

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present:

Mr. Justice S.M. Masud Hossain Dolon

Civil Revision No. 3755 of 2005.

Md. Cherag Ali.

..... Pre-emptor- petitioner.

-Versus-

Md. Abdul Malik and others.

..... Pre-emptee-opposite parties.

Ms. Farhana Siraj Roonie with

Mr. Monishankar Sarkar, Advocate

... For the petitioner.

None appears for the opposite parties.

Heard & Judgment on 15.02.2024.

This Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 24.03.2005 passed by the learned Joint District Judge, Additional Court, Sylhet, in Miscellaneous Appeal No. 43 of 2002 dismissed the appeal and affirmed the judgment and order dated 25.04.2002 passed by the learned Assistant Judge (in charge) Companigonj, Sylhet in Miscellaneous (pre-emption) Case No. 4 of 2000 should not be set-aside and/or pass such other or further order or orders as to this court may seem fit and proper.

Short facts, necessary for disposal of the Rule, are that the petitioner as pre-emptor filed Miscellaneous Case being No. 4 of 2000 before the Assistant Judge, Companigonj, Sylhet under section 96 of the State Acquisition and Tenancy Act, 1950 against the opposite parties for pre-emption of the case land.

The case of the pre-emptor, in brief, is that the case land originally belongs to one Eyaj Ali and others. The said Eyaj Ali died leaving behind pre-emptor and the Pre-emptor became co-sharer of the case land by inheritance. That other co-sharer of the case land namely Aris Ali died issueless and co-sharers namely Arsad Ali died leaving behind pre-emptee co-sharers and thereafter recorded owner of the case land Jaban Ali died leaving pre-emptee co-sharers 4,5 and 10 and recorded owner of the case land Ajmal Ali died leaving behind pre-emptee co-sharer Nos.11-19. The pre-emptee co-sharers 2 and 3 are recorded owner of the case khatian and another recorded owner Suruj Ali died leaving pre-emptee co-sharer Nos.20-27. The pre-emptee seller Nos.2-5 sold the case land to the pre-emptee purchaser No.1 by registered Kobala dated 09.04.2000 and the pre-emptor came to know about the kabala on the vary date and the pre-emptor obtained the certified copy of the kabala deed on 10.04.2000 and confirmed that the pre-emptee opposite parties

transferred the case land to pre-emptee purchaser No.1 who is a stranger purchaser of the case land at consideration of Tk. 7,500/-. The pre-emptor was not aware about the disputed transfer even no notice under section 89 of the State Acquisition and Tenancy Act was served upon the co-sharer in the case land and the case land is part and parcel of the homestead of the petitioner and the opposite parties No.1 is a stranger and he has no possession in the same against which the petitioner has been filed the case in time and is entitled to get pre-emption of the case land.

The opposite party No.1 pre-emptee purchaser contested the case by filing a written objection and denied the material allegation made in the pre-emption application contending inter-alia that there is no cause of action for filing the case. The case is barred by limitation and the same is barred by defect of parties, the case is also barred by estoppels, waiver and acquiescence and the pre-emptor is not a co-sharer of the case in question holding and the pre-emptor did not deposit the actual sale price, development price and compensation. The case land originally belonged to one Kasheb Mohammad who while had been possession the same died leaving behind two sons namely Jowad Ali and Sayed Ali. The said Jowad Ali transferred some quantum of land from contiguous north of case

land to one Sonahar Ali (Predecessor of pre-emptee purchaser) in the year 1966 and delivered possession of the same. The pre-emptee purchaser has been possessing the aforesaid land by constructing dwelling house thereon, after death of his predecessors Sonahar Ali. The pre-emptee sellers Nos. 2-5 had proposed the pre-emptor to purchase the case land but the pre-emptor did not agree with the proposal because of financial problem. Subsequently the pre-emptee sellers Nos. 2-5 requested the pre-emptee to purchase the case land who agreed with the proposal with full knowledge of pre-emptor and purchaser has been residing in the case land by constructing dwelling houses thereon. The pre-emptor had been knowledge about the transfer of case land. The pre-emptee purchaser developed the case land which spending about Tk.40,000/- The pre-emptor is a greedy person and for obtaining illegal gain filed the present pre-emption case.

The learned Assistant Judge (in-charge) Companigonj, Sylhet after scrutinizing oral and documentary evidences submitted by the parties in support of their respective claims rejected the Miscellaneous Case. Against this order petitioner filed Miscellaneous Appeal being No. 43 of 2002 before the learned District Judge, Sylhet who transferred the same to the Court of learned Joint District Judge,

Additional Court, Sylhet for disposal. After hearing the parties the learned Joint District Judge dismissed the appeal and affirmed the judgment and order passed by the learned Assistant Judge (in-charge) Companigonj, Sylhet against which the petitioner filed the instant Revisional application and obtained Rule.

Ms. Farhana Siraj Roonie, the learned Advocate appearing on behalf of the petitioners, submits that the learned courts below misconceived the issues involved in the case and the relevant law applicable thereto and in consequence erred in law resulting in an error in the decision occasioning failure of justice. She further submits that both the courts below failed to discuss the facts, deposition of the witnesses and the relevant law applicable thus the courts below committed an error of law. She further submits that the courts below did not take any issue in connection with the question whether the case is barred by estoppels, waiver and acquiescence but took an erroneous view that the pre-emptor is a mediator of the transaction of the case land and he had full knowledge and misappreciation of the oral and documentary evidence on record and thus the Courts below in the decision occasioning failure of justice. She further submits that the pre-emptor is a co-sharer by inheritance in the case holding and the case is not barred by limitation and also

the case is not barred by defect of parties and also not mis joinder of parties or non joinder of parties but they without properly considered the facts and circumstances of the case and the oral evidence of the parties erroneously found that the pre-emptor had knowledge about the disputed transfer of case land and as such the case is barred by estoppel, waiver and acquiescence and upon such finding dismissed the pre-emption case and thus the courts below committed an error of law resulting in an error in the decision occasioning failure of justice. Accordingly, she submits for making the Rule absolute for ends of justice.

None appears for the opposite party when the matter is taken up for hearing.

In view of the above submission of the learned Advocate for the petitioner, I have perused lower court records, all other relevant paper submitted by the parties, judgment and order passed by the learned Trial Court and also Judgment and order passed by the learned Appellate Court. It appears from the record that the case was filed under section 96 of the State Acquisition and Tenancy Act, 1950 and the plaintiff pre-emptor was a co-sharer of the case land by the inheritance. The pre-emptor was not aware about the transfer even

no notice was served under section 89 of the State Acquisition and Tenancy Act for this reason the instant case was filed.

I have gone through the record that pre-emptee purchaser denying all the material allegation contending inter-alia that the case is barred by estoppel, Waiver and the pre-emptor is not a co-sharer of the case land. I have perused the record that the land in question originally belongs to one Eyaj Ali and others. The said Eyaj Ali died leaving behind pre-emptor and the pre-emptor became co-sharer of the case land by inheritance.

The next question raised that requires careful consideration is, whether the alleged conduct of the pre-emptor who had refused to purchase the case land prior sale would have amounted to waiver, acquiescence and estoppel, even if such conduct is taken to have been well proved by the evidence on record, to extinguish the right of pre-emption of the pre-emptor.

I have carefully perused the evidence of O.P.W 1,2,3&4 that all the witnesses have testified that there was a discussion about the sale of the land but no witness has clearly testified that the pre-emptor asked to take the said land or that he refused to buy the case land.

In the case of Akhlaqur Rahman vs Safar Ullah, reported in 1994 BLD (AD)20, it is held relying on the case of Shi Audh Behari Singh vs Gajadhar Jaipur(1955) ISCR 70 that the right of pre-emption can be taken to have been waived or relinquished at an earlier date than on date of actual completion of the sale under the law. This position is deduced on the concept that although the right of pre-emption becomes enforceable only when there is a sale, but the right exists antecedently to the sale, inasmuch as such right is indispensable for avoiding inconvenience and disturbances arising out of introduction of stranger into the land.

In the case of Farauddin vs Majuddin, reported in 44 DLR (AD) 62 the right of pre-emption is held to accrue not before but after the sale of the case land. The relevant passage runs as under:

“It is true, the right of pre-emption accrues after transfer of the land, and statutory right of pre-emption cannot be taken away by mere verbal assurance of the person having such right, unless other facts and circumstances clearly make out a case of acquiescence or Waiver. ‘Acquiescence’ arises when a person knowing that he has an enforceable right but neglects to enforce the same for such a long time that the other person opposing such right may fairly infer that he has waived or abandoned it. It is failure to object to

certain transaction or act. 'Waiver' means simply abandonment of any existing claim or right."

The view taken in the aforesaid case of Fazaruddin appears to be a better view. Right of pre-emption accrues on the date of registration of the sale deed. The pre-emptive right of purchase of the case land accrued to the pre-emptor only after the case land was sold to the purchaser pre-emptee by its owner and not before. Pre-emptive right does not exist before sale and so it is not enforceable before sale. Any such right before sale is an inchoate and immature right. Hence no conduct of the pre-emptor before sale of the case land refusing to purchase the same or consenting sale thereof to another can constitute waiver, acquiescence or estoppel demolishing his right of pre-emption.

Here, In this case the learned trial court also found that pre-emptee opposite party in their deposition stated that at the time of alleged sale the petitioner was present there. Specially OPW no. 4 in his examination in chief stated that the pre-emptor petitioner refused to purchase the land at the time and he advise the pre-emptee opposite party to sale the property but the pre-emptor was failed to cross examination OPW. 4 In this regard.

In this circumstance, we found that the petitioner as P.W. 1 denied alleged that he was the mediator of the sale. In the case of

Dewan Ali vs Jasimuddin, reported in 60 DLR(AD) 73 clearly stated that the pre-emptive right of purchase of the case land accrued to the pre-emptor only after the case land was sold to the purchaser pre-emptee by its owner and not before. Pre-emptive right does not exist before sale and so it is not enforceable before sale. Though the petitioner even if present at the time of sale was not barred his right to get the property as pre-emptor.

It appears that Section 96 of the State Acquisition and Tenancy Act right of pre-emption accrues on the date of registration of the sale deed. The pre-emptive right of purchase of the case land accrued to the pre-emptor only after the case land was sold to the purchaser pre-emptee by its owner and not before. Pre-emptive right does not exist before sale and so it is not enforceable before sale. Any such right before sale is an inchoate and immature right. Hence no conduct of the pre-emptor before sale of the case land refusing to purchase the same or consenting to sale thereof to other can constitute waiver, acquiescence or estoppels demolishing his right of pre-emption as in Syed Shamsul Alam vs Syed Hamidul Haque, 69 DLR(AD) 339.

Section 96 of the State Acquisition and Tenancy Act the pre-emptive right to purchase can accrue to the pre-emptor only after

the case land is sold to the pre-emptee, not before that the pre-emptive right does not exist before the sale, and therefore, such a right is not enforceable before the sale as in Hazi Mohammad Abdul Malek vs Jamal Hossain, 24 BLC (AD) 111.

Since the petitioner has own the contiguous land by inheritance and in view of the above facts and circumstances of the case as the pre-emptor petitioner has successfully proved his own case, I am of the view that both the courts below has committed an error of law resulting in an error in the decision occasioning failure of justice.

In view of the discussion made above, I find merit in this Rule.

In the result, the Rule is made absolute. The Impugned judgment and order passed by the learned Joint District Judge, Additional Court, Sylhet in Miscellaneous Appeal No. 43 of 2002 dismissed the appeal and affirmed the judgment and order dated 23.06.2010 passed by the learned Assistant Judge (in charge) Companigonj, Sylhet in Miscellaneous (pre-emption) Case No. 4 of 2000 be set-aside.

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