Bench:
Mr. Justice Bhishmadev Chakrabortty
and
Mr. Justice Md. Akhtaruzzaman

First Appeal No. 39 of 2015
With
Civil Rule No.83(F) of 2015

Alhaj Md. Harunor Rashid Talukder
.....appellant
-Versus-
Abdus Salam Howlader being dead his heirs:-
1(a) Mrs. Lila Begum and another
.....respondents

Mr. Abdur Rezzak Khan, Senior Advocate with
Mr. Md. Mamunor Rashid, Advocate
..... for the appellant

Mr. Swapan Kumar Datta with Mr. Hasan Emam Talukder and Mr. Suprakash Datta, Advocates
..... for respondent 1

Judgment on 22.01.2024

Bhishmadev Chakrabortty, J.

Since the Rule has arisen out of the above first appeal and parties hereto are same, both are heard together and disposed of by this judgment.

This appeal at the instance of defendant 1 is directed against the judgment and decree of the Joint District Judge, Court No.2, Bagerhat passed on 02.11.2014 in Title Suit No.08 of 2007 decreeing the suit for pre-emption under Muslim Law.

The plaint case, in brief, are that the lands of SA *Khatians* 686 and 687 of mouja Khada, police station-Sharankhola within the district of Bagerhat originally belonged to Hatem Ali Hawlader, the

predecessor of the plaintiff. After the death of Hatem Ali, the plaintiff and defendants 3-17 as heirs became its owner. The plaintiff purchased .2550 acres of land of SA *Khatian* 686 from defendant 10 through a registered *kabala* dated 06.08.1992. Thus he became a co-sharer in the suit *jote* by way of inheritance and purchase. The plaintiff used to look after his land through his father-in-law. He went to his in-law's house in the morning on 18.05.2007 and found defendants 1 and 2 moving around the suit land. On query, he came to learn that defendants 3-17 sold out the suit land to them at a consideration of Taka 6.10 lac. In presence of Abdul Hares Akand (PW2), Abdul Jabbar Talukder (PW3), Jamal Talukder and Abdul Kader Mollah of Kadamtala village, the plaintiff beat his chest and claimed the land; he offered defendants 1 and 2 to take the consideration money and hand over the land to him which they refused. The plaintiff then collecting certified copy of the disputed *kabala* instituted the instant suit for pre-emption under Muslim Law.

Defendants 1 and 2 contested the suit by filing written statement. They denied there the averments made in the plaint and contended that the plaintiff had full knowledge about the disputed transfer. They offered him to purchase the land but he expressed his inability for want of money. Moreover, the disputed deed was registered on commission in the house of the plaintiff with his full knowledge. The formalities of claiming the suit land according to

Muslim Law were not complied with and as such the suit would be dismissed.

On pleadings the trial Court framed the following issues-

i. whether or not the suit is maintainable in the present form and manner.

ii. whether or not the suit is bad for defect of parties.

iii. whether or not the plaintiff is a co-sharer of the suit *jote*.

iv. whether or not the plaintiff has complied with the formalities as required by the law.

v. whether or not plaintiff is entitled to get any other relief as prayed for.

In the trial, the plaintiff examined 3 witnesses while the defendants examined 2. The plaintiff produced documents exhibits 1-3 but the defendants did not produce any document. However, the trial Court considering the evidence and other material on record decreed the suit for pre-emption giving rise to this appeal.

Mr. Abdur Rezzak Khan, learned Senior Advocate for the appellants taking us through the plaint, written statement, evidence of witnesses and relevant provisions of law submits that the plaintiff had full knowledge about the disputed transfer. The vendors of the deed offered him to purchase the land but he refused. The disputed deed was registered in plaintiff's house on commission. The conduct of the

pre-emptor is sufficient to give rise to waiver and acquiescence and as such estoppel operates against him. To substantiate the aforesaid submission, Mr. Khan refers to the cases of Akhlasur Rahman and others Vs. Safurullah and others, 14 BLD (AD) 20; Maulana Abdul Karim Vs. Nurjahan Begum and others, 1986 BLD 125 and Bishnu Pada Sikder and others Vs. Badiuzzaman and others, 21 BLT 533. He then refers to the provisions of section 236 of Mulla's Principles of Mohamedan Law, 21st edition and submits that the formality for getting pre-emption is to be strictly complied with, *i.e.*, he has to make demand called as *talab-i-mowasibat* and thereafter *talab-i-ishhad*. The plaintiff failed to prove that he claimed the land at the time of its selling and thereafter offered money to the purchasers for getting the land returned. He adds that a person who intends to advance a claim based on the right of pre-emption must immediately on receiving information of the sale express in explicit terms of his intention to claim the land. In making the demand there must be no delay on the part of the pre-emptor. The other condition is that the pre-emptor should without making any delay repeat before witnesses his demand. Mr. Khan pointed us that the sale deed was executed and registered on 17.05.2007 but the alleged demand was made on 18.05.2007 which cannot be a valid demand to get an order of pre-emption under Muslim Law. He then refers to the cases of Md. Lokman Mondal Vs. Amir Ali Mondal and others, 21 DLR 211; Ali Muhammad Vs. Taj

Muhammad, Indian Law Repors, Volume I, Page 283 and Shamsuddin Ahmed alias Tofa Mia and others Vs. Abdul Latif Bhuiyan, being dead his heirs: Asia Khatun and others, 33 DLR (AD) 359 and submits that the plaintiff is to make positive assertion that at the time of second demand a reference was made to the first demand which was not done here. Referring to ILR Vol.1's case he submits that there the plaintiff came to know about the disputed sale in the morning and made demand at about 7.30-8.00 pm and for that reason only his claim was refused. A valid demand is a pre-requisite for claiming pre-emption under Muslim Law. Legal demands are to be made immediately on getting the information about sale of the immovable property. Mr. Khan then submits that as per the provisions of Order 6 Rule 2 of the Code of Civil Procedure (the Code) pleading shall contain statement in a concise form of the material facts and non mentioning of the date of offer to the plaintiff in the written statement will not frastate his claim, if the fact is corroborated by evidence of the defendants' witnesses. In this connection he refers to the cases of Hasenuddin Vs. Government of the People's Republic of Bangladesh and others, 6 BLC 54 and Madhu Sudan Malakar Vs. Jobed Ali and others, 61 DLR 127 and relied on the *ratio* laid therein. Mr. Khan finally refers to the evidence of PW1, "এমনি বুক চাপরাইয়াছি, কেন চাপরাইতে হয় তাহা আমি জানিতাম না।" and submits that it is clear in the above quoted evidence that the legal requirements of demand was not fulfilled as

per the provisions of Muslim Law. The trial Court failed to assess the evidence of the witnesses in its legal perspective and misdirected and misconstrued in its approach of the matter and thereby erred in law in decreeing the suit for pre-emption which is required to be interfered with in appeal.

Mr. Suprakash Datta, learned Advocate for respondent 1, on the other hand, supports the impugned judgment. He takes us through the written statement of the defendants and their oral evidence and submits that the defendants tried to make out a case that they offered the plaintiff to purchase the land but he refused for want of money. The burden of it's proof lies upon the defendants but they hopelessly failed. In the written statement they did not state the date when they make such offer to the plaintiff, even in their evidence nothing is found to that effect except a vague assertion that he was offered. Therefore, the knowledge of the plaintiff about the alleged transfer or that it was registered in his house has not been proved. He refers to the evidence of DW2 and submits that in evidence he admitted that the plaintiff was not in house at the time of registration of the document. The plaintiff came to learn about the disputed transfer on 18.05.2007 and then and there he made his claim as per the provisions of Muslim Law. It is not the requirement of law of making claim at the time of registration of the deed. The law provides that the plaintiff has to make the claim promptly receiving the information of the sale

which he did. In evidence PW1 supported the statements of the plaint which has been corroborated by the evidence of PWs 2 and 3. In reply to the submission of Mr. Khan that the plaintiff did not know why he beat on his chest, Mr. Datta submits that this is an isolated statement made by PW 1 during cross-examination and only for that reason the claim of the plaintiff should not be brushed aside. He refers to the case of Boramma Vs. Krishna Gowda and others, 9 SCC (2000) 214 and submits that to extract and isolate an answer given by a witness during cross-examination and then to draw inferences from it would not be consistent with sound rules of appreciation of evidence because what particular question was put to the plaintiff was not written in evidence. The right of pre-emption should not be taken away for technical strict compliance of the formalities, if otherwise the demand is proved by the evidence of witnesses. The trial Court on correct assessment of fact and law allowed the pre-emption which may not be interfered with by this Court in appeal.

We have considered the submissions of both the sides, gone through the materials on record, the relevant law and *ratio* of the cases cited by the parties.

It is admitted position of fact that the plaintiff is a co-sharer in the suit *jote* by inheritance and purchase. The defendants did not raise any objection about the co-sharership of the plaintiff. Defendants 3-17 sold out the suit land to defendants 1 and 2 through registered *kabala*

dated 17.05.2007. The vendors are also co-sharer in the suit *jote* but vendees are strangers.

In the written statement defendants 1 and 2 averred that the plaintiff and the vendors resided in the same house and the disputed *kabala* was registered there on commission. The defendants further contented that the plaintiff was offered to purchase the land but he refused. The above contention is to be proved by the defendants under the provisions of sections 102 and 103 of the Evidence Act. On going through the written statement we find that there the defendants did not state the date they offered the land to the plaintiff. On perusal of written statement and scanning the evidence of DW1 Md. Harun Talukder together, we find that even if it is accepted that the defendants offered the suit land to the plaintiff it was after defendants 1 and 2 had agreed to purchase. PW1 Abdus Salam Talukder denied the defendants' suggestion that he was offered to purchase the suit land. By the evidence of DWs 1 and 2 and cross-examining the plaintiff's witnesses the defendants failed to prove that the vendors offered the plaintiff to purchase the suit land. The defendants' case that the plaintiff expressed his inability to purchase for want of money cannot be believed because the plaintiff purchased a part of the land earlier through exhibit 3. PW1's evidence prove that he had ability to purchase the sold land.

The fact as stated in the written statement that the disputed *kabala* was registered in the house of the plaintiff was also not proved. DW1 in cross-examination stated, "মালেকের বাড়ীতে বসে দলিল রেজিঃ হয়।" In examination-in-chief DW2 Siddiqur Rahman, a vendor of the deed stated,"কমিশনে দলিল রেজিঃ হয় আমাদের বাড়ীতে। তখন বাদী ছিল না।" In cross-examination he stated, "দলিল রেজিঃ সময় বাদী উপস্থিত ছিল না।" In view of the above oral evidence, it is clear that at the time of execution and registration of the *kabala* on commission the plaintiff was not present there. Therefore, the submission of Mr. Khan that the plaintiff had knowledge about the disputed transfer and the pre-emption application is not maintainable or it was barred by principle of waiver, acquiescence and estoppel, bears no substance.

Now let us examine whether the provisions of Muslim Law were complied with in making the demands. It is well settled that the right of *shufaa* or pre-emption under Muslim Law is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person. The manner of making demand for pre-emption envisaged in section 236 of the Mullah's Mohamedan Law (21st edition) is as under-

> "No person is entitled to the right of pre-emption unless-
>
> (1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called *talab-i-mowasibat* (literally, demand of jumping, that is, immediate demand): and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the *talab-i-mowasibat* had already been made, and has made a formal demand-

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and
(b) in the presence at least of two witnesses. This formality is called *talab-i-ishhad* (demand with invocation of witnesses)."

In the aforesaid section which deals with the manner of pre-emption it is clear that the *talab-i-mowasibat* is spoken of as the first demand, and the *talab-i-ishhad* is the second demand. The third demand consists of the institution of the suit for pre-emption which is called *talab-i-tamlik*. The *talab-i-mowasibat* and *talab-i-ishhad* are condition to exercise the right of pre-emption. The *talab-i-ishhad* is as indispensable as the *talab-i-mowasibat.* The formalities must be strictly observed and there must be clear proof of their observance.

In the case in hand the plaintiff asserted in the plaint that in the morning of 18.05.2007 he went to his in-law's house situated near the suit land and found defendants 1 and 2 roaming aground there. He then came to learn about the transfer of the suit land. Then and there he beat his chest and demanded the land for his own use. He then offered defendants 1 and 2 the consideration money and to hand over land to him but they refused to do so. Plaintiff Abdus Salam Talukder PW1 in the dock corroborated the aforesaid fact. The defendants

cross-examined him but failed to bring out anything adverse. The plaintiff made the aforesaid two demands in the suit land on 18.05.2007 in presence of PWs 2 and 3. PW2 Abdul Haraz Akond sated, "১৮.০৫.২০০৭ তারিখে নালিশী জমি মাপামাপির সময় ঐ জমিতে ছিলাম। তখন সালাম চিল্লাচিল্লি করিয়া হারুন তালুকদার ও রেহানার কাছে জমি ফেরত দেওয়ার দাবী করিতেছে। সালামের কথায় হারুন ফেরৎ দেবেনা বলে। সালাম বলে যে আমার জমিটা একান্ত দরকার।" PW3 Abdul Jabbar Talukder stated,"সালাম সাহেব কেনা বেচার একদিন পরে ঐ জমিতে বসে হারুন সাহেবের কাছে টাকা নিয়া জমি ফেরৎ চায়। সালাম সাহেব বুক চাপড়াইয়া জোরে ঐ দাবী করে। ঐ সময় আমি জমিতে ছিলাম।" In cross-examination he affirmed, "ঐ সময় আমি জমিতে ছিলাম।" The law provides that at the time of making first demand *talab-i-mowasibat* no witness is required to remain present but it is required for the second demand *Talabi-i-ishhad*. The witnesses present at the time of second demand '*Talabi-i-ishhad'* is to lead evidence supporting it which has been done in this case by PWs 2 and 3 successfully. They have corroborated the plaint case and evidence of PW1 to that effect.

If we assess the evidence of PWs 1-3 and the evidence of DWs, we can safely hold that the statements made by PW1 in cross-examination-"এমনি বুক চাপরাইয়াছি, কেন চাপরাইতে হয় তাহা আমি জানিতামনা।" is an isolated statement made by him at the event of cross-examination and for that reason only the claim of the plaintiff for getting pre-emption should not be rejected. In the case of Boramma Vs. Krishna Gowda and others, 9 SCC (2000) 214 it has been held-

> "it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference taking it in isolation. The Court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case."

The *ratio* laid in the aforecited case appears befitting in this case. Here, the balance of preponderance of evidence is to be considered and such balance goes in favour of the plaintiff respondent. Therefore, the submission of Mr. Khan referring to the cross-examination of PW1 bears no substance. The *ratio* of the cases cited by him do not match this case considering the facts of those cases upon which the *ratio* has been laid.

It is well settled that once the pre-emptor succeeds in adducing satisfactory evidence in regard to the fulfillment of the aforesaid requirement, his claim cannot be rejected on hyper technical interpretation of the formalities or on microscopic examination of the evidence to find some fault here or there. In any event, the Court should examine the evidence and materials on record in regard to the observance of the formalities in a judicial manner keeping in view of the practical and real state of affairs and also the fact that when Muslim Law has given such a right to a person, it should not be whitted away by insisting hyper-technical and unrealistically strict compliance of the formalities accompanied with its exercise. It is to be remembered that "formalities" after all are only formalities intended

to serve some ostensible purpose and once that purpose is served, these should not be allowed to be used to take away the legal right of a claimant. “Formalities” in no case should be allowed to operate beyond the field allotted to them by law. The plaintiff successfully observed the formalities of the law and filed the suit (*talab-i-tamlik*) in time and as such we find no bar in getting the order of pre-emption.

In view of the discussion made hereinabove, we find that although the demand of pre-emption is treated as a weak type of demand but the plaintiff successfully proved that he made demand in strict compliance of the provisions of law. The learned Joint District Judge correctly appreciated the evidence of the parties and allowed the plaintiff’s claim of pre-emption under Muslim Law. We find nothing wrong in the impugned judgment and decree.

Resultantly, this appeal fails. The judgment and decree passed by the trial Court is thereby affirmed. However, there will be no order as to costs. Since the appeal has been dismissed, the connecting Rule is discharged being infructuous. The order of stay stands vacated.

Communicate the judgment and send down the lower Court’s record.

Md. Akhtaruzzaman, J.

I agree.