

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 590 of 2007

IN THE MATTER OF :

An application under Section 115(4) of the Code
of Civil Procedure.

-And-

In the Matter of:

Mohammad Zakaria

..... Petitioner

Versus

Mustafizur Rahman and others

.....Opposite parties

Mr. Zulfiqur Bulbul Chowdhury, Adv

... For the petitioner

None

..... For the Opposite parties

Heard and Judgment on: 08.10.2020.

Md. Riaz Uddin Khan; J-

By this rule the opposite party No. 1 was asked to show cause as to why the impugned judgment and order dated 20.08.2006 passed by the learned Joint District Judge, Additional Court, Chittagong in Miscellaneous Appeal No. 200 of 1996 affirming the judgment and order dated 14.08.1996 passed by the learned Senior Assistant Judge, Satkania, Chittagong in Miscellaneous Case No.26 of 1994 should not be set aside and/or such other or further order or orders as to this court may seem fit and proper.

The Pre-emptor-appellant-petitioner filed Miscellaneous Case No. 26 of 1994 praying for Pre-emption of the case land claiming himself as the co-sharer by inheritance in the case Khatian. The Opposite Party No. 1 as Pre-emptee contested the suit denying the facts that the Pre-emptor is a co-sharer by inheritance as B.S Khatian has not been recorded in the name of the Pre-emptor or his predecessor. Upon hearing the trail court was pleased to dismiss the Pre-emption case on the finding that since the pre-emptor is not the co-sharer by inheritance and the B.S Khatian has not been recorded in the name of the Pre-emptor or his predecessor, he has no right to file the case as Pre-emptor claiming himself as the co-sharer by inheritance. Against the judgment of the trail court the pre-emptor filed Miscellaneous Appeal No. 26 of 1996. In the appeal the Pre-emptor appellant filed an application for amendment of the plaint under Order 6 Rule 17 of the Code of Civil Procedure claiming himself as the co-sharer tenant of the contiguous land. That application was allowed though the Pre-emptee contested it by filing written objection. However, after hearing the appeal the learned Joint District Judge, Additional Court, Chittagong by his impugned judgment and order dated 20.08.2006 dismissed the appeal on the findings amongst other that the pre-emptor appellant is not the co-

sharer by inheritance since B.S Khatian has not been recorded in his or his predecessor's name. In his finding the Appellate Court further observed referring a decision of the High Court Division that right of Pre-emption as a contiguous land owner not having raised in the original application under section 96 of the State Acquisition and Tenancy Act, 1950, cannot be allowed to do so by subsequently amending the application to include a claim to that effect. With these findings the court of appeal below dismissed the appeal.

Being aggrieved by and dissatisfied with the said judgment and order passed by the trial court as well as the court of appeal below the Pre-emptor-appellant filed the instant Revision before this Court and obtained the rule as aforesaid.

Mr. Zulfiqur Bulbul Chowdhury, the learned Advocate for the petitioner submits that the Appellate Court below is wrong in its finding that the appellant filed an application for amendment of the plaint and it was kept with record. Because the Appellate Court by its order no. 95 dated 27.10.2003 allowed the application for amendment. Mr. Chowdhury then submits that since the amendment of the Pre-emption application was allowed the Pre-emptor should have given a chance to adduce evidence in favour of his claim and if there was any objection the pre-emptee had an

opportunity to file better statement and adduce evidence in favour of his claim. Mr. Chowdhury next submits that upon which decision passed by the High Court Division, the Court of appeal below relied upon was subsequently reversed by the Hon'ble Appellate Division which has been reported in 42 DLR (AD)-Page-110 in the case of Sree Shushil Ranjan Dutto -Vs- Al-Haj Moulvi Idris Mia. The learned advocate heavily relied upon the decision particularly paragraph Nos.11 and 12. Mr. Chowdhury finally submits that since the Pre-emptor petitioner by subsequent amendment claimed himself as a contiguous owner of the case land but could not adduce evidence, this is a fit case for remand to determine the new facts.

Though the Pre-emptee-Opposite party No. 1 appeared by filing a vokatnama but did not appear before this court to oppose the rule or file any counter-affidavit controverting the claim of the Pre-emptor-appellant-petitioner.

I have heard the learned Advocate for the petitioner, perused the application, the judgments passed by both the courts below and the record of the Lower Court. It appears from the Lower Court Record that by order No. 95 dated 27.10.2003 the Lower Appellate Court allowed the application for amendment filed by the Pre-emptor appellant regarding his claim as the contiguous owner. But it

appears from the impugned judgment that the Lower Appellate Court failed to apply his judicial mind regarding this aspect of the case and wrongly stated that an application for amendment was filed which was kept with the record. It further appears from the impugned judgment that the Lower Appellate Court relied upon a decision of the case of Shree Shushil Ranjan Dutta-Vs-Al-Haj Moulvi Idris Mia reported in 38 DLR Page-206 but that decision of the High Court Division has been reversed by the Hon'ble Appellate Division and it has been reported in the 42 DLR (AD) Page-110. In that case the question arose as to whether amendment of Pre-emption application introducing a new claim for Pre-emption on the basis of contiguous ownership of the disputed land would materially alter the nature and character of the proceeding, particularly when it is barred by limitation and the Hon'ble Appellate Division held that nothing will stand in the way of the appellant for claiming the Pre-emption either as a co-sharer tenant or as a tenant holding land contiguous to the land transferred.

In the case of Nurun Nahar -Vs- Md. Fazlur Rahman reported in Bangladesh Supreme Court Report (1979) 135 it is held that:-

“Once an amendment of the plaint is allowed the amendment will relate back to the date of the institution of the suit, and will be operative from that date.”

Since in the present case the pre-emption case was filed within the statutory period as held by the trial court as well as the Appellate Court and the amendment was allowed though in a court of appeal but as per the above mention decision of the Apex Court of our country when an amendment is allowed it will relate back to the date of institution of the suit and will be operative from that date since the original Pre-emption case was within time, the amendment of the plaint will not be a bar on the ground of limitation. That being the position of law I have no option but to interfere with the impugned judgment and order.

In the facts and circumstances of the case and for the interest of justice my considered view is that the justice would be best served if the case is send back for remand to the court of appeal below, since the original Pre-emption case was filed in 1994, only to determine the claim of the Pre-emptor whether he is a tenant holding land contiguous to the land transferred or not by adducing evidence from both the sides, if the parties desire.

In the result the rule is made absolute.

The judgment and order dated 20.08.2006 passed by the learned Joint District Judge, Additional Court, Chittagong in Miscellaneous Appeal No. 200 of 1996 affirming the judgment and

order dated 14.08.1996 passed by the learned Senior Assistant Judge, Satkania, Chittagong in Miscellaneous Case No. 26 of 1994 is hereby set aside. The Appellate Court is directed to give both the parties an opportunity to adduce additional evidence only to decide whether the Pre-emptor is a tenant holding land contiguous to the land transferred or not and pass fresh judgment in accordance with law in the light of observations made above. The appellate Court below is further directed to dispose of the appeal expeditiously considering the long pending dispute.

Send down the case record at once along with a copy of this judgment and order.