

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 607 of 2004

Mohiuddin Ahammad and another
... Petitioners

-Versus-

Md. Daulat Miah and others
...Opposite-Parties

Ms. Syeda Nasrin with
Mr. Md. Razu Howlader Palash,
Mr. Bibek Chandra,
Mr. Saddam Hossain,
Mr. Golam Kibria,
Mr. Khandokar Sultan Ahmed,
Ms. Jannatul Islam Peya and
Mr. Murad Hossain, Advocates
...For the Petitioners
Mr. Mohammad Ali Azam, Advocate
...For the Opposite-Party No. 1.

Judgment on 13rd November, 2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite party No.1 to show cause as to why the judgment and order dated 24.11.2003 passed by the learned Additional District Judge, 2nd Court, Kishoreganj in Miscellaneous Appeal No. 17 of 1998 allowing the appeal and thereby reversing the judgment and order dated 21.07.1998 passed by the learned Senior Assistant Judge, Bajitpur, Kishoreganj in Pre-emption Case No. 05 of 1996 dismissing the case should not be set aside and/or

pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The opposite party No. 1, as pre-emptor, instituted Pre-emption Case No. 05 of 1996 in the Court of Senior Assistant Judge, Bajitpur, Kishoreganj against the present petitioner, as pre-emptee, praying for pre-emption of the case property stating that the property belonged to opposite-party No. 2, Mina Begum from whom the petitioner by a Registered Deed No. 5960 dated 23.11.1992 and Deed No. 3172 dated 25.07.1994 purchased a portion of the property measuring 8 sataks of land, on the extreme south, running from east to west. After purchase, he got his name mutated in the khatian by separation of jama, constructed a pucca house thereon providing other facilities and residing therein with his family. Mina Begum subsequently, sold 4 sataks of land to the pre-emptee by a Registered Deed No. 207 dated 15.01.1996 without offering the same to the pre-emptor. The pre-emptor claimed that he somehow, came to know about the transfer and obtained true copy of the sale deed from concerned Registry Office,

and after obtaining the same finally came to know that the opposite-party No. 2 sold out 4 sataks of land to the petitioner-pre-emptee without knowledge of the opposite-party No. 1-pre-emptor. Had the owner Mina Begum asked the opposite-party No. 1 to purchase the property he would have purchased the same for his convenience of possession and enjoyment as a co-sharer in the land by purchase, as such, filed the present case for pre-emption of the property by depositing consideration money along with other incidental costs thereto.

The petitioner pre-emptee contested the case by filing written objection denying all the allegations made in the application contending, *inter alia*, that Mina Begum as owner of the property for the first time asked the pre-emptor to purchase the same at the market price, but he refused to purchase the same, then Mina Begum and her husband along with other local people including local commissioner requested the pre-emptee to see the pre-emptor and convince to him to purchase the property. On the request of the owner of the property the pre-emptee himself along with others went to the pre-emptor and asked him to purchase the property

from Mina Begum, but the pre-emptor did not agree to purchase the same at the market price, rather he told the pre-emptee and the vendor that he will purchase the property if the price of the same is fixed at the lower rate he purchased earlier; otherwise, to sell out the property to any other persons and in that case he will have no objection. Thereafter, the owner of the property proposed the pre-emptee to purchase the same at the market price and the pre-emptee purchased the same with the knowledge of the pre-emptor and others and since then he has been possessing the property by erecting house thereon spending Tk. 60,000/-. Subsequently, the pre-emptee by another deed purchased $\frac{1}{2}$ satak of land from Mina Begum adjacent to the property purchased earlier. He further stated that the property purchased by the pre-emptor situated at the extreme south of the plot touching east and west. The property purchased by the pre-emptee is situated at north east corner of the plot No. 28 having boundary on the north road, on the west and south property of the vendor and on the east one Khashru. Between the property of pre-emptor and the pre-emptee original owner Mina Begum's property is situated and the property of Mina Begum

running from east to west intersects contiguousness with the pre-emptor. As such, by the land of Mina Begum between the pre-emptor and the pre-emptee, there remains no connection of land between themselves. Therefore, the case is barred by principle of waiver, estoppel and acquiescence as well as barred for the reason of cessation of co-sharership of the pre-emptor in the suit plot, as such, the case is liable to be dismissed.

The trial court framed 6(six) issues for determination of the dispute. In course of hearing the pre-emptor examined 3(three) witnesses as Pt.Ws and the opposite-party examined 2(two) witness as Op.Ws in support of their claim and have submitted documents which were duly marked as exhibits. The trial court after hearing by its judgment and order dated 21.07.1998 dismissed the case.

Being aggrieved by and dissatisfied with the judgment and order of the trial court, the pre-emptor preferred Miscellaneous Appeal No. 17 of 1998 before the learned District Judge, Kishoreganj. Eventually, the appeal was heard and disposed of by the learned Additional District Judge, 2nd Court, Kishoreganj on transfer who upon hearing by the impugned judgment and order

dated 24.11.2003 allowed the appeal and set aside the judgment and order of the trial court, consequently, allowed pre-emption in favour of pre-emptor. At this juncture, the pre-emptee petitioners 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.

Ms. Syeda Nasin, learned Advocate appearing for the petitioners submits that vendor of the pre-emptor and the pre-emptee is common one named Mina Begum. The pre-emptor purchased 4 sataks of land by a Registered Deed No. 5960 dated 23.11.1992 and 2 sataks of land by a Registered Deed No. 3172 dated 25.07.1994. After purchase the petitioner got his name mutated in the khatian and while in possession and enjoyment by giving definite boundary demarcating the property from the rest land under Plot No. 28 obtained loan from bank by mortgaging the land.

She submits that since the pre-emptor got his name mutated in khatian by separation of jama in Mutation Case No. 121(9-1)/1994-1995 much earlier than the purchase of the pre-emptee he

is ceased to be a co-sharer in the land. Said fact has been properly appreciated by the trial court and held that a person not a co-sharer in the land is not entitled to get pre-emption of the property.

She argued that Op. Ws in support of pre-emptee deposed before the trial court stating that at the first instance the opposite-party No. 1 was requested to purchase the property at the market price, but he twice refused to purchase the same saying that he would purchase the property if the price of the same is fixed at the rate he purchased earlier, otherwise, he told the vendor to sell the property to any other persons and in that case he will not have any objection. Thereafter, the pre-emptee purchased the property with the knowledge of the pre-emptees, as such, the case is barred by principle of waiver, estoppel and acquiescence. She further submits that the property purchased by the pre-emptee is situated at a considerable distance from the property purchased by the pre-emptor intersected by the property of vendor in between pre-emptor and pre-emptees property, and the property purchased by the pre-emptee is not at all contiguous to the land of the pre-emptor and not at all necessary for his use and enjoyment. The trial court while

refusing pre-emption rightly held as such, but the appellate court without controverting and adverting the observations made by the trial court most unfortunately found that because of cancelation of mutation at the instance of the pre-emptor in Miscellaneous Case No. 16A(13) of 1995-1996 co-sharership in the property has become restored.

She also submits that in the event of any error in the order of mutation, the only way and scope open to the pre-emptor to get the order corrected by filing an application, but the pre-emptor cannot get the mutation and separation of jama cancelled by filing a miscellaneous case in whose favour the mutation was done. Moreover, after passing any order by any Officer of the government allowing or rejecting an application it becomes functio officio. If by the said order the beneficiary has become aggrieved he can move before the higher authority i.e. A. D. C. (Revenue), but the pre-emptor with a malafide intention after mutating and separating jama in his name and after obtaining loan from the bank by depositing documents including the mutation khatian again got the same cancelled purposely by filing another miscellaneous case on

the plea of wrong mentioning of the khatian in the order. The trial court considering the fact rightly refused the pre-emption, but the appellate court most unfortunately allowed pre-emption in favour of the pre-emptor findings co-sharership of the pre-emptor. Moreover, the pre-emptor did not mention anything about the mutation and its cancellation in the original application of this case. He amended the plaint and inserted this history after the pre-emptees brought this fact in their written objection, which shows malafide intention of the pre-emptor who has not come before the court with clean hands.

Mr. Mohammad Ali Azam, learned Advocate appearing for the opposite party No. 1 at the very outset submits that, admittedly, the property covered by Plot No. 28 belonged to Mina Begum from whom the pre-emptor by two sale deeds purchased 8 sataks land on the south of the plot. If the pre-emptor was offered to purchase the case land before sale he would have purchased the same. But without knowledge of the pre-emptor the vendor transferred the property to the pre-emptee. He also submits that mere separation of jama by mutation of the khatian itself does not cease co-sharership

in the land even if a plot recorded in the name of different persons in different khatians, however, the pre-emptor got the mutation case cancelled as in the order of mutation, khatian number was wrongly mentioned. He submits that mere knowledge of transfer and offer to purchase the property to the pre-emptor cannot extinguish the right of pre-emption, as the right of pre-emption is statutory right, as such, the trial court misinterpreted the law, but the appellate court rightly held that because of cancellation of the mutation before selling of the property and filing of the case co-sharership has become restored, the appellate court committed no error in the decision occasioning failure of justice.

Heard the learned Advocates of both the parties, have gone through the revisional application, application for pre-emption, written objection thereto, evidences both oral and documentary available in lower court records and the impugned judgment and orders of both the courts below.

Admittedly, the property belonged to one Mina Begum from whom the pre-emptor purchased 8 sataks of land by 2 sale deeds at the extreme south of the plot running east to west. The property

sought to be pre-empted is situated at the extreme north and east of the plot. Between the land of pre-emptor and the land of pre-emptee, property of vendor Mina Begum is situated running from east to west clearly separating and dividing the land of pre-emptor and pre-emptee. The case property has been intersected by the property of the vendor. It appears that subsequently, the pre-emptee by another sale deed dated 24.04.2003 purchased $\frac{1}{2}$ satak land adjacent to the purchased land on the south running from east to north, touching the land of the vendor. There is no nexus between the land of the pre-emptor and the pre-emptee. The case land is not at all necessary for peaceful enjoyment of the pre-emptor's land.

Admittedly, the pre-emptor after purchase, got his name mutated in the khatian by separation of jama in Mutation Case No. 121(9-1)94-95, and on the basis of said mutation and separation of jama obtained loan from bank by mortgaging the property and depositing all the title documents and subsequently, by another Miscellaneous Case No. 16A(13)95-96 got the mutation cancelled at his own motion on the ground of wrong mentioning of khatian. Thereafter, he filed the instant case, claiming himself to be co-

sharer in the plot by purchase against the pre-emptee suppressing the fact of mutation of khatian and cancellation of the same.

On the other hand, the pre-emptee claimed that before purchase of the property, he himself along with the vendor and others requested the pre-emptor to purchase the property at the market price, but he repeatedly refused the proposal and told the vendor to sell the same to any other person and he will not raise any objection. Thereafter, pre-emptee purchased the property at the market price and after purchase he developed the land and erected a structure thereon at a cost of Tk. 60,000/-. Subsequently, he also purchased $\frac{1}{2}$ satak of land adjacent to the land purchased earlier and has been possessing the same to the knowledge of the pre-emptor. He also claimed that a portion of land adjacent to the west of the plot were sold to two different persons, but the pre-emptor did not pray for pre-emption against those persons as well as the property subsequently purchased by the pre-emptee touching the property of original vendor.

The pre-emptor after purchase on his own initiative got his name mutated in the khatian by separation of jama. When a person got his name mutated by way of separation of jama in the khatian he is no more a co-sharer in the plot. In the instant case, admittedly, the petitioner got his name mutated in the khatian by separation of jama, but subsequently, he got the mutation cancelled in a separate miscellaneous case. The question is, because of cancelation of the mutation whether the co-sharership in the plot has again restored entitling a person to claim pre-emption against pre-emptee.

To appreciate the point I have gone through the application for pre-emption and written objection thereto. The petitioner in his application clearly stated that he got the khatian separated by way of mutation and obtained loan from the bank. In this situation, as observed in the case of *Alfazuddin Ahmed Vs. Abdur Rahman and others* reported in 8 MLR (AD) 2003 page 153 held that;

“as the pre-emptor got the jama of khatian split up in respect of land purchased from the vendor and got the separate khatian opened in his name before the transfer to the pre-emptee and consequent thereupon as he ceased to be the co-sharer in the khatian pre-

emption sought for on the basis of purchase from Mina Begum against the pre-emptee who purchased the land from same vendor was not available.”

In the instant case, I find that the pre-emptor got his name mutated by separation of jama and opened a separate khatian in his name, as such, before transfer of the property by the vendor and filing of the case he was no more co-sharer, the trial court rightly held as such. Apart from this evidences led by other parties establishes that the property before transfer offered to the pre-emptor, but because of offering to purchase the property by the vendor and not purchased by the pre-emptor does not ipso facto relinquish his right to pre-emption if other requirements are fulfilled. In the instant case, admittedly, the case has been filed within time prescribed by law, as such, the question of waiver, acquiescence is no bar for the instant case. But only hurdle for the pre-emptor is mutation and separation of jama which was subsequently cancelled on his own initiative.

If any error occurred in the order passed by any authority, the applicant can get the error corrected by filing another application,

but after passing order the officer concern has become functus officio, he cannot alter or cancel the order passed by him without review on any cogent reason. If the pre-emptor at all aggrieved by the order of mutation passed by the Assistant Commissioner of Land he can move before the A.D.C. (Revenue) in appeal but he cannot get the same khatian cancelled by filing another miscellaneous case. The act and conduct of the pre-emptor seems to be purposely done only to establish himself as the co-sharer in the khatian which the law does not permit at all.

Apart from this the property purchased by the pre-emptee is situated at a distance from the property of the pre-emptor as appearing from the boundary given in the purchase deed of the petitioner as well as purchase deed of the pre-emptee. Both the boundary defers from each other and evidences established that between the 2 plots owned by pre-emptor and the pre-emptee there are other properties of the vendor Mina Begum intersecting and dividing both the plots in question and the pre-emptees land is not adjacent to the pre-emptor. Moreover, the owner of the property Mina Begum not only transferred the property to the pre-emptor,

she transferred a portion of the plot to Haji Shanu Miah and Kanu Babu and by another deed dated 24.04.2003 to the pre-emptee which has not been questioned by the pre-emptor and no case praying for pre-emption against the said deed as well as against Haji Shanu Miah and Kanu Babu, who are standing on the same status, has not been filed by the pre-emptor. Therefore, filing of the present case against the pre-emptee established that the pre-emptor filed the pre-emption case not for the purpose of enjoyment of the property as co-sharer, but for the purpose of benefit taking advantage of value of the property shown in the deed.

In view of the above, I find that the appellate court failed to appreciate the provisions of law as well as evidences both oral and documentary and has committed error of law in the decision occasioning failure of justice.

Taking into consideration of the above, I find merit in the Rule as well as in the submissions of the learned Advocate for the petitioners.

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

The judgment and order dated 24.11.2003 passed by the appellate court in Miscellaneous Appeal No. 17 of 1998 is hereby *set aside* and the judgment and order of the trial court is hereby restored.

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

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