

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

Present:

**Mr. Justice Md. Riaz Uddin Khan**

**Civil Revision No. 4955 of 2024**

**IN THE MATTER OF :**

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

-And-

In the Matter of:

Alhaj Md. Shawkat Ali

...Preemptee-Petitioner

-Versus-

Md. Golam Rabbani and others

...Respondent-Opposite Parties

Ms. Salina Akter with

Mr. Uzzal Bhowmick, Advocates

...For the petitioner

Mr. Md. Alamgir Mostafizur Rahman with

Mr. Khondoker Asraful Alam, Advocates

...For the Opposite Party Nos. 1 and 2

**Judgment on: 17.12.2025**

**Md. Riaz Uddin Khan, J-**

At the instance of pre-emptee Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment and order dated 31.07.2024 passed by the District Judge, Rajshahi in Miscellaneous Appeal No. 97 of 2022 disallowing the appeal and thereby affirming the judgment and order dated 06.09.2022 passed by the Senior Assistant Judge, Godagari, Rajshahi in Miscellaneous Case No. 08 of 2012 rejecting the application under Order IX Rule 13 of the Code of Civil Procedure 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.

At the time of issuance of Rule this court was pleased to stay operation of the impugned judgment and order till disposal of the Rule.

Succinct facts for disposal of this Rule are that the opposite party no.1 as preemptor on 30.01.2006 filed a Preemption case, Miscellaneous Case No.03 of 2006 before the Senior Assistant Judge, Godagari, Rajshahi under section 96 of the State Acquisition and Tenancy Act, 1950 against the present petitioner (purchaser) and others. The present petitioner appeared and submitted written objection but did not contest either by cross-examining or adducing any witness.

The trial court fixed the matter for *ex parte* hearing and the preemptor adduced himself as PW-1. The trial court on perusal of the pleading of the preemptor and on consideration of oral and documentary evidence on record was pleased to pass an *ex parte* judgment and order dated 26.07.2011.

The present petitioner (purchaser-preemptee) filed Miscellaneous (Sani) Case no. 08 of 2012 to set aside the *ex parte* Judgment and order dated 26.07.2011 passed by the Senior Assistant Judge, Godagari, Rajshahi along with an application for condonation of delay.

After hearing the parties on 06.09.2022 the Senior Assistant Judge, Godagari, Rajshahi on perusal of the plea of both the parties was pleased to reject the Miscellaneous (Sani) Case by the judgment and order dated 06.09.2022.

Against the said judgment and order dated 06.09.2022 the petitioner preferred Miscellaneous Appeal No. 97 of 2022 before the District Judge,

Rajshahi who after hearing the parties was also pleased to dismiss the appeal by impugned judgment and order dated 31.07.2024.

Being aggrieved by and dissatisfied with the said impugned judgment and order dated 31.07.2024 passed by the District Judge, Rajshahi in Miscellaneous Appeal No. 97 of 2022 the pre-emptee filed the instant civil revision and obtained the Rule and order of stay as stated at the very outset.

The pre-emptee petitioner filed two supplementary affidavits and an application under Order VI Rule 5 and Order 41 Rule 27 read with section 151 of Code of Civil Procedure for submitting better statement and additional evidence.

Ms. Salina Akter along with Mr. Uzzal Bhowmick the learned advocate appearing for the petitioner submits that during pendency of the preemption case the petitioner was not present before the court because he was in a foreign mission as a Government service holder for that reason he could not know day to day progress of the case. After coming back from abroad, knowing the fate of the case the petitioner filed the sani case for setting aside the ex parte judgment along with an application for condonation of delay.

The learned advocate then submits that the disputed property was ejmali property which jointly enjoyed by the preemptor and the opposite party nos. 2 to 15. On 06.07.1997 they executed a registered Partition Deed no. 6772 for separating their property and it was acted upon. Thereafter on 02.04.2005 the petitioner purchased the disputed property measuring

.07 decimals vide deed no.3040 from preemtee no.2 who was in exclusive possession of the same by partition. Both the petitioner and the opposite parties are the owner of the property by registered Partition deed, accordingly they mutated their names and mutation khatain has been opened in their names. So, their tenancy has already been separated under section 117 of the State Acquisition and Tenancy Act, 1950. As such the right of Preemption of the opposite parties has been extinguished. But both the courts below failed to consider that aspect of the case giving emphasis on the false claim of the preemptor opposite party and ignoring all other matters and aspects relating thereto and as such the same is not sustainable in law.

The learned advocate next submits that the lawyer of the petitioner before the trial court erroneously did not mention how many days delay was occurred in the condonation of delay application in filing sani case but only for that reason both the courts below rejected the sani case. The error was committed by the learned Advocate of the petitioner for that reason the hapless petitioner should not suffer.

Ms. Salina Akter further submits that the impugned Judgment and order passed by the appellate court below admitted the appeal meaning thereby the delay was condoned and after admitting the appeal the learned District Judge cannot reject the appeal on the ground of delay which is illegal. The learned Senior Assistant Judge, Godagari, Rajshahi committed procedural mistake. At first the learned court allowed the Miscellaneous Sani case and set aside the *ex parte* judgment and order dt.26.07.201 but after that the

learned court rejected that Sani Case on the ground of delay, the same is not sustainable in law and as such the court below committed an error of law resulting in an error in the decision occasioning failure of justice and the same is liable to be set-aside. In support of her submissions the learned advocate referred the decisions reported in 59 DLR (AD) 1, 29 DLR 259 and 5 MLR 140.

The learned advocate finally submits that she has filed an application for submitting better statement and additional evidence which should be allowed to secure ends of justice as the petitioner has a good case in merit in the original preemption case, so that he can contest the case on merit by adducing and producing evidence on his behalf.

On the other hand Md. Alamgir Mostafizur Rahman the learned advocate appearing on behalf of the opposite party Nos. 1 and 2 submits that as per article 164 of the Limitation Act an application under order-IX, rule-13 can be filed within 30 days from the date of the decree or, where the summons was not duly served when the applicant has knowledge of the decree. In the instant case the pre-emptee purchaser appeared and filed written statement but did not contest and the pre-emption application was allowed ex parte on 26.07.2011. Then the pre-emptee purchaser filed Miscellaneous Case being no. 08 of 2012 under order-IX, rule-13 of Code of Civil Procedure on 14.02.2012. In the averment of the Miscellaneous case the pre-emptee purchaser stated that he was informed about the ex-parte order from the learned advocate on 06.02.2012. But he did not produce any witnesses or that learned

advocate or advocate's clerk to prove the date of knowledge. It is settled law that in the Miscellaneous case under order-9, rule-13 the applicant shall have to prove the date of knowledge otherwise this application should be rejected. He referred two cases reported in 12 MLR (AD) 34 and 4 BLC (AD) 285 in support of this contention.

The learned advocate then submits that pre-emptee purchaser in the averment of his application under order-9, rule-13 stated that he was in abroad. After coming in the country he was ill. During taking evidence the pre-emptee purchaser did not produce any passport in this regard or any medical certificate or produce the Doctor under whom he took treatment. When the applicant states in the application under order-9, rule-13 that he was ill he must prove his illness. In this connection he referred two cases reported in 2 BLC (AD) 96 and 8 BLC (AD) 160.

The learned advocate next submits that the pre-emptee purchaser during taking evidence in Misc Case no. 08 of 2012 did not produce any document. Not only that, he did not produce any evidence before appeal court. But in the revision before this Court learned advocate for the petitioner has submitted various type of documents for the first time. It is settled law that revision court cannot consider any new document before it. In this connection he refers the case reported in 70 DLR (AD) 168.

Mr. Rahman further submits that in the application under order-9, rule-13 the court cannot go beyond its jurisdiction. Court can only consider whether "the summons was not duly served, or that he

was prevented by any sufficient cause from appearing when the suit was called on for hearing". In support of this contention he refers the cases reported in 42 DLR (AD) 74, 2 BLC (AD) 96, 10 BLC (AD) 153 and 2004 BLD 335.

The learned advocate vigorously submits that it is also settled law that a Revision court cannot act beyond its jurisdiction in setting aside concurrent finding, when there is no misreading and misappreciation of the evidence on record. In this connection he refers the cases reported in 73 DLR (AD) 156 and 43 DLR (AD) 82.

Regarding the prayer of sending the case on remand the learned advocate submits that it is well settled law that when the gross negligence or laches of any party are clearly shown in the case, remand shall not be granted. In the instant case the petitioner in the trial court as well as appeal court did not try to take any step to prove his case. As such remand cannot be granted. In this connection he refers the cases reported in 6 MLR (AD) 179, 16 BLT (AD) 42, 10 BLT (AD) 132, 1986 BLD (AD) 135 and 54 DLR (AD) 74.

The learned advocate for the opposite parties lastly submits that the learned appellate court correctly affirmed the judgment and order of the trial court on proper and elaborate discussions. As such the Rule should be discharged with cost.

I have heard the learned advocates for both the parties, perused the application, supplementary affidavits along with annexures. I have also perused the Lower Court Records including depositions and other documents available in the record.

It appears from record that the pre-emptee appeared before the trial court in the original preemption case and filed written objection but when the case was fixed for adducing witnesses the pre-emptee did not appear before the court for which the trial court fixed the matter for ex parte hearing and after examining the preemptor as witness passed the ex parte judgment allowing the pre-emption case. The pre-emption case was allowed on 26.07.2011. Then the pre-emptee on 14.02.2012 filed Miscellaneous Case No.08 of 2012 under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex parte judgment along with an application for condoning the delay in filing the miscellaneous case. The pre-emptor contested that Miscellaneous Case by filing written objection. Both the pre-emptee and pre-emptor adduced witnesses and produced some documents before the court. The pre-emptee examined only himself to prove his case while the pre-emptor also examined only himself to oppose the case. The pre-emptee claimed that during the period of trial of the preemption case he was serving in a foreign mission as a member for the Bangladesh Army for which he could not contest the case. After coming from foreign mission he fell in ailment and after recovery he filed the Miscellaneous Case No. 08 of 2012. An application for condonation of delay was filed but there was no mentioning of how many days delay occurred. In support of his reason of delay he did not produce any document from foreign mission or regarding his ailment he neither produced any medical certificate nor examined the doctor under whom he took treatment. Considering all these facts the trial court rejected

the application filed under Order IX, Rule 13 of the Code of Civil Procedure by his judgment and order dated 06.09.2022. Miscellaneous Appeal No. 97 of 2022 was filed against that decision of the trial court but in that court the petitioner also did not file any additional document to prove his case for which the Lower Appellate Court dismissed the appeal affirming the judgment and order passed by the trial court.

Now, before this revision Court the learned advocates for both preemptee petitioner and preemptor opposite parties raised some questions of law in the backdrop of the facts as stated above. The 1<sup>st</sup> question regarding condoning delay under section 5 of the Limitation Act in the reported case, 59 DLR (AD) 1 our apex Court referred the decision of Indian Supreme Court, AIR 1987 (SC) 1353 wherein a liberal approach is adopted on principles of condoning delay: 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late, 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties, 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner, 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done

because of a non-deliberate delay, 5. There is no presumption that delay is occasioned deliberately, or on account of mala-fides. A litigant does not stand to benefit by recording delay. In fact, he runs a serious risk, 6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. In the case reported in 29 DLR 259 it was observed that delay due to wrong but bonafide advice of the lawyer is a sufficient explanation of delay. Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the section though there is certainly no general doctrine which saves parties from the results of wrong advice.

Our supreme Court (AD) in the case, 4 BLC (AD) 285 observed that it was incumbent upon the defendants to show why the application under Order-IX, Rule-13 for setting aside the ex parte decree was filed in long delay and that too without any explanation of such long delay. Sahabuddin Ahmed through whom the defendant got his initial knowledge of the ex parte decree was not examined, in fact, no one was examined to prove the date of definite knowledge of ex parte decree. In 2 BLC (AD) 96 their Lordships observed that the petitioner did not adduce any evidence as to his alleged illness preventing him from appearing in court while the suit was called on for hearing. So, application under Order IX, Rule-13 is not sustainable. In 8 BLC (AD) 160 the Court held that the petitioner's application under Order IX rule 13 was barred by

limitation as she could not prove the fact of her illness and without examination of the doctor, the medical certificate granted by him is inadmissible in evidence. In the case, 2004 BLD 335, our Supreme Court (HCD) held that "Under Order IX Rule 13 of the Code of Civil Procedure, the trial Court has got discretion to set aside a decree passed ex-parte but such discretion can only be exercised on either of the grounds namely, (a) summons was not duly served; (b) absentee defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. In the absence of any of such findings, the trial Court has no jurisdiction to set aside an ex-parte decree."

Regarding invoking inherent power under section 151 of the Code of Civil Procedure the Appellate Division in the case, 42 DLR (AD) 74 observed: "learned Assistant Judge evidently did not set aside the ex parte decree on the grounds as are available under Order-9, Rule 13-C.P.C but he resorted to the inherent power of the Court under section 151 C.P.C. This the Assistant Judge could not lawfully do, because, if he is considering an application under Order 9, rule 13 C.P.C he has authority to determine whether the ground for setting aside the ex parte decree as mentioned therein exists or does not exist. He cannot draw upon inherent power while acting under a specific provision of the Act governing the disposal of the case. Therefore, the view taken by the learned Judge of the High Court Division is correct and it could not be said that he was not justified in setting aside the order of the Assistant Judge." In the case reported in 2 BLC (AD) 96 it was observed that an

application under Order IX rule 13, CPC was allowed on terms of payment of cost not on the finding that the defendant was prevented by sufficient cause from appearing but "ন্যায় বিচারের খাতিরে।" Court cannot exercise inherent power where relief is provided and claimed under a specific provision of law. In the case reported in 10 BLC (AD) 153 it was further observed that it is seen from the order of the learned Subordinate Judge that the defendant-petitioners in support of their case for setting aside the ex-parte decree totally failed to establish that summons was not served on the defendants or the defendants were prevented by sufficient cause from appearing before the Court when the case was taken up for hearing. In that state of the matter the learned Subordinate Judge was totally in error in setting aside the ex-parte decree and consequently, the High Court Division has not committed any error or illegality in setting aside the erroneous order of the Court below.

On the question of sending the case on remand in the case, 6 MLR (AD) 179 their lordships categorically observed: "The appellate Court also found that defendant ought to have been given a chance to adduce evidence in support of their claim and for that matter passed the order of remand. But from the perusal of the record it appears that the present petitioner took no step for giving additional evidence before the appellate Court and also has not taken any step for calling for the record of the earlier suit. What the appellate Court did was nothing but giving an opportunity to the defence to fill up the lacuna which law has not permitted. No step was taken before the appellate court by the present petitioner to adduce

additional evidence or to call for the record of the earlier disposed of suit. There is nothing on record to show that there was collusion in between the plaintiff and the defence Advocate. In such a situation the High Court Division rightly found that the suit could not be sent back on remand for filling up lacuna". In 16 BLT (AD) 42 it is held: "The Law is settled now that an order of remand is not well founded in law if the same is premium for the laches and negligence of one of the parties to the suit or to enable a party to fill up a lacuna in his case which inspite of the opportunity to fill up the said gap, the party did not care to take step in that regard". In 10 BLT (AD) 132 the Court said: "In view of the clear finding of the trial Court regarding Hiba-bil-Ewaz as aforesaid we are of the view that this open remand order for a fresh decision in the suit allowing parties to adduce fresh evidence is designed to fill in the lacuna of the pleadings of the parties, which is not the intent and object of the order of remand contemplated under Order XLI rule 23 of the Code of Civil Procedure. In the case of Dr Razia Khatun vs Bhanu Guha and others 1986 BLD (AD) 135 it has been observed that "The long line of judicial decision is to the effect that the remand order should be avoided as far as possible and even the Privy Council in some cases observed that indiscriminate order of remand tantamounts to shirking the responsibility." In 54 DLR (AD) 74 their Lordships held: "Remand as contemplated under Order XLI rule 23 of the Code of Civil Procedure was not of matter of course or to fill in the lacuna in any party's pleading. In the instant case the plaintiff having led

evidence to show that the Hiba-bil-Ewaz allegedly executed by Wazeduddin in favour of Abdul Majid being a forged and concocted one, there was no reason to send back the suit on remand to the trial Court for fresh decision after making necessary amendment of the plaint with opportunity to the contesting parties to adduce fresh evidence".

On the question of revisional jurisdiction under section 115 of the Code of Civil Procedure in 43 DLR (AD)-82 their lordships held that a revisional court acts beyond its jurisdiction in setting aside concurrent finding of fact, when there is no misreading and misappreciation of the evidence on record. in 70 DLR (AD) 168 it was held: "The jurisdiction under section 115 of the Code of Civil Procedure is very limited. It has not empowered the revisional court to sit on appeal and take into consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice". In 73 DLR (AD) 156 their Lordships observed that to believe or disbelieve a witness is within the domain of the Courts below and the High Court Division in exercise of its revisional jurisdiction cannot interfere in such domain unless there is misreading or non-reading of evidence on record by the Courts below.

In the instant case we have already noticed that the pre-emptee appeared before the trial court in the original preemption case and filed written objection but did not contest the case and the court passed the ex parte judgment allowing the pre-emption

case vide order dated 26.07.2011. Then the pre-emptee after about 7 months on 14.02.2012 filed Miscellaneous Case No.08 of 2012 under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex parte judgment along with an application for condoning the delay in filing the miscellaneous case. The petitioner claimed that during the period of trial of the preemption case he was serving in a foreign mission as a member for the Bangladesh Army for which he could not contest the case and after coming from foreign mission he fell in illness and after recovery on query from his advocate he came to know about the ex parte judgment and filed the Miscellaneous Case No. 08 of 2012. An application under section 5 of the Limitation Act for condonation of delay was also filed stating that he was abroad for about 10 years and came back recently and thereafter fell ill and in this way the delay occurred. It appears that the application filed under Order IX, Rule 13 of the Code of Civil Procedure has not been drafted properly, no cogent explanation was given. In the application for condoning delay there was no mentioning of how many days delay occurred. In support of his reason of delay he did not produce any documents from foreign mission or regarding his ailment he neither produced any medical certificate nor examined the doctor under whom he took treatment. Moreover, he the petitioner failed to prove his date of definite knowledge of ex parte decree by adducing any witness or document. Considering all these facts the trial court rejected the application filed under Order IX, Rule 13 of the Code of Civil Procedure by his judgment and order dated 06.09.2022. Miscellaneous Appeal No. 97 of

2022 was filed against that decision of the trial court but in that court the petitioner also did not take any endeavor to file any additional document to prove his case for which the Lower Appellate Court dismissed the appeal affirming the judgment and order passed by the trial court. It is not the mere mistake on the part of the learned advocate but sheer laches and negligence on the part of the preemptive petitioner. The learned advocate appearing before this Court was trying to improve her case by submitting some documents for the first time before this Court but also failed to produce the relevant documents especially the medical certificate and his travel documents. It is true that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of mala-fides. A litigant does not stand to benefit by recording delay. In fact, he runs a serious risk. We should remember that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. In applying that principle Court can condone the delay if there is no negligence on the part of the petitioner but if there is gross negligence, the Court should not condone the delay in the name of securing the ends of justice.

The petitioner has failed to submit convincing evidence that it is a case to be sent back on remand in the light of the above mentioned

decisions. To fulfill the lacuna remand cannot be granted. The revision court should not interfere in the concurrent findings of fact unless there is misreading and nonconsideration of evidence on record and in the present case there is neither misreading nor nonconsideration of evidence. From the catena of decisions of our superior Court as mentioned above it is settled that the Court should not interfere when the party has gross negligence. I find laches and gross negligence on the part of the petitioner in pursuing his cause for which I am not inclined to interfere with the judgment and order passed by the courts below on concurrent findings of fact. In the facts and circumstances of the case and the position of law as discussed above, the instant Rule has no merits, hence, I am constrained to discharge the Rule.

In the result the Rule is **discharged**. However, there will be no order as to cost.

The order of stay passed earlier by this Court stands vacated and all the applications filed by the petitioner are rejected in the light of this judgment.

Send down the Lower Court Records and communicate the judgment and order at once.