

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CIVIL REVISIONAL JURISDICTION)

*Present:*

*Mr. Justice S M Kuddus Zaman*

**CIVIL REVISION NO.3126 OF 2016**

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure.

And

Md. Rafiqul Islam

... Petitioner

-Versus-

Md. Matiur Rahman Driver and others

.... Opposite parties

Mr. Nikhil Kumar Saha, Advocate

.... For the petitioner.

Mr. Md. Suruzzaman Akonda, Advocate

.... For the opposite party

No.1.

**Heard on 26.02.2024 and 02.03.2025.**

**Judgment on 03.03.2025.**

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and order dated 22.06.2016 passed by the learned Joint District Judge, 1<sup>st</sup> Court, Sherpur in Miscellaneous Appeal No.12 of 2014 confirming the judgment and order dated 27.01.2014 passed by the learned Senior Assistant Judge, Sherpur Sadar, Sherpur in Pre-emption Miscellaneous Case No.9 of 2005 should not be set aside and or/pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that the opposite party as petitioner instituted above case under Section 24 of the Non-Agricultural Tenancy Act, 1949 for pre-emption against registered kabola deed dated 20.12.2004 transferring 5 decimal land of BS Khatian No.35 by opposite party No.2 to opposite party No.1 alleging that the petitioner purchased 5 decimal land of BS Khatian No.36 by registered kabola deed dated 19.06.2004 from opposite party No.25 and thus he became a co-sharer of above holding. Opposite party No.1 is a stranger to above holding and he purchased above 5 decimal land without service of any notice upon the petitioner. To resist the right of pre-emption the opposite party fraudulently mentioned Khatian No.35 in above kabla dated 20.12.2004 instead of Khatian No.36.

Opposite party No.1 contested the case by filing a written objection alleging that opposite party No.2 requested the petitioner to purchase above land but since disputed land was a ditch the petitioner refused to purchase and he requested the petitioner to purchase above land and the petitioner after purchase of above land mud filled above ditch and constructed dwelling house and living in above house along with the members of his family.

At trial petitioner and opposite parties examined three witnesses each. Documents of the petitioner were marked as Exhibit Nos.1-4 series and those of the opposite parties were marked as Exhibit No."Ka".

On consideration of the facts and circumstances of the case and evidence on record the learned Senior Assistant Judge allowed above case.

Being aggrieved by and dissatisfied with above judgment and order of the trial Court opposite party No.1 as appellant preferred Miscellaneous Appeal No.12 of 2014 to the District Judge, Sherpur which was heard by the learned Joint District Judge, 1<sup>st</sup> Court who dismissed above appeal and affirmed the judgment and order of the trial Court.

Being aggrieved by and dissatisfied with above judgment and order of the Court of Appeal below above appellant as petitioner moved to this Court with this Civil Revisional application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

Mr. Nikhil Kumar Saha, learned Advocate for the petitioner submits that this case was barred by limitation and after purchase of above land opposite party constructed his dwelling hut by spending Taka 25,000/- and the same has been proved by the report of the Advocate Commissioner appointed by the Court. But the learned Judge of the trial Court awarded only Taka 40,000/- as development cost which was shockingly inadequate. The learned Judge of the Court of Appeal below without an independent assessment of the evidence on record most illegally dismissed the appeal and affirmed the unlawful judgment and order of the trial Court which is not tenable in law.

On the other hand Mr. Md. Suruzzaman Akonda, learned Advocate for opposite party No.1 submits that disputed land was situated within the territorial limits of Sherpur Municipality. As such the petitioner rightly filed this case for pre-emption under Section 24 of the Non-Agricultural Tenancy Act, 1949. The petitioner is a co-sharer by purchase of the land of R. O. R. Khatian No.36 and the disputed land also belonged to R. O. R. Khatian No.36 but to resist the right to pre-emption of the petitioner the opposite party Nos.1 and 2 fraudulently mentioned R. O. R. Khatian No.35 in the impugned kabla deed. The learned Judges of both the Courts below on correct appreciation of evidence on record rightly held that the petitioner has succeeded to prove above fraudulent insertion of erroneous Khatian Number in the impugned kabla deed and the learned Judge of the Court of Appeal below rightly dismissed above appeal and affirmed the lawful judgment and order of the trial Court which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record including the pleadings, judgments of the Courts below ad evidence.

At Paragraph No.2 of the plaint the petitioner has stated that he became a co-sharer by purchase of 5 decimal land appertaining to BS Khatian No.36 from opposite party No.25 by registered kabla deed dated 19.04.2004. Disputed land which opposite party No.1 purchased from opposite party No.2 by impugned kabola deed dated 20.12.2004 also belongs to BS Khatian No.36 but opposite party No.1 to resist the

pre-emption right of the petitioner fraudulently wrote B.S. Khatian No.35 in above kabola deed. While giving evidence as PW1 the petitioner reiterated above claims in his evidence and stated that the BS Khatian Number of the disputed land was 36 but to defeat the pre-emption right of the petitioner the opposite parties fraudulently mentioned BS Khatian No.35 in the impugned kabla deed.

But it turns out from the schedule of the plaint that the petitioner has described disputed 5 decimal land by mentioning BS Khatian No.35 and not BS Khatian No.36. The impugned kabola deed (Exhibit No."Ka") shows that 5 decimal land of BS Khatian No.35 was transferred by above kabola deed. There is no claim of the petitioner that the opposite party No.2 had no title or possession in any land of BS Khatian No.35. Admittedly the petitioner is not a co-sharer of BS Khatian No.35. The petitioner could not produce any evidence to prove that in impugned kabla deed BS Khatian Number 35 was fraudulently mentioned instead of BS Khatian No.36.

A pre-emptor files a case for pre-emption admitting the title and possession of the pre-emptee in the disputed land and the correctness genuinity of the impugned kabla deed. There is no scope to determine an allegation of fraud as to the identity of land of the impugned a kabla deed in a case for pre-emption when the parties to above deed deny any fraud and there is no claim that the seller had no title in the land of above deed. Admittedly opposite party No.1 purchased land of BS Khatian No.35 and opposite party No.2 claimed to have sold to

opposite party No.1 the land above holding there is nothing on record to show that opposite party No.2 had no title and possession in above land of BS Khatian No.35 or opposite party No.2 had title and possession only in the land of BS Khatian No.36.

In above view of the facts and circumstances of the case and on record I hold that since disputed five decimal land appertains to BS Khatian No.35 and the petitioner was not a co-sharer to above khatian this case for pre-emption was not tenable in law.

The petitioner has filed this case for pre-emption under Section 24 of the Non-Agricultural Tenancy Act, 1949 but it turns out from the impugned kabola deed (Exhibit No.5) that the nature of the land was "Kanda". It has been admitted that after purchase of above land opposite party No.1 mud filled above ditch raised above land and erected his dwelling huts. A piece of land does not become a non-agricultural land merely for its location within the territorial limits of any Municipality or Pourashava. To be a non agricultural land the land must fall within the definition of Non-Agricultural land as provided in the Non-Agricultural Act, 1949. There is nothing on record to show that disputed land was non agricultural land as has been defined in Section 2(4) of the Non-Agricultural Tenancy Act, 1949. On consideration of above materials on record I hold that filing of this case under Section 24 of the Non-Agricultural Tenancy Act, 1949 was misconceived and not tenable in law.

In above view of the facts and circumstances of the case and evidence on record I hold that the learned Judge of the Court of Appeal below utterly failed to appreciate the evidence on record properly and most illegally dismissed the appeal and affirmed the unlawful judgment and order of the trial Court which is not tenable in law.

I find substance in this Civil Revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute. The impugned judgment and order dated 22.06.2016 passed by the learned Joint District Judge, 1<sup>st</sup> Court, Sherpur in Miscellaneous Appeal No.12 of 2014 affirming the judgment and order dated 27.01.2014 passed by the learned Senior Assistant Judge, Sherpur Sadar, Sherpur in Pre-emption Miscellaneous Case No.9 of 2005 is set aside and above Pre-emption Miscellaneous Case is dismissed on contest without cost.

Send down the lower Court's records immediately.