purchase on 15.01.2012 for the first time and the petitioners after collected the certified copy of the said documents on 23.01.2012 came to know about it. The purchaser opposite party no. 1 is a stranger to the land. The petitioners as co-sharers have the right of preemption to acquire the land. Hence they filed the preemption case on 30.01.2012.

The opponent No. 1 contested the case by filing written objection denying all the material averments contending *inter alia* that three brothers Aboni Kumar Paul, Jagoddish Chandra Paul and Balai Kumar Paul had good relation. Jagoddish Chandra Paul became ill in the year of 2011 and for the purpose of his treatment the three brothers decided to sell their property to the opponent no.1. Thereafter on 15.04.2011

at their residence they (the petitioners as well as their father and two uncle) fixed the price of the property at Tk. 150,000/- (one lakh and fifty thousand), and decided to have the instrument registered on the 24.08.2011, in presence of Abdur Rashid and Vajon Kumar Paul. On the day of Registration, this opponent went to the house of Jagodish Chandra Paul, and the petitioners informed him of their father's illness and took him to their father. This opponent, perceiving the gloomy condition of Jagodish Chandra Paul, asked for what to do next to the petitioners as well as to the opponent nos. 2 & 3. They (the petitioners and the opponent nos. 2 & 3) decided to register the shares of land of the opponent nos. 2 & 3 on that day and the share of Jagodish Chandra Paul be registered on his recovery. In furtherance, it was also agreed that on his expiry, the petitioners will have the same registered in favour of this opponent. Thereafter, the opponent nos. 2 & 3 executed the instrument of sale, bearing no. 6616, registered on 24.08.2011 in the Office of the Sub Registrar, Sadar, Kushtia to Md. Atiar Rahman, this opponent. Jagodish Chandra Paul passed away subsequently. This opponent requested the petitioners as per their promise to execute an instrument for the property in favour of this opponent but they demanded the value 3 times more. The petitioners being acquainted all the affairs filed the instant case which is barred by waiver, estoppel and acquiescence. For increasing the value of the case land, with a greedy intention, the petitioners filed this false case which is liable to be dismissed with cost.

The trial court framed as many as 4 (Four) issues for adjudication of the case. The petitioners examined 3 (Three) witnesses and exhibited some documents which were marked as Exhibits 1-3 and the opponent no.1 also examined 3 (three) witnesses and exhibited some documents which were marked as Exhibits Ka-Umo to prove their respective case.

The learned Judge of the trial Court on perusal of the oral and documentary evidence on record was pleased to allow the preemption by its judgment and order dated 30.05.2022.

The opponent No. 1 being aggrieved by the said judgment and order dated 30.05.2022 preferred Misc. preemption Appeal No. 46 2022 before the learned District Judge, Kushtia which was ultimately heard by the Additional District Judge, 1st Court, Kushtia who upon hearing by his impugned judgment and order dated 31.01.2023 allowed the appeal and thereby reversed the judgment of the trial court.

Being aggrieved by and dissatisfied with the impugned judgment and order dated 31.01.2023 the petitioners filed the instant civil revision before this Court and obtained the Rule as stated at the very outset.

Mr. Md. Sabur Khan along with Mr. Muhammad Ahsan Habib appearing for the preemptor-petitioners submits that the learned Judge of the Appellate Court below failed to consider that petitioners are the co-sharers by inheritance to the case holding from their father. The opposite party no.1 is a stranger which is also admitted by the OPW-1 in cross examination and thus the appellate court committed error of law

resulting in an error in the decision occasioning failure of justice and the same is liable to be set aside.

The learned advocate then submits that the learned Judge of the Appellate Court has failed to consider that the OPW-1 admitted in cross examination that he was requested by Aboni and Balai, the opposite party nos.2 & 3 respectively for purchasing the property and at the time of fixing the price, the petitioner No. 1 was not present. On the other hand OPW-3 admitted in cross examination that the petitioners have not been contacted to sell of the property after demise of their father. Though the pre-emptee purchaser took plea that the pre-emption is barred by waiver, estoppel and acquiescence but has totally failed to prove that facts and as such the judgment and order passed by the court of appeal below is liable to be set aside and those of the trial court should be restored.

Mr. Khan lastly submits that the pre-emptors are co-sharers by inheritance. Because, though the disputed sale deed was executed/registered on 24.08.2011 and their father Jagodish could not file the preemption case as a co-sharer by purchase but after his death in December 2011, the petitioners became the co-sharers by inheritance in the holding and filed the case within limitation period and has rightly been decided by the trial court but the court of appeal below committed an error in law resulting in an error in decision occasioning failure of justice in reversing that finding. In support of his contention the learned advocate cited decision of Abdul Majid vs. Akhil

Chandra Sengupta and others reported in 1994 BLD 79 and Abdul Haque Miah and another vs. Abdul Rashid and another reported in 35 DLR (AD) 54.

Per-contra Mr. Md. Abdul Awal, the learned advocate appearing for the pre-emptee opposite party no.1 submits that the pre-emptors are not co-sharers by inheritance as when the impugned deed was registered they were not owners of the holding rather their father Jagodish was the owner of the holding who is admittedly a co-sharer by purchase. The trial court failed to consider this aspect of the case while the court of appeal below rightly found that the pre-emptors were not the co-sharer by inheritance.

The learned advocate next submits that the present pre-emption case is also not maintainable as facts suggest from evidence on record that the father of the pre-emptors and the pre-emptors themselves participated in the negotiation process of the impugned sale as such they are barred to file pre-emption case as it is hit by the principle of waiver, estoppel and acquiescence. The learned advocate for the opposite party in support of his contention cited the decision reported in 35 DLR (AD) 54 (supra) and Shamima Begum and another vs. Rezuana Sultana (Jhumur) and others reported in 75 DLR 541.

I have heard the learned advocates of both the sides, perused the revisional application along with the two judgments passed by the courts below. I have also perused the lower court records including the depositions and exhibits.

Two questions have been raised before this Court. Firstly, whether the pre-emptors were the co-

sharers by inheritance or not and the second question is whether the pre-emptors should be barred for pre-emption of the case land on the ground of principles of waiver, estoppel and acquiescence.

The present preemption case has been filed under section 96 of the State acquisition and Tenancy Act, 1950 and to deal with the two questions raised above let us examine the relevant provision of law. Section 96(1) of the State Acquisition and Tenancy Act, 1950 states-

96. **Right of Pre-emption-(1)** If a portion or share of a holding of a raiyat is sold to a person who is not a co-sharer tenant in the holding, one or more co-sharer tenants of the holding may, within two months of the service of the notice given under section 89, or, if no notice has been served under section 89, within two months of the date of the knowledge of the sale, apply to the Court for the said portion or share to be sold to himself or themselves:

Provided that no application under this section shall lie unless the applicant is-

- (a) a co-sharer tenant in the holding by inheritance; and
- (b) a person to whom sale of the holding or the portion or share thereof, as the case may be, can be made under section 90:

Provided further that no application under this section shall lie after expiry of three years from the date of registration of the sale deed.

From plain reading it is clear from the above provision that other than the co-sharer by inheritance in the holding, no one can file any case for pre-emption subject to the condition under section 90 of the Act. It further provides that if any notice is served under section 89 of the Act then from date of receiving notice within 2 months or if no notice is served then within 2 months from the date of knowledge of such sale the pre-emptor has to file the case. However, no application under this section shall lie after expiry of three years from the date of registration of the sale deed. In the present case serving notice under section 89 does not arise at all because admittedly there was no co-sharer by inheritance at the time of negotiation or execution or even registration of the sale deed as all three brothers were co-sharers by purchase. As it appears from the present case that the petitioners claimed that they could know about the sale on 15.01.2012 and obtained the certificate copy on 23.01.2012 and filed the case on 30.01.2012, clearly within 2 months from the date of their knowledge and also within three years from the date of registration.

The first question whether the pre-emptors were the co-sharers by inheritance is the main question of this case. In the present case the impugned sale deed was registered on 24.08.2011, admittedly on that date the pre-emptors' father Jagodish Chandra Paul was

alive who was the co-sharer by purchase of the holding with his two brothers, the sellers of the disputed property. The pre-emptors claiming themselves as co-sharers by inheritance filed the instant pre-emption case in January 2012 after the death of their father who died in December, 2011. It is now settled law that the right of preemption accrues only after the property is sold, not before that. In other words before the sale, no right of preemption exists. The learned advocate for the petitioners take a plea that on 24.08.2011 the registration was not completed but failed to show this Court on what date the registration was completed under section 60 of the Registration Act. The learned advocate tried to pursue this Court by submitting that since the petitioners right to file pre-emption case starts on the date of completion of the registration and from that date the petitioners were co-sharers by inheritance in the holding.

The petitioners claimed that after the death of their father they became the co-sharers by inheritance in the holding and then their right of preemption accrued and filed the instant case, which in my view, is totally wrong. As the petitioners admitted that their father died in December 2011, clearly after more than 3 months of the date of registration of the disputed sale deed dated 24.08.2011. At the time of sale and date of registration they were not co-sharers but their father was a co-sharer by purchase, having no right of preemption. The legal maxim *Nemo dat quod non habet* (No one gives what he does not have) renders that the petitioners cannot claim any right by inheritance of their father which their father could not claim.

Since the petitioners became co-sharers by inheritance after the death of their father in December 2011 much later the date of sale and registration of the deed on 24.08.2011, the instant preemption case was not maintainable.

On the 2nd question whether the preemption case is barred by the principles of waiver, estoppel and acquiescence. This question is not important in the present case as I have already opined that the instant preemption case is not maintainable. Be that as it may, from evidence on record it appears that one of the preemptee sellers who is the full uncle of pre-emptors Aboni Kumar Paul deposed before the court as OPW-3 that during the negotiation the pre-emptors and their father Jagodish and Akbar were present and took part in the negotiation which was held at the residence of Jagodish. This fact is also supported by witness Akbar, OPW-2 beside the preemptee purchaser, OPW-1. In that view of the matter also the pre-emption case is not maintainable on the principles of estoppel, waiver and acquiescence. In both counts the pre-emption case is not maintainable and that is rightly held by the court of appeal below. Though on wrong conception of present law, the learned judge of the court of appeal below referred repealed sub-section 10 (a) of the repealed section 96 of the State Acquisition and Tenancy Act, 1950 which has no manner of application in the present case as it is filed after the introduction of new section 96 of the Act in 2006. However, the ultimate decision of the appellate court below that the preemption case is not maintainable is correct which calls for no interference by this Court.

In the facts and circumstances of the case and the position of law as discussed above, I am of the firm view, the preemption case is not maintainable and the question raised by the petitioners in the present Rule has no substance which is liable to be discharged for devoid of merits destined to fail.

In the result the Rule is **discharged**.
However, without any order as to cost.

Sent down the lower court records and communicate this judgment at once.