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

**Present:**
Mr. Justice Md. Khairul Alam

**Civil Revision No. 1360 of 2012**

Miah Chan.
….. Petitioner.
-Versus-
Md. Hatem Ali Afrad and others.
….. Opposite parties.
Mr. Md. Mozammal Hossain with
Mr. Md. Harun-or-Rashid and
Ms. Mahfuza Begum, Advocates
…… For the petitioner.
Mr. Md. Ruhul Quddus Kazal with
Mr. Akter Rasul and
Mr. Kamal Parvez, Advocates
..... For the opposite parties.

Heard on: 24.07.2025, 30.07.2025 and
**Judgment on: 06.08.2025**

This Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 26.02.2012 passed by the learned Joint District Judge, 2nd Court, Narsingdi in Miscellaneous Appeal No. 05 of 2007 allowing the appeal and thereby setting aside the judgment and order dated 28.01.2007 passed by the learned Senior Assistant Judge, Sadar, Narsingdi in Pre-emption Case No. 56 of 1997 filed under section 96 of the State Acquisition And Tenancy Act, 1950 (shortly the Act, 1950) allowing the pre-emption case should not set aside, and/or pass such other or further order or orders as to this court may seem fit and proper.

Relevant facts for disposal of the Rule are that the present petitioner, as pre-emptor, filed the pre-emption case under section 96 of the Act, 1950, impleading the present opposite parties as pre-

emptees, seeking to pre-empt the case property. The case of the pre-emptor, in short, is that the pre-emptor is the co-sharer of the case property by inheritance, and accordingly, R.S. Khatian No. 491 and 1491 were rightly prepared in his name and the name of his full brother Alam Chan, the pre-emptee No. 2, who sold his share of the holding to the pre-emptee No.1, a stranger, by a Kabala deed dated 12.08.1997 with a consideration of Taka 42,000/- without giving him any notice, as required under the provision of section 98 of the Act, 1950. The pre-emptor came to know about the sale on 15.08,1997 and applied for the certified copy. Upon obtaining the certified copy of the deed on 19.08.1997, the pre-emptor discovered that an exchange deed had been fraudulently created to defeat his right of pre-emption. Hence the case.

The pre-emptee No. 1 contested the said pre-emption case by filing a written objection, denying the material allegations made in the pre-emption application. The case of pre-emptee No. 1, in short, is that the claim of the pre-emptor is barred by estoppels, waiver, and acquiescence. The transaction is not a sale, rather, pre-emptee No. 1 and pre-emptee No. 2 exchanged their respective lands for convenience. Being an exchange deed, only a token price was shown in the deed. The cunning pre-emptor, with *mala fide* intention and greed to acquire the case land at a minimum price, instituted the case. Hence, the case is liable to be dismissed.

During the trial, both parties adduced both oral and documentary evidence in support of their respective cases, and the documentary evidence adduced by the parties was duly exhibited.

After conclusion of the trial, the learned Senior Assistant Judge, Sadar, Narsingdi by the judgment and order dated 28.01.2007 allowed the said pre-emption case holding, inter alia, that the case was not barred either by limitation, defect of parties, or the principles of estoppel, waiver and acquiescence. It was also held that the pre-emptor was a co-sharer in the case holding and that the impugned deed was out and out a sale deed.

Against the said judgment and order, the pre-emptee No. 1 preferred Miscellaneous Appeal No. 05 of 2007 in the court of District Judge, Narsingdi which was subsequently heard and disposed of by the learned Joint District Judge, 2nd Court, Narshingdi, who by the judgment and order dated 26.02.2012 allowed the same and thereby reversed the judgment and order passed by the trial court, holding inter alia that the alleged transfer was not out and out a sale in the guise of an exchange, rather an exchange.

Being aggrieved thereby the petitioner filed this civil revision and obtained the Rule and an order of stay.

Mr. Md. Mozammal Hossain, the learned Advocate appearing for the petitioner submits that pre-emptee No.1 was not the owner of the property which he allegedly exchanged with the case property, the value of the case property is more higher than that of the property exchanged which proves that the impugned transaction was a colourable transaction and the trial court rightly held that the impugned transaction was out and out a sale, but the court of appeal below without adverting the said finding with evidence on record erroneously held that the impugned deed was an exchange deed. He next submits that section 103 of the Evidence Act clearly stipulates that the burden

of proof as to any particular fact lies on that person who wishes the Court to believe its existence, since the pre-emptee claimed that the alleged deed was not a sale deed but a deed of exchange, the onus was upon the pre-emptee to prove the same, which he failed to do. In support of the submission, he refers to the case of Uzzal Sarker and others vs. Kutub Uddin and others reported in 76 DLR (AD) (2024) 175. He next submits that when the nature of transaction becomes doubtful on the specific allegation made by the pre-emptor, the matter is required to be tested by adducing evidence and the pre-emptor by adducing evidence proved that the alleged deed was out and out a sale deed not a deed of exchange but the court of appeal below on misconception of law and fact passed the impugned order. In support of the submission, he refers to the case of Alfazuddin Mollah and others vs. Almas Chokder reported in 56 DLR (AD) (2004) 179. He lastly submits that the court has ample power to adjudicate whether the transaction of the case is genuine or colourable in the guise of a deed of exchange. In support of the submission, he refers to the case of Jul Haque vs. Wahed Ali reported in 74 DLR (AD) (2022) 161.

Per contra, Mr. Md. Akter Rasul, the learned Advocate appearing for opposite party No.1 submits that when a transaction is reduced to writing and registered in accordance with law, the deed itself is proof of its content. He next submits that the contents of a registered deed will prevail until and unless rebutted by sufficient and credible evidence, and it is the pre-emptor who must prove, by tangible evidence, that the impugned deed, though styled as an exchange, is in reality a sale. He next submits that since the pre-emptor failed to prove by adducing any

evidence that the transaction in question is a colourable one, the court of appeal below rightly passed the impugned judgment and order.

Heard the learned Advocate for the contending parties, perused the revisional application and other materials on record including the impugned judgment and order.

It appears that the present petitioner as pre-emptor filed the miscellaneous case under section 96 of the Act praying for pre-emption of the case land, alleging that the impugned exchange deed was an out-and-out sale deed. The trial Court allowed the pre-emption holding the exchange deed, out and out a sale deed, but the Court of appeal below reversed the same holding that the impugned deed is an exchange deed.

Therefore, the sole point for determination in this Rule is whether the learned Court of Appeal below was justified in reversing the finding of the trial court to the effect that the impugned deed is, in substance, a deed of sale in the guise of an exchange.

A sale is a transfer of ownership for money, while an exchange is a transfer of ownership of one thing for another. A transfer by way of exchange, along with some other transfers such as gift, mortgage, conditional sale, waqf, is exempted from pre-emption under section 96 of the Act, 1950, but a sale is always pre-emptable.

In general, documentary evidence is given preference over oral evidence. Section 59 of the Evidence Act provides that all facts, except the contents of documents, may be proved by oral evidence. Sections 91 and 92 of the Evidence Act also provide that when a contract, grant or other disposition of property is reduced to writing, or when a matter

is required by law to be in writing, the oral evidence cannot be used to contradict the contents.

Taking advantage of these provisions, unscrupulous people sometimes execute deeds styled as exchange, mortgage, gift or conditional sale, etc, concealing the true nature of the sale. Our apex court has consistently held that in pre-emption proceedings, the Court may examine the real nature of a transaction to prevent fraud upon the law.

In the case of Muzaffar Ali Bepari vs. Omar Ali and others, reported in 1 BLC (AD) 25, it has been held that where a reconveyance is for the purpose of defeating the right of pre-emption and that the reconveyance is a collusive one through the clandestine understanding between the buyer (pre-emptee) and the seller (original owner) and that the transfer is a colourable and sham transaction and that the pre-emptee, in fact, did not part with the possession of the land allegedly shown to have been reconveyed to the original owner, a reconveyance of the aforesaid nature would not affect the right of pre-emption.

In the case of Uzzal Sarker and others v. Kutub Uddin and others, reported in 76 DLR (AD) (2024) 175, it was established by the pre-emptor, through evidence that the alleged pre-emptee did not deliver possession of the land and continued to enjoy both properties. The pre-emptee failed to rebut this evidence. The trial Court, upon considering the evidence presented by the pre-emptor, held that the purported exchange had never taken effect. The Court of Appeal, acting as the final Court of fact, affirmed this finding. Subsequently, this Division reversed the findings of the Courts below. Ultimately, the Apex Court endorsed the view of the trial Court.

In the case of Alfazuddin Mollah and others vs. Almas Chokder reported in 56 DLR (AD) (2004) 179, the pre-emptor filed the pre-emption application claiming an exchange deed out and out a sale deed, the pre-emptee filed an application under Order VII rule 11 of the Code of Civil Procedure alleging that against an exchange deed no pre-emption lies. The application was rejected by the trial Court, and in revision, the said order was set aside and the pre-emption application was rejected. Our apex Court held that when the nature of the transaction becomes doubtful on the specific allegation made by the pre-emptor, then the matter is required to be tested by adducing evidence.

In the case of Jul Haque vs. Wahed Ali reported in 74 DLR (AD) (2022) 161, the trial court found that the pre-emptee was holding both the land of exchange and thereby held that fraud had been practiced for misusing the provision of law and allowed the pre-emption. The Court of Appeal below affirmed the same, this Division set aside the said judgments. Our apex court held that the court has ample power to adjudicate whether the transaction of the case is genuine or colourable in the guise of a deed of exchange.

Considering the authorities together, it appears to me that if any transaction by way of exchange is found to be colourable or a sham, and the right, title, and interest in the property purportedly exchanged are not duly transferred, then the right of pre-emption shall remain unaffected. However, once the genuineness of the transfer is established by showing that the right, title, and possession have in fact been transferred to the respective transferees, the prayer for pre-emption cannot be entertained; in other words, pre-emption will not be

granted. For this purpose, the Court is empowered to examine the true nature of the deed on the basis of evidence.

In the instant case, PW1 admitted that both pre-emptee No.1 and pre-emptee No. 2 had been in possession of their respective transferred lands. Considering the said evidence of the PW 1, the Court of Appeal below held that the genuineness of the exchange has been established by reliable evidence and it has also been established that after the exchange, the right, title and interest of the respective land had already been altered and that both the transferees were in possession of their respective transferred lands. Accordingly, the Court of Appeal below also held that the trial Court erred in law in holding that the impugned deed was, in substance, a deed of sale in the guise of an exchange.

From the records, it also appears that although the pre-emptor, as PW1, admitted in his cross-examination that both pre-emptee No. 1 and pre-emptee No. 2 had been possessing their respective transferred lands, he nevertheless contended in the pre-emption application as well as in his deposition that the transfer was for money. Other PWs also supported the said contention of the pre-emption application. The pre-emptee No. 1, however, denied the allegation of monetary consideration. Admittedly, a smaller parcel of land of pre-emptee No. 1 is in the possession of pre-emptee No. 2, and if, for the sake of argument, it is held that a larger piece of land was exchanged for a smaller piece of land along with some money, a question may arise as to the true nature of that transfer.

It is now well settled that for a transaction to amount to a “sale” within the meaning of section 54 of the Transfer of Property Act, the

consideration must consist solely of money. Where the consideration is partly of money and partly of immovable property, such a transaction cannot be treated as a sale, rather, it falls within the ambit of section 118 of the Act as an “exchange.” In the Case of Ismail Shah vs. Saleh Muhammad Shah and others reported in (1925) 86 I.C. 266, a deed was executed purporting to be a deed of exchange, whereby a house valued at Rs. 1,500/- was exchanged for land together with an additional sum of Rs. 500/-. The subordinate Judge rejected the claim for pre-emption, holding that the transfer was an exchange. The Lahore High Court affirmed the said view, holding that the transfer of immovable property in lieu of another property, even with an additional money adjustment, constitutes an exchange and not a sale.

Therefore, the authorities as cited by the learned Advocate for the opposite parties, and discussed hereinabove, are not applicable in the facts and circumstances of the present case.

There is nothing on record to show that the deed of exchange in the instant case was a colourable and sham transaction or, in other words, was not a genuine one or that the exchange was made with the object of defeating the right of pre-emption.

In the above facts and circumstances, I am of the view that the learned Court of Appeal below was justified in reversing the finding of the trial court to the effect that the impugned deed is, in substance, a deed of sale in the guise of an exchange, and do not find any reason to interfere with the impugned judgment and order.

Accordingly, the Rule is discharged without any order as to costs.

The order of stay granted earlier by this Court is hereby recalled and vacated.

Send down the L.C.R. along with a copy of this judgment to the concerned court for information and necessary action.

Kashem, B.O