

IN THE SUPREME COURT OF BANGLADESH  
Appellate Division

PRESENT

*Mr. Justice Hasan Foez Siddique, C. J.*

*Mr. Justice M. Enayetur Rahim*

*Mr. Justice Jahangir Hossain*

CIVIL APPEAL NO. 10 OF 2017

(From the judgment and order dated the 15<sup>th</sup> day of April, 2013 passed by the High Court Division in Civil Revision No. 761 of 2010).

Muntachir and others : . . . Appellants

-Versus-

Ruposhi Begum and others : . . . Respondents

For the Appellants : Mr. Qumrun Nessa, Advocate,  
instructed by Mr. Md. Taufique Hossain  
Advocate-on-Record

For Respondent Nos. 1-8 : Mr. Md. Abul Kalam Chowdhury,  
Advocate, instructed by  
Mr. Zainul Abedin,  
Advocate-on-Record

Respondent Nos.9-17 : Not represented

**Date of hearing : The 23<sup>rd</sup> day of May, 2023**

**Date of judgment : The 24<sup>nd</sup> day of May, 2023**

JUDGMENT

**M. Enayetur Rahim, J:** This civil appeal, by leave, is directed against the judgment and order dated 15.04.2013 passed by the High Court Division in Civil Revision No. 761 of 2010 making the Rule absolute.

The facts, relevant for disposal of this appeal in brief, are that one Arif Miah, the predecessor of the present respondents and another as petitioners (hereinafter referred to as pre-emptor) filed Miscellaneous Case No.58 of 1990 for pre-emption of the case land under Section 96 of the State Acquisition and Tenancy Act in the Court of the Senior Assistant Judge, Begumgonj, Noakhali. The pre-emptors' case

was that Dan Gazi and others were the original owners of the land of Khatian No. 459 and the preemptors were recorded as co-owners in the land of the said Khatian. One Quader Miah, the father of pre-emptor No. 2 was also a co-sharer of the land of the said Khatian. They were full brothers. The land of Khatian No. 448 is adjacent to the said Khatian No. 459. The homestead of the pre-emptors' is on plot No. 1526 and 1527. Land of plot Nos. 1522 and 1525 of Khatian No. 448 are adjacent to the south. Thus the pre-emptors are co-sharers by inheritance and contiguous landowner of plot Nos. 1522 and 1525 of Khatian Nos. 448 and 459. The vendor opposite party Nos. 3 and 4 are co-sharers with the pre-emptors who sold the case land vide saf-kabala dated 06.10.1990 for taka 10,000/- beyond the knowledge of the pre-emptors and they came to know about it, and on 18.10.1990 obtained certified copy. The purchaser-opposite parties (hereinafter referred to as pre-emptee) are strangers. The pre-emptors prayed for pre-emption of the transferred land measuring  $05\frac{1}{4}$  decimals of Khatian No. 448 and  $03\frac{3}{4}$  decimals of Khatian No. 459 in all 09 decimals land.

The present appellant No. 1, as pre-emptee contested the case by filing written objection contending, *inter alia*, that Jamal Uddin, the predecessor of the appellant No. 2 was the uncle of the pre-emptor, namely Arif Miah (now deceased). The preemptors are the successors of the said Arif Miah. Said late Arif Miah was a co-sharer in the said Khatian and *jote*, who claimed right of pre-emption against the predecessor of the pre-emptee alleging that opposite party Nos. 3 and 4 in the pre-emption case sold a land measuring 9 decimals by saf-kabala dated 06-10-1990 for Tk. 10,000/-

which is within the knowledge of the preemptors. Opposite party Nos. 2-4 in the pre-emption case filed another written objection contending, *inter alia*, that the preemptors are not contiguous owners of land described in schedule-1 of the pre-emption case. Opposite party No. 3 and 4 mortgaged the case land to opposite party Nos. 1-2 of the pre-emption case which was retransferred by a deed executed on 03.06.1991. The pre-emptor Abdul Malek withdrew his money amounting to Tk. 5,500/- by admitting the contention made by the pre-emptees, as such there cannot be any pre-emption case under the provisions of law on an application dated 12.01.1991 on which the pre-emptor No.1, Arif Miah filed an objection on such application. However, the trial Court passed the order and allowed him to withdraw the said amount, but eventually the pre-emptor Abdul Malek could not withdraw the deposited money.

During trial, the respective parties adduced both oral and documentary evidence.

Trial Court rejected the pre-emption case by its order dated 01.09.2003. Being aggrieved, pre-emptor No. 1, Arif Miah filed Miscellaneous Appeal No. 73 of 2003 in the Court of District Judge, Noakhali. On transfer the appeal was heard by the Joint District Judge, Third Court, Noakhali, who after hearing, by his order dated 24.11.2009 dismissed the appeal. Then the preemptors filed Civil Revision No. 761 of 2010 before the High Court Division and obtained Rule, which upon hearing the parties was made absolute.

Being aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the pre-emptees filed Civil Petition for Leave to Appeal No. 1479 of 2014

before this Division. Accordingly, leave was granted on 06.12.2016.

Hence the present appeal.

Ms. Quamrun Nessa, learned Advocate appearing on behalf of the petitioners submitted that the trial Court as well as the lower appellate Court having considered the evidence on record came to a definite finding that the pre-emptee is a co-sharer in Khatian No. 448 and as such the preemptors' claim for pre-emption as contiguous land holder in Khatian No. 448 is not maintainable. The High Court Division without reversing the concurrent finding of fact regarding the co-shareship of the pre-emptee arrived at by the Courts below most erroneously made the Rule absolute reversing the lower Courts' judgments and orders.

She further submits that admittedly the preemptor Arif Miah is a co-sharer in Khatian No. 459 and the trial Court as well as the appellate Court concurrently held that his claim for partial pre-emption in Khatian No. 459 is not permissible in law but the High Court Division erred in law in making the Rule absolute holding that claim of partial pre-emption is maintainable which is contrary to the decision of **Hazi Tajamal Ali being dead his heirs Kamarunnessa and ors. Vs. Abdus Sattar and another** reported in **34 DLR(AD) 217** in which it has been held that partial pre-emption is not allowed where a co-sharer tenant claims pre-emption.

Mr. Md. Abul Kalam Chowdhury, learned Advocate appearing on behalf of respondent Nos.1-8 having supported the impugned judgment and order of the High Court Division submits that all the Courts found that preemptor Arif Miah is a co-sharer

in Kha schedule land of pre-emption petition, Khatian No. 459 but trial Court and appellate Court erroneously found that partial pre-emption is not permissible in law; however in Civil revision the High Court Division found that partial pre-emption is permissible with reference to the case of **Karimunnessa Begum Chowdhurani and others Vs Niranjana Chowdhury and another**, reported in **43 DLR(AD) 1991 page 108** and as such High Court Division rightly and legally made the Rule absolute.

Mr. Chowdhury also submits that as co-sharer preemptor, Arif Miah now his heirs these respondents claim land of Khatian No. 459 measuring transferred  $3\frac{3}{4}$  decimals land of Kha schedule of the pre-emption petition and they do not claim land of Khatian No. 448 of Ka schedule and after judgment and order of the High Court Division these respondents took possession through Court only  $3\frac{3}{4}$  decimals land of Khatian No. 459 on 16.04.2014 and as such pre-emption case was acted upon partially as per findings of the High Court Division. He lastly submits that admittedly the pre-emptees are strangers in Khatian No. 459 and the preemptor Arif Miah is a co-sharer by inheritance and partial pre-emption for  $3\frac{3}{4}$  decimals land of Khatian No. 459 was taken possession by preemptor and partial pre-emption has already been acted upon.

We have considered the submissions of the learned Advocates for the parties concerned, perused the impugned judgment and order of the High Court Division as well as the Courts below and other connected papers on record.

In this particular case, it is admitted fact that preemptor Arif Miah is a co-sharer by inheritance in khatian No.459 and the said pre-emptor abandoned his claim of pre-

emption for  $05\frac{1}{4}$  decimals of land in khatian No.448 and, that the other pre-emptor gave up his claim of pre-emption, the contiguous land owner.

Now the moot question in this appeal is whether partial pre-emption can be allowed.

The trial Court as well as the Appellate Court refused to allow pre-emption. However, the High Court Division in revision allowed partial pre-emption relying on the case of **Karimunnessa Begum Chowdhurani and others Vs. Niranjana Chowdhury & another**, reported in **43 DLR (AD)108**. In the above case it has been held by this Division to the effect:

*“Here in this case, five holdings were transferred by a single kabala and consideration money of each of the holdings was shown separately in the kabala. The petitioner deposited the consideration money for the four holdings he prayed for by way of pre-emption; there was no difficulty in allowing his prayer for pre-emption of the four holdings as pre-emption is preferable holding-wise. This pre-emption is not hit by the doctrine of partial pre-emption. Section 96 gives right to a co-sharer-tenant, like the respondent-pre-emptor to purchase the “portion or share of a holding transferred” By the pre-emption in question he is entitled to get those portions or shares so that he could keep intact the original holding or holdings.”*

In the cases of **Ahmed Hossain & ors. Vs. Basharat Ali and ors.** reported in **32 DLR (AD)54**, wherein principle of partial pre-emption has been discussed.

In the case of **Aktarunnessa Vs. Habibullah**, reported in **31 DLR (AD)88** pre-emption was allowed to a contiguous land holder in respect of two out of three plots comprising the land transferred. In the cases of **Haji Tajamal Ali being dead**

**his heirs: Kamarunnessa and ors. Vs. Abdus Sattar and others** reported in **34 DLR (AD) 217**, it has been observed as follows:

*“This rule (partial pre-emption) is applicable to a case where pre-emption is sought by a co-sharer tenant who is required to pre-empt the entire (wrongly typed as ensire) land transferred, but is not applicable in a case where a contiguous land holder seeks pre-emption and ‘contiguity’ being the only basis for his claim, he may pre-empt only that part of the land transferred to which his land is contiguous unless the land transferred is a compact block of area.”*

If we consider the above propositions of law coupled with the attending facts and circumstances of the present case, in particular the pre-emptor Arif Miah is a co-sharer in holding No.459, we are of the view that the High Court Division did not commit any error in allowing the partial pre-emption as the same is permissible in law.

Having considered and discussed as above, we find merit in the appeal. Accordingly, the appeal is allowed in part. The application for pre-emption is disallowed in respect of  $05\frac{1}{4}$  decimals land of holding No.448 and allowed in respect of  $03\frac{3}{4}$  decimals land of holding No. 459.

There will no order as to costs.

**C. J.**

**J.**

**J.**