Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.3973 OF 2023.

Abdul Goni Sheikh, being dead, his legal heir:

Abdul Hannan Sheikh and others

..... Defendant-Petitioners.

-VERSUS-

Md. Safiul Azam and others

..... Plaintiff-Opposite party.

Mr. Ahmed Nowshed Jamil with
Ms. Sayeda Shoukat Ara with
Ms. Fatima Nasrin, Advocate.

--------For the petitioners.

Mr. Abdur Razzak Razu, Advocate

..... For the opposite parties.

Heard on 23.02.2025, 03.03.2025, 11.03.2025, 16.03.2025 and 18.03.2025.

Judgment on 04.05.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 17.05.2023 passed by learned District Judge, Pirojpur in Title Appeal No. 18 of 2020 reversing the Judgment and decree dated 31.10.2019 passed by the learned Assistant Judge, Nazirpur, Pirojpur in Title Suit No.

167 of 2011 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 disposal of the Rule are that the preemptor-opposite party instituted Title Suit No.167 of 2011 before the learned Assistant Judge, Nazirpur, Pirojpur, against the preempte-petitioner for pre-emption (Haq-Safa) of the suit land under Mohammedan Law, contending inter-alia that on 14.11.2011, the preemptor came to know that the defendant No. 2 Sorab alias Manik, behind the knowledge of the plaintiff, sold 12 decimal of land to defendant No. 01 by kabala dated 10.11.2011. Having learnt the same, the preemtor demanded that the land be returned to him in the presence of the witnesses. Plaintiff performed Talab-i-Mowasibat and Talab-i-Ishhsad in accordance with the law. Defendant No. 1 refused to return the land, so the plaintiff was constrained to file this suit for pre-emption under the Mohamedan Law.

The preemte-purchaser contested the suit by filing a written statement contending inter alia that the plaintiff insisted the defendant purchase the suit land. Kabala

purchaser is a co-sharer of the suit khatian. He bought the suit land within the knowledge of the plaintiff. The plaintiff has failed to perform the formalities required under the law to get pre-emption. The plaintiff's case falls, so the case is liable to be dismissed.

The learned Assistant Judge, Nazirpur, Pirojpur, framed the necessary issues.

Subsequently, the learned Assistant Judge, Nazirpur, Pirojpur, dismissed the suit by the Judgment and decree dated 31.10.2019.

Being aggrieved by and dissatisfied with the above Judgment and decree, the preemptor, as appellant, preferred Title Appeal No.18 of 2020 before the District Judge, Pirojpur. Eventually, the learned District Judge, Pirojpur, allowed the appeal and reversed the Judgment and decree of the trial Court by the Judgment and decree dated 31.10.2019.

Being aggrieved by and dissatisfied with the above Judgment and decree, the preempte-respondent as petitioner preferred this Civil Revision under section 115(1)

of the Code of Civil Procedure before this court and obtained the instant Rule and an order of stay.

I have anxiously considered the submissions advanced by both parties, peruse the Judgment of the courts below and oral and documentary evidence on the records.

It appears the opposite party, as preemptor, filed the instant suit under Mohammadan law. In order to prove the claim, the preemptor side examined 03 P.Ws and exhibited the material evidence. On the other hand, the preempte-petitioner examined as many as 02 OP.Ws. I have scrutinized each deposition and cross-examination of the witnesses.

It appears that the trial court below dismissed the suit with the findings that the preemptor failed to perform the talab-i-ishad. On the other hand, the Appellate court below, reversing the trial court's findings, observed that the preemptor side adducing and producing the oral and documentary evidence successfully proved the talab-i-ishad and decreed the suit.

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(Haq-safa) 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 make reference 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.

In the instant case, the preemptor to prove his case examined as many as three witnesses, including himself, but 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 1st 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 reported 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 preemptor's omission 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 others, reported in I L R 27 All. 160, it was held that:-

Express reference to Talab-i-moasibat is necessary when 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 preemptor 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 DLR (AD) 359 it was held that:-

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

In view of the above, it appears that the ceremonies, as per the provision so enumerated in section 236 of the Mohmedan Law (Mulla), are to be strictly performed by the preemptor to get a pre-emption.

Mr. Ahmed Nawshad Jamil, the learned advocate appearing on behalf of the petitioner, submits that the preemptor opposite party failed to prove talab-i-mowasibat (1st demand) and talab-i-ishad (2nd demand) following the provision of the Mohamedan Law.

Mr. Md. Abdur Razzak, the learned advocate appearing on behalf of the opposite party, submits that when the two demands of Talab-i-mowasibat and Talab-i-ishad are combinedly performed, it is not necessary to make a separate second demand, i.e. Talab-i-ishad. Moreover, it is unnecessary to refer to the first demand at the time of making the second demand if the first demand was made in the presence of the vendor or the vendee or on the premises sold. In his contention, he referred to the case of Mahbooban -Vs- Fatima Begum and others reported in AIR 1952 All 167 wherein it was held that:-

> "The above considerations in the light of the relevant case-law lead to the following enunciations: (1) that the necessity of making a second demand, called the talab-i-istishhad, is dispensed with if the first demand, called the

> talab-i-mawasibat, was made in the presence of the vendor or the vendee or on the premises sold and in the presence of witnesses who heard that demand, even though there was no invocation of those witnesses at the time, and (2) that the necessity of making a reference to the first demand at the time of making the second demand is dispensed with if the first demand was made in the presence of the vendor or the vendee or on the premises sold."

He also referred to the case of Mohammad Umar –Vs- Amir Mohammad reported in AIR 1958 MP 423, 1958 JLJ 554, 1958 MPLJ 419, wherein it was held that:-

If the first demand is made in the presence of witnesses of the vendor or vendee, or on the premises sold and in the presence of witnesses who heard the demand, it was not necessary to mention the fact of the first demand at the time of the Talab-i-isshad.

In replay Mr. Jamil submits that decision referred by the learned advocate for the petitioner has neither binding effect nor is applicable in the instant case, and in his

contention he referred the case of Terab Ali and others –Vs- Syed Ullah and others reported in 27 ALR (AD) 91 it was held that:

> "We can sum up in this way that the case laws declared by any superior court other than Bangladesh including Pakistan after 25th March, 1971 (that is after independence of Bangladesh) and that of India after 13th August, 1947 (that is after partition of Pakistan) are not applicable in our jurisdiction as binding precedents.
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> Moreover, as the Judges of Sub-ordinate Judiciary, as a whole, are not empowered to interpret laws or making a precedent, rather, are bound to apply "existing laws" as it is, it is better for them only to cite or rely on the existing laws and case laws applicable in our jurisdiction and at the same time refrain from rely on foreign case law, not covered under the constitutional scheme framed through Article 111 and Article 149 of the Constitution of Bangladesh as discussed above. Moreover, as per the provisions of the Law

> Reports Act, 1875 and practices of the Court, using of reference books other than recognized law reports, is not appropriate.
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> Accordingly, we find merit in submissions of the learned Counsel for the leave petitioner. However, in our opinion, it is worth disposing of the leave petition instead of granting leave."

I have already noticed that the essential part for a valid claim for pre-emption under Mohmden Law is "demand"; the demands are to be made as provided under the Mohmedan Law. The invocation of witness is not required to give validity to the 1st demand (talab-i-Mowasibat), in my opinion, refers to the immediate demand, as the context shows, because the just preceding passage speaks of attesting the immediate demand. According to the Hedaya (Hamilton's translation, Grady's, page 551) the statement that " this (second demand) also is requisite; because evidence is wanted to establish prove before the Magistrate" or that "upon the Shafee thus taking some person to witness, his right Shaffa is fully established and confirmed" does not militate the view I take. These

statements show that the second demand is necessary in order to afford prove of the first and that on performance of the second demand, the right of Shaffa is perfect. But they do not show how the second demand is to be made. For one thing, they do not show that this demand must specifically refer to the fact of the first demand having been made. But it is well settled that such reference is absolutely essential. In the instant case, the preemptor, on hearing of the sale, performed the ceremony of talab-i-mowasibat, but the second demand i.e. talab-i-ishad, was defective on another ground that there was no reference to the immediate demand having been made, because the preemptor neither in the plaint nor in the deposition demanded pre-emption; rather, he simply asked to return the case land. Therefore, it appears that the trial court correctly says that the preemptor did not perform the talab-i-ishad as per the provision of Mohmedan Law. On the other hand, the appellate court below has committed an error of law resulting in an error in the decision, occasioning failure of justice in not holding that the preemptor failed to prove talab-i-ishad following the law.

Considering the above facts and circumstances and the discussion made above, it can be said that the decision passed in the case of Mahbooban -Vs- Fatima Begum and others reported in AIR 1952 All 167, and the case of Mohammad Umar –Vs- Amir Mohammad reported in AIR 1958 MP 423, 1958 JLJ 554, 1958 MPLJ 419 does not have a binding effect and cannot be treated as a binding precedent.

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. Therefore, on a total misconception of the law and facts, the learned Judge of the appellate court below misconstrued and misinterpreted the evidence and materials on record and most illegally reversed the Judgment of the trial court below. Consequently, it appears to me that the Judgment of the appellate court below suffers from legal infirmity, which can be interfered with by this court exercising revisional power under Section 115 (1) of the Code.

Resultantly, the Rule is made absolute.

The impugned Judgment and decree dated 17.05.2023 passed by the learned District Judge, Pirojpur, in Title Appeal No. 18 of 2020 is hereby set aside, and the Judgment and decree dated 31.10.2019 passed by the learned Assistant Judge, Nazirpur, Pirojpur, in Title Suit No. 167 of 2011 is hereby affirmed.

Communicate the Judgment and send down the Lower Court Records at once.

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(Md. Salim, J).

Rakib(ABO)