

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

Civil Revision No.2803 of 2014

Md. Sultan Sikdar and another
----- Pre-emptee-Appellant-Petitioners
=Versus=
Md. Shamsul Alam and others
---- Pre-emptor-Respondent-Opposite Parties

Mr. Md. Golam Nabi, with
Mr. Sanowar Rahman, Advocates
----For the Pre-emptee-Appellant-Petitioners
Mr. Rehan Hossain, with
Ms. Asma Akhter, Advocates
-- For the Pre-emptor-Respondent-Opposite
Party No.1.

Heard on 04.06.2017 and Judgment on 07.06.2017

At the instance of the Pre-emptee-appellant-petitioners, Md. Sultan Sikder and another, this Rule has been issued এই মর্মে ১নং অপরপক্ষের প্রতি কারণ দর্শানো পূর্বক রুল জারী করা হইল, কেন টাঙ্গাইলের বিজ্ঞ বিশেষ জজ (জেলা জজ) আদালত এর মিস ৫৯/২০১১ নং আপীলি প্রচারিত ২১/০৫/২০১৪ তারিখের তর্কিত রায় এবং আদেশ রদ ও রহিত করা হইলি না এবং দরখাস্তকারীদ্বয় অএ আদালত এর বিবিচনায় আর যে সকল প্রতিকার পাইত্রি পাব্রিন তাহার ও আদেশ কেন দেওয়া হইলি না।

The relevant facts for disposal of the Rule inter-alia, are that the present opposite party No.1 as the pre-emptor filed the Pre-emption Miscellaneous Case No.3 of 2006 in the Court of learned Assistant

Judge, Deldoar, Tangail claiming right of pre-emption under Section 96 of the State Acquisition and Tenancy Act. The application for the said case contains that the land measuring 1.09 acres was originally owned by Bhanu Bibi, Baser Shikder, Noyez alias Nomez Uddin, Abdul Barek and Kulsum Bibi. The said Abdul Barek died leaving behind his son Md. Latif Mia who transferred 0.08 acres in favour of the present-pre-emptor, Md. Shamsul Alam, through a registered sale deed No. 3408 dated 10.01.2001 and he was in possession on 29.11.2005. One of the co-sharers of the said land sold 0.12 acres of land in favour of the present-pre-emptees Md. Sultan Siker and Milon Sikder by the pre-emptee-opposite party No.2 through a registered sale deed. The pre-emptee purchasers are the strangers and the case land is situated adjacent to the present opposite party. The present pre-emptor was not aware of the said deed thus the suit has been filed as soon as he could obtain a certified copy of the said deed.

The present pre-emptee as the other party contested the suit by filing a written objection, contending, inter-alia, that the suit is not maintainable under law. In fact, the pre-emptor knew about the transfer but he refused to purchase the case land from pre-emptee-opposite party No.2. After purchasing the same pre-emptee has been in possession by paying rent to the Government and by mutating the land-in-question and

also recording a separate D.P. Khatian No. 82, Plot No. 207 in her own name. The pre-emptee-purchasers expended a huge amount of money upon the said case land by making high land from low land using earth and also by making tin shed thereupon.

After hearing the parties, the learned Assistant Judge, Deldoar, Tangail allowed the Miscellaneous Case by his judgment and order dated 07.07.2011. Being aggrieved the present-petitioners as the appellants preferred the Miscellaneous Appeal No. 59 of 2011 before the learned District Judge, Tangail which was heard by the learned Special District Judge, Tangail which is pending for hearing. In the said pending appeal, the present-petitioners filed an application under Order 26 Rule 9 of the Code of Civil Procedure to appoint an Advocate Commissioner for assessing the money spent for development of the case land. After hearing the parties said application was rejected by the learned appellate court below by his order dated 21.05.2014. This revisional application has been filed under Section 115(1) of the Code of Civil Procedure and the Rule was issued thereupon.

Mr. Golam Nabi, the learned advocate appearing with Mr. Sanowar Rahman submits that a local investigation to be made for the purpose of evaluating any matter in dispute or of ascertaining the market value of any property the court may appoint a commission. In the instant

case, it is important to appoint an Advocate Commissioner to make local investigation for ensuring whether the petitioners spent any money in the case land and if answer is positive, how much the petitioners spent for the purpose of developing the suit land but the court below did not consider the above matter and rejected the application by simply saying that it is not the subject matter for commissioner to investigate, thereby, committed error of law resulting in an error in the decision occasioning failure of justice.

The Rule has been opposed by the opposite party No.1.

Mr. Rehan Hossain, the learned Advocate appearing with Ms. Asma Akhter for the opposite party No. 1 submits that after considering the relevant evidence the learned trial court allowed the Miscellaneous Case filed by the present-pre-emptor-opposite party No.1 and the appeal preferred by the present-petitioners is pending for disposal since 2011 but during pendency of the appeal an application was filed under Order 26 Rule 9 of the Code of Civil Procedure for appointing an Advocate Commissioner with malafide intention in order to delay disposal of the appeal therefore, the learned appellate court lawfully rejected the application and, thus, the Rule should be discharged.

The learned Advocate further submits that the pre-emptor-opposite party No.1 proved that some houses and trees which have been

placed on the case land as such, there is no requirement for appointment of an Advocate Commissioner to assess the number of houses and trees thereupon.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under Section 115(1) of the Code of Civil Procedure along with Annexures therein, in particular, the impugned judgment and order dated 21.05.2014, it appears to me that the present-opposite party No.1 as an applicant filed the Miscellaneous Case under Section 96 of the State Acquisition and Tenancy Act. The said case was allowed after completing all the required steps by both the parties in the trial but the present-petitioners made no application for making an assessment by an Advocate Commissioner as to the houses and trees and other structures situation on the case land.

In view of the above, how an application under Order 26, Rule 9 of the Code of Civil Procedure is permissible or necessary is to be decided by this Court. I have carefully examined the submissions and also the impugned order passed by the learned appellate court below on 21.05.2014. I find that there is no necessity for assessment or inspection by any Advocate Commissioner because the admitted position is that there are a huge number of houses and trees upon the case land.

In view of the above, I consider that an application under Order 26 Rule 9 of the Code of Civil Procedure is absolutely an inappropriate step in an appeal stage because the trial court has already allowed the miscellaneous case by ascertaining the right of pre-emptor under Section 96 of the State Acquisition and Tenancy Act therefore, the appellate court has every authority to ask for additional amount from the pre-emptor if the appeal is disallowed on merit thereby the pre-emptee may bring a claim as to any development cost upon the land from the pre-emptor. In any way, the appellate court has full discretion to take decision on merit, as such, the requirement for an appointment of an Advocate Commissioner is not call for, as such, the impugned order passed by the appellate court by rejecting the application does not call for any interference from this Court. I am inclined to dispose of this Rule.

Accordingly, the Rule is disposed of.

The learned Special Judge, (District Judge), Tangail is hereby directed to consider the cost for improvement of the case land by the pre-emptee-purchaser after purchase of the case land if it is necessary for any purpose after disposal of the appeal being the Miscellaneous Appeal No.59 of 2011 pending before that Court.

The learned appellate court is also hereby directed to dispose of the Miscellaneous Appeal No. 59 of 2011 within 3 (three) months positively from the date of receipt of this order.

The ad-interim order of stay granted at the time of issuance of the Rule is hereby recalled and vacated.

The office is directed to communicate this judgment and order to the concerned Court immediately.