

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 2971 OF 2011

Md. Wahidul Islam

---- Pre-emptee-Respondent-Petitioner

=Versus=

Md. Alkaj Ali Biswas and another

---- Pre-emptor-Appellant-Opposite Parties

Mr. Abul Kalam Chowdhury with

Mr. Ahmed Nowshed Jamil, Advocates

----- For the Petitioner

Mr. Abul Kalam Mainuddin with

Mr. Munshi Abdul Hamid, Advocates

----- For the Opposite Party No. 1

Heard on: 18.02.2018

Judgment on: 19.03.2018.

At the instance of the present pre-emptee-respondent petitioner, Md. Wahidul Islam, this Rule has been issued calling upon the opposite parties No. 1-2 to show cause as to why the judgment and order complained of in the petition moved in court should not be set aside.

The Rule is directed against the judgment and Order dated 26.05.2011 passed by the learned Additional District Judge, 1st Court, Khulna in Miscellaneous Appeal No. 158 of 2009 reversing the judgment and Order dated 28.07.2009 passed by the learned Assistant Judge in charge, Court No. 2, Khulna in Miscellaneous Case No. 37 of 2007 rejecting pre-emption application.

The relevant facts for disposal of the this Rule, *inter-alia*, are that the present opposite party No. 1 as the pre-emptor-applicant filed the Miscellaneous Case No. 37 of 2007 in the court of the learned Assistant Judge, Daulatpur, Khulna claiming right of pre-emption. The case application contains that Abdul Motleb Karikor was the original S.A. recorded owner of the case land in S.A. Khatian No. 2821 who along with other co-sharers sold 15 decimal of land to one Ansar Uddin on 10.05.1983. Ansar Uddin sold 0.1250 acres to the pre-emptor. The said Motleb mortgaged 15 decimal of land along with other land with the opposite party No. 2, Sonali Bank, Fultala Branch, Khulna on 01.04.1984. Being a defaulter in payment of the borrowed money the bank sold the land on auction pursuant to be title Execution Case No. 04.1997 at Tk. 65,000/- (Tk. sixty five thousand) behind the knowledge of the pre-emptor and without giving any notice to the pre-emptor, as such, the present petitioner accrued a right of pre-emption as being a co-sharers by purchase of the same holding or same jote. The present opposite party No. 1 was a stranger and the case land is a non-agricultural land adjacent to the house of the pre-emptor.

The present pre-emptee-opposite party Nos. 1 and 2 contested the case by filing separate written objections denying the statements made in the application of the Miscellaneous Case and contended that the case was barred by limitation and no right of pre-emption accrued by the present petitioner. The written objection also contains that Motaleb obtain loan from the present opposite party No. 2, Sonali

Bank, after mortgaging the case land and in due course of time he failed to repay the loan amount, thus, the money was realized by the Execution Case No. 04 of 1997. Motleb sold 15 decimal of land from Dag No. 1670 in favour of Md. Ansar Uddin through the sale deed dated 10.05.1983. Sufia Khatun, mother of Motleb and Saburunnesa, the sister of Motleb jointly sold 1 decimal to Ansar Uddin. Whereas Ansar Uddin and others again sold the land to Motleb, thereby Motleb owned total land measuring 58 decimal which he mortgaged to the Bank and eventually the land was sold on auction dated 09.10.2000 which was confirmed on 27.11.2000, as such, no right of pre-emption was created in favour of the present pre-emptor petitioner. The present pre-emptee opposite party No. 2, the Bank by filing a written objection contended that Motleb mortgaged the case land with the Sonali Bank, Fultala Branch, Khulna for obtaining loan but subsequently he failed to repay the borrowed money, as such, the opposite party No. 2 realized the money through execution case by selling the property on auction.

After the hearing the parties the learned trial court rejected the pre-emption case by his judgment and order dated 28.07.2009. Being aggrieved the present petitioner as the appellant preferred the Miscellaneous Appeal Case No. 158 of 2009 in the court of learned District Judge which was heard by the learned Additional District Judge, 1st Court, Khulna on transfer who by his judgment and order dated 26.05.2011 allowed the appeal thereby setting aside the

judgment of the trial court. This revisional application has been filed under Section 115 (1) of the Code of Civil Procedure challenging the legality of the impugned order and the Rule was issued thereupon.

Mr. Abul Kalam Chowdhury, the learned Advocate, appearing along with the learned Advocate Mr. Ahmed Nowshed Jamil for the petitioner, submits that the present petitioner as the pre-emptor filed the case under wrong law by depositing five percent of the consideration money because the case should have been filed under Section 96 of the State Acquisition and Tenancy Act by depositing ten percent of the consideration money before filing of the case and Section 96 of the Act 1950 clearly excluded any right of pre-emption in case of mortgage / auction of any property, as such, the sale of the case land on auction cannot create any pre-emption right but the learned appellate court below by misreading the evidence and misconstruing the relevant law came to a wrongful conclusion to allow the appeal, whereas, the learned trial court after considering the evidence on record came to a lawful conclusion to dismiss the case filed by the present opposite party, as such, this court should interfere into the judgment and order of the learned appellate court below and to make the Rule absolute.

The learned Advocate also submits that as per law the case was under Section 96 of the State Acquisition and Tenancy Act and petitioner as PW1 admitted both in examination in chief and cross examination that delivery of possession of case land was given on

06.10.2006 and case was filed on 24.07.2007 and as such case was hopelessly barred by limitation, contrary findings of appellate court below is legally erroneous and result of misreading, non-consideration of evidence and materials and law. Therefore, impugned judgment and order of appellate court below is not sustainable in law.

The Rule has been opposed by the present opposite party No. 1.

Mr. Abul Kalam Mainuddin, the learned Advocate, appearing along with Mr. Munshi Abdul Hamid, the learned Advocate, submits that admittedly mortgage has been excluded from the right of pre-emption under Section 96 of the Act, 1950 but on foreclosure of the mortgage a right of pre-emption can be created, therefore, the learned appellate court below lawfully decided that the right of pre-emption was created in favour of the present opposite party No. 1 who by his judgment and order properly set aside the judgment of the learned trial court but the present petitioner obtained the Rule by misleading this court which is liable to be discharged. The learned Advocate also submits that a right of pre-emption is created by filing a case within the stipulated period of time under Section 96 of the Act, 1950 or Section 24 of the Non-agricultural Tenancy Act upon receipt of a notice, alternatively, from the date of knowledge of any land sold by a co-owner. Accordingly, the present opposite party as the pre-emptor filed the suit within the period of date of knowledge, as such, the case was not barred by limitation. He also submits that under Section 33 Sub-section 5 of the অর্থ ঋণ আদালত আইন, ২০০৩ any land can be sold by a

decree holder but the land will be handed over only by an through court therefore the instant case land was occupied by the pre-emptor, as such, right of pre-emption has been created.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under Section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and order passed by the appellate court and also perusing the materials in the lower court records, it appears to me that the present opposite party No. 1 as the pre-emptor-applicant filed a case claiming right of pre-emption upon the land sold by the present opposite party No. 2, the Sonali Bank, Fultala Branch, Khulna, which was mortgaged by one Motleb in order to obtain some loan from bank. After being a defaulter in repaying the borrowed money the case land measuring 58 decimals was sold on auction by the bank and pursuant to the Execution Case No. 04 of 1997 at Tk. 65,000/- (Tk. sixty five thousand). The present opposite party No. 1 as the pre-emptor claimed right of pre-emption of the said auction sale as being a co-owner of the case land.

In the above even situation, this court has to take a decision whether any right of pre-emption has been created in favour of the present opposite party No. 1 as a co-owner of the said same jote. In order to deal with this matter, I have carefully examined the documents exhibited in the case, in particular, exhibits –(Ga) 1 and

(Ga) 2 which are certificate of sale by way of an auction and also the certificate of handing over possession of the suit land. I have also carefully examined the relevant provisions of Section 96 of the State Acquisition and Tenancy Act and Section 24 of the Non-agricultural Tenancy Act. Section 96 has preciously mentioned about creation of a pre-emption right. Section 24 has created a right which looks right a right of pre-emption but not pre-emption as such regarding non-agricultural land. In the instant matter, the case land is admittedly situated in a village area, of agricultural land and no homestead around the agricultural land, as such, right could be created under Section 96 of the Act, 1950.

Having said that, Section 96 of the Act, 1950 before amendment in the year of 2006 preciously excluded any mortgage by a conditional sale under Section 96(10)(d). As such, the sale of land on auction by an execution case of a mortgaged property on 09.10.2000 and confirmed on 27.11.2000 had created no right of pre-emption in favour of the present opposite party No. 1 as a pre-emptor.

Regarding the limitation period in filing the case for right of pre-emption the law before amendment of Section 96 was within 4 (four) months from the date of notice under Section 89 or from the date of knowledge. In the instant case the present pre-emptor opposite party admittedly came to know about the auction sale on 06.10.2006 but the case was filed on 24.07.2007 which is beyond the limitation period stipulated under Section 96 of the Act, 1950. Even if Section

24 of the Non-agriculture Tenancy Act would have been applicable the case was filed beyond the limitation period on the above mentioned delay in filing this case, as such, the case was barred by limitation prescribed in the special law.

Now I am inclined to examine the judgment and order passed by the learned courts below. The learned trial court came to a lawful conclusion to dismiss the case filed by the present pre-emptor opposite party on the basis of the following findings:

“অর্থাৎ সে সুবাদে আনছার উদ্দিন সরেজমিনে ১ নং তরফছানীকে দখল দেবার সময় নালিশী নিলাম বিক্রয়ের কথা স্বাভাবিক ভা-বই জান-ত প-রন। ছা-য়-লর দাবী ম-ত কেবল মাত্র ঘর গৃহাদী ব্যতিত বক্রী জমিতে বাদী / ছা-য়ম স্বীয় স্বত্ব দখল পরিচালনা ক-র আস-ছন (দরখাস্ত / আরজীর ৩য় পৃষ্ঠার শেষ ২ লাইন) তাহ-ল দখল প্রমা-নর বিষয় আনছার উদ্দিন জানতে পেরেছেন কিন্তু ছায়েল জানতে পেরেন না কেন তা এখা-ন বোধগম্য নয়। নালিশী নিলাম বিক্রয়ের পর বয়নামা ও দখলদামার সই মোহরী যথাক্রমে প্রদর্শনী গ ১ ও গ ২ হ-ত দেখা যায় যে আদালত যো-গ সকল আনুষ্ঠানিকার মাধ্য-ম নিলাম খরিদদার-ক দখল বুঝি-য় দেয়া হ-চ্ছ। অথচ ছা-য়ল এ স-বর কিছুই জা-নন না ব-ল দাবী ক-রন। ও পি ডব্লিউ-১ তার জেরায় জানান যে, “আমি দখল পাই ২ বা-র। প্রথমবার ১০-০৫-২০০৩ তাং। সর্ব-শেষ ০৬-১১-২০০৬ তাং।” “পি, ডব্লিউ - ১ তার জেরায় ব-লন যে,” আমি জানি ০৬-১০-২০০৬ তাং যখন দখল নি-ত যায় জানি। আমি আসি ১ বছর পর। কেনা খোজ নি-ত সময় লে-গ-ছ।” স্বীকৃত ম-তই ছা-য়ল ০৬-১০-২০০৬ ইং তাং নালিশী বিক্রয়ের কথা জানত। আর মামলা রজু হ-য়-ছ, ২৪-০৭-০৭ ইং তাং এ সম্প-র্ক খোজ নেবার যে অজুহাত ছা-য়ল নি-য়-ছন তা নিতান্তই খোড়া যুক্তি।”

On the other hand, the learned appellate court below wrongfully found the evidence adduced and produced by the parties and failed to applying his judicial mind for consideration of the evidence, thereby, came to a wrongful conclusion to allow the appeal on the basis of the following findings:

“আনছার উদ্দিন এখন ও দখলে আছে। নিলাম মূলে নিলাম খরিদদার তহিদুল ইসলাম দখল নাই। ২ নম্বর প্রতিপক্ষ অর্থক্ষণ আইন ১২ ধারায় মোকদ্দমা দা-য়-রর পূ-র্বই সরজমি-ন দখল নেয় নাই। সুতরাং মোকদ্দমাটি তামাদিতে বারিত ম-র্ম সিদ্ধান্ত ভুল ছিল আরজি প্রত্যাখ্যান বা আনছার উদ্দিনের ভুল আইনে মিস কেস দায়ের করা TECHNICAL ব্যাপার। অগ্রক্রেতার দাবী আনছার উদ্দিন তাহার অনুমতি দখল কার। নিলাম খরিদদার ১ নম্বর প্রতিপক্ষ দখল পায় নাই। এবং সে জমায় আগন্তক। মূল অগ্রক্রয় মোকদ্দমায় পক্ষদোষ নাই তাহা রায়ে স্বীকৃত। মোকদ্দমাটি তামাদি-ত বারিত ন-হ। তাহা আ-লাচনা করিয়া সিদ্ধান্ত গ্রহণ করা হইয়াছে। অগ্রক্রয় দরখাস্তকারী জমার শরীক তাহা রায়ে স্বীকৃত। ফুলতলা এলাকায় দা-মাদার মৌজা পৌর এলাকা ন-হ তাহা-ত জমি গাছ পালা বৃক্ষাদি ও ঘর বাড়ী রহিয়া-ছ। এই ক্ষেত্রে সম্পূর্ণ ৫৮ শতাংশ অকৃষি জমি বি-বচনা করা যাই-ব না। আবার সম্পূর্ণ জমি কৃষি জমি বি-বচনা করা যাই-ব না। দেওয়ানী আদাল-ত ভুল আইন কোড করার কার-ন প্রতিকার পাই-ত বাধা নাই।”

In view of the above discussions and after perusal of the judgment and order passed by the learned courts below, I am of the opinion that the learned trial court committed no error of law by dismissing the pre-emption case but the learned appellate court below failed to consider the evidence filed by the parties thereby concluded wrongly to allow the appeal, as such, the judgment and order passed by the learned appellate court is liable be set aside . I am therefore inclined to interfere into the judgment and order.

Accordingly, I find merit in the Rule.

In the result, the Rule is made absolute.

The interim order of stay granted at the time of issuance of the Rule upon the operation of the impugned judgment and order dated 26.05.2011 passed in Miscellaneous Appeal No. 158 of 2009 is hereby recalled and vacated.

The Section is directed to communicate this judgment and decree to the concern Court below and also directed to send down the lower court records immediately.