

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION**

(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Emdadul Huq

Civil Revision No. 1427 of 2012.

Md. Abdul Wares & another
.....Petitioner.

Md. Amidul Islam alias Photo Miah being
dead his heirs 1(a) Momtaz Begum and others.
.....Opposite parties.

Mr. Md. Nazrul Islam with
Mr. Abdul Baten, Advocates
.....For the petitioner.

Mr. Md. Abdul Haque, Advocate.
.....For the opposite parties.

Heard on : The 16th June, ist, 7th and
15th July, ist, 2nd and 15th September,
2014.

Judgment on: The 20th October, 2014.

The Rule issued in this Civil Revision is about sustainability of the judgment and order dated 29-01-2012 by which the learned Joint District Judge, 2nd Court, Sherpur allowed Miscellaneous Appeal No. 11 of 2003 and thereby allowed pre-emption of 47 decimals of land on reversing the judgment of dismissal dated 03-06-2003 passed by the learned Assistant Judge, who disallowed the pre-emption by dismissing Pre-emption Miscellaneous Case No. 14 of 2000 instituted under section 96 of the State Acquisition and Tenancy Act, 1950 (**shortly the Act, 1950**).

Pre-emptor's Case

The opposite party No. 1 Aminul Islam @ Photo Mia (deceased) filed the above noted case for getting pre-emption of the case land as a contiguous land holder. He claimed that the case land was recorded as Plot No. 1401 in C.S. Khatian No. 314

showing Arobdi Mondal as the owner and his son Rahim Uddin as the possessor. Subsequently the case plot was recorded in the ROR khatian No. 564 in the name of Rahim Uddin's son Nasimuddin from whom opposite party Nos. 3-32 inherited the case plot. Opposite party No. 3, by kabala dated 06-09-1999, sold the case land to two strangers being opposite party Nos. 1 and 2. No notice of the sale was served upon the pre-emptor. He came to know of the sale from other people and collected certified copy on 07-02-2000 and filed the case.

The pre-emptor acquired the contiguous plot No. 1403 by a registered exchange deed dated 03-12-1984. Moreover he became a co-sharer in the case jote by virtue of a deed of hiba dated 14-06-1981 executed by his father Seraj Mia being one of the sons of Mozaffar Ali a descendant of the C.S. tenant Arobdi Mondal.

Case of the pre-emptees

The pre-emptees (petitioners), in their written objection, contend that the case is not maintainable, that it suffers from the defect of party and that it is barred by limitation and also by the principles of waiver, estoppel and acquiescence.

They claim that the vendor firstly offered to sale the case land to the pre-emptor and other co-sharers. But all of them refused to purchase the same. So the vendor sold the case land to the pre-emptees. After purchase the pre-emptees have improved the case land. The pre-emptor has filed the case due to increase in the price of the case land.

Proceedings and decisions of the courts below

At the trial, the pre-emptor adduced only oral evidence through three witnesses including himself as P. W. 1. The pre-emptees adduced only oral evidence through two witnesses.

The trial Court, upon consideration of the evidence on record, dismissed the case upon recording findings that the case was barred by limitation, that it was bad for defect of party with a further finding that the pre-emptor failed to prove his status as a contiguous land holder and also as a co-sharer.

In the appeal, the appellant-pre-emptor adduced additional evidence and produced some documents that were marked as Exhibit-1 (series) and 2 (series).

After hearing both sides, the learned Joint District Judge, by the judgment dated 18-04-2004 set aside the judgment of the trial court and decided to send the case back on remand for framing an issue on the status of the pre-emptor as a contiguous land holder and to write out a fresh judgment on the basis of the evidence on record.

Against that decision, the pre-emptees filed Civil Revision No. 3330 of 2004. After contested hearing, a single Bench of this Court by a judgment dated 25-05-2009 set aside the judgment of the appellate court and sent the Appeal on remand with a direction that the parties should be allowed to adduce additional evidence and thereafter a fresh judgment should be delivered by the appellate court.

Then the pre-emptor prayed for amendment of the pre-emption application for addition of some persons as parties, who had been earlier named by the pre-emptees in the trial court as necessary parties in reply to interrogatories filed by the pre-emptor. This application was allowed by the appellate court by order dated 23-01-2011 and 38 persons were added as parties.

After contested hearing the learned Joint District Judge allowed the Appeal by the impugned judgment on setting aside the judgment of dismissal passed by the trial Court and allowed pre-emption.

Deliberation in Revision

At the hearing of this Revision, Mr Md. Nazrul Islam, the learned Advocate for the petitioner-emptees, submits that the appellate court committed an error of law in holding that the Feeder Road as mentioned in the transfer document as being located on the southern side of the case land is not properly represented by the Government of Bangladesh through the Deputy Commissioner (D.C) (opposite party No. 34).

Mr. Islam the learned Advocate next submits that the Roads and High Ways Department, should have been added as a party to represent the said Feed Road.

Mr. Islam, the learned advocate, next submits that the appellate Court also failed to consider material evidence on record, namely Exhibit-2 being the certified copy of the kabala under pre-emption which does not mention any contiguous land holder with the name Photo Mia as the alias name of the pre-emptor Aminul Islam.

Mr. Islam, the learned advocate lastly submits that the 38 persons named by the pre-emptees at the trial stage were not added as respondents in the trial court, but so added at the appellate stage beyond the period of limitation of 4 (four) months and therefore the addition was illegal.

Mr. Islam the learned Advocate lastly submits that according to orders dated 01-03-2011 and 02-06-2011 notices upon added respondents being Nos. 45, 46 and 63 were not served, and therefore the appeal was not legally disposed of by the appellate court.

In reply Mr.Md. Abdul Haque, the learned advocate for the pre-emptors submits that the appellate court, as the last court on the questions of fact, recorded its decision upon discussion of the evidence on all the relevant issues and therefore no interference is necessary in this Revision.

Mr. Haque, the learned advocate next submits that the pre-emptor has proved his status as a contiguous land holder which is admitted not only in the document under pre-emption but also proved by his title deed and that petitioner's alias name being Photo Mia is admitted by the witnesses of the pre-emptees.

Mr. Haque, the learned advocate further submits that the Government represented by the D.C, as opposite party No. 34 sufficiently represents the interest of the contiguous land on the southern side, which is described in the kabala under pre-emption,

as Feeder Road and therefore the case is not bad for defect of party.

Mr. Haque, the learned Advocate lastly submits that the pre-emptees, at the trial stage, named 38 persons as necessary parties without specifying their status as co-sharer or contiguous landholder, and yet the pre-emptor impleaded them in the appeal only to meet their objection.

Findings and decisions in Revision

The trial Court took up four points for decision namely (1), maintainability of the case, (2), limitation, (3) defect of party and (4), the pre-emption prayed for.

The appellate Court, in addition to those four points, took up another three points, namely, (1) bar due to waiver and acquiescence, (2) improvement claimed by the pre-emptees and (3) pre-emptor's status as contiguous land holder.

On the issue of limitation the trial court, upon discussion of the oral evidence on record, found that the sale actually took place 7 or 8 months before the execution of the kabala on 06-07-1999 and that the pre-emptor knew of the sale but filed the case after 8 months of his knowledge and therefore the case is barred by limitation.

The appellate Court reversed the trial court's decision on limitation on the reasoning that the statutory period of limitation of four months as specified by section 96 of the Act, 1950 is to be reckoned from the date of registration of the transfer deed in the volume of the sub-registry office under section 60 of the Registration Act. The appellate court decided that the case is not barred by limitation, because the transfer document was registered in the volume on 25-01-2000 and the case was filed on 18-05-2000.

I fully agree with the decision of the appellate Court in view of the date of registration as recorded in Exhibit-2 being the certified copy of the transfer document.

With regard to defect of party, the trial court, with reference to the statements of P.W.1 and P.W.2 recorded a finding that some contiguous land holders were not made parties. The trial court however did not specifically mention their names.

On the contrary the appellate Court recorded a finding that all the co-sharers by inheritance have been made parties in the pre-emption application as opposite party Nos. 3-32 being the admitted heirs of the C.S. and S. A recorded tenant Rahim Uddin.

The appellate Court further recorded a finding that the three contiguous land holders being Lachu Mia, Abdul Malek and Aminul Islam as mentioned in the kabala under pre-emption have been impleaded as parties.

The appellate Court further recorded a finding that as per the kabala under pre-emption the southern side of the case land is a Feeder Road of the Government and it is represented in the pre-emption application as Government of Bangladesh, represented by the Deputy Commissioner.

The appellate Court further recorded a finding that, apart from the said co-sharers and contiguous land holders, the pre-emptor-appellant, at the appellate stage, impleaded 38 persons as parties (respondent Nos. 35-72) in view of the objection raised by the pre-emptees in the trial Court.

The appellate Court concluded that the case does not suffer from the defect of party and thus reversed the decision of the trial Court on that point.

I find nothing on record to disagree with the appellate Court on the point of defect of party. However it is noted that there is nothing on record to show that the said 38 persons are necessary parties as co-sharers or contiguous land holders. It appears that the appellant pre-emptor impleaded them only to meet the objections raised by the pre-emptees.

The argument advanced by Mr. Md. Nazrul Islam, the learned Advocate for the petitioner pre-emptees with regard to non service of notice of the Appeal upon the added respondents Nos.

45, 46 and 63 as stated in orders dated 01-03-2011, passed by the appellate court is not acceptable. Because they are not necessary parties and therefore non service of notice upon them will not render the above decision of the appellate Court on the point of defect of party as illegal.

With regard to the pre-emptor's status as contiguous land holder the appellate Court, on the basis of the transfer document (Exhibit-2) and the statements of O.P.W.1 and 2 and also on the pre-emptor's title document by which pre-emptor acquired the contiguous Plot No. 1403 (Exhibit-2/1), the appellate court found that the pre-emptor Aminul Islam is a contiguous land holder and that the pre-emptor's alias name is Photo Mia.

On perusal of the evidence on record, I fully agree with the finding of the appellate Court on the pre-emptor's alias name and his status as a contiguous land holder.

With regard to the application of the principles of waiver, estoppel and acquiescence, the appellate Court, with reference to the statements of the witnesses of the pre-emptees, found that the pre-emptees have failed to prove their case on this point.

The appellate Court correctly relied on the principle laid down in the case of Fazaruddin-Vs.-Maizuddin and others, reported in 44 D.L.R.(AD), page-62, to the effect that mere verbal assurance of a person having right to pre-emption can not be a bar to preemption unless other facts and circumstances make out a clear case of waiver and acquiescence.

I agree with the finding of the appellate Court that the pre-emptor is not barred by the principle of estoppels, waiver and acquiescence.

With regard to improvement of the case land the appellate Court, with reference to the statements of the witnesses of both sides, found that the preemtees have improved the case land by filling in earth and accordingly fixed the cost at Tk. 500/-.

I find nothing on record to disagree with the appellate Court on the improvement aspect.

The appellate Court recorded a finding that the case is maintainable and concluded that the pre-emptor is entitled to pre-emption subject to payment of an improvement cost of Tk. 500/-

I fully agree with the decision of the appellate Court.

This Rule has no merit.

In the result, the rule is discharged. The impugned judgment and order dated 29-01-2012 passed by the learned Joint District Judge, 2nd Court, Sheerpur in Miscellaneous Appeal No. 11 of 2003 is upheld subject to modification that the preemptor is directed to deposit the improvement cost within 60 days after receipt of the copy of this judgment and the lower court records and thereafter the delivery of possession will take place.

The trial Court shall inform the learned Advocate engaged by the pre-emptor for this purpose or otherwise notify the pre-emptor.

No order as to cost.

Send down the lower court record with a copy of this judgment.

Habib/B.O