

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

Present:

Mr. Justice S.M. Masud Hossain Dolon

Civil Revision No. 1858 of 2003.

Kajal Kanti Dey and others.

.... Pre-emptee-petitioners.

-Versus-

Rezia Begum Chowdhury and others

.... Pre-emptor-opposite parties.

Mr. Chanchal Kumar Biswas with

Mr. Md. Ekramul Hoque, Advocate

..... for the petitioners.

No one appears for the opposite parties.

Heard & Judgment on: 15.02.2024.

This Rule has been issued calling upon opposite-party Nos. 1-9, to show cause as to why impugned judgment and order dated 23.01.2003 passed by the learned Additional District Judge, 3rd Court, Sylhet in Miscellaneous Appeal No. 39 of 1991 reversing the judgment and order dated 17.02.1991 passed by the learned Senior Assistant Judge, Sadar, Sylhet in Miscellaneous Case No. 46 of 1989 should not be set-aside.

The opposite parties as pre-emptor filed Miscellaneous Case being no. 46 of 1989 under section 96 of the State Acquisition and Tenancy Act, 1950 before learned Assistant Judge, Sadar, Sylhet for co-sharer of the holding by purchase. The pre-emption, in brief is that the

pre-emptor by kabala dated 22.05.1973 purchased from Sailendra Kumar Das Purkayastha and others and area of .09 ½ acres from dag no. 1235 of the case holding and thereby became a co-sharer by purchase in the holding and on 19.06.1989, came to know about the present sale by opposite party Nos. 2-5 in favour of opposite party No. 1 of the case by kabala dated 23.05.1988 and filed the instant case.

The predecessor of the petitioner who was the opposite party No. 1 (pre-emptee purchaser) contested the case by filing a written statement and contended inter-alia that the case is not maintainable under section 96 of the State Acquisition and Tenancy Act as the case land is a homestead. The Pre-emptee purchaser further stated that his father in law took settlement from the owner in the year 1945 of 1 poya land from dag No. 1235 and 1236 and constructed house therein. The said pre-emptee purchaser married the daughter of the settlement holder in the year of 1962 and having no other house or land started living with his father in law also by constructing a tinshed house and since then living there by taking connection of the electricity, water and gas line and also installed a tubewel. While living such, birth of his three sons and daughter took place in the case house. At one point of time the relationship with his brother in law was deteriorated and having good relationship with the pre-emptor and on being informed about the original record of rights stood in the

name of the Zamindar in place of his name and on advised and to remove the cloud on negotiation by the pre-emptor, purchased the case land by registered kabala dated 23.05.1988. After such purchase on 23.05.1988 the pre-emptor purchased 02 ½ acres of land from one Suniti Bala instead of offering the same to the pre-emptee purchaser, though the land is adjacent to the land of the pre-emptee purchaser, which made the relationship worst in between the pre-emptor and pre-emptee purchaser and out of grudge the pre-emptor filed the case and accordingly prayed for dismissal of the case.

The learned Assistant Judge, Sadar, Sylhet after scrutinizing oral and documentary evidences adduced by the parties in support of their respective claims, rejected the miscellaneous case by judgment and order dated 17.02.1991 against which pre-emptor filed Miscellaneous Appeal No. 39 of 1991 before learned District Judge, Sylhet who transferred the same to learned Additional District Judge, 3rd Court, Sylhet for hearing. After hearing the parties, learned Additional District Judge allowed the appeal and reversed the judgment and order passed by learned Assistant Judge, Sadar, Sylhet against which the pre-emptee petitioners has moved the instant revisional application and obtained Rule.

Mr. Md. Ekramul Hoque on behalf of the petitioner submits that the appellate court failed to appreciate that the pre-emptee purchaser

possessing the case land since 1966 as settlement holder by constructing house, planting trees, bringing electricity and gas connection in his own name, installing tubewell and in view of a threat by the Zamindar on being embolden by the wrong record of rights in their name, it is the pre-emptor who negotiated the sale to protect the present possession and right of the pre-emptee purchaser and thereby waived his right of pre-emption if any and as such committed an error of law, resulted in an error in the decision, occasioned failure of justice. He further submits that the court of appeal below while reversing the judgment and order of the trial court failed to notice that the pre-emptor as P.W. 1 admitted that the pre-emptee purchaser living in the case land with his family and 2/3 houses in the case land, which supports the claim of the pre-emptee purchaser as to the classification of the case land as homestead and as such the same cannot be pre-empted under section 96 of the state Acquisition and Tenancy Act, further the pre-emptor is not a co-sharer of the case land by inheritance and as such committed an error of law, resulted in an error in the decision, occasioned failure of justice.

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

I have perused the judgments and orders passed by both the Courts below and all other relevant papers thereto. It appears that the

pre-emptor by kabala purchased the land from Sailendra Kumar Das Purkayastha and others from dag No. 1235 of the case holding and thereby became a co-sharer by purchase, came to know about the present sale by opposite party nos. 2-5 in favour of opposite party No. 1 of the case by kabla and filed the instant case.

It appears that the learned trial court has clearly stated that there is no dispute that Md. Momtaz Ali Chowdhury is the co-sharer by purchased of the land being khatian no. 252. On the otherhand, the pre-emptee purchased the land .09 ½ acres from Khatian no. 252 and co-sharer Md. Momtaz Ali Chowdhury was present during the transfer of the land in question, assisted in the purchase by mediation and was present during the writing and execution of the registered kabla deed and it is supported by OPW 2, 3 and commissioner report.

It also appears that since the pre-emptee has no property of his own, the pre-emptee already started living there in his father-in-law's house. A verbal permission of the original owner of the land Monindra Kumar Purkayastha and started living there. With the consent of the Md. Momtaz Ali Chowdhury, the pre-emptee petitioner purchased the said land, constructed a new house, made various improvements thereon and started living permanently with gas and electricity connection. The pre-emptee petitioner has no land other than the said land. On the otherhand, the pre-emptor opposite party has buildings

and other land as can be seen from the sketch map exhibited by OPW-2 and Commissioner. It is not necessary for him to buy the said property. If the petitioner is evicted from the house, the pre-emptee petitioner along with his family will become homeless. Moreover, the pre-emptee petitioner has constructed houses with kitchen with various types of trees, tube well etc in the property.

In the case of Ahmed Hossain and others vs Basharat Ali and others reported in 32 DLR (AD) 54 it is held that-

“The right of Pre-emption is allowed to a claimant in consideration of his necessity and not as a matter of luxury.”

I have carefully perused the records that the pre-emptee purchaser have been possessing the land in question and constructing house, planting tree, bringing electricity and gas connection to his own name.

It appears that the alleged sale deed was executed on 23.05.1988 but same was registered on 18.04.1983 as Exhibit No. K and pre-emptor filed pre-emption case on 21.06.1983 within the stipulated time. Moreover section 96(II) of the State Acquisition and Tenancy Act provides the period will begin from the date of the registration of sale deed. It also appears that the pre-emptor was

negotiated the sale for the pre-emptee purchaser which was proved by the depositions of OP.W 1, OP.W 2 and OP.W 3.

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.

It appears that the pre-emptor is a co-sharer by purchase of the case holding but the amended provision of pre-emption law under section 96(a) of the State Acquisition and Tenancy Act provided that

no application under this section shall lie unless the applicant is a co-sharer tenant in the holding by inheritance and the same view was taken by this Division in Rupa Akter vs Md. Ayet Acl, reported in 24 BLC 37. The amended law has omitted the right to pre-emption that was available to the contiguous land holder.

Sub section 14 and 16 of section 96 of the State Acquisition and Tenancy Act introduced two new provisions one is courts Jurisdiction to entertain a suit for possession of the land in connection with which the application is brought and other is creating a bar on pre-emption of homestead land. In the present case, the pre-emptor as PW1 admitted that the pre-emptee purchaser is living in the case land with his family and there are 2/3 houses in the case land. The learned Trial Court also scrutinized Commissioner's report as exhibit-Cha and Cha(1) and found that 2(two) house including washroom, one separate house and trees were there, the said commissioner was also examined as PW4. Moreover the trial court was also inspected the case land and found the same.

Considering the above facts and circumstances of the case, I am of the view that the impugned judgment and order passed by the learned Additional District Judge, 3rd Court, Sylhet suffers from gross irregularity and he has committed error of law resulting in an error in

the decision occasioning failure of justice and as such it is not tenable in law.

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 Additional District Judge, 3rd Court, Sylhet in Miscellaneous Appeal No. 39 of 1991 is set-aside and the judgment and order passed by the learned Senior Assistant Judge, Sadar, Sylhet in Miscellaneous Case No. 46 of 1989 be affirmed.

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