

Present

Mr. Justice Mohammad Ullah

Civil Revision No. 771 of 2000

Md. Ruhul Amin Munshi

..... ***Petitioner***
(Pre-emptor)

-Versus-

Mst. Naitan Nessa and

.....Opposite Parties

Mr. Riazuddin Khan, Advocate.

..... For the petitioner.

None appears

..... For the Opposite Parties

Hearing 20.5.2012

and

Judgment on 20.5.2012 & 21.5.2012

On an application under section 115(1) of the Code of Civil Procedure, Rule was issued upon the opposite party No.1 to show cause as to why the judgment and order dated 19.10.1999 passed by the then learned Subordinate Judge, 1st Court, Magura in Miscellaneous Appeal No. 28 of 1999 affirming those dated 13.5.1999 passed by the learned Assistant Judge, Salikha, Magura in Miscellaneous Case No. 9 of 1996 should not be set aside.

The petitioner as pre-emptor instituted Miscellaneous Case No. 9 of 1996 in the court of Assistant Judge, Salikha Magura, against the opposite

parties for pre-emption of 12 decimal of land appertaining to plot No. 4900 under S.A Katian No. 2073 of Mouza Gongarampur as described in the schedule of pre-emption petition. He stated that the case land originally belonged to Rampada Mondal, Tarapada Mondal and Kalipada Mondal. The S.A Katian No. 2073 was rightly recorded in their names. Tarapada Mondal died leaving his wife Ranga Bala Mondal and daughter Swashani Roy as his heirs. Pre-emptor petitioner purchased their share by a registered deed dated 04.01.1982. The pre-emptor petitioner also purchased the share of Kalipada Mondol through a registered deed dated 17.11.1980 and thereby he became co-sharer to the case land. Rampada Roy died leaving behind his son Shree Vas Roy as his heir and thereby the pre-emptor petitioner and the said Sree Vas Roy remained co-sharer of the case land. The said son of late Rampada Roy, Sree Vas sold out the case land to the pre-emptee opposite party No.1 Mst. Naitan Nessa by executing a registered deed dated 01.02.1996 beyond the knowledge of the pre-emptor petitioner. The pre-emptee opposite party No. 1 Mst. Naitan Nessa is a stranger in the suit jot. Thereafter on 02.03.1996 the petitioner instituted the case for pre-emption.

The opposite party No.1 Mst. Naitan Nessa contested the case by filing a written objection. She stated that the case to be dismissed as bad for defect

of parties. She also stated that pre-emptor petitioner did not mention as to how Tarapada Roy acquired his share of the land. Two deeds by virtue of which the pre-emptor claimed to have purchased some land from the case plot are forged and fabricated. Pre-emptor petitioner was present at the time of talk of sale and at his mediation case land was transferred in her favour and consideration of the case land was also settled at Tk. 8,000/- through him (Pre-emptor) and after purchase of the case land she has been living there by erecting thatched hut. Since the case land had been transferred in her favour at the mediation of the pre-emptor, his right of pre-emption has waived as a co-sharer.

The trial court taking deposition of both the parties considered the materials on record and pleased to dismiss the Miscellaneous Case and against which the pre-emptor as appellant preferred Miscellaneous Appeal No. 28 of 1999 before the learned District Judge, Magura who transferred the same to the then Subordinate Judge, 1st Court, Magura for disposal, who by his impugned judgment and order dated 19.10.1999 dismissed the Miscellaneous Appeal and thereby affirmed the judgment and order of the trial court. Thereafter the petitioner moved this court and obtained the present rule as stated above.

Mr. Riazuddin Khan, the learned Advocate for the petitioner submits the following submission in support of the Rule:

(1) The impugned judgment and order is bad in law and on facts.

(2) Both the courts below have fallen into error of law occasioning failure of justice in holding that the case land was transferred at the mediation of the pre-emptor-petitioner.

(3) Both the courts below concurrently failed to consider the settled principle of law that mere presence of knowledge cannot take away the statutory right of a pre-emptor, and

(4) Both the courts below concurrently failed to appreciate that the evidence on records do not make out a case of waiver and acquiescence.

The pre-emptee-opposite party No. 1 did not enter appearance in the rule though the notice was duly served upon her.

The learned Assistant Judge framed as many as 4 following issues in disposing the Miscellaneous Case:

(a) Whether the case is maintainable in its present form?

(b) Whether the case is bad for defect of parties?

(c) Whether the case is barred by law of limitation?

(d) Whether the applicant is entitled to get relief of pre-emption as prayed for?

The learned Assistant Judge decided the issue Nos. a-c in favour of the pre-emptor petitioner. And lastly has taken decision about issue No. d against the pre-emptor-petitioner and held that the pre-emptor had knowledge about transfer of the case land and at his mediation such transfer was made.

The pre-emptor petitioner examined solely himself in the instant case who reiterated the version of the Miscellaneous Case filed under section 96 of the State Acquisition & Tenancy Act.

The P.W. 1 produced S. A katian No. 2073 (exhibit-1), deed No. 6632 dated 17.11.80 (exhibit-2), deed No. 147 dated 04.01.1982 (exhibit-3) certified copy of the disputed deed No. 435 dated 01.02.1996 (exhibit-4).

In cross-examination he stated that he came to know from pre-emptee about the transfer of the case land for the 1st time and at that time no one present thereat. He denied the suggestion that he had knowledge about transfer and at his mediation transfer was made and he waived his statutory right.

On the other hand O.P.W.1 Naitan Nessa stated that she had to work as a maid servant to the deferent houses for her livelihood. She also stated that

she purchased the case land at the instance of the pre-emptor and at his mediation transfer was made at a consideration of TK. 8,000/-. She stated that there was a talk of transfer in the house of pre-emptor and at that time her brother (O.P.W. 2) Muslim Uddin and her vendor Sree Vas were present.

In cross-examination she stated that there was a hut and subsequently she constructed a thatched hut in the case land.

O.P.W. 2 Muslim Uddin also stated about his presence at the time of talking of transfer of the case land in the house of pre-emptor and said that the pre-emptor himself negotiated the price of the case land.

Upon such materials evidence on record the learned trial court dismissed the Miscellaneous Case on the ground of waiver and acquiescence.

The learned appellant court after hearing both the parties also dismissed the appeal and thereby affirmed the judgment and order of the trial court concurring with the finding of the trial court as a final court of fact.

I have gone through the materials on record namely the pleadings of the case, evidence produced by the parties, exhibited documents and considered the submissions of the learned Advocate for the pre-emptor petitioner and the grounds taken in the revision application by the pre-emptor-petitioner.

In the case of Nayarandas Nandkishore vs. Jagan Nath and others reported in AIR 1950 (Madhya Bharat) 85, it has been held that:

“Both as a proposition of Mohammadan law as well as principle of equity, if a Pre-emptor has given his consent before sale, he should not be allowed to assert his claim after the sale.”

It has further been held that: *“In Pre-emption cases, the Doctrine of estoppels as a substantive rule of law is to be invoked and as a result of if when a Pre-emptor refuses to purchase or consents to a sale or acquiesces he is stopped from subsequently ascertaining his claim of Pre-emption.”*

In the case of Maulana Abdul Karim vs. Nurjahan Begum and others, reported in VI BLD, 125.

It has been held that *“when the Pre-emptor negotiates the sale under Pre-emption or the facts are such that his acquiescence can be safely concluded, the doctrine of estoppels comes into full play. His conduct will be a bar even though he files his application for Pre-emption within time and even though Pre-emption is a statutory right.”*

The case under my consideration is therefore, not so much a case of only waiver, but to also a case of acquiescence and also a case of estoppel under section 115 of the Evidence Act. The concurrent finding of facts is that the Pre-emptor had a leading part in bringing about the transaction by assisting the seller in selling the land and encouraged the buyer in purchasing it and himself negotiated the price, the conduct of the Pre-emptor is sufficient to give rise to waiver and acquiescence and as such estoppels operates against him.

It appears that the pre-emptor petitioner examined himself only and he could not prove the date of knowledge about transfer by adducing any other corroborative evidence. On the other hand the pre-emptee has been able to prove that the transfer was held at the mediation of the pre-emptor who settled the price of the transfer by producing O.P.W. 2 in court, who proved his presence at the time of talk of sale to the house of the pre-emptor.

O.P.W-1 Mst. Naitan Nessa stated in her cross -examination that:

“জমি কেনা বেচার পরে জমি রেজিষ্ট্রি হয় । কথা বার্তার ১০/১৫ দিন পরে জমি রেজিষ্ট্রি হয়। জমির মূল্য শ্রীবাস আমার কাছে ৮০০০/- টাকা চায়। জমির মূল্য রুহুল আমিন ও আমার ভাই মোসলেম শেখ ঠিক করে দেন। রুহুল মেয়ে পাঠায়ে আমাকেই ডেকে আনেন। রুহুল আমিন বলেন যে,তুমি অন্যের বাড়ী কাজ করে বেড়াও জমি তুমিই কেন। সকাল ১০ টার দিকে কথা বার্তা হয়।”.....টাকা দেই রুহুল আমিনের বাড়ীতে প্রথম ৪০০০/- টাকা দেই। টাকা দেওয়ার সময় আমার ভাই রুহুল আমিন ও শ্রীবাস ছিল।

O.P.W-2 .Moslemuddin stated in this cross that:

“নালিশি জমি কেনা বেচার কথা বার্তার সময় আমি ছিলাম। রুহুল আমিনের বাড়ীতে কথাবার্তা হয়। আমাকে ডেকে আনেন শ্রীবাস.....।

“রুহুল আমিনের বাড়ীতে আমি অনুমান ৮/৯ টার দিকে যাই । রুহুল আমিন কে বলি নালিশী জমির তুমি শরিক তুমি জমি রাখ। রুহুল আমিন বলে যে, আমার জমি নেওয়ার কায়দা নেই। এর পর রুহুল আমিন তার মেয়েকে দিয়ে নয়তনকে ডাকায় ।”

প্রথম ৪০০০/- টাকা দেওয়ার সময় আমি ছিলাম। নয়তন দেয় আমাকে আমি রুহুল আমিনকে
দিই, রুহুল আমিন শ্রীবাস কে টাকা দেয়।

From the perusal of the evidence of o.p.w.s it transpires that at the mediation of the pre-emptor talk was held and price of the case land was also settled in his house in presence of o. p. w. 1, o.p.pw. 2 and the vendor Sree Was thereby clear case of waiver and acquiescence is established and both the courts below rightly held that the case is barred by waiver and acquiescence and rejected the prayer for pre-emption accordingly.

Moreover finding of facts arrived at by the courts below concurrently as to waiver and acquiescence cannot be interfered in revision until and unless the said findings is found to be perverse and in the instant case I do not find any perversity with the finding of both the courts below.

For the reasons stated above, the judgment and order of the courts below need not be interfered with.

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

Let a copy of this judgment and lower courts record be sent immediately.