Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 4274 of 2023

Ohidur Rahman and another
..... Petitioners
-Versus-

Md. Abdur Rab (Khoka) and others
..... Opposite-Parties

Mr. A.M. Amin Uddin, Senior Advocate with
Mr. Syed Sayedul Haque, Advocate
Mr. Md. Liton Ahmed, Advocate and
Ms. Peya Jannatul, Advocate
… For the Petitioners
Mr. Md. Golam Rabbani, Advocate
… For the Opposite Parties

Judgment on 28.07.2024

In this revision Rule was issued calling upon the opposite party Nos. 1-2 to show cause as to why the impugned judgment and order dated 06.06.2023 passed by the learned Additional District Judge, 2nd Court, Naogaon in Miscellaneous Appeal No. 68 of 2022 allowing the appeal and reversing the judgment and order dated 05.09.2022 passed by the learned Joint District Judge, 1st Court, Naogaon in Miscellaneous Case No. 87 of 2018 allowing the application for pre-emption should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts relevant for disposal of this Rule, in short, are that the petitioner No. 1 filed Miscellaneous Case No. 87 of 2018 against the opposite parties for pre-emption in the court of learned Joint District Judge, 1st Court, Naogaon claiming that the case land stand recorded in R.S. Khatian No. 375 in the names of Niranjan Lal Agarwala and Chiranji Lal Agarwala in equal share, 8 annas each. Chiranji Lal died leaving two sons, the opposite Party Nos. 6 and 7. The opposite party No. 6 being owner of 4 annas share in suit plot, entered into an agreement for sale of 400 sahasrangsha land with the petitioners on 20.01.2014. The opposite party No. 6 having failed to execute and register the sale deed in favour of petitioners, the petitioners filed Other Class Suit No. 146 of 2014 for specific performance of contract and got decree on 26.02.2014 and also got sale deed being No. 5410 dated 12.08.2015 through court. The opposite party No. 7 also being owner of 4 annas share in suit plot, entered into an agreement for sale of 400 sahasrangsha land with petitioner No. 1 on 28.07.2015. The opposite party No. 7 having failed to execute and register the sale deed, the petitioner No. 1 filed Other Class Suit No. 5 of 2016 for specific performance of contract and got decree on 26.06.2016 and also got sale deed being No. 1314 dated 13.02.2017

through court. Thus the petitioners are co-sharers in the case land by way of purchase and also by contiguous land holders. The opposite party Nos. 1-2 are stranger purchasers to the case land. The opposite party No. 3 as co-sharer sold his share to opposite party Nos. 1-2 beyond the petitioners knowledge by sale deed dated 18.09.2018. On 26.09.2018 the petitioners came to know about the disputed sale after obtaining certified copy of the said deed and hence the present case.

The opposite party Nos. 1-2 as opposite parties pre-emptees contested the case by filing written objection contending that 1696 sahasrangsha land in R.S. Plot No. 1315 was rightly recorded in R.S. Khatian No. 375 in the names of Chiranji Lal Agarwala, father of opposite party Nos. 6-7 and Niranjan Lal Agarwala, the opposite party No. 8 in equal share. The opposite party Nos. 6-7 inherited 8 annas shares in the case plot and transferred the same measuring 800 sahasrangsha to the petitioners out of 0848 sahasrangsha land. The opposite party No. 8 being owner of 0848 sahasrangsha land transferred $0422\frac{1}{2}$ sahasrangsha to the opposite party Nos. 4-5 and $422\frac{1}{4}$ sahasrangsha to the opposite party No. 3 vide two sale deeds dated 26.04.2016. The opposite party Nos. 3, 4 and

5 after purchase got the khatian mutated on separation of jama in their names vide Miscellaneous Case Nos. 218/13/2016-17 and 219/13/2016-17 and they combinedly planned to construct a five storied building thereon. Accordingly, took permission from concerned offices and meanwhile, first floor completed and 2nd floor is half-done. The opposite party No. 3 being in need of money transferred his share including the half done building to the opposite party Nos. 1-2. Its actual sale price was much higher, but in the deed, to minimize expenses on account of stamp duty and government taxes value of the property has been shown at Tk. 40,00,000/- (Forty lakh) as fixed by the registration office. Having known about writing of such low price in the deed, the petitioners filed this case for illegal gain. Its present value would be Tk. 3,00,00,000/- (Three crore). The petitioners are not co-sharers in the case land, they being co-sharer in the holding by purchase have no locus standi to institute the case. Moreover, before transfer to the petitioners and the opposite party Nos. 1-2, the original co-sharers in the jote namely, the opposite party Nos. 6, 7 and 8 got the suit property partitioned in Partition Suit No. 38 of 1991 and got their share of land separated by demarcation. After legal partition of the case land finally by a decree, the opposite party Nos. 1-2,

4 and 5 herein having purchased the share of opposite party No. 8, have constructed five storied building on the said separate portion of opposite party No. 8, the petitioners have no co-sharership in the land of opposite party No. 8, i.e. the case land. The case is totally false, malafide and ill motivated, as such, the same is liable to be rejected.

The trial court did not frame any issue for determination of dispute, though on 15.09.2020 was fixed for framing issues as appearing from the order No. 29 of the order sheets. However, the trial court took the matter for hearing and in course of hearing the pre-emptor examined three witnesses as Pt.Ws and the opposite party No. 1 examined two witnesses as O.P.Ws. Both the parties submitted some documents in support of their respective claim which were duly marked as exhibits. The trial court after hearing by its judgment and order dated 09.05.2022 allowed the application for pre-emption.

Being aggrieved by and dissatisfied with the judgment and order of the trial court, the pre-emptee preferred Miscellaneous Appeal No. 68 of 2022 before the learned District Judge, Naogaon. Eventually, the appeal was heard and disposed of by the Additional District Judge, 2nd Court, Naogaon on transfer who by the impugned judgment and order dated

06.06.2023 allowed the appeal and thereby reversed the judgment and order of the trial court, dismissing the miscellaneous case. At this juncture, the pre-emptor petitioners moved this Court by filing this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

Mr. A.M. Amin Uddin, Senior Advocate with Mr. Syed Sayedul Haque, Mr. Md. Liton Ahmed and Ms. Peya Jannatul learned Advocates appearing for the petitioner submit that the case land covered by Plot No. 1315 under R.S. Khatian No. 375 measuring 1696 sahasrangsha admittedly, belonged to two brothers named Niranjan Lal Agarwala and Chiranji Lal Agarwala in equal share. Chiranji Lal Agarwala died leaving two sons opposite party Nos. 6 and 7 who got the share left by Chiranji Lal Agarwala equally 4 annas each measuring $422\frac{1}{2}$ sahasrangsha. Opposite party Nos. 6 and 7 transferred 800 sahasrangsa land from their share to the petitioners by registered deed No. 5410 dated 12.08.2015 and deed No. 1314 dated 13.02.2017. Therefore, the petitioners by purchase have become co-sharers in the land and have been possessing the same with the knowledge of Niranjan Lal Agarwala. Niranjan Lal Agarwala being a co-sharer of the half portion of land in question transferred his

share to opposite party Nos. 4 and 5 by a registered deed No. 2975 dated 26.04.2016 and opposite party No. 3 Biddut Kumar Das by a registered deed No. 2974 dated 26.04.2016. Biddut Kumar though got his name mutated in the khatian, but no notice under section 117 of the SAT Act was served upon the pre-emptors. As such, the splitting up of khatian and mutation in the name of Biddut Kumar Das has no contribution in separation of joma as it was made without compliance of the provision of section 117 (1)(c) of the SAT Act.

He further submits that the opposite parties claim that the property has been partitioned between Niranjan Lal Agarwala and Chiranji Lal Agarwala by a final decree passed in Partition Suit No. 38 of 1991, but by a deed of partition even a decree passed in a partition suit it cannot be construed that the pre-emptors are ceased to be co-sharer in the land. The trial court while allowing pre-emption appreciated all those related laws in this regard and referred so many decisions of this Court wherein it has been decided that by a decree of partition and mutation in the khatian without service of notice under section 117 of the SAT Act, co-sharership in the land would not be ceased. As such, the petitioners are entitled to get pre-emption of the case property, but the appellate court without

appreciating the fact and circumstances of the case as well as related laws in this regard unfortunately held that because of partition of the property between the vendors of the present petitioners and opposite parties to the proceeding, co-sharership whatever they have had become ceased to exist and also wrongly held that the petitioners being purchaser of the land they are not co-sharer as mentioned in section 24 of NAT Act and allowed the appeal setting aside the judgment and order of the trial court, as such, committed an error of law in the decision occasioning failure of justice. In support of his such submissions he has referred to the cases of ***Md. Abdur Rouf and others vs. Ahmuda Khatun and others*** reported in ***33 DLR (AD) 323***, ***Aminullah (MD) and others vs. Serajul Huq and others*** reported in ***65 DLR (AD) 82*** and ***Harunur Rashid and others vs. Afruza Khanam and others*** reported in ***70 DLR (AD) 180***.

Mr. Md. Golam Rabbani, learned Advocate appearing for the opposite party Nos. 1 and 2 submits that there is no dispute that the case property originally belonged to Niranjan Lal Agarwala and his brother Chiranji Lal Agarwala. Niranjan Lal Agarwala filed Partition Suit No. 38 of 1991 praying for a decree of partition of the case property along with other properties belonged to them. The suit was decreed on 13.09.2001 in

preliminary form. Thereafter, Advocate Commissioner was appointed by the court to effect partition physically on commission who after distributing the saham to the parties submitted report on 04.03.2013 before the trial court. Against the Advocate Commissioner report neither the plaintiff nor the defendant filed any objection. The trial court took the matter for hearing on 26.02.2014 and on that date after hearing both the parties accepted the report of the commissioner and the preliminary decree was made final making the report part of the decree. During pendency of Partition Suit No. 38 of 1991 Chiranji Lal Agarwala died in his place the opposite party Nos. 6 and 7 namely Binode Kumar Patodia and Rajesh Kumar Patodia were substituted. After passing final decree in Partition Suit No. 38 of 1991, the property in question legally partitioned and demarcated in between Niranjan Lal Agarwala and Binode Kumar Patodia and Rajesh Kumar Patodia. The petitioners entered into a registered agreement for sale No. 434 dated 20.01.2014 with Binode Kumar Patodia for purchasing 400 sahasrangsha land from Plot No. 1315. Subsequently, Rajesh Kumar Patodia also executed a registered agreement for sale No. 4915 dated 12.08.2015 with the petitioner No. 1 for sale of his share measuring 400 sahasrangsha. Both of them when

refused to execute the sale deeds and register the same in favour of the petitioners they filed suit before the court for specific performance of contract. Both the suit were decreed on compromise and the court executed and registered sale deeds in favour of the petitioner on 12.08.2015 and 13.02.2017.

On the other hand Niranjan Lal sold his share to opposite party Nos. 3-5 by two sale deeds dated 26.04.2016. After purchase Biddut Kumar, vendor of the pre-emptees got his name mutated in the khatian and opposite party Nos. 4 and 5 also got their names mutated in the khatian, as such, because of legal partition of the case property in Partition Suit No. 38 of 1991, mutation in the khatian and separation of jama, co-sharership of the petitioners vendors in the case land has become ceased. The trial court failed to appreciate the relevant laws and decision in this regard and on misconception of laws and the decisions referred allowed the pre-emption, holding that by partition decree as well as by mutation the property in question has not been sub-divided between the co-sharers legally. The petitioners being purchasers are co-sharer in the case land and also held that because of non-service of notice upon the petitioners under section 117(1)(c) of the SAT Act splitting up of jama

and mutation has not affected the right of the petitioners for seeking pre-emption of the case land, but the appellate court while allowing the appeal and setting aside the judgment and order of the trial court rightly held that before purchase of the case land by the petitioner co-sharership of the land was ceased to exist in between their vendors Binode Kumar Patodia, Rajesh Kumar Patodia and Niranjan Agarwala. Therefore, the petitioners are not co-sharer in the case land and also held that because of a final decree passed in Partition Suit No. 38 of 1991, the property in question automatically separated from each other and demarcated in between the vendors of the petitioners and the opposite party pre-emptees.

He further submits that the petitioners knowing fully well about transfer of the property to Anil Chandra Ghosh, his wife Ratna and Biddut Kumar Das, did not file any case seeking pre-emption against Biddut Kumar Das, vendor of the present pre-emptee. As such, they also waived and acquiesced their right of pre-emption. Therefore, the appellate court in allowing appeal and setting aside the judgment and order of the trial court and refusing pre-emption to the petitioners has not committed any error of law in the decision occasioning failure of justice. In support of his such submissions he has referred to a catena of cases ***Shafiuddin***

Chowdhury vs. Md. Abdul Karim and others reported in ***52 DLR (AD) 41= 8 BLT (AD) 1964***, ***Alfazuddin Ahmed vs. Abdur Rahman and others*** reported in ***BCR 2005 (AD) 258 = 13 BLT (AD) 236 = 8 MLR (AD) 153***, ***Aktaruzzaman alias Shahin vs. Abdur Rashid Khan and others*** reported in ***62 DLR (AD) 250***, ***Asad Ali (Md) and another vs. Golam Sarwar and others*** reported in ***66 DLR (AD) 315*** and ***Abul Kasem Md. Kaiser vs. Md. Ramjan Ali and others*** reported in ***17 ADC 377*** .

Heard the learned Advocates of both the sides, have gone through the revisional application, application for pre-emption, written objection and amendments thereto, evidences both oral and documentary available in lower court records and impugned judgment and decree of both the courts below.

This case is relating to the land in Plot No. 1315 under R.S. Khatian No. 375 measuring 1696 sahasrangsha which admittedly belonged to two brothers Niranjan Lal Agarwala and Chiranji Lal Agarwala in equal share as recorded in the khatian. Niranjan Lal Agarwala filed Partition Suit No. 38 of 1991 for partition of all the properties belonged to them against his brother Chiranji Lal Agarwala along with other co-sharers, as defendant. During pendency of the suit Chiranji Lal Agarwala died leaving two sons

Binode Kumar Patodia and Rajesh Kumar Patodia who were substituted in his place as defendant Nos. 1 (Ka) and 1 (Kha). After contested hearing, the suit was decreed in preliminary form on 13.09.2001, by the said decree case Plot No. 1315 equally distributed among them mentioning that the defendant No. 1(ka)-1(kha) will get east portion of the case plot and the plaintiff Niranjan Lal Agarwala will get west part of the case plot. Thereafter, the court appointed an Advocate Commissioner to distribute saham to the parties to the proceeding physically, accordingly, Advocate Commissioner executed the writ and distributed saham to them by demarcation and submitted his report before the trial court on 04.03.2013. Neither plaintiff in suit nor defendant Nos. 1 (Ka)-1(Kha) raised any objection against the commission report. Consequently, the trial court fixed a date for hearing about commission report and on the date fixed none of the parties objected to the commissioner's report, resultantly, the trial court by its order dated 26.02.2014 accepted the commission report without objection and made the preliminary decree final making the report part of the final decree, that decree is still subsisting.

The pre-emptor petitioners though not made any statement in their application for pre-emption, but at the time of hearing submitted that the petitioner No. 1 filed Other Suit No. 21 of 2013 subsequently, renumbered as Other Class Suit No. 256 of 2016 challenging the judgment passed in Partition Suit No. 38 of 1991 to the effect that the decree passed in Partition Suit No. 38 of 1991 is not binding upon the petitioners which is now pending before the trial court. Side by side they also submit that the petitioners preferred First Appeal No. 170 of 2014 against the judgment and decree passed in Partition Suit No. 38 of 1991 before this Court which is also pending for disposal, but from the papers available in file, I find that present petitioners were not party in Partition Suit No. 38 of 1991. Moreover, during pendency of Other Class Suit No. $\frac{21 \text{ of } 2013}{256 \text{ of } 2016}$ and First Appeal No. 170 of 2014, the petitioners entered into agreement for sale with the defendant Nos. 1(Ka) and 1(Kha) in Partition Suit No. 38 of 1991 on 20.01.2014 and 12.08.2015, admitting unconditionally that Binode Kumar Patodia and Rajesh Kumar Patodia got the property by a partition decree passed in Partition Suit No. 38 of 1991. Therefore, the suit whatever filed by the present petitioner either challenging the decree passed in Partition Suit No. 38 of 1991 or appeal against the judgment and

decree, has no connection in respect of title of opposite party Nos. 6 and 7 in the case land. Recital of registered sale deed No. 5410 dated 12.08.2015 obtained by the petitioners from Binode Kumar Patodia and deed No. 1314 dated 13.02.2017 obtained from Rajesh Kumar Patodia clearly discloses that both Binode Kumar Patodia and Rajesh Kumar Patodia got the property by inheritance and by a final decree passed in Partition Suit No. 38 of 1991. For easy understanding the relevant portion of recital of the deeds are quoted below;

> *''নিম্ন তফসীল সম্পত্তি সাবেক ৫২০ দাগে ১৫ শতক সম্পত্তি চিরঞ্জিলাল পাটোদিয়া ও নিরাঞ্জন লাল পাটোদিয়া প্রত্যেক তুল্যাংশ ।।. আনা অংশে প্রাপ্ত হইয়া অন্যান্য সম্পত্তি সহ আর,এস জরিপে ৩৭৫ নং খতিয়ান প্রস্তুত হয়। প্রকাশ থাকে যে সাবেক ৫২০ দাগের ১৫ শতক সম্পত্তি Corresponding R.S ১৩১৫ দাগে অন্যান্য সম্পত্তি সহ ১৬৯৬ সহস্রাংশ সম্পত্তি উল্লেখিত আর,এস ৩৭৫ নং খতিয়ানে রেকর্ড হইয়াছে। উক্ত ৩৭৫ নং আর,এস খতিয়ানে নিরাঞ্জনলাল আগরওয়ালা ।।. আনা ও চিরঞ্জিলাল আগরওয়ালা ।।. আনা একুনে ১ ষোল আনা রেকর্ড হইলেও উল্লেখিত রেকর্ডে ''৮-১১-৬৬ ইং সনের পারিবারিক বন্টনমুলে অত্র খতিয়ানে চিরঞ্জিলাল আগরওয়ালার দখলে নাই'' লিখন ভ্রমাত্মক বটে। পরবর্তীতে উক্ত নিরাঞ্জনলাল আগরওয়ালা ওরফে পাটোদিয়া বিজ্ঞ নওগাঁ সাব জজ আদালতে ৩৮/৯১ বাটোয়ারা মোকদ্দমায় অধুনামৃত চিরঞ্জিলাল আগরওয়ালা ওরফে পাটোদিয়া সহ অন্যান্য বিবাদীর বিরুদ্ধে দায়ের করেন। উক্ত চিরঞ্জিলাল আগরওয়ালা ওরফে পাটোদিয়া উক্ত মোকদ্দমায় প্রতিদ্বন্দ্বিতা করেন এবং দুই পুত্র যথাক্রমে রাজেশ কুমার আগরওয়ালা ওরফে পাটোদিয়া এবং বিনোদ কুমার আগরওয়াল ওরফে পাটোদিয়া কে ওয়ারিশ রাখিয়া মৃত্যুবরণ করেন। উক্ত বিনোদ কুমার আগরওয়ালা ওরফে পাটোদিয়া এবং রাজেশ কুমার আগরওয়াল ওরফে পাটোদিয়া সাবেক ৫২০ হাল ১৩১৫ দাগের ১৬৯৬ সহস্রাংশ সম্পত্তির অর্ধাংশ পূর্বাংশে ০৮৪৮ সহস্রাংশ সম্পত্তিতে পিতা চিরঞ্জিলাল আগরওয়ালা নিরবিচ্ছিন্নভাবে স্বত্ববান ও ভোগ দখলকার আছেন। বর্ণিত ৩৮/৯১ বাটোয়ারার মোকদ্দমায় বিজ্ঞ আদালত আইনী প্রক্রিয়ায় বিনোদ কুমার আগরওয়ালা ওরফে পাটোদিয়া ও রাজেশ কুমার আগারওয়ালা ওরফে পাটোদিয়া কে পৃথক ছাহাম প্রদান করেন এবং উক্ত ৩৮/৯১ বাঁটোয়ারা মোকদ্দমার চূড়ান্ত ডিক্রীর সদয় আদেশ প্রদান সহ ডিক্রী প্রস্তুত অন্তে বিজ্ঞ আদালতের স্বাক্ষরিত হয়।''*

The petitioners claimed that they have become co-sharer in the land by purchase from Binode Kumar and Rajesh Kumar, and by partition decree and mutation in the name of purchaser Biddut Kumar Das the right of pre-emption of the petitioners has not been affected in any manner. In support of such submissions they referred to certain decisions which may be looked into.

In the case of Abdur Rouf vs. Ahmuda Khatun reported in ***33 DLR (AD) 223*** three questions were raised, (i) maintainability of the case under section 24 of the NAT Act (ii) nature of land and (iii) whether splitting up of the Jama extinguished the right of pre-emption. In the instant case the 3rd question is relevant though the fact of that case is different from the instant case, where there was no partition by metes and bound either by a registered deed of partition or by any decree passed in partition suit before any court, their lordships held that, in the absence of partition by metes and bound a non-notified co-sharer of the holding would remain co-sharer as if there was no sub-division of holding and claim of the pre-emptor is maintainable. In the present case there was a partition by metes and bound.

In the case of Aminullah vs. Serajul Huq reported in ***65 DLR (AD) 82*** it was held that 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 the said case there was no partition by metes and bound either by a registered deed of partition or by a decree of partition through court. Both the cases are substantially different in fact from the instant case as there was no partition by partition decree, like the present one.

In the case reported in ***70 DLR (AD) 180*** their lordships relied on the decision reported in ***65 DLR (AD) 82*** and held that no amicable partition among the co-sharers even if reached in writing, nor even a decree passed in a partition suit allotting different saham to co-sharer can substitute the order as mentioned in section 117(1)(c) of the Act, but fact of the said case also not similar to present one as there was no partition of the property among the co-sharer by metes and bound, rather there was a family arrangement among the co-sharers. All those cases referred above basically enunciated a principle that in the absence of partition by metes and bound non-service of notice upon a co-sharer in case of sub-division of holding is no separation of jama in the eye of law, but it was observed

incidentally and the word put in by the way not relevant for that particular case which the trial court could not conceive in its true perspective and failed to find that the decisions on this particular issue decided by the apex court in various cases earlier have not been discussed in that case or reviewed the same. In this case opposite party Nos. 4 and 5 are co-sharer of the opposite party Nos. 1 and 2 pre-emptees as their vendor is common one, not the petitioners.

On the other hand, learned Advocate for the pre-emptee opposite party relied on the case of Shafiuddin Chowdhury vs. Abdul Karim reported in ***52 DLR (AD) 41,*** wherein, the property was partitioned in Partition Suit No. 36 of 1975 distributing saham to the vendors who sold the same to a stranger who after purchase got his name mutated in the khatian, hence the pre-emptor is not a co-sharer in the case land and in that case it was also settled that;

> *"passing of the final decree in a partition suit finally determines the rights of the co-sharers in the land. Hence, the application for pre-emption of pre-emptor-respondent on the basis of co-sharership is not maintainable."*

The case of ***Alfazuddin Ahmed vs. Abdur Rahman and other*** reported in ***5 (2005) BCR (AD) 258***=52 DLR (AD) 41 = 13 BLT (AD)

236, fact of which is almost similar to this case, wherein a partition decree was passed and after partition one of the heirs transferred her share to the pre-emptee, same question was decided holding that;

> *"Because of the decree in the partition suit as there has been ceasing of co-sharership between the plaintiff and the defendant of the partition suit that ended in final decree upon allotment of separate saham to respective parties and that as the pre-emptors got the jama of Khatian No. 3232/1 (Ext.3) split up in respect of their land purchased from the heirs of the defendant and got a separate khatian opened in their names before the transfer to the pre-emptee and consequent thereupon as they ceased to be the co-sharers of Khatian No. 3232/1 or in other words land of the said khatian pre-emption sought for on the basis of purchase of land made from the heirs of the defendant against the pre-emptee who purchased the land sought to be pre-empted from heirs of the defendant was not available."*

In the case of ***Aktruzzaman vs. Abdur Rashid Khan*** reported in **62 DLR (AD) 250** the pre-emption case was resisted by the pre-emptee on the ground that the property in question was partitioned by a registered deed of partition among all the co-sharers before transfer made on 23.01.1983 and after partition there has been separation of the holding and the parties are in enjoyment of their respective share separately by constructing different structures having separate boundaries. In that case it was held that;

> *"The registered deed of partition is a complete transaction of transfer of ownership and possession among the co-sharers, which put an end to co-sharership.*
>
> *Partition suit ending in a final decree or an amicable partition of the property among the admitted co-sharer through a registered deed of partition put an absolute end to co-sharership for all practical purpose irrespective of separation or splitting of land or jama through mutation proceeding."*

In the case of ***Asad Ali vs. Golam Sarwar*** reported in 66 DLR (AD) 315 same question was raised. There was a partition of the property in Title Suit No. 397 of 1920 by a compromise decree among the co-sharers. The trial court dismissed the pre-emption case, but the appellate court allowed pre-emption. In revision High Court Division affirmed the judgment of the appellate court. On appeal before the Appellate Division both the judgments of the appellate court and High Court Division were set aside holding that;

> *"In a proceeding under section 24 of the Act the question of co-sharership in the holding or tenancy is immaterial, however, the question of co-sharership in the 'land' is material. After partition by metes and bounds of the land or a holding or even of a plot or plots among its co-sharers each of such co-sharers loses their co-sharership in all other land of the holding or the plot or plots excepting his own share only even if the holding or tenancy remains intact and he, therefore, cannot claim pre-emption under section*

24 of the Act if any share or portion thereof of any other owner of holding or plot is transferred."

Finally, in the case of ***Abul Kashem Md. Kaiser vs. Md. Ramjan Ali*** reported in **XVII (17) ADC, 377 (judgment passed on 05.02.2020 relying on the decisions reported in 33 DLR (AD) 323, 35 DLR (AD), 230, 52 DLR (AD) 41, 11 DLR (SC) 78, 62 DLR (AD) 250, 54 DLR 181, 54 DLR (AD) 126, 55 DLR (AD) 108, 55 DLR, 214 and 1 ADC 515 (Abdul Munim @ Tanu Miah vs. Mahfuzur Rahman and others** which is latest one among the cases referred by both the parties in which His Lordship Mr. Justice Mirza Hussain Haider who was one of the judges in the case reported in ***70 DLR*** (AD) 180 relied on series of decisions reported in various law journals held that;

"co-sharership of a plot/holding definitely comes to an end with mutation of the holding and separation of jama. In case of holding, as it relates to section 96 of the SAT Act, it obviously comes to an end by separation of Jama/mutation or by final decree in a partition suit or by a registered partition deed and in case of plot, as it relates to section 24 of the NAT Act, it comes to an end when any of those measures take place which are applicable in the case of section 96 of the SAT Act and also by physical partition by the co-sharers by demarcation. Otherwise, if the quantum of land, as recorded in one plot in the name of more than one person in a survey, is deemed to be an independent unit and in the joint ownership of those persons as recorded, then till partition by metes and bounds to declare all such land still joint for the

purpose of pre-emption will go against the public policy as well."

Now the question before us whether by a decree passed in Partition Suit No. 38 of 1991 determined the right of the parties to the proceeding ending their co-sharership in the land in common plot and whether a notice under section 117(1)(c) of the SAT Act at all required to be served upon the petitioner before separation of jama and mutation of khatian. To answer first question, we are to see what is meant by co-sharership and who is co-sharer in the land. A co-sharer refers to a person who owns a share of portion of a property jointly with others. A co-sharer is someone who has a legal right to possess and enjoy a specific portion of a property that is held in co-ownership. The petitioners are purchaser of a portion of plot from Binode Kumar Patodia and Rajesh Kumar Patodia who were defendants in Partition Suit No. 38 of 1991. Among the plaintiff and defendants in partition suit the plot in question was partitioned through a decree passed by the court in accordance with law and the proceeding ended with a final decree determining the share, right to possession of the parties to the suit. It means that by partition decree the share distributed to them physically by demarcating the plot into two parts i.e. east portion fell in the share of Binode Kumar and Rajesh Kumar, west portion fell in the

share of Niranjan Lal Agarwala. So, co-sharership between Niranjan Lal Agarwala and heirs of Chiranji Lal Agarwala named Binode Kumar and Rejesh Kumar was determined by a partition decree between them and after passing final decree without any objection from any party the proceeding, finally, took effect that the co-sharership of the property has been ceased to exist. Since co-sharership in the land by a partition decree has been determined between the vendors of both the pre-emptors and pre-emptees in Partition Suit No. 38 of 1991 neither vendors of the present pre-emptors or the pre-emptees are co-sharer in the case land. Co-sharership whatever have had in between Niranjan Lal Agarwala and Binode Kumar Patodia and his brother Rajesh Kumar was ceased after passing final decree in partition suit. Where the vendors of the present pre-emptors lost their co-sharership following a partition decree passed in Partition Suit No. 38 of 1991 there is no question at all to be a co-sharer in the land as claimed by the pre-emptors.

Apart from this, the pre-emptors admitting cessation of co-sharership of their vendors in Partition Suit No. 38 of 1991 purchased the land and in the recital of both the sale deeds it has been clearly disclosed

that Binode Kumar Patodia and Rejesh Kumar Patodia acquired the property by inheritance and by a decree in partition suit.

From perusal of paragraph 3 of the plaint in Other Suit No. 25 of 2017 it appears that the plaintiff pre-emptors came to know about transfer of the case property by Niranjan Lal Agarwala to opposite party Nos. 3-5 by two separate deeds on 06.04.2017, when Anil Chandra Ghosh disclosed that he, his wife and opposite party No. 3 Biddut Kumar Das purchased the land at a consideration of Tk. 1,00,01,000/- (One crore one thousand) each from Niranjan Lal Agarwala, but the petitioners did not file any case against the vendor of the pre-emptees, Biddut Kumar Das praying for pre-emption. Because of not filing any pre-emption case against Biddut Kumar Das knowing transfer of a portion of the land to him on 06.04.2017, subsequent transfer by him in favour of present pre-emptees in the year 2018 is hit by principle of waiver and acquiescence.

From exhibits of the pre-emptors and the pre-emptees along with Advocate Commissioner's report, in particular sketch map to the sale deeds of both parties this court finds that Plot Nos. 1315 divided into three parts. Boundary and sketch map as drawn in all the sale deeds showing position of land sold show that the petitioners purchased extreme

eastern part of the plot, the pre-emptee opposite party Nos. 1 and 2 purchased extreme west side of the plot, between them land of other purchasers Anil Chandra Ghosh and Ratna Rani Ghosh is situated. After purchase in the year 2016 Anil Chandra, Ratna Rani and Biddut Kumar Das got their names mutated in the khatian by separation of Joma and jointly obtained building construction plan from municipal authority to construct a residential-cum-commercial building on the case property and they constructed the building upto first floor ceiling level as appearing from commission report (exhibit-1). Then Biddut Kumar transferred his share in the property to the present pre-emptees who also jointly with opposite party Nos. 4 and 5 completed construction of five stored building thereon. No pre-emption has yet been granted in favour of the petitioners against Anil Chandra Ghosh and Ratna Rani Ghosh for the property situated between the property purchased by pre-emptors and present pre-emptees.

Now there is no independent existence of case property measuring $422\frac{1}{2}$ sahasrangsha as a five storied building has been erected upon whole of the property measuring 845 sahasrangsha land. In this situation, I do not know how by pre-emption, the case property can be separated from

the other portion of the land and how the pre-emption case be maintained and therefore, in the event of allowing pre-emption in favour of the pre-emptors it would be quite impossible to execute the order of this Court and because of such impossibility this pre-emption case is incompetent and incapable of execution also. All the decisions of the Appellate Division referred above have been settled that by a registered deed of partition among the co-sharers and a partition decree passed by the court in a partition suit, co-sharership among the co-owners has become ceased to exist. In the instant case since the co-sharership of Binode Kumar and Rajesh Kumar, the vendors of the present petitioners have become ceased to exist after passing a final decree in partition suit, the present petitioners are not co-sharer in the land and before mutation or separation of jama no notice under section 117 of the SAT Act was required to be served upon them as section 117(1)(c) of the SAT Act provides that for the purpose of sub-division of a joint tenancy for distribution of rent thereof, on an application made to him by one or more co-sharer tenants, direct, by order in writing such sub-division of a joint tenancy amongst the co-sharer tenants and distribution of rent thereof including arrears of rent, if any, as he may consider fair and equitable: Provided that no such order shall be

passed unless reasonable notice is given to the parties concerned to appear and being heard in the matter.

In the instant case the petitioners purchased the land by two registered deeds one dated 12.08.2015 and another dated 13.02.2017 and their names neither appeared in the respective khatian by way of mutation or by any means nor they are concerned parties to the proceeding requiring service of notice upon them as co-sharership of their vendors have become ceased by partition decree before their purchase and one of the purchase is dated 13.02.2017 i,e, after the purchase of opposite party Nos. 3-5.

In view of the decisions quoted above, I find that the pre-emptors are not co-sharers in the land as co-sharership of their vendors has become ceased and ended on and from the very day of passing a final decree in partition suit and they being not co-sharers or party concerned, no notice under section 117 of the SAT Act were required to be served upon them, moreover, proviso to section 117 of the Act says that for sub-division of holding the obligation is upon the Revenue Officer concerned of giving notice to the parties concerned not the applicant. Therefore, as per section

114 (a) of the Evidence Act it is presumed that the official act have been done rightly and regularly complying with necessary requirements.

The appellate court while allowing the appeal and setting aside the judgment of the trial court rightly held that because of final decree in a partition suit co-sharership of the vendors of the pre-emptors and pre-emptees has become ceased to exist, as such, the case is not maintainable in law.

Therefore, I find no error in the judgment and order passed by the appellate court allowing the appeal and setting aside the judgment and order of the trial court calling for interference.

Before parting with the case it is to be mentioned that nowadays every owners are getting their property developed with the aid of developer and selling flats to different stranger purchasers, some of the plot has vast area measuring acres of land. If in every cases a co-sharer in plot is allowed to claim right of pre-emption no stranger could be owner of property in urban area. It is also notable that mouzawish value of the property for registration purpose fixed by the Registration Office is much more lesser than actual market price of the property. Taking advantage of less valuation of the sale deed co-sharers in land in all cases comes with

the applications for pre-emption for illegal gain like the present one. In the instant case the vendor's sale deed was valued at Tk. 1(one) crore 1(one) thousand, because of such valuation the petitioners did not apply for pre-emption of the case land.

An established precedent handed down by past Judges that right of pre-emption accrues on the date of registration of deed of sale, when registration is compulsory, it means that from the date of entering into volume, signed, sealed and certificated by the registering officer under 60 of the Registration Act. Nowadays, it takes a longer time even upto 5 years to get a document registered under section 60 after presentation just when the pre-emptee is secured in his belief that he can relax with his ownership and possession of purchased land arrives the notice of a pre-emption case a rude awakening. Surely, the pre-emptor cannot be given such a long rope with which to hang the pre-emptee, after such a lapse of time as observed by his lordship Mr. Justice Mustafa Kamal. It is a high time to think over the matter considering the practical situation of the world. Because of the situations mentioned hereinabove, I think that the law of pre-emption in our country now has become redundant and for this law, number of cases increased and bona fide purchasers of the property

have been suffering hardship for uncertained period. Therefore, the law of pre-emption is required to be repealed or amended drastically to protect the interest of the bona fide purchasers from the repression of pre-emption cases, so that volume of cases in this particular area will be reduced and the purchasers can be relaxed with their ownership and possession of the purchased land.

Taking into consideration the above, I find no merit in the rule as well as in the submissions of the learned Advocates for the petitioners.

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

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

1) A copy of this judgment be forwarded to the Secretary, Ministry of Law, Justice and Parliamentary Affairs for necessary action.
2) The Chairman, Law Commission for taking necessary steps.