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

Present
Madam Justice Kashefa Hussain

Civil Revision No. 3600 of 2014

Abdul Maleque
.....petitioner
-Versus-
Md. Riazuddin and others
------- Opposite parties.
Mr. Shah Alam Sarker, Advocate
------ For the petitioner

Mrs. Nahid Yesmin Advocate with

Mr. Iqbal Hasan, Advocate

------- For the Opposite Parties.

Heard on: 30.10.2018, 04.11.2018,
06.11.2018, 07.11.2018 and Judgment
on 13.12. 2018.

Supplementary affidavit do form part of the main petition.

Rule was issued in the instant Civil Revisional application calling upon the opposite party No. 1 to show cause as to why the judgment and order dated 20.05.2014 passed by the learned Joint District Judge, 2nd Court, Narsingdi in Pre-emption Miscellaneous Appeal No. 23 of 2012 affirming the judgment and order dated 22.05.2012 passed by the learned Assistant Judge, Shibpur, Narsingdi in Pre-emption Miscellaneous Case No. 34 of 1998 should not be set aside and or pass such other order or further order or orders as to this court may seem fit and proper.

The opposite party No. 1 as pre-emptor instituted the pre-emption Miscellaneous Case No. 34 of 1998 in the court of learned Assistant Judge, Shibpur, Narsingdi impleading the present petitioner pre-emptee and some others including the vendor as opposite parties in the pre-emption Miscellaneous case. Upon hearing both sides the court of learned Assistant Judge allowed the pre-emption case by its judgment and order dated 22.05.2012. Being aggrieved by the judgment and order of the court of learned Assistant Judge, the opposite party in the pre-emption case (petitioner in the civil revision) as appellant filed pre-emption Miscellaneous Appeal No. 23 of 2012 before the court of learned District Judge, Narsingdi which upon transfer was heard by the learned Joint District Judge, 2nd Court, Narsingdi. Upon hearing both sides the appellate court disallowed the appeal by its judgment and order dated 26.05.2014 and thereby affirmed the earlier judgment and order passed by the learned Assistant Judge dated 22.05.2012.

Being aggrieved and dissatisfied with the judgment and order of the courts below, the petitioner in the pre-emption miscellaneous case being appellant in the miscellaneous appeal as petitioner filed the instant Civil Revisional application which is instantly before this court for disposal.

Facts and circumstances of the case as stated in the plaint in the miscellaneous case in short is that the petitioner and

opposite party Nos. 2-5 are brother and sisters sibilings. They are co-sharers by inheritance to the case land. The opposite parties Nos. 2-5 transferred the case land to the opposite party No. 1 collusively without notifying the petitioner and beyond his knowledge by deed No. 4587 dated 23.07.1997. The opposite party No. 1 is a stranger to the case land. Though the alleged deed has been made out to be a deed of exchange, actually it is out and out a sale deed. By the deed the opposite party Nos. 2-5 obtained only 40 decimals of land in lieu of 192 decimals land of the same mouza. In the alleged deed the value of 40 decimals of land was shown as Taka 40,000/- whereas the same was returned back to the opposite party No. 1 in consideration of Tk. 10,000/- on 15.10.1997. The opposite party No. 1 claimed the possession of the case land on 16.06.1998 disclosing the facts of the alleged purchase. The petitioner was the share cropper of the case land. The petitioner procured certified copy of the alleged deed on 27.09.1998 and came to know about the deed. He had land not more than eight bighas including the case land. Under these circumstances the petitioner brought the original pre-emption case.

The pre-emptee opposite parties in the miscellaneous case being petitioner in the civil revision as pre-emptee contested the case by filing a written statement denying all the material allegation in the plaint holding inter alia that the case is not

maintainable in its present form and manner. It is bad for defect of parties and barred by limitation. It is barred by principles of estoppels, waiver and acquiescence. The opposite party being a co-sharer to S.A Khatian No. 20 corresponding to C.S khatian No. 6 exchanged his land with the case land of Fozila Khatian and others by deed of exchange No. 4587 dated 23.07.1997. Fozila Khatun and others handed over the possession of the case land to the opposite party. A pre-emption case is not tenable in law against a deed of exchange. The opposite party obtained 204 decimals of land of plot Nos. 460/495, 449 and 459 by deed of purchase No. 5836 dated 22.07.1993. So the opposite party is not stranger to the case land. The petitioner was not inclined to purchase the land of his co-sharers. His mother transferred 24 decimals of land of Mustt. Mokbuler Nessa by sale deed No. 7103 dated 26.10.1997. It is a false statement that he came to know about the alleged sale on 27.09.1998. The petitioner has brought a false case which is liable to be dismissed with costs.

Learned Advocate Mr. Shah Alam Sarker appeared for the petitioner while Mrs. Nahid Yesmin, Advocate along with Mr. Iqbal Hasan, Advocate represented the opposite parties.

Learned Advocate for the pre-emptee petitioner submits that both the courts below upon misreading and non consideration of evidences passed erroneous judgments and orders respectively and the judgments and orders are not

sustainable and ought to be set aside. In the light of his assertion the learned Advocate for the petitioner submits that the pre-emption case is not maintainable at all given that the impugned deed No. 4587 dated 23.07.1997 is an ewaz exchange deed and not a sale deed. He continues that the deed being not a sale deed but an ewaz exchange deed, therefore a pre-emption case does not lie as not being maintainable and the case ought to have been dismissed in limine. He argues that the pre-emptor opposite parties in the miscellaneous case did not may any statement to the effect as to who was or were a witnesses to the deed nor the time and place where the deed was executed was stated. He argues that the courts below gave their finding on the basis of P.W-2 and P.W-3 both of whom are cousins of the pre-emptor. He pursuaded that the P.W-2 and P.W-3 being close relatives of the pre-emptor are not independent witnesses and their witnesses are not credible and may not by relied upon. He also agitates that the courts below only on the basis of the deposition of P.-W-2 and P.W-3 arrived upon the finding that it is not an ewaz exchange deed and continued that the P.W-2 and P.W-3 made inconsistent depositions but the courts below upon misconstruing the deposition and evidences came to their decision and gave wrong findings as such. On the point of limitation he argues that the case is hopelessly barred by limitation. In pursuance he submits that the pre-emptor could not prove by evidences and deposition that pursuant to execution of the deed dated

23.07.1997, he eventually gained knowledge about after a year in 1998. In this context learned Advocate for the petitioner submits that the contention of the pre-emptor regarding his date of knowledge is not true and submits that the statutory time for filing a case is 4 (four) months as prescribed under the relevant law. He argues that he pre-emptor could not prove by deposition and witnesses that he gained knowledge in 1998. He also submits that it is stated in the plaint of the pre-emptor that the pre-emptor gained knowledge of the execution of the deed in front of some other people including some local gentries(স্থানীয় গণ্যমান্য ব্যক্তিবর্গ) . In this context he argues that however no such local gentries were brought as witnesses to corroborate the plea taken in the plaint. He also makes submission to the effect that although the land was eventually after purchase by the pre-emptee sold to another person yet the subsequent purchaser was not made a party in the case and that as such the case also suffers from defect of parties. In support of his contention that the case is barred by limitation he cites a few decisions of our Apex court in the case of Mohammad Akbar Chowdhury Vs. Khalilur Rahman reported in VI ADC(2009) 131, in the case of Md. Alauddin Vs. Azizul Hussain and others reported in 5 ADC 389, in the case of Shantipada Shil Vs. Sunil Kumar Sarker and others reported in 19 MLR(AD)(2014)263. He also submits that the p.w-2 and p.w-3 cousins are close relatives of the pre-emptor and they admit having knowledge of the transaction but that then it is difficult to

believe that the pre-emptor did not have knowledge. On his plea that the case suffers from defect of parties and therefore not maintainable, he cites a decision of our Apex court in the case of Abdus Samad Vs. Sohrab Ali reported in 53 DLR(AD)(1981)113. He concludes his submission upon assertion that the learned courts below did not take these cogent grounds into consideration and completely overlooked these and the case not being maintainable since it is an awaj exchange deed and not out and out sale deed, therefore both the judgment and order of the courts below ought to be set aside and the Rule bears merit and ought to be made absolute for ends of justice.

On the other hand learned Advocate for the opposite parties submits that the courts below upon correct appraisal of all evidences and witnesses came upon concurrent findings of fact and therefore those need not be interfered with. Regarding the petitioner's contention that the case is barred by limitation, the learned Advocate for the opposite parties submits that the opposite parties in the pre-emption case (being the petitioner here) could not at any stage during trial or appeal show any evidences by way of deposition whatsoever that the pre-emptor had previous knowledge of the sale execution of the deed. In this context, he draws this court's attention to the judgment of the trial court wherefrom it appears that the trial court gave its finding regarding the issue of the pre-emptor gaining knowledge

of the deed to the effect, ***"Pt. w ২ এবং Pt. w ৩ তাকে সমর্থন করে জবানবন্দি প্রদান করেছে। ১নং তরফছানী পক্ষের বিজ্ঞ কৌশলী Pt. w ১ কে জেরাকালে মামলাটি তামাদিতে বারিত মর্মে কোন সাজেশন প্রদান করে নি। উপরন্তু মজহর পক্ষের বিপরীতে যায় এমন কোন বক্তব্য বের করতে দেখা যায় না।***** মজহর পক্ষ বরাবর কোন পক্ষ নোটিশ প্রদান করা হয়েছে মর্মে ও ১নং তরফছানী দাবী করেন নি।"*** He next takes me to the relevant portion on the issue of limitation in the judgment of the appellate court: ***"the opposite party could not produce any evidence to prove that petitioner knew about the alleged transaction from the very beginning; all of p.w-1, p.w-2 and p.w-3 have corroborated the case of the petitioner and in cross examination nothing contradictory is found out and the petitioner knew about the transfer on 16.09.1998 and filed the case on 20.10.1998."*** Relying upon the observation of the courts below he submits that there are no misreading of the evidences by the courts below on the issue of limitation and therefore the case is not barred by limitation. Regarding the petitioner's argument that since the p.w-2 and p.w-3 being first cousin of the opposite parties had knowledge of the deed therefore it is difficult to believe that the pre-emptor did not have knowledge of the deed, the opposite parties pre-emptor submits that it is evident from the recital of the deed itself that the vendors sister's husband were witnesses to the deed. However none of the p.ws also including the cousins were made witnesses to the deed.

Controverting the argument of the petitioner that the pre-emption case suffers from defect of parties, Learned Advocate for opposite parties submits that apparently subsequent to purchase from the vendor sister of the pre-emptor, the pre-emptee sold the land to some others including one Sundor Ali. On this point he submits that the subsequent purchasee Samla Khatun is wife of Sundor Ali and Samla Khatun is a party to the case and hence it is not true that the case suffers from defect of parties. He next submits that it is evident from the conduct of the vendor sister and the pre-emptee from the very beginning of the transaction that it is not an awaj exchange deed but rather it is an out and out sale deed in as much as that the courts below correctly observed that by this deed the opposite party Nos. 2-5 obtained only 40 decimals of land in lieu of 192 decimals of land in the same mouza and in the alleged deed the value of 40 decimals of land was shown as Taka 40000/-. He agitates that whereas the same land was returned to cousin of opposite party No. 1 in consideration of Tk. 10000/- on 15.10.1997 that is only a few months after the purchase by the pre-emptee. In this context he agitated that their subsequent conduct speaks for itself, and it is crystal clear that the deed was superficially shown to be an awaj exchange deed only to avoid any claim from the pre-emptor brother and with the intention to hoodwink the law. He concludes his submission upon assertion that the deed No. 4587 dated 23.07.1997 is out and out a sale deed and not an awaj

exchange deed and the plaintiff pre-emptee being co-sharer by inheritance have the lawful right to preempt the property and the pre-emptee is a stranger to the property only and therefore the Rule bears no merit and ought to be discharged for ends of justice.

Heard the learned Advocates from both sides, perused the application, material on records and the judgment of the courts below and decisions cited by the learned Advocate. It is evident that the main contention in this case arises out of the deed No. 4587 dated 23.07.1997**.** The petitioner pre-emptee claims that it is an awaj exchange deed while the opposite parties filed the pre-emption case challenging that it is not an awaj exchange deed but an out and out sale deed that he has the right to pre-empt the property. The pre-emptee petitioner contended that the suit is not maintainable as such as a pre-emption case since the deed is an awaj exchange deed and not a sale deed. Therefore to decide the issue of maintainability in this case it must be examined whether it is an awaj exchange deed or an out and out sale deed. To come upon a proper finding on the issue, the intention behind executing the deed must be found out from the evidences and witnesses. It is found that the trial court and the appellate court based their findings also on the circumstantial evidences. Upon sifting through the depositions I do not find any marked inconsistency or indiscrepancy in the deposition of the p.ws. The

learned Advocate for the petitioner agitated that since the p.ws are close relatives of the pre-emptor therefore they cannot be independent witnesses as such. In this context it may be significantly noted that the vendors are sisters of the pre-emptor and therefore the p.w-2 and p.w-3 being close relatives of both the preemptor and the vendor are naturally also cousins and close relatives of the vendor too. And therefore in the absence of any proof of bias or prejudice it cannot be presumed that the p.w-2 and p.w-3 are not independent witnesses. It is evident that p.w-2 and p.w-3 stand on equal footing in their relationship with the pre-emptor and vendor sister.

I have perused the findings of the appellate court on the amount of land shown to be exchanged in the awaj exchange deed. I am of the considered view that the appellate court correctly gave its observation that : ***"By this deed the opposite party Nos. 2-5 obtained only 40 decimals land instead of 192 decimals of land of the same mouza. In the alleged deed the value of 40 decimals land was shown as 40,000/- whereas the same was returned back to opposite party No. 1 in consideration of Tk. 10,000/- on 15.10.1997."***

The trial court also made similar findings to the effect in that in its judgment stated that: *"দ্বিতীয়ত; মজহর পক্ষের দাখিলীয় প্রদর্শনী-১ অনুযায়ী দেকা যাচ্ছে যে, ২-৫ নং তরফছানী যে, জমি ১ নং তরফছানী থেকে নালিশা দলিলের মাধ্যমে পেয়েচে বলে দাবী করেচে সে জমিই ১৫/১০/১৯৯৭ ইং তারিখে ৬৮৪৪*

নং দালিলের মাধ্যমে আঃ হেকিম এর নামে সাফ কবলা করা হয় ১০,০০০/- টাকা মূল্যে নির্ধারনে।"

The courts below made some observation on possession but it is my considered view that since it is an ejmali property the issue of possession is not so much relevant in this case. But yet it may be noted that the O.P.Ws made inconsistent statements as to possession. At one stage the O.P.Ws deposed that they live at their husband's home separately while at another stage O.P.W 1 deposes that they did not obtain possession of the suit land.

From the evidences, particularly the circumstantial evidences the fact of 192 decimals of land being exchanged in lieu of 40 decimals of land only appears to be an absurd transaction. And apparently all the land belongs to the same category and are more or less nearby lands. The fact that the valuation of the land which is shown to be Tk. 40,000/- was sold as at Tk. 10,000/- only after few months is adequate proof that it was only superficially an awaj exchange deed but actually it is an out and out sale deed. It is further significant to note that none of the vendor sisters were produced before court, although they are necessary witnesses in the case. Moreover, considering that they are parties to the deed however none of them were brought as witnesses to depose but only the husband of one of the sisters came as a witnesses.

Given that there are any lacunas in the deposition of the Pws, but the circumstantial evidence clearly show that 40 decimals of land was "exchanged" in lieu of 192 decimals of land and the lands supposedly "exchanged" are in the vicinity and generally belong to the same category of lands. Moreover, the same plot which was supposedly exchanged between the pre-emptee and the vendor at a valuation of Tk 40,000/-, the same was returned by the pre-emptee at a value of Tk 10,000/- after about 3 (months) only. I am of the considered view that the circumstantial evidence and which evidence is also reflected in the documents on record, shall gain preponderance in the instant case.

The petitioner claimed that the suit suffers from defect of parties and cited a decision to this effect. On the petitioner's submission that the case is not maintainable suffering from defect of parties since the subsequent purchaser was not made a party. I find force in the submission of the counsel for the opposite parties given that the wife of the subsequent purchaser is already a party to the suit and it is adequate to suffice against the petitioners claim to defect of parties. Therefore, my considered finding is that the suit does not suffer from defect of parties.

The petitioner cited decisions supporting his contention that the suit is barred by limitation. On this point also I find force

in the argument of the opposite parties. On the point of limitation it is my considered view that the opposite party No. 1 also could not prove by evidences that the pre-emptor had previous knowledge of the deed.

From the foregoing discussions made above I am inclined to hold that both the courts below upon proper assessment of the evidences and deposition and taking other facts and circumstances properly into consideration came upon their concurrent and consistent findings and there is no reason to interfere with those. I find no merit in this Rule.

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

The order of stay granted earlier by this court is hereby set aside.

Send down the lower courts records at once.

Communicate the judgment at once.

Arif(B.O)