

Bench:

Mr. Justice Bhishmadev Chakrabortty

Civil Revision No. 976 of 2012

Md. Bashir Uddin Khan and others

.....petitioners

-Versus-

Md. Lokman Hossain Khan and others

.....opposite parties

No one appears for the petitioners

Mr. Chanchal Kumar Biswas with

Ms. Rutba Ikhtilat Tuli, Advocates

.....for opposite party1

Judgment on 13.05.2024

This rule, at the instance of pre-emptors, was issued calling upon pre-emptee-opposite party 1 to show cause as to why the judgment and order of the Joint District Judge, 2nd Court, Rajbari passed on 27.11.2011 in Miscellaneous Appeal No. 34 of 2008 allowing the appeal reversing the judgment and order of the Senior Assistant Judge, Sadar, Rajbari passed on 13.11.2008 in Miscellaneous Case No. 15 of 2002 allowing the case for pre-emption should not be set aside.

The case of the pre-emptors, in brief, are that the case land described in the schedule to the pre-emption application originally belonged to Karim Kha. He died leaving behind a son, a wife, a daughter and his father Joydhor Kha. Joydhor Kha during his possession and enjoyment died leaving behind 3 sons, the pre-emptor, Amanat Kha, Abdur Rashid Kha and daughter Khaybornessa. Amanat

Kha died leaving behind a wife Anwara Begum, son Abdul Jabbar Kha and 2 daughters Hafiza and Rabeya. Abdur Rashid Kha died unmarried and consequently the pre-emptor and his brothers and sisters inherited the land. Opposite party 2 instituted Title Suit No 33 of 1995 claiming that they inherited the suit land but it was dismissed. SA khatian 41 was prepared in the name of Joydhor Kha which was partly wrong. Miscellaneous Cases No. 42, 43 and 72 of 2002 were allowed on compromise. The pre-emptee forcefully entered into the case land on 11.12.2006 and erected a 10X5 cubit tinshed house adjacent to the house of the pre-emptor. Opposite party 2 exchanged the pre-empted land with the petitioner in 1962. The pre-emptor has been possessing the suit land more than 40 years. The pre-emptee disclosed about the pre-empted *kabala* to the son of pre-emptor on 16.2.2002. He then collected certified copy of the *kabala* and filed the case within the stipulated period of limitation.

The pre-emptee contested the case by filing written objection where he denied the statements made in the case. He further contended that the pre-emptor is not a co-sharer in the suit *khatian*. The land of RS *Khatian* 40 originally belonged Abdus Samad Molla , Afsar Molla, Akbar Molla, Aftab Molla, Nurun Nessa Khatun and Zahura Khatun. Fuljan and her son opposite party 2 got the suit land of SA *khatian* 41 through *kabala* and accordingly record was prepared in their names. The pre-emptor is not a co-sharer in disputed RS and

SA *khatians*. The pre-empted land was not included in the previously instituted Title Suit No. 33 of 1995. It was further contended that father of the pre-emptor Joydhor Kha died on 31.10.1944 before the death of his son Karim Kha and as such he did not inherit the land of suit *khatian*. In the premises above the case would be rejected.

The Assistant Judge framed two issues to adjudicate the matter in dispute, whether the case is maintainable in the present form and manner and the pre-emptor is entitled to get relief as prayed for.

In the trial, the pre-emptor examined 1 witness while the pre-emptee examined 2. The documents produced by the pre-emptor were exhibits 1-8. However, the learned Assistant Judge allowed the case for pre-emption against which the pre-emptor filed miscellaneous appeal before the District Judge, Rajbari. The Joint District Judge, 2nd Court, Rajbari heard the appeal on transfer and allowed the same by setting aside the judgment and order passed by the Assistant Judge which prompted the petitioners to approach this Court upon which this rule has been issued.

No one appears for the petitioners although the matter has been appearing in the daily cause list for couple of days with the name of the learned Advocate for them. This is an old matter of 2012 against order and as such it is taken up for disposal on merit in presence of the learned Advocate for opposite party 1 only.

Mr. Chanchal Kumar Biswas, learned Advocate for the pre-emptee-opposite party 1 taking me through the judgment of the Courts below and the provisions of the Non Agricultural Tenancy Act, 1949 (the Act, 1949) submits that this is a case seeking pre-emption under section 24 of the aforesaid Act where a pre-emptor has to prove that he is a co-sharer of the suit *khatian* by way of inheritance or by purchase. But the pre-emptor failed to prove it. There is nothing to show that any record of right has been prepared in his name or in the name of his predecessor. He then refers to the evidence of OPW2 and submits that in evidence he stated that Joydhor Kha died on 31.10.1944 and it was recorded accordingly but the Assistant Judge failed to apply the mind in considering the last digit 4 as 5 and erroneously found that the pre-emptor inherited suit land from Joydhor Kha. The appellate Court correctly assessed the evidence of witness and other materials on record and came to the conclusion that the pre-emptor is not a co-sharer in the *khatian* and he is not entitled to get an order for pre-emption. The findings and decision of the Court of appeal below is based on fact, law and evidence which may not be interfered with by this Court.

I have considered the submissions of Mr. Biswas, gone through the judgments passed by the Courts below, the evidence of witnesses and the provisions of law referred to. In a case filed under section 24 of the Act, 1949 the pre-emptor has to prove that he is a co-sharer by

inheritance or by purchase. In this case the pre-emptor is to prove that he is a co-sharer in RS *khatian* 40 corresponding to SA *khatian* 41 in any of the way as told above. The pre-emptor produced RS *khatians* 332, 77, 240, 420 corresponding to SA *khatians* 250, 104, 278 and 275 respectively exhibit-8 series. But the above *khatians* are in no way related with the suit *khatian* attracting the pre-empted land. The trial Court held that the pre-emptee admitted in evidence that Joydhar Kha died on 31.10.1945. But the pre-emptor stated that Joydhar Kha died on 30.11.1944 which was after Karim Kha's death dated 13.11.1994 and as such the pre-emptor inherited land of the *khatian* as heir of Joydhar Kha. The above findings of the Assistant Judge is totally wrong and misreading of evidence of OPWs. OPW1 in evidence stated that Joydhar Kha died 31.10.1944 but the learned Assistant Judge erred in law in ascertaining date 31.10.1945 in place of 31.10.1944. It is well settled practice that if any ambiguity arises about any word or any number written, the learned Judge has to compare the writings of that particular person written in other places. I have compared the writings of the learned Judge in other places of the evidence of OPW1. The number 5 is found prominent and clear in everywhere of recorded evidence. Number 4 written in other places are also similar to the last number of date 31.10.1944. The learned Assistant Judge wrongly held date 31.10.1944 as 31.10.1945 in the evidence of OPW1. Therefore, the admission of the death of Joydhar

Kha after the death of Karim Kha as found by the Assistant Judge is totally wrong and beyond the evidence on record.

From the exhibited documents of the pre-emptor and oral evidence led by him, I find that he failed to prove that he is a co-sharer in the suit *khatian* either by inheritance or by purchase. Although, it is found that the application for pre-emption has been filed within time and legal formalities were complied with but he cannot get an order of pre-emption without having been a co-sharer of the suit *khatian*. The Court of appeal below correctly assessed the evidence both oral and documentary and found that no record has been prepared in the name of the pre-emptor or in the name of his predecessors and he being not a co-sharer is not entitled to get the order of pre-emption.

Although the lower Appellate Court decided the facts of death of Joydhar Kha in a different way, which is not correct but his ultimate decision of allowing the appeal rejecting the case for pre-emption is well founded. Therefore, I find no error of law in the impugned appellate judgment and order which occasioned failure of justice. There is no misreading and non-consideration of evidence and as such the judgment of the appellate Court should not be interfered with by this Court.

In view of the discussion made hereinabove, I find no merit in this rule. Accordingly, the rule is discharged. However, there will be

no order as to costs. The judgment and order passed by the appellate Court is hereby affirmed.

The order of *status quo* stands vacated.

Communicate the judgment and send down the lower Court records.