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

Present:

Mr. Justice Md. Bashir Ullah

Civil Revision No. 3103 of 2004

IN THE MATTER OF:

An application under Section 115(1) of the Code of the Civil Procedure, 1908

And

IN THE MATTER OF:

Md. Abdus Satter
... Pre-emptor-Respondent-Petitioner.

-Versus-

Md. Abdus Salam and others
... Pre-emptee-Appellant-Opposite parties.

Mr. Samarendra Nath Goswami with
Ms. Afsana Begum, Advocate
... For Pre-emptor-Respondent-Petitioner.

Not represented
... For pre-emptee-Appellant-opposite parties.

Heard & Judgment on: 01.08.2024

At the instance of the pre-emptor in Miscellaneous Case No. 01 of 2001, this Rule was issued calling upon the opposite party No. 1 to show cause as to why the judgment and order dated 23.06.2004 passed by the Joint District Judge, Third Court, Naogaon in Miscellaneous Appeal No. 85 of 2002 reversing the judgment and order dated 06.07.2002 passed by the Assistant Judge, 9th Court, Naogaon in Miscellaneous Case No. 01 of 2001 should not be set aside or such other or further order or orders passed as to this Court may seem fit and proper.

At the time of the issuance of the Rule, the operation of the judgment and order dated 23.06.2004 passed by the Joint District Judge, Third Court, Naogaon in Miscellaneous Appeal No. 85 of 2002 was stayed.

Facts relevant for the purpose of disposal of the Rule, in short, are that, the suit land originally belonged to one Samiruddin, father of the pre-emptor and opposite party nos. 7-8. Samir Uddin transferred the case land by way of registered kabala deed to the petitioner and opposite party no. 7. Subsequently, the pre-emptor and opposite party nos. 7-8 partitioned their land and the pre-emptor got .045 acre of land in plot No. 447 and opposite party no. 7 got .115 acres of land. Thus the opposite party no. 7, brother of the pre-emptor became owner and thereafter sold the case land by two separate sale deeds to the opposite party nos. 1 to 6 without giving any notice of sale to the pre-emptor. The opposite party nos. 1-6 are stranger in the disputed case holding. The pre-emptor came to know about the disputed sale on 31.12.2000, when the opposite party nos. 1 to 6 came to measure the case land. The case holding in question is contiguous to the house of the pre-emptor and he is a co-sharer in the disputed case holding. Hence, after obtaining the certified copies of the disputed deeds on 01.01.2001, the petitioner as pre-emptor instituted Miscellaneous Case No. 01 of 2001, before the Assistant Judge, 9th Court, Naogaon.

The pre-emptee-opposite party nos. 1-5 and 7 contested the case by filing a joint written objection denying all material allegations made in the petition. Defence case in short is that opposite party no.7 offered to sell the case land to the pre-emptor for want of money but he refused to purchase. Then he offered to pre-emptee nos. 1 to 6 to purchase the case land and they accepted the proposal. Accordingly, the opposite party no. 7 executed two deeds being nos. 3553 and 3554 on 20.08.2000. On the same day, the opposite party nos. 1-5 executed registered an *ekrarnama* assuring that if the opposite party no.7 would repay the consideration money within 15.01.2001 they would return the case land and execute reconveyance deed in favour of the opposite party no. 7. Accordingly, the opposite party no. 7 repaid consideration money to the opposite party nos. 1-5 on 11.01.2001 and opposite party nos. 1-5 executed a transfer deed being no. 91 in favour of the opposite party no. 7. Opposite party no. 7 is in possession in the case land.

In order to dispose of the case, the trial Court framed as many as 4(four) different issues. During trial, the pre-emptor examined one witness and opposite party examined two witnesses to prove their respective cases.

Upon hearing the parties, the learned Assistant Judge, after considering the evidence on record allowed the pre-emption case by judgment and order dated 06.07.2002.

Challenging the above-mentioned judgment and order, opposite party no.1 as appellant preferred Miscellaneous Appeal No. 85 of 2002 before the learned District Judge, Naogaon. The District Judge, Naogaon transferred the appeal to the learned Joint District Judge, Third Court, Naogaon. Upon hearing the parties, the learned Joint District Judge, Third Court, Naogaon allowed the appeal on 23.06.2004 and sent the case back on remand with a direction to the learned Assistant Judge to hear the case afresh after giving opportunity to both the parties in respect of *ekrarnama*.

Being aggrieved by and dissatisfied with the judgment and order dated 23.06.2004 passed by the Joint District Judge, Third Court, Naogaon in Miscellaneous Appeal No. 85 of 2002, the petitioner preferred the instant Civil Revision under Section 115(1) of the Code of Civil Procedure before this Court and obtained Rule and stay.

Ms. Afsana Begum learned Advocate appearing on behalf of the petitioner submits that the pre-emptor is a co-sharer by inherent in the case land, on the other hand the pre-emptee nos. 1 to 6 are strangers. The pre-emptees failed to prove the *ekrarnama* and hence the trial Court rightly allowed the pre-emption Case. But the appellate Court below failed to consider the facts and circumstances that the trial Court made elaborate discussion about the *ekrarnama* and the pre-emptees could not prove the same. Notwithstanding, the appellate Court below send the case back on remand which is totally illegal and liable to be set aside.

With such submission, the learned Advocate finally prays to make the Rule absolute by setting aside the impugned judgment and order.

No one appears on behalf of the opposite parties.

I have heard the learned Advocate for the petitioner and perused the revisional application, the judgment and order and other materials on record.

Record shows that PW1, Md. Abdus Sattar in his deposition stated that:

> "সত্য নহে যে, নালিশী দাগে ৭নং প্রতিপক্ষের বাড়ি আছে বা সম্পত্তি বিক্রয়ের কথা আমাকে জানায় বা আমি ক্রয় করিতে অস্বীকার করি বা বিক্রয়ের তারিখেই একটি একরারনামা রেজিষ্ট্রি হয়। ঐ একরারনামা পরবর্তীতে সৃজিত। কোন অরেজিষ্ট্রিকৃত একরারনামা করলেও তাহা পরবর্তীতে সৃজিত। সত্য নহে যে, একরারনামা বলে ৯১নং রেজিষ্ট্রি দলিলে ১-৫নং প্রতিপক্ষ ৭নং প্রতিক্ষকে ফেরত দেয়। ঐ দলিল সঠিক নহে। আমার অগ্রক্রয় মামলাকে প্রতিহত করার জন্য বেআইনীভাবে সৃজিত হয়েছে।"

In cross examination he replied that:

> "সত্য নহে যে... ঐ তারিখেই একরারনামা লেখা হয় বা ঐ একরারনামার শর্ত মোতাবেক ১৫-১-২০০১ তারিখের মধ্যে দলিল মূল্য ফেরত দিলে ১-৬নং প্রতিপক্ষ ৭নং প্রতিপক্ষ বরাবর ফেরত দিবে বা আমি একরারনামার বিষয় জানতাম।"

OPW1 Md. Abdus Salam in his cross examination replied that:

> "আমি একরারনামা রেজিষ্ট্রি করি নাই। আমি একরারনামার stamp vendor কে সাক্ষী মানি নাই। কোন vendor এর কাছ থেকে ক্রয় করি খেয়াল নাই। ভেন্ডার এর Stamp Register তলব দেই নাই। ..."

OPW2, Saidur Rahman, in cross examination replied that:

> "আমি একরারনামায় সাক্ষী নাই। ... সত্য নহে যে, প্রার্থীর অধিকার ঠেকানোর জন্য জাল একরারনামা সৃষ্টি করেছি। সত্য নহে যে, একরারনামা বিষয়ে আমার কোন জ্ঞান নাই বা মিথ্যা সাক্ষী দিলাম। "

The above mentioned evidence indicates that the pre-emptee failed to prove the *ekrarnama*. The so called *ekrarnama* is not registered, and the same was not exhibited in the pre-emption case. The trial Court discussed in details regarding the *ekrarnama*. Unfortunately, the appellate Court below failed to appreciate such vital aspect that the trial Court below discussed in its judgment in details.

Law is settled that order of remand can not be granted as a matter of course to fill up the lacuna in the case. The *ekrarnama* was not tendered and proved in evidence by the pre-emptee although that was their definite case. The appellate Court failed to appreciate this aspect of the case and wrongly refused pre-emption by sending the case down on remand. The *ekrarnama* appears to be a colourable transaction in order to defeat pre-emption. The trial Court did not commit any wrong in granting pre-emption. The judgment and order passed by the appellate

Court below being perverse and misconceived is liable to be set aside and the pre-emption is allowed.

In the result the Rule is made absolute, however without any order as to cost.

The judgment and order dated 23.06.2004 passed by the Joint District Judge, Third Court, Naogaon is set aside.

The order of stay granted at the time of issuance of the Rule stands recalled and vacated.

Send down the Lower Court Records with a copy of this judgment to the court concerned forthwith.

(**Justice Md. Bashir Ullah**)

Md. Sabuj Akan/
Assistant Bench Officer

The appellate Court below did not ponder for a while that stated in his cross-examination that "..আমি একরারনামা রেজিষ্ট্রি করি নাই। ... আমি একরার নামার stamp vender .. কে সাক্ষি ... মানি নাই। কোন vender .. এর কাছ থেকে stamp.. ক্রয় করি .... বেযাল নাই vender .. ক্রয় stamp register ... তলব দেয় নাই। " and the trial Court bellow hold that" opposite party did not formally prove the *ekrarnama* and as such appellate Court below committed an error of law resulting in an error in the decision occasioning a failure of justice.

It is submitted that the appellate Court below without applying judicial mind misreading of the evidence on record by holding that "... মামলাটি পুনঃ বিচারের জন্য প্রেরিত হইলে প্রতিপক্ষ তাহাদের কথিত একরারনামা প্রমানের জন্য অতিরিক্ত সাক্ষ্য প্রমানের সুযোগ .. হইবে।" principle laid down in 6 BLT (HCD) is that "re-examination shall not be allowed to destroy the effect of cross-examination" and as such committed an error of law resulting in an error in the decision occasioning a failure of justice.

The principle laid down in the case of S. Mohammad Shahjahan Vs. Md. Akmal Hossain & others reported in 5 BLT (HCD) 19 is that "order of remand by the appellate Court on preliminary point not proper

when the said preliminary point was raised in the trial Court and the Judgment was passed on discussion of the entire evidence on record adduced by both the parties" and as such appellate Court below committed an error of law resulting in an error in the decision occasioning a failure of justice.

The appellate Court below failed to consider the facts and circumstances that contesting opposite party failed to discharge the onus to prove that the *ekrarnama* was correct and as such order of remand in respect of *ekrarnama* was therefore absolutely uncalled for and the impugned Judgment and order liable to be set aside. Wherefore, it is humbly prayed that your lordships would graciously be pleased to call for the record and to issue rule on the opposite party No.1 to show cause as to why the Judgment and order dated 23.06.2004 passed by the Joint District Judge, 3rd Court, Naogaon in Miscellaneous Appeal No. 85 of 2002 reversing those Judgment and order dated 06.07.2002 passed by the Assistant Judge 9th Court, Naogaon in Miscellaneous Case No.1 of 2002 and order of remand should not be set aside, after hearing the parties, perusing the records and cause shown if any to make the Rule absolute and pass such other or further order or orders as to your lordships may deem fit and proper