In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice J.N.Deb Choudhury.

Civil Revision No. 2244 of 2007.

Oli Ahmed Chowdhury being dead his legal heirs:

1(a). Jarina Begum and others,

..... Petitioners.

Vs.

Md. Osman Gani and others,

..... Opposite-Parties.

Mr. Mahmudul Islam, Advocate
With Mr. Probir Neogi, Advocate
.....For the Petitioners.

Mr. Qumrul Haque Siddique, Advocate
With Mr. Mohiuddin Ahmed, Advocate
..... For the Opposite Parties.

Heard on: 06.07.2015
and Judgment on : 07.07.2015

This Rule was issued calling upon the opposite party Nos. 1-3 to show cause as to why the judgment and order dated 26.02.2007 passed by the learned Additional District Judge, First Court, Chittagong in Miscellaneous Appeal No. 08 of 2006 affirming the judgment and order dated 27.11.2005 passed by the learned Senior Assistant Judge, Satkania, Chittagong in Miscellaneous Case No. 16 of 2002, should not be set-aside and to pass such other or further order or orders as to this Court may deem fit and proper.

Facts necessary for disposal of this Rule, in short, is that the petitioners as pre-emptors on 17.02.2002 filed Miscellaneous Case No. 16 of 2002 before the Court of Senior Assistant Judge, Satkania, Chittagong for pre-emption under section 96 of the State Acquisition and Tenancy Act 1950, contending, inter alia, that the opposite-party No. 4 of the case transferred the case land in favour of the opposite-party Nos. 1-3 by registered kabala dated 30.08.2001 concerning case dag Nos. 3605 and 3606. The pre-emptors are the co-sharer of the holding so also they are contiguous land owners of the land under pre-emption. The pre-emptor on 15.12.2001 for the first time came to know about the transfer and after obtaining the certified copy of the kabala on 19.12.2001 filed the pre-emption case.

The opposite party Nos. 1-3 contested the case by filing written objection denying the material allegations made in the application and contended inter alia, that the pre-emptors are not co-sharer of the case holding nor they are contiguous land owners. It is the further case of the said opposite parties that the pre-emptors were approached before the sale took place and on their refusal to purchase, the pre-emptee-purchasers purchased the case land and as such, the case is hit by the principle of waiver, acquiescence and

estoppel and accordingly prayed for dismissal of the pre-emption case.

During trial, the pre-emptor-appellant-petitioners examined 2(two) witnesses and exhibited their documents and the pre-emptee-opposite-parties examined 5(five) witnesses in support of their respective claims.

The trial court upon considering the evidence and other materials on record dismissed the pre-emption case mainly on reasonings:

(i) Pre-emptors are not co-sharers of the case holding.

(ii) Pre-emptor No. 1 though contiguous land holder of the case land; but, the pre-emptor Nos. 2-5 are not contiguous land holder of case dag No. 3605.

(iii) The case is hit by the principle of waiver, acquiescence and estoppel as the pre-emptors on being approached refused to purchase the case land.

(iv) The case land as within the area of the Pourasava and as such the case under section 96 of the State Acquisition and Tenancy Act is not maintainable.

(v) Sale deed dated 30.08.2001 not being registered under section 60 of the Registration Act, 1908 and as such the case being premature and thus not maintainable.

(vi) Pre-emptors are not agriculturists as they are in service and engaged in business.

Being aggrieved with the aforesaid judgment and order the pre-emptors preferred Miscellaneous Appeal No. 8 of 2006 before the learned District Judge, Chittagong and on transferred the case was heard and disposed of by the learned Additional District Judge, First Court, Chittagong, who by judgment and order dated 26.02.2007 dismissed the miscellaneous appeal and affirmed the judgment and order of the trial Court.

The pre-emptors thereafter on being aggrieved by and dissatisfied with the aforesaid judgment and order preferred the instant Civil Revision before this Court and obtained the instant Rule.

Mr. Mahmudul Islam appearing with Mr. Probir Neogi, the learned advocates for the petitioners, submits that both the Courts below have committed an error of law resulted in an error in the decision and occasioned failure of justice in deciding the pre-

emption case. He further submits that the Trial Court found the pre-emptor No. 1 as being the owner of dag No. 3607 and as such, he is contiguous land holder of the whole case land being dag Nos. 3605 and 3606 and also found that the pre-emptor Nos. 2-5 being the owners of dag No. 3625 are the contiguous land holder of case dag No. 3606 and both case dag Nos. 3605 and 3606 are contiguous to each other so all the pre-emptors are contiguous land holders of the case land and the trial Court upon misconception arrived at a finding that the pre-emptor Nos. 2-5 are not contiguous land holders of the whole case land which finding is not correct. The learned Advocate for the petitioners next submits that though the pre-emptee-purchasers stated that before the sale the pre-emptors being approached to purchase the case land before the sale; but, as they refused to purchase the case land for want of money, so the case is hit by the principle of waiver, acquiescence and estoppels; but in support of such statement the pre-emptee-purchasers could not adduce sufficient evidence to prove the said fact rather the pre-emptee-seller never approached the pre-emptors before the sale took place. Moreover, he submits that the right of pre-emption accrued only after the transfer took place and as such the question of waiver,

acquiescence and estoppel cannot come before the right so accrued. In support of his contention he relied upon a decision reported in 13 MLR (AD) 198. He next submits that admittedly the case land was transferred on 30.08.2001 and the case land has been included within the periphery of Pourasava on 10.07.2003 i.e. long after the transfer took place and accordingly the findings of the trial Court regarding maintainability of pre-emption case as the land in question is within the periphery of the Pourasava is not tenable in the eye of law. He next submits that the trial Court on misconception of law hold that the pre-emptors being in service and engaged in business and as such they are not agriculturists and this findings being based on no evidence moreover the pre-emptors admittedly the owner of agricultural land adjacent to the case land being dag nos. 3605 and 3625 which are agricultural lands and lastly he submits that the case though filed before completion of registration under section 60 of the Registration Act, 1908; but, the same was registered during pendency of the case and as such the defect cured and thus the case is maintainable and accordingly, the findings of the trial Court is not correct and the appellate Court below being the last Court of fact affirmed the judgment and order of the Trial Court without

discussing any evidences and as such the judgment and orders of the courts below being based on misreading, non reading and non consideration of evidences on record and thereby liable to be set-aside on making the Rule absolute.

On the other hand Mr. Qumrul Haque Siddique appearing with Mr. Mohiuddin Ahmed, the learned advocates for the opposite-party Nos. 1-3 on conceding other points raised by the learned advocate for the petitioners, only submits that the pre-emption case was barred by limitation as the pre-emptors filed the pre-emption case on 17.02.2002 while the sale took place on 30.08.2001 and the pre-emptors though stated the date of knowledge of the sale as on 15.12.2001; but, failed to prove the same by adducing evidence. He further submits that the word “transferred” as mentioned in section 96(1) of the state Acquisition and Tenancy Act, 1950 before its amendment means the date of execution of the sale deed. He relying upon the ultimate decisions of the courts below prayed for discharge of the Rule.

In order to appreciate the submissions made by the learned advocates for the respective parties, I have gone through the

revisional application, evidences on record and also perused the impugned judgment and order of the Courts below.

Now, the question calls for consideration whether the Courts below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and orders.

The Trial Court found that the pre-emptor No. 1 is contiguous land owner of the case dag Nos. 3605 and 3606 and pre-emptor Nos. 2-5 are contiguous land owners of case dag No. 3606. It is not disputed by the learned advocate for the opposite-parties that the case dag Nos. 3605 and 3606 are contiguous to each other and as such this Court is of the view that the pre-emptors are contiguous land owners of the whole case land.

Admittedly, the sale took place on 30.08.2001 and at the relevant time the case land was not within the periphery of the Pourasava. Though the kabala in question was registered under section 60 of the Registration Act on 12.07.2003 as also stated by the opposite-party Nos. 1-3 by filing a supplementary affidavit; but, in view of section 47 of the Registration Act, the kabala shall be deemed to have been operated from the date of its execution. The

pre-emption is a right of purchase in preference and the pre-emptors on their success replace the pre-emptee-purchasers and became the purchasers in accordance with law. As such, the kabala under pre-emption shall be deemed to have been operated from the date of its execution i.e. from 30.08.2001 while the case land was not within the periphery of the Pourasava and accordingly, the case under section 96 of the State Acquisition and Tenancy Act, 1950 is maintainable.

The pre-emptee-purchasers stated in their written objection that the case is hit by the principle of waiver, acquiescence and estoppel and in order to prove the said fact the pre-emptee-opposite party No. 1 examined himself as O.P.W. 1 and admitted in his cross-examination that none of the pre-emptors were present during the sale took place and also stated that as the case land being low land and as such the pre-emptors did not purchase the case land. O.P.W. 2 and 3 did not state anything regarding waiver, acquiescence and estoppel. O.P.W. 4 stated in his examination-in-chief that the pre-emptors for want of money refused to purchase the case land which statement contradict with the statement of O.P.W. No. 1 and admitted during cross-examination that he could not remember the

date of approach and also stated that, "না: জমিন খরিদ বিক্রির সময় আমি দেশে ছিলাম না। তবে কথাবার্তার সময় দেশে ছিলাম। ২০০১ সনে কথাবার্তা ও খরিদ বিক্রি হয়। নাঃ জমি খরিদের ১/২ মাস পরে আমার থেকে মাটি কিনেছে।---------- প্রার্থীপক্ষকে যাচনা করার সময় আমি ছিলাম। তবে দিন তারিখ স্মরন নেই।" and O.P.W. No. 5 stated that he can't remember the date of approach. Thus, it appears that the pre-emptee-purchasers failed to prove their case of waiver, acquiescience and estoppel as stated in the written objection. Moreover, it has been decided by the Hon'ble Appellate Division in the case of Md. Dewan Ali Vs. Md. Jasim Uddin and others, reported in 13 MLR (AD)202 that,

> "*Right of pre-emption accrues on the date of registration of the sale deed. The pre-emptive right of purchase of the case land accrued to the pre-emptor only after the case land was sold to the purchaser pre-emptee by its owner and not before. Pre-emptive right does not exist before sale and so it is not enforceable before sale. Any such right before sale is an inchoate and immature right. Hence no conduct of the pre-emptor before sale of the case land refusing to purchase the same or consenting sale thereof to other can*

> *constitute waiver, acquiescence or eestoppel demolishing his right of pre-emption. The bare requisite for extinction or demolition of pre-emption right lies in the accrual or existence of such right.*"

From this decision it appears that before the transfer took place no question of waiver, acquiescence and estoppel can arise. In the present case the pre-emptee purchasers did not claim that after the transfer of the case land the pre-emptors waived their right of pre-emption.

The finding of the courts below that the pre-emptors are not agriculturists as they are in service and engaged in business also not tenable in the eye of law as the pre-emptors have agricultural land adjacent to the case land and there was no such issue before the trial Court.

The learned advocate for the opposite-party Nos. 1-3 mainly argued that the case was barred by limitation as the sale deed was executed on 30.08.2001 and the case was filed on 17.02.2002 and the pre-emptors also failed to prove their stated date of knowledge on 15.12.2001 and according to him the starting point of limitation is the date of transfer of the sale deed and the word "transferred" as

mentioned in section 96(1) of the State Acquisition and Tenancy Act, 1950 refers to the date of execution of the sale deed. It appears from the record so also from the supplementary affidavit filed by the opposite-party Nos. 1-3, that the kabala in question has been registered under section 60 of the Registration Act on 12.07.2003 and the case was filed on 17.02.2002. So, it appears that while the case was filed the same was premature as the right of pre-emption accrues only after completion of registration under section 60 of the Registration Act, 1908 and it also appears that during pendency of the pre-emption case the kabala in question has been registered under section 60 of the said Act and it is the consistent view of our Apex Court particularly in the case of Ayesha Khatun (Musammat) Vs. Musammat Jahanara Begum and others, reported in 43 DLR (AD) 9, the Hon'ble Appellate Division held;

> "*This case involves interpretation of both section 96 of the State Acquisition and Tenancy Act, and section 47 of the Registration Act. It is now a settled principle of law that the cause of action under section 96 of the State Acquisition and Tenancy Act accrues on the date of the registration of the deed of sale, when registration*

is compulsory- see Abdur Rahman Vs. Maklis Ali 31 DLR (AD) 118. This is because the right of pre-emption arises on the completion of the transfer. It could not be said to have completed earlier by reason of section 47 of the Registration Act though thereunder the instrument of transfer commences to operate from earlier date. If, however, an application for pre-emption is filed before the completion of the transfer i.e. the registration of the sale, as in the appellant's case, it is not to be dismissed on the ground of prematurity if the deed of transfer is registered during the pendency of the pre-emption proceeding- see Lebu Miah Vs. Ganesh Chandra, 34 DLR (AD) 220 and Aftab Mia Vs. Wahab Ali, BCR 1982 (AD) 87"

Considering the above, the stating point of limitation for the purpose of filing a pre-emption case is the date of registration of the kabala under 60 of the Registration Act, as before registration under section 60 of the Registration Act, the kabala can't be considered as "Registered" and before that no title can pass to the purchasers and

once it is registered, the kabala shall be deemed to be operated from the date of execution of the same.

As such though the pre-emption case was filed before the completion of registration under section 60 of the Registration Act and during pendency of the case, the kabala has been registered under section 60 of the Act, the defect of prematurity cured and the pre-emption case is maintainable. Moreover, the pre-emptee purchasers in their written objection did not raise the question that the case is barred by limitation nor any issue to that effect was framed. In view of such fact and law the contention of the learned advocate for the opposite-party Nos. 1-3 that the case is barred by limitation cannot be accepted.

In view of the discussions made above this Court is of the view that the trial Court and the Court of appeal below upon misreading, non-reading and non-consideration of evidences on record and also upon non application of judicial mind dismissed the pre-emption case and those are liable to be set-aside.

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

The impugned judgment and order dated 26.02.2007 passed by the learned Additional District Judge, 1st Court, Chittagong in Miscellaneous Appeal No. 08 of 2006 and the judgment and order dated 27.11.2005 passed by the learned Senior Assistant Judge, Satkania, Chittagong in Miscellaneous Case No. 16 of 2002, are set-aside.

The Miscellaneous Case No. 16 of 2002 of the Court of Senior Assistant Judge, Satkania, Chittagong is hereby allowed and the case land is transferred in favour of the pre-emptors and the pre-emptee purchasers are at liberty to withdraw the consideration money of the sale deed along with compensation money as deposited by the pre-emptors.

Send down the Lower Court Records along with a copy of the judgment at once.

Murshedul Hasan,
Bench Officer