Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.2749 OF 2009.

Md. Abu Sayed Mia.

----------*Defendant-Petitioner.*

-VERSUS-

Mahfuza Khatun and others

----------Plaintiff-Opposite Parties.

Mr. Sherder Abul Hossain with
Mr. Md. Nur Uddin and
Mr. Md. Ismail Hossain, Advocate

--------For the petitioner.

No one appears

.....For the opposite parties.

.

Heard on 24.04.2025, 30.04.2025, 22.06.2025 and 24.06.2025.

Judgment on 24.06.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 14.07.2009 passed by learned Additional District Judge, Lakshmipur in Title Appeal No.76 of 1999 allowing the appeal and reversing the judgment and decree dated

22.07.1999 passed by the learned Senior Assistant Judge, Lakshmipur in Title Suit No.171 of 1995 dismissing the suit should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The facts in brief for the disposal of the Rule are that the preemptor-opposite parties Nos. 1-7, as plaintiffs, instituted Title Suit No. 171 of 1995 before the learned Assistant Judge, Sadar, Lakshmipur, impleading the petitioners for pre-emption, i.e., Haqsafa of the case land under Section 236 of the Mohammadan Law, contending, inter alia, that the plaintiff-preemptor is a co-sharer of the instant suit Khatian by inheritance. Instead, the defendants Nos. 2 and 3, as first parties, transferred 0.08 acres of land to the defendant No. 1 vide Ewaz deed dated 19.05.1992; however, the said deed is an out-and-out sale deed. Defendant No.1 is the stranger purchaser of the case, Khatian. To deprive the plaintiffs of their pre-emption right, the defendants Nos. 1-3, in collusion with each other, created the said Ewaz deed. On 05.07.1995 defendant No.1 express that he purchased the case land and the plaintiff

instantly entered into the case land and in presence of the witnesses and defendant No.1 by making jump loudly declaring Hum Safi, Hum Safi and asked the defendant No.1 to withdraw his claim over the suit land after taking purchase value from the plaintiffs and in this way the plaintiff maintain Talab-i-mowasibat and Talab-i-ishhad.

The defendant No. 1 contested the suit by filing a written statement, denying the plaint case, stating inter alia that this defendant-petitioner, vide Ewaz deed dated 19/05/1992, became the owner and possessor of the suit land and has been possessing the same. The plaintiff has complete knowledge of the said Ewaz and the handover of possession of the suit land. After obtaining permission from the local Municipality, the plaintiff constructed a side wall on the north and west sides of the case land. The defendant No.1 purchased the suit land with her own money, as per the sale deed dated 19.05.1992. The plaintiff is not a co-sharer by inheritance in the suit's Khatian and failed to perform the ceremony of the Mohammadan Law. Moreover, they filed the case based on a false plea; as such, the suit is liable to be dismissed.

The learned Senior Assistant Judge, Lakshmipur, framed the necessary issues to determine the dispute between the parties.

Subsequently, the learned Senior Assistant Judge, Lakshmipur, by the Judgment and decree dated 22.07.1999 dismissed the suit.

Being aggrieved, the plaintiff-opposite parties, as appellants preferred Title Appeal No.76 of 1999 before the learned District Judge, Lakshmipur. Eventually, the learned Additional District Judge, Lakshmipur, by the Judgment and decree dated 14.07.2009 allowed the appeal and decreed the suit.

Being aggrieved, the defendant-petitioner preferred this Civil Revision under Section 115(1) of the Code of Civil Procedure before this court and obtained the instant Rule.

Mr. Sherder Abul Hossain, the learned Counsel appearing on behalf of the petitioner, submits that there is neither evidence nor any finding to the effect by the appellate court below that while making Talab-e-ishhad, reference was made to Talab-e-mowasibat, and absence of that evidence is fatal to the plaintiff's case for Haq-Safa.

Despite the matter appearing on the cause list for hearing on a consecutive date, no one feels inclined to appear on behalf of the opposite party to contest the Rule. However, in the presence of the learned advocate for the petitioner, I am tempted to dispose of the Rule on merit.

I have anxiously considered the submissions advanced by the Bar, perused the Judgment of the courts below, and reviewed the oral and documentary evidence on the record.

It appears that the opposite party herein, as plaintiff-preemptor, preferred the instant suit for pre-emption under the Mohamadan Law. According to the plaint on 05.07.1995, the preemptor came to know that the disputed transfer was completed by the registration of the deed (Exhibit-Kha). Therefore, the plaintiff-preemptor performed the ceremonies in accordance with the requirements of the Mohammedan Law. After obtaining a certified copy of the deed dated 19.05.1992, the instant suit was filed by the preemptor.

In order to prove the case, the plaintiff examined as many as three witnesses and presented the relevant

documents. On the other hand, the defendant examined as many as three witnesses and exhibited the relevant documents.

I have scrutinized each deposition and cross-examination of the witnesses. The learned trial court considered the above evidence on record and dismissed the suit, stating that the plaintiff-preemptor had performed the ceremony under the Mohammadan Law after a long delay. Moreover, the instant suit for pre-emption under Mohammadan law is not maintainable because the suit land was transferred by way of an Ewaz Deed. On the other hand, the appellate court allowed the appeal and decreed the suit based on the findings that the plaintiff performed the ceremony of Mohammadan Law in accordance with the law and that the transfer of the suit land by an Ewaz deed was a coloable transfer and was an out-and-out sale deed.

To substantiate the submissions advanced by the Bar, the relevant law may be quoted as follows:--

Section 236 of the Mohammedan Law (Mullah's) provided that "Demands for pre-emption, No person is entitled to the right of pre-emption unless-

(I) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called Talab-i-mowasibat (literally, demand of jumping, that is, immediate demand), and unless

(2) he has, with the least practicable delay, affirmed the intention, referring expressly to the fact that the Talab-i-mowasibat had already been and has made a formal demand-

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and

(b) In the presence of at least two witnesses. This formality is called Talab-i-ishhad (demand with invocation of witnesses)."

It manifests that in order to establish the right of pre-emption under the Mohammedan law, the preemptor, after having made Talab-i-mowasibat, has to affirm his intention with the least practicable delay, referring expressly to the fact that Talab-i-mowasibat had been performed. It, therefore, the preemptor is required to refer Talab-i-mowasibat when making Talab-i-ishhad expressly. The

evocation of witnesses is an essential part of the ceremony of Talab-i-ishhad. The above formalities are to be strictly performed by the preemptor.

I have already noticed that in the instant case, the preemptor to prove his case examined as many as three witnesses, instead, has neither claimed nor adduced evidence that at the time of making the second demand, i.e., Talab-i-ishhad, a reference was made to the first demand, i.e., Talab-i-mowasibat. This omission at the time of making the Talab-i-ishhad is indeed fatal to the claim of the preemptor.

This view gets support from the case of Nasir Ahmed and Ors Vs. Mohammad Sheir Ali, and another report in PLR 5 Dac, page 757, it was held that—

Inasmuch as at the time of making the second demand, that is Talab-i-ishhad before witnesses, no reference was made that the preemptor had already made the first demand of Talab-i-mowasibat, the second demand was not made in accordance with law, and the preemptors ommission to make such reference was fatal to his claim.

A similar view has been taken in the case of Mubarak Husain Vs. Kanis Banu and Ors report in I L R 27 All. 160, it was held that -----

Express reference to Talab-i-mowasibat is necessary when the second demand, namely Talab-i-ishhad, is made.

The case of Sadiq Ali Vs. Abdul Baqi Khan @ Abdul Karim reported in I L R 45 Alla. 290 it was held that--

If the preemtor in making the second demand failed to call the attention of witnesses to the fact that he had already made the first demand, it was not valid.

The case of Shamsuddin Ahmed @ Tofa, Mia & Ors Vs. Abdul Latif Bhuiyan, reported in 33 D L R (AD) 359 it was held that-----

The Rules of Mohammadan law provide that the formalities are to be strictly performed by the preemptor.

In the instant case, the plaintiff-preemtor neither asserted nor adduced any evidence to the effect that at the time of making the second demand, i.e., Talab-i-ishhad, a reference was made to the first demand, i.e., Talab-i-mowasibat.

In view of the above, it appears in the present case that the ceremonies, as per the provision so enumerated in section 236 of the Mohammedan Law (Mulla), were not admittedly performed by the preemptor. Moreover, it is evident that the suit land was transferred on 19.05.1992, and the plaintiff-preemptor made the first demand on 05.07.1995. It is also apparent from the record that the defendant purchaser obtained permission from the local Municipality to construct the boundary wall of the suit land on 22.03.1993, and accordingly, he built the walls. Therefore. It is presumed that the plaintiff was aware of the above transfer of the suit land. Moreover, he failed to prove his knowledge of the transfer of the suit land on 05.07.1995; instead, he was unable to perform the ceremonial aspects of the Mohammadan Law within the time specified by the law.

Farther, in the instant case, I have come across form the evidence on records that the preemptor-opposite party has failed to discharge his onus of proof and the trial Court below in the observation and findings on the basis of evidences on records, rightly held that the deed-in-question

is purely a deed of exchange not a sub-kabala and as such it is not pre-emptable under the ambit of Section 236 of the Mohammadan Law.

Therefore, it appears that the trial court judiciously considered the evidence on record and dismissed the suit with a sound reason. On the other hand, the appellate court below, considering the evidence on record, found certain weaknesses in the defence version of the case. However, the fact remains that if the plaintiff wants a decree, he must stand on his own feet. It appears that the appellate court below, disposing of the matter, did not thoroughly consider the oral and documentary evidence and reached an incorrect finding that the trial court had committed an error in dismissing the suit.

Considering the above facts, circumstances of the case, and discussions made herein above, I am of the firm view that the appellate court below did not correctly appreciate and construe the documents and materials on record in accordance with the law in allowing the appeal, setting aside the Judgment of the trial Court below. Moreover, the appellate court did not advert to the reasoning of the trial court below, and this hit the root of the merit of the suit. Therefore, it is not a proper

judgment of reversal and has occasioned a failure of justice. Consequently, I find merit in the Rule.

Resultantly, the Rule is made absolute. The impugned Judgment and decree dated 14.07.2009 passed by the learned Additional District Judge, Lakshmipur in Title Appeal No.76 of 1999 is hereby set aside. The Judgment and decree dated 22.07.1999 passed by the learned Senior Assistant Judge, Lakshmipur in Title Suit No.171 of 1995 is hereby affirmed.

Communicate the Judgment with the lower courts' records at once.

.....
(Md. Salim, J).

Kabir/BO