

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

Present:

**Mr. Justice Md. Riaz Uddin Khan**

**Civil Revision No. 3756 of 2014**

**IN THE MATTER OF :**

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

-And-

In the Matter of:

Idris Ali

... Preemptee-Petitioner

-Versus-

Md. Abdul Kalam Azad being dead his heirs

1. (a) Mst. Hasina Khatun and others

... Preemptor-Opposite Parties

Mr. Md. Ishtiaq Ahmed, Advocate

... For the petitioner

**Judgment on: 10.03.2026**

**Md. Riaz Uddin Khan, J-**

At the instance of the pre-emptee Rule was issued asking the opposite party Nos. 1-3 to show cause as to why the impugned judgment and order dated 11.06.2024 passed by the Joint District Judge, 2<sup>nd</sup> Court, Kurigram in Miscellaneous Appeal No. 68 of 2011 dismissing the appeal and thereby affirming the order No. 14 dated 14.09.2011 passed by the Assistant Judge, Rowmari, Kurigram in Miscellaneous (Sani) Case No. 03 of 2010 should not be set aside and/or such other or further order or orders should not be passed as to this Court may deem fit and appropriate.

The operation of the order No. 36 dated 24.01.2005 and order No. 39 dated 18.09.2005 passed by the Assistant Judge, Rowmari, Kurigram in Miscellaneous

Case No. 03 of 2002 (section-96) was stayed till disposal of the Rule by order dated 30.12.2015.

Brief facts for disposal of this Rule is that the present opposite party no.1 as preemptor instituted Miscellaneous (preemption) Case no. 03 of 2002 under section 96 of the State Acquisition and Tenancy Act in the court of Assistant Judge, Rowmari, Kurigram against the petitioner and opposite party nos. 2-5 of this revision. Thereafter, the present petitioner as preemptee no.1 appeared in the case but did not contest the case as the plot number of his land as mentioned in the disputed deed was not in the schedule of the preemption case rather a different plot number was there. The learned Assistant Judge fixed the matter for ex parte hearing and ultimately allowed the preemption case ex parte by his order no. 36 dated 24-01-2005. Then long after 8 months of ex parte order the preemptor filed an application for correction of plot number of the case land and the learned Assistant Judge allowed the application and modified the order dated 24-01-2005 by his order no.39 dated 18-09-2005.

Thereafter on 01.01.2010 being informed about the ex parte order from the preemptor the petitioner obtained copy of the same on 06.01.2010 and then on 12.01.2010 filed Miscellaneous (Sani) Case no. 03 of 2010 under Order-IX, Rule-13 of the Code of Civil Procedure against the aforesaid ex parte order. The opposite party no.1 filed written objection denying all the material allegations made in the sani case but did not contest it.

The petitioner examined himself as PW-1 to prove his case but was not cross-examined and the opposite party no.1 did not contest the case by adduce any evidence. The case was fixed on 14-09-2011 for ex parte order and the learned Assistant Judge however was pleased to reject the Sani Case by his order no.14 dated 14-09-2011.

The petitioner filed Miscellaneous Appeal No. 68 of 2011 against the above order no.14 dated 14-09-2011 before the Court of the District Judge, Kurigram which was ultimately heard by the learned Joint District Judge, 2<sup>nd</sup> Court, Kurigram who was pleased to disallow the appeal by his impugned judgment and order dated 11-06-2014.

Being aggrieved by and dissatisfied with the said judgment and order dated 11.06.2014 the preemptee-petitioner filed the instant civil revision before this Court and obtained the Rule and stay as stated at the very outset.

The substituted opposite party nos.1(a), 1(c) and 1(d) though filed vokalatnama but did not contest the Rule despite the fact that the matter was appearing in the list for several dates and copy of the supplementary affidavit filed by the petitioner was received by the learned advocate for the opposite parties.

Mr. Istiak Ahmed, the learned advocate appearing for the petitioner with two supplementary affidavits submits that the petitioner purchased the land of RS plot number 5424 but the opposite party

claimed land mentioning the RS plot no.542 in the schedule of his Miscellaneous Case seeking pre-emption filed against the instant petitioner. In such view of the matter the engaged learned advocate of the petitioner advised him that there is no need to contest the aforesaid preemption case by filing written objection as the schedule of the Case land does not contain the purchased land of the petitioner. Pursuant to the aforesaid wrong advice of learned advocate, the petitioner did not contest the aforesaid Miscellaneous Case. The learned advocate then submits that it is settled principle of law that for the wrong advice of the learned advocate, litigant should not be suffered and both the Courts below failed to appreciate the above principle of law in passing the impugned judgment and orders and reached to a wrong conclusion and thus committed an error of law resulting in an error in decision occasioning a failure of justice.

The learned advocate next submits that after the date of passing final judgment and order dated 24.01.2005, the trial court became *functus officio* and after being *functus officio*, the trial court has no legal authority to allow an application for amendment of the schedule land of Pre-emption Case but the learned judge of the trial court allowed such application by his order no.39 dated 18.09.2005 in the said preemption case. The learned judge of the appellate court below also failed to appreciate the above legal issue in passing the impugned judgment and order.

The learned advocate further submits that both the courts below committed error of law in holding that the petitioner waived his right to contest the case after being appeared preferred not to contest the case but the fact remains that since the plot number of his purchased land did not tally with the schedule of the preemption case and as a result on the wrong advice of the learned advocate, the applicant after appearing in the preemption case did not contest the case. Both the courts below without considering the above aspects of the case came to a wrong finding.

The learned advocate also submits that both the courts below came to a wrong finding that the Sani Case was barred by limitation inasmuch as they failed to consider that the application for correction/amendment of the schedule of the property was not served upon the petitioner or his learned advocate and the petitioner categorically stated that by practicing fraud upon the court the amendment order was obtained and further stated that the petitioner came to know about the ex parte order and subsequent amendment order on 01.01.2010 from the preemptor and after obtaining order from the court on 06.01.2010 filed the sani case on 12.01.2010 and in that view of the matter the case was not at all barred by limitation. The petitioner possessing the case land since purchase and the preemptor never informed the petitioner about the ex parte order he obtained before 01.01.2010. Had the preemptor ever went to the case land immediately after the ex-parte decree or in any way he could know about the same, there is no earthly reason for the petitioner not to come before the court

immediately to set aside the same in time. There is no presumption that delay is occasioned deliberately, or on account of mala-fides as he did not get any benefit by the delay and as such the courts below should have allowed the sani case setting aside the ex parte order, the learned advocate submits.

Mr. Ahmed finally submits that the Miscellaneous (pre-emption) Case No. 03 of 2002 filed by the opposite party no.1 (preemptor) itself was liable to be dismissed for defect of parties as all the co-sharers of the holding were not made parties, which is a mandatory provision of law. The learned advocate submits that while the preemptor made Momdel Hossain and Emdad Hossain both sons of Akbar Ali as parties while Nowsher Ali was not made party. Similarly Hasina Khatun, Firoza Khatun, Joygun Nessa, Maleka Bewa, Hameton Nessa, Hajera Khatun, Rokeya Khatun and Lamorttavan Nessa are not made party, all of whom are co-sharers in the case holding in RS Khatian No.122. In that view of the matter the impugned judgment and orders passed by the courts below are liable to be set aside, the learned advocate submits. In support of his submissions the learned advocate cited the case of Indrajit Kundu and others Vs. Bejoy Krishna Kundu being dead his heirs Biswajit Kundu and others reported in 5 BLC (AD) 39, the case of Abdus Samad and others Vs. Md. Sohrab Ali and others reported in 33 DLR (AD) 113 and the case of Akhtarun Nessa and another Vs. Habibullah and others reported in 31 DLR (AD) 88.

I have heard the learned advocate for the petitioner, perused the application, supplementary

affidavits along with the annexures. It seems the trial court rejected the Miscellaneous (Sani) Case on two grounds: first, since the preemptee petitioner once appeared by filing vokalatnama in the original Miscellaneous (preemption) case and subsequently preferred not to contest the case by adducing evidence, the preemptee petitioner waived his right and except the plot number everything of the schedule of preemption case contains the purchased property of the preemptee petitioner as such his plea is not a good ground not to contest the case. Secondly, the Sani case is barred by limitation as long after 5 years of ex parte order it was filed. It further appears from the impugned judgment and order passed by the court of appeal below that the learned judge concurred on both the above findings of the trial court.

On the query whether the original preemption case should be restored by allowing the Sani case filed under Order-IX, Rule-13, if there is no *prima facie* merit in the original preemption case in favour of the petitioner, the learned advocate argued that the preemption case itself was not maintainable for defect of parties as all the co-sharer tenants of the holdings under RS Khatian No.122 were not made parties which is a mandatory provision under section 96 of the State Acquisition and Tenancy Act. It appears that the opposite party No. 1 filed the original pre-emption case being No. 03 of 2002 under section 96 of the State Acquisition and Tenancy Act against five persons including the purchaser petitioner. The learned advocate for the petitioner has shown this Court the R.S. Khatain No. 122, under which the land of disputed

deed is situated and it appears several persons namely Nowsher Ali, Momdel Hossain, Emdad Hossain, Gulshan Ara, Hasina Khatun, Firoza Khatun, Momena Khatun, Joygun Nessa, Maleka Bewa, Hameton Nessa, Hajera Khatun, Rokeya Khatun, Lamorttavan Nessa are the recorded tenants of the holding as appears in the R.S. Khatain no.122 corresponding to RS Dag nos.5198, 5202, 5210, 5420, 5421, 5423, 5424, 5425, 5428 and 5268. It further appears from the preemption application that beside the petitioner only Momdel Hossain, Emdad Hossain, Gulshan Begum and Momena Bewa are made parties. In such facts, I am of the view that has a *prima facie* merit in the preemption case.

On the point of limitation in the reported case, 59 DLR (AD) 1 our apex Court referred the decision of Indian Supreme Court, AIR 1987 (SC) 1353 wherein a liberal approach is adopted on principles of condoning delay: 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late, 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties, 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner, 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in

injustice being done because of a non-deliberate delay, 5. There is no presumption that delay is occasioned deliberately, or on account of mala-fides. A litigant does not stand to benefit by recording delay. In fact, he runs a serious risk, 6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. In the case reported in 29 DLR 259 it was observed that delay due to wrong but *bona fide* advice of the lawyer is a sufficient explanation of delay. Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the section though there is certainly no general doctrine which saves parties from the results of wrong advice. In the present case as we noticed that the preemptee petitioner in his application under Order-IX, Rule-13 explain his reason that on wrong conception and advise of his engaged lawyer though appeared but did not contest the case. He further stated that the preemptor long after five months of final order without serving notice/petition upon him filed an application for amendment of the schedule of the case land and fraudulently obtained the order. He came to know about the ex parte order from the preemptor for the first time on 01.01.2010 and then on 12.01.2010 filed the Sani case. It further appears that no separate application under section 5 of the limitation Act for condoning delay was filed. This is also a mistake committed by the learned advocate. Taking a cue from above mentioned two decisions that when substantial justice and technical considerations

are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate cause, as there is no presumption that delay is occasioned deliberately, or on account of *mala fides* and wrong advise of the learned advocate, I am of the opinion that the explanation given by the petitioner was reasonable. It is noticeable that the preemptor opposite party did not contest the Sani case though appeared. In that view, the evidence adduced by the petitioner is uncontroverted and the claim of the petitioner is not challenged. Both the courts below have taken a harsh approach, especially when the other side neither cross-examined the petitioner nor adduce any opposite evidence. In the given facts and circumstances the petitioner should have given a chance to contest the original preemption case by allowing the Miscellaneous (Sani) case. In *Sanatannessa Bewa Vs. Haipatullah Sarker and others* reported in 41 DLR (AD) 105 wherein it has been held that *in considering an application for restoration the Court often takes into consideration, besides the grounds taken for restoration, whether any useful purpose will be served in allowing the same. In its anxiety to do justice the merit of the case is often considered by the Court before exercising discretion in such matter. We do not, therefore, think that the impugned order has been vitiated by reason of consideration of the merit of the case also.* In the light of the above observation by our apex Court, in the present case I have also taken into consideration prima facie merit of the case.

In such view of the matter as discussed above, considering all aspect of the case, I am inclined to interfere with the impugned judgment and orders which are liable to be set aside.

In the result the Rule is made **absolute**. There will be no order as to cost.

The stay granted earlier by this Court stands vacated.

The impugned judgment and order dated 11.06.2024 passed by the Joint District Judge, 2<sup>nd</sup> Court, Kurigram in Miscellaneous Appeal No. 68 of 2011 dismissing the appeal and thereby affirming the order No. 14 dated 14.09.2011 passed by the Assistant Judge, Rowmari, Kurigram in Miscellaneous (Sani) Case No. 03 of 2010 is hereby set aside and the Miscellaneous (Sani) Case No. 03 of 2010 is allowed. The ex parte order no.36 dated 24.01.2005 passed by the Assistant Judge, Rowmari, Kurigram in Miscellaneous Case No.03 of 2002 (section-96) is also hereby set aside and the trial court is directed to hear the case afresh giving all the parties an opportunity to contest the case by serving fresh notice. However, the observations made in this judgment will not bear anything in the merit of the Miscellaneous Case No.03 of 2002 (section-96).

Communicate the judgment and order at once.