

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present

Madam Justice Kashefa Hussain

Civil Revision No. 4912 of 2010

Chandana Rani Sarkar

.....petitioner

-Versus-

Protap Chandra Sarkar and anothers

----- Opposite parties

Mr. Bhabesh Chandra Mustafi, Advocate

----- For the petitioner

Mr. Md. Mostafa Kamal, Advocate

----- For the Opposite Parties.

Heard on: 29.10.2018, 04.11.2018 and
Judgment on 06.11.2018

Rule was issued calling upon the opposite party No. 1 to show cause as to why the Judgment and order complained of in the petition moved in court today should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

This case arises out of a preemption matter where in the present opposite parties as preemptor instituted Miscellaneous Case No. 20 of 2004 before the court of Senior Assistant Judge (in charged), Kownia, Rangpur against the present petitioner who is pre-emptee in this case. After hearing pursuant to trial the court of Senior Assistant Judge (in charged) disallowed the preemption petition in Miscellaneous Case No. 20 of 2004 by its judgment and order dated 03.05.2006. Being dissatisfied by the

judgment and order dated 03.05.2006 passed by the Senior Assistant Judge (in charged), Rangpur the instant opposite party Nos. 1 and 2 filed a Miscellaneous Case No. 46 of 2006 which was heard by the Additional District Judge, 2nd Court, Rangpur. The Additional District Judge 2nd Court, Rangpur after hearing allowed the appeal and sent the case back to the trial court on remand by its judgment and order dated 03.10.2010.

Being aggrieved by the judgment and order of the Additional District Judge, 2nd Court, Rangpur in Miscellaneous Appeal No. 46 of 2006 the preemptee respondent as petitioner filed the instant Civil Revisional application which is before me for disposal.

Learned Advocate Mr. Bhabesh Chandra Mustafi appears on behalf of the petitioner while the Opposite Party No. 1 is represented by Mr. Md. Mostafa Kamal along with Mr. Ruhul Amin.

Learned Advocate Mr. Bhabesh Chandra Mustafi for the petitioners submits that the trial Court correctly disallowed the preemption case but the appellate court upon a wrong conclusion allowed the appeal and sent back the case on remand. He argued that the appeal court sent back the case relying upon a lacuna on the evidences. On this point the learned advocate for the petitioner submits that a case cannot be sent on remand on the basis of lacuna to fill up any lacuna in pleading. In support he

cites a decision in the case of Akitullah Vs Zafala Begum reported in 54 DLR (AD) 2002 page 74. He contends that the judgment and order of the appellate court is a travesty of justice and the judgment and order of the trial court ought to be affirmed being correctly given and the rule bears merits and ought to be absolute.

On the other hand the learned advocate for the opposite parties submits that the appellate court upon correct finding drew the conclusion that the trial court's decision is not accordance with law. He argues that the appellate court correctly found that the trial court had examined only the petitioner that is the preemptor who was PW-1 and that there is no evidence of the preemptee being examined. He also submits that the appellate court correctly found that there is no evidence on record to show that the preemptor lost his status as co-sharer of jote. He further submits there is no evidence in the record to show that there was no evidence of any separation of joma or any new khatian being created and which the appellate court correctly observed. He contends that for ends of justice all these facts must be taken into consideration before drawing a conclusion coming into a definite finding. In support of his submission he cites a decision of this court in the case of Ganendra Mondal Vs Kalipada Mondal reported in 62 DLR (2011) page 449 wherefrom he shows that this case is also related to a preemption matter. In the light of his

submissions he asserts that the trial court gave an incorrect judgment and the appellate court correctly set it aside and sent it back on remand and therefore this Rule bears any merit and ought to be discharged for ends of justice.

I have heard the learned Advocates from both sides perused the application and materials on records including both the judgment of the courts below. I have found that the observations made by the appellate court seem to be correct in as much as that there is no evidences in the records which may indicate that there was any separation of Joma or any new khatian was created. There are no evidences to show that the suit land was demarcated and that there was an amicable partition between the 3 bothers and that the preemptor has actually lost his status as co-sharer of the jote. None of these evidences are on record. These evidences are necessary to come into a definite finding as to the present Opposite Parties right to preemption. Furthermore the appellate court correctly found that no depositions was taken from the side of the preemptee (who are petitioners in the instant Civil Revisional application). In the light of the circumstances I am inclined to agree with the decision of the appellate court regarding sending back the matter on remand. However I am also of the considered view that the appellate court in its operative part should not have stated that the appeal is “allowed” since the matter has not been yet decided

on the merits and the Appellate Court directed to send back the case for remand upon fresh trial to the trial court.

Be that as it may under the facts and circumstances I am of the considered view that the appellate court correctly ordered that the matter be sent back on remand to the trial court for fresh hearing.

From the foregoing discussions made above, upon hearing the learned Advocate and perusing the decisions cited by both sides I am of the considered view that it is a fit case for remand and I find no merit in the Rule.

In the result, the Rule is discharged and I find no reason to interference with the decision of the appellate court and it is hereby directed that the instant case be sent back on remand for fresh trial before the trial court upon restoring the case to its original file and number and it is hereby also directed that the trial court may dispose of the matter within the earliest possible time preferably within 6(six) months of receiving this judgment and order.

Order of stay granted earlier by this court is hereby recalled and vacated.

Send down the Lower Court's Record at once.

Communicate the order at once.