

Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.830 OF 2006.

Md. Solaiman Hossen

..... Respondent-Petitioner

-VERSUS-

Md. Anwar Hossen and others

..... Preemtor-opposite Parties.

No one appears

..... For the petitioner.

Mr. Humayun Kabir, Advocate

.....For Preemtor-opposite parties.

**Heard on 03.11.2024, 13.11.2024
and 25.11.2024.**

Judgment on 25.11.2024.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and order dated 10.10.2005 passed by learned Joint District Judge, 2nd Court, Sirajganj in Miscellaneous Appeal No.27 of 2002, allowing the appeal and reversing the Judgment and order dated 02.03.2002 passed by the learned Senior Assistant Judge, Shahjadpur, Sirajganj in Miscellaneous Case No.41 of 1997 dismissing the case should not be set aside and/or

pass such other or further order or orders as to this Court may seem fit and proper.

Facts in brief for disposal of the Rule is that the preemptor filed Miscellaneous Case No.41 of 1997 before the Senior Assistant Judge, Shahjadpur, Sirajganj, for preemption of the case land contending inter-alia that he is a co-sharer by purchase in the Case Khatian. The preemptor Nos. 2, 4-6, sold out .05 acres of case land to the preemptor purchaser by the Registered deed dated 17.07.1994, beyond his knowledge, without serving any notice before transferring the case land but the case failed as the case land was reconveyed to the vendors. Thereafter, preemptor Nos. 2-4 sold out 06 ½ acres of Land from the non-suit plot No.2323 to a stranger, preemptor-purchaser, without making over possession and having any consideration for the same collusively and later exchanged the case land with the same by the Registered kabala dated 04.02.1997 concealing the fact of sale to frustrate the right of preemption of the preemptor. The preemptor knew about the transfer on 07.04.1997 and filed the suit upon deposit

of the consideration money and the compensation within the limitation from the date of knowledge.

The preemte-purchaser contested the case by filing a written objection denying all the material allegations in the petition, contending inter alia that the preemte purchaser purchased a Banyan tree of the preemte-vendors standing on the case land at Tk.45,000/- but due to dull condition of his business opposite party purchaser could not remove the tree from the case land which led the preemte-vendors arranged a local Salish. The Salish ordered both sides to exchange the case land with 06 ½ acres of land of the preemte purchaser, which he purchased from the opposite party vendors by the Registered deed dated 16.10.1996. Accordingly, they made the exchange by the Registered deed dated 04.02.1997. The preemptor has filed the case with untrue statements, so the preemption Miscellaneous Case is liable to be disallowed.

The learned Senior Assistant Judge, Shahjadpur, Sirajganj, framed necessary issues to determine the dispute involved between the parties.

Subsequently, the learned Senior Assistant Judge, Shahjadpur, Sirajganj, dismissed the case by the Judgment and order dated 02.03.2002.

Being aggrieved, the preemptor-opposite party, as appellant, preferred Miscellaneous Appeal No.27 of 2002 before the District Judge, Sirajganj. Eventually, the learned Joint District Judge, 2nd Court, Sirajganj, allowed the appeal and reversed the Judgment and order of the trial Court.

Being aggrieved, the preemptor-petitioner preferred this Civil Revision under section 115 (1) of the Code of Civil Procedure before this Court and obtained the instant Rule and an order of stay which was extended from time to time.

No one appears to press the Rule on behalf of the petitioner. However, in the presence of Mr. Humayun Kabir, the learned advocate for the preemptor-opposite party, I am inclined to dispose of the Rule on merit.

I have anxiously perused the Judgment of the courts below, as well as oral and documentary evidence and other materials on the records. It manifests that, admittedly, the pre-emptor-petitioner is a co-sharer by purchase in the

Case khatian. It appears from the parties' pleadings that the pre-emptive opposite party No.1, in his written objection, clearly asserted that he purchased a Banyan tree from the opposite party vendors. Due to the dull condition of his business, he could not remove the tree from the case land, which led the opposite party vendors to arrange a local Salish. The Salish ordered both sides to exchange the case land with 06 ½ acres of Land of the opposite party purchaser, which he purchased from the opposite party vendors by the registered dated 16.10.1996. Accordingly, they made the exchange by the registered deed dated 04.02.1997.

It manifests that the preemptor petitioner examined as many as five PWs, and the preemptive opposite party examined as many as four OPWs. I have scrutinized their deposition, cross-examination, and exhibit -1- alleged deed of exchange. It appears from the face of the said kabala that it is a deed of exchange, not a sub-kabala, and it is the positive contention in the pleadings of the preemptive petitioner that the case land was not sold in favor of him. While disallowing the Miscellaneous Case, the learned

Judge of the trial court says that the deed is not the sale deed but deed of exchange; the properties of the case deed exist, and the parties to the deed are the owners of those properties, and therefore, the deed in question is nothing but a deed of exchange which is not preemptable.

On the other hand, while reversing the trial court's Judgment, the learned Judge of the appellate Court says that the deed in question is colorable.

Having perused the appellate Court's Judgment, it manifests that the appellate Court, as a last court of facts, did not at all properly discuss the evidence on record, did not hold that findings of the trial Court are perverse for misreading, nonreading, and/or the trial Court did not correctly appreciate the particular parts of the evidence on record. Moreover, the appellate Court did not controvert the trial court's reasoning, which hit the root of the suit's merit.

Notably, as per provision of section 96 of the State Acquisition and Tenancy Act, 1950, it is a decided matter in our judicature that in the case of a colorable transaction, the onus of proof entirely lies upon the party, who asserts that the transfer is a sub-kabala in disguise of a deed of exchange under section 101 and 103 of the Evidence Act [I of 1872]. Apart from

this, the contents of the deed will get priority until and unless it is rebutted by sufficient convincing, credible evidence, with that of the oral evidence adduced from the sides of the parties. The preemptor's incumbent duty is to prove by adequate tangible, credible evidence that the deed in question is out and out a sale deed, in disguise of a deed of exchange.

In the instant case, having perused the deposition and cross-examination of the PWs it appears to me that the preemptor-petitioner has failed to discharge his onus of proof that the alleged deed out and out a sub-kabala and the learned Senior Assistant Judge, Shahjadpur, Sirajganj in his observation and findings based on evidence on records, rightly held that the deed in question is purely a deed of exchange, not a sub-kabala and as such it is not preemptable under the ambit of Section 96 of the State Acquisition and Tenancy Act, 1950.

In view of the above facts and circumstances of the case, it appears that I find merit in the Rule.

Resultantly, the Rule is made absolute without any order as to the cost.

The impugned Judgment and order dated 10.10.2005 passed by learned Joint District Judge, 2nd Court, Sirajganj in Miscellaneous Appeal No.27 of 2002 is hereby set aside

and the Judgment and order dated 02.03.2002 passed by the learned Senior Assistant Judge, Shahjadpur, Sirajganj in Miscellaneous (Preemption) Case No.41 of 1997 is hereby affirmed.

The order of stay passed at the time of issuance of Rule stands vacated.

Communicate the Judgment and send down Lower Court Records at once.

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(Md. Salim, J).