

Present:-

Mr. Justice Mahmudul Hoque

**Civil Revision No. 5095 of 2005**

Noor Begum

..... Petitioner

-Versus-

Tofel Ahmed being dead his heirs:1(a) Sakina Khatun and others

..... Opposite-Parties

Mr. Mustafa Niaz Muhammad, Senior Advocate with  
Mr. Md. Belal Hossain, Advocate

... For the Petitioner

None appeared

.....For the opposite parties

**Judgment on 03.03.2025**

In this revision Rule was issued calling upon the opposite party Nos. 1-7 to show cause as to why the impugned judgment and order dated 21.09.2005 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Chattogram in Miscellaneous Appeal No. 296 of 1995 allowing the same and reversing the judgment and order No. 58 dated 31.10.1995 passed by the learned Senior Assistant Judge, Hathazari, Chattogram, in Miscellaneous Case No. 18 of 1993 allowing pre-emption 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 relevant for disposal of this Rule, in short, are that petitioner, as pre-emptor, filed Miscellaneous Case No. 18 of 1993 under Section 96 of the State Acquisition and Tenancy Act in the Court of learned Senior Assistant Judge, Hathazari, Chattogram against the opposite parties, as pre-emptee for pre-emption of the case property stating that one Siddique Ahmed was the owner of B.S. Khatian No. 2207 who died leaving the pre-emptor as his daughter and opposite parties 2-16 as the successors of Siddique Ahmed and opposite party Nos. 22-28 are the successor of others recorded tenants and possessor by purchase. Opposite party Nos. 2-7 sold the land on 17.05.1993 in excess of their share to the pre-emptee opposite party No. 1 without serving any notice to the pre-emptor. When the pre-emptee tried to take possession of the case land on 23.05.1993 the pre-emptor came to know about the sale of the case property and obtained true copy of the kabala on 31.05.1993 from concerned registry office and offered the consideration money with compensation to the pre-emptee and demanded the kabala, but he refused. The opposite party No. 1 is stranger to the case property. Hence, the case for pre-emption.

The opposite party No. 1 contested the case by filing written objection and opposite party Nos. 2-7 also filed a separate written

objection denying all the material allegations of the pre-emption application contending *inter alia*, that the suit property was mortgaged to the opposite party No. 1 with the knowledge of the husband of the pre-emptor on 17.05.1993 for a limited period with an agreement for recoveyance. Accordingly, the opposite party No. 1 reconveyed the case property by a registered deed dated 19.07.1993 to the opposite party Nos. 2-7. Before mortgaging the case property the petitioner was asked to take mortgage of the same but she and her husband expressed their inability. Though the property was mortgaged to opposite party No. 1 but possession was not delivered to him. From the very beginning case property is under the possession of the opposite parties 2-7. The pre-emptor herself did not file the case, it has been filed by her husband with mala fide intention only to harras the opposite parties and for illegal gain knowing that the actual value of the case property is much more than the value mentioned in the deed, hence, the case is liable to be dismissed.

The trial court framed 4 (four) issues for adjudication of the dispute. In course of hearing the petitioner examined 3 (three) witnesses as Pt.Ws and the opposite parties examined 05 (five) witnesses as OPWs. Both the parties submitted some documents in support of their respective

claim which were duly marked as exhibits. The trial court after hearing and considering evidences both oral and documentary allowed pre-emption in part by its judgment and order dated 31.10.1995.

Being aggrieved by and dissatisfied with the judgment and order of the trial court, the opposite parties preferred Miscellaneous Appeal No. 296 of 1995 before the learned District Judge, Chattogram. Eventually, the appeal was transferred to the court of Joint District Judge, 2<sup>nd</sup> court, Chattogram for hearing and disposal who heard the appeal and after hearing by the impugned judgment and order dated 21.09.2005 allowed the appeal and reversed the judgment and order of the trial court refusing pre-emption. At this juncture, the petitioner moved this Court by filing this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of stay.

Mr. Mustafa Niaz Muhammad, learned Senior Advocate with Mr. Md. Belal Hossain, learned Advocates appearing for the petitioner submit that the trial court as well as the appellate court concurrently found and observed that the petitioner is a co-sharer by inheritance in the case holding and the case is not barred by limitation and defect of parties and also observed that the pre-emptee opposite party No. 1 is a stranger.

He submits that the trial court while allowing pre-emption in part discussed all the evidences adduced on behalf of petitioner and the document of transfer and found that the deed in question is out and out sale and subsequently an unregistered agreement for reconveyance was created by the opposite parties in connivance with each other to defeat pre-emption of the case property. The trial court discussed the nature of transfer, evidences led by opposite parties and finally concluded that it was not a mortgage but an out and out sale. The appellate court did not controvert those findings of the trial court, but only observing that it was a mortgage and within a very short time, the property was reconveyed to the seller opposite parties, as such, there remains nothing to be pre-empted by the petitioner.

He finally submits that in allowing partial pre-emption, the trial court rightly held that the opposite party Nos. 2-7 as per law of inheritance inherited the property measuring  $1\frac{1}{2}$  gondas, but they transferred beyond their share measuring  $3\frac{1}{2}$  gondas to the opposite party No. 1 and proportionately determined the consideration for  $1\frac{1}{2}$  gondas along with compensation totalling Tk. 7071.90/-, as such, the trial court

rightly allowed pre-emption in part, but the appellate court failed to appreciate the provisions of law, evidences on record and without adverting the findings and observation of the trial court allowed the appeal only on the point that the property actually was not sold by the co-sharer of the petitioner, but it was mortgaged to the opposite party No. 1 and subsequently, the opposite party No. 1 reconveyed the property to the opposite party seller.

None appears on behalf of opposite parties to oppose the Rule, consequently, heard the learned Advocate for the petitioner, have gone through the revisional application under Section 115(1) of the Code of Civil Procedure, application for pre-emption, written objection thereto, evidences both oral and documentary available in lower court records and impugned judgment and order of both the courts below.

Admittedly, case property under B.S. Khatian No. 2207 belonged to Siddique Ahmed. The opposite party Nos. 2-16 are legal heirs of said Siddique Ahmed and the petitioner is daughter of Siddique Ahmed. The opposite party Nos. 2-7 as heirs of Siddique Ahmed transferred the case property to opposite party No. 1 Ahmed Hossain by registered deed No. 1349 dated 17.05.1993 in excess of their share measuring  $3\frac{1}{2}$  gondas

without notice to the petitioner. Had it been offered to the petitioner before sale she would have purchased the same at the market price, but before selling the property the opposite party Nos. 2-7 did not even served a notice upon the petitioner. The petitioner all of a sudden came to know on 23.05.1993 when the opposite party No. 1 tried to take possession of the property and after making search with the Sub-Registry Office and obtaining true copy of the sale deed on 30.05.1993 filed the instant case. The opposite party No. 1 and opposite party Nos. 2-7 by filing separate written objection contended that the case property is ejmali property of opposite party Nos. 2-7, they in need of money tried to mortgage the case property and offered the same to the petitioner and her husband but they expressed their inability, consequently, opposite party Nos. 2-7 approached the opposite party No. 1 to take mortgage of the case property and to pay Tk. 15,000/- (fifteen thousand) only as loan to the opposite party Nos. 2-7.

He agreed and the case property was mortgaged by way of sale deed with an agreement for reconveyance on 17.05.1993. The property was not sold to the opposite party No. 1, it was a mortgage, as such, the case of the petitioner is not at all maintainable. From perusal of record it

appears that the case was filed by the petitioner on 20.06.1993. Opposite party No. 1 entered into appearance in the case on 21.11.1993, opposite party Nos. 2-7 appeared in the case on 08.01.1994 and they by filing separate written objection contended that the petitioner herself did not file the present case, but her husband with a mala fide intention by taking thumb impression of the petitioner filed the case for illegal gain. They stated that for urgent need of money, the opposite party Nos. 2-7 mortgaged the property with opposite party No. 1 by a registered sale deed No. 1349 dated 17.05.1993 with an agreement for reconveyance of the same. As per agreement for reconveyance opposite party No. 1 returned the case property to the seller opposite parties by a registered deed No. 1947 dated 19.07.1993 much earlier than entering into appearance in the instant case. When the property was returned to the seller opposite party Nos. 2-7 by opposite party No. 1 they were not at all aware of filing of the present case.

Had the property was sold to opposite party No. 1, the property would not have been returned within two months two days before appearing in the instant case. It is also claimed that the property mortgaged with opposite party No. 1 are ejmali property there is no



partition by metes and bound among the co-sharer including the petitioner. Therefore, before determination of their share question of transfer of the property by way of sale deed does not arise at all. The trial court though found that the transaction is in fact an out and out sale but the agreement created subsequently to defeat the pre-emption, but has failed to find that when the agreement was executed in between the opposite party Nos. 1 and 2-7 and the property in question was returned on 19.07.1993, the pre-emptee as well as the seller opposite party were not in the know of filing of the pre-emption case.

Therefore, the question of creation of agreement and deed of reconveyance before entering into appearance in the case and to defeat pre-emption of the petitioner has no basis at all. It is fact that the property was transferred by a sale deed dated 17.05.1993 to the opposite party No. 1 who is a stranger, but it was transferred to the opposite party with an agreement for reconveyance of the same date. Both the sale deed and the agreement were written by one Parimal Biswas with same ink, attesting witnesses are same as appearing from (exhibit-Ka (ka) and Kha (kha) and by another deed No. 1947 dated 19.07.1993, opposite party No. 1 Ahmed Hossain reconveyed the property to the opposite party Nos. 2-7 and the

said deed also written by Parimal Biswas and one of the common attesting witness Kamrul Ahsan. From the evidences, facts and circumstances of the case, this Court finds that the opposite party before coming to know about filing of the pre-emption case reconveyed the property in favour of seller on 19.07.1993. Therefore, there is no element to be considered that the property was actually sold by opposite party Nos. 2-7, but it is established that the property was actually mortgaged to opposite party No. 1 and subsequently the property was reconveyed in favour of seller opposite parties. Therefore, the property in question remains with the seller who are admittedly heirs of Siddique Ahmed and co-sharer of the petitioner.

From perusal of the deeds in question, it appears that the opposite party Nos. 2-7 transferred and or mortgaged  $3\frac{1}{2}$  gondas of land with the opposite party No. 1. The trial court without ascertaining and determining the share of the legal heirs of Siddique Ahmed, on the basis of statement made by petitioner in her application for pre-emption held that the opposite party Nos. 2-7 are legally entitled to transfer  $1\frac{1}{2}$  gondas land to opposite party No. 1 without any basis. Moreover, as per provisions of

law partial pre-emption cannot be allowed because of the fact that admittedly the property transferred to opposite party No. 1 measuring  $3\frac{1}{2}$  gondas out of which the trial court allowed pre-emption for  $1\frac{1}{2}$  gondas land, leaving 2 gondas land in the share of opposite party No.1 pre-emptee meaning thereby, the petitioner herself admitted the pre-emptee as one of the co-sharer by purchase, holding share of 2 gondas more than the share sought to be pre-empted by the petitioner. In that case when a purchaser is admitted to be a co-sharer by leaving some property out of the sale deed there cannot be any pre-emption for the rest land in favour of the pre-emptor. The trial court unfortunately failed to understand the objectives of law of pre-emption in its true perspective.

In view of the above, I find that the appellate court rightly allowed the appeal and set aside the judgment and order of the trial court.

Taking into consideration the above, I find no merit in the Rule as well as in the submissions of the learned Advocate for the petitioner calling for interference by this Court.

In the result, the Rule is discharged however, without any order as to costs.

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

Communicate a copy of this judgment to the court concerned and send down the lower court records at once.

Md. Akteruzzaman Khan (B.O)