

Misc Pre-emption 48/2021

Bangladesh Form No. 3701

HIGH COURT FORM NO.J (2)
HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE
DISTRICT- CHATTOGRAM

IN THE COURT OF SENIOR ASSISTANT JUDGE, 2ND COURT,
PATIYA, CHATTOGRAM

Present : **Mr. Md. Hasan Zaman,**
Senior Assistant Judge,
Patiya, Chattogram.

Date of Delivery of Judgment : 31st day of May, 2022

Miscellaneous Case No. 48 of 2021

Md. SolaimanPetitioner

-Versus-

Haji Ali Ahmed Sowdagar & others**Opposite parties**

This case came up for final hearing on **05.04.2012, 10.04,2018, 11.04.2019,**
24.11.2019, 29.11.2021; 20.01.2022 and 23.03.2022.

In presence of

Mr. Balaram Kanti Das ----- **Advocate for Petitioner.**

Mr. Ajit Kumar Dey -----**Advocate for Opposite parties.**

And having stood for consideration to this day, the court delivered the
following judgment:-

This is a miscellaneous case under section 96 of the SA T Act 1950.

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1) The Petitioner's case in brief is

that land sought to be pre-empted along with other lands belonged to Amin Ullah whose name was recorded in RS Khatain no.766, 800 and 798. That Amin Ullah died leaving behind 02 sons Siddik Ahmed and Sayed Ahemd as his legal heirs. Later on Siddik Ahemd died leaving behind 03 sons namely the opposite party no 3, 4 and Jafar Ahmed, a wife Mazma Khatun and 03 daughters namely the opposite party no 5,6 and Sayra Khatun. Sayra Khatun died leaving 03 sons Abdur Rahman, Md. Lokman and Abdul Momen. They transferred their share in favor of opposite party no.4. At the same way Mazma Khatun transferred her share by way of gift to opposite party no.4. Jafar Ahmed died leaving behind the opposite party no. 7-11 as his legal heirs.

2) It is further case of the petitioner that Sayed Ahmed died leaving behind a son (**the petitioner**) and two daughters namely Masuma Khatun and Achiaya Khatun. P.S and B.S Khatian has been recorded in the name of petitioner and others heirs. Achiya Khatun transferred her entire share by dint of **Kabala dated 05.10.1988** in favor of petitioner. Later on Mahsuma Khatun transferred her share **vide deed no. 5211 dated 28.10.1997** in favor of opposite party no.2 who transferred the same land to opposite party no.1. During pendency of suit the suit land has been transferred in favor of opposite party no 26.

3) It is further case of the petitioner that the petitioner is a co-sharer by way of inheritance as well as by purchase to the disputed holding. On the other hand, the opposite party no. 1 is an stranger who did not get any possession of the suit land. The petitioner feels great necessity of the land transferred. The petitioners finally came to know as to the said transfer on 29.06.2002 collecting certified copy of alleged deed from the sub-registry office. The opposite party no.1 the transferee is a stranger purchaser to the disputed holding whereas the petitioner is a co-sharer by inheritance and a contiguous land holder. As such as per provision of section 96 of the SAT Act 1950

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(Before amendment 2006) he is entitled to pre-empt the transfer made by the Kabala dated 06.05.2002.

4) It is further case of the pre-emptor that the he has brought this application only for 3 decimals out of 5 decimals of the impugned kabala. He has no claim to the rest 02 decimals. For this he is entitled to get back the deposited amount along with compensation of Tk 8,800 for 02 decimals after completion of trial.

Opposite parties Case :

5) **The prayer for pre-emption was opposed by the opposite party no.1 by filing written objection** contending, *inter alia*, that the case is not maintainable in its present form and manner; there is no cause of action; the case is barred by law as well as by limitation. The opposite parties also contended that the petition is filed on basis of premature cause of action for which it is liable to be rejected. By denying all averments of the application, the positive case of the opposite party no.1 is that suit land originally belonged to R.S recorded owner Amin Ullah who died leaving behind two sons namely Siddik Ahmed and Sayed Ahmed as his heirs. Later on, Sayed Ahmed died leaving a son, the petitioner and two daughter Masuma Khatun and Achiya Khatun as his heirs. Masuma Khatun transferred her share measuring 12 decimals vide deed no. 5211 dated 28.10.1997 in favour of opposite party no.2 who later on transferred 07 decimals in favour of Md Ismail and others. Later on opposite party no.2 transferred 5 decimals of land by way of mortgage on execution of deed of return for a tenure of 05 years on 06.05.2002 in favour of opposite party no.1. It is further contended by the opposite party that the impugned deed dated 06.05.2002 was not a sale deed rather a mortgage deed. Thus the petitioner is not legally entitled to pre-empt the suit land and for this, it shall liable to be dismissed.

Issues:

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6) From the rival pleadings of both the parties and considering the submissions of learned advocate of both the parties at the time of arguments, the following issues has been framed for proper adjudication of the case.

- a) Whether the case is maintainable in its present form and law ?
- b) Whether the petitioner has cause of action to file this petition?
- c) Whether the case is barred by provision of limitation?
- d) Whether the petitioner is a co-sharer tenant in the disputed holding or a tenant holding land contiguous to the land transferred?
- e) Whether the petitioner may get the relief as prayed for?

Discussions and Decisions:

7) On perusal of the record, it appears that this case was filed on 27.07.2002 in the court of 1st senior Assistant Judge, Patiya and it was registered and numbered as **Misc 78 of 2002** which was later on transferred before this court vide **order no.90 dated 31.03.2021** and accordingly this case was renumbered as **Misc 48 of 2021**.

8) In support of his case, the pre-emptor **Md. Solaiman** examined himself as **Pt.W.1** before this court. **During examination of Pt.W.1**, the following documents were produced and proved, which have been marked as Exhibits:-

1.	R.S Khatian no. 766, 798, 800	Exhibit 1 (series)
2.	P.S khatian no. 722, 744 and 746	Exhibit 2 (series)
3.	B.S Khatian no. 1047, 1015 and 1046	Exhibit 3 (series)
4.	Certified copy of Deed no. 1987 dated 06.05.2002	Exhibit 4
5.	Certified copy of Deed no.1987 dated 06.03.2002	Exhibit 4 (Ka)
6.	Certified copy of Deed no. 5505 dated 05.10.1988	Exhibit 5
7.	Certified copy of Deed no. 609 dated 01.10.2002	Exhibit 6
8.	Certified copy of Deed no. 5211 dated 28.10.1997	Exhibit 7

9) On the other hand, the opposite parties examined **02** witnesses namely **Md. Saifur Alam (Op.W1)** and **Md Sayed Hossain (Op.W.2)** before the court. During

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examination of **Op.W.1** the following documents were produced and proved, which have been marked as exhibits:-

1.	R.S Khatian no. 766, 798, 800 and B.S 1047, 1015, 1046	Exhibit Ka (series)
1.	Certified copy of Deed no. 5211 dated 28.10.1997	Exhibit Kha
2.	Certified copy of Deed no. 6180 dated 08.12.1999	Exhibit Ga
3.	Certified copy of Deed no.2987 dated 06.05.2002	Exhibit Gha
4.	Certified copy of Deed no. 6180 dated 08.12.1999	Exhibit Uma

Decision with Reasons

10) **Md. Solaiman (Pt.W.1)** for the petitioner and **Md.Saifur Alam (OP.W 2)** for the opposite parties has given statements admitting the facts of the application and written objections respectively.

11) **ISSUE NO. a and b**

a) **Whether the case is maintainable in its present form and law?**

b) **Whether the petitioner has cause of action or *locus standi* to file this petition?**

These issues are taken up together for convenience. Ld. Advocates for both the parties did not articulate these points at the time of argument. Nevertheless, this Court finds it necessary to discuss these points for reaching to the just decision of this case.

12) This is an application for pre-emption under Section 96 of the **State Acquisition and Tenancy Act, 1950** where the petitioner claims the right of pre-emption of the case plot being a co-sharer by inheritance and an adjoining land owner of the same, of which this Court has jurisdiction of adjudication. The petitioner by way of **Challan** has deposited the actual consideration amount together with compensation following the provision of law. This case is purely civil in nature and there is no bar to try this suit by this court. Therefore, considering all these this Court finds that this application is maintainable in form and in law.

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13) The pre-emption petition reveals sufficient *cause of action* for the petitioner for bringing the instant case considering the allegation that the petitioner is a co-sharer tenant to the disputed holdings both by way of inheritance and by purchase. The opposite party no.2 very secretly and without any notice transferred the case property by a registered deed on 06.05.2002 in favour of opposite party no.1 who is totally a stranger to the disputed holding. This fact of secret transfer came to the knowledge of the petitioner on 25.06.2022 when he collected certified copy of the impugned deed. On 29.06.2002 the opposite party no 1 refused to execute the said Kabala in favor of the petitioner. Thus the alleged transfer compelled the petitioner to bring this application for pre-emption. It is contended that the cause of action for this case arose when the opposite party No.1 purchased the case property vide a registered sale deed from the vendor. In this instant case, the factum of transfer has not been denied by the opposite parties. The opposite parties have not brought on record any evidence where from it can be decided that the cause of action arose from another date than what the petitioner claims. Thus it appears to this court that the petitioner had enough cause of action to institute this present case.

In the light of above discussion these two points are decided in favour of the petitioner.

Issue No c) : Whether the case is barred by provision of limitation?

14) The point of limitation is raised by the opposite party in the written objection and as the period of limitation is of much importance in case of maintainability of the pre-emption application, this Court is inclined to decide this point.

15) Section 96 of the Act (Before amendment in 2006) the limitation period for filing an application for pre-emption by a co-sharer tenant or tenant of contiguous land holder is four months from the date of knowledge of such transfer and in case notice is served upon the co-sharer tenant under section 89, the limitation period is also four months from the date of service of such notice.

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16) Now to determine the date from when the limitation starts to run in case of pre-emption, this Court is inclined to rely upon the decision of a case reported in [43 DLR 506, 10 BLC, 250], wherein Hon'ble Court uniformly held that “ the limitation for making the application for pre-emption u/s 96 does not start from the date of execution of the document transferring the land but from the date of registration of the deed because the date of registration is the date of accrual of the right of pre-emption.” It is also held that the date of registration means the date when the registration of the deed of transfer is completed under Section 60 of the Registration Act.

17) It is the specific plea of the petitioner that he has not been served with the notice of the impugned sale. The opposite parties have not brought any evidence to establish that notice was served upon the petitioner. In this circumstance, this Court presumes that no notice was served upon the petitioner. In view of above discussion, the period of limitation for filing application for pre-emption by an adjoining land owner will run from the date of completion of registration of the impugned sale deed.

18) In this instant case, on perusal of **the Exhibit 4 (Ka)**, it appears that the date of completion of registration is on **28.07.2003**. On perusal of the record it appears that the petitioner has filed this application on **27.07.2002**. Accordingly, this case is found to be pre mature. In this context, this court is very much inclined to rely on the decision of the case reported in **[44 DLR (AD) 65]** wherein it has been held that if pre-emption application is filed before registration of the sale deed, it is not to be dismissed on the ground of pre-maturity if the same is registered during pendency of the pre-emption proceeding. In another case reported in **[45 DLR 126]** it has been held that **pre-maturity is cured when registration is effected during pendency of the case.**

19) In view of above discussion , this court is of considered view that there is no bar to the maintainability of application during period of presentation of such deed and subsequent completion of its registration. It can be said that no final or interlocutory relief can be meted out to a pre-emptor till completion of registration of the deed. As a

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result this instant case is not affected at all due to its premature filing rather in view of this it can be safely presumed there is no question of its being barred by law of limitation.

In the light of above discussion this point is decided in favour of the petitioner

Issue No d) : **Whether the petitioner is a co-sharer tenant in the disputed holding or a tenant holding land contiguous to the land transferred?**

Issue no. e) **Whether the petitioner may get the relief as prayed for?**

20) These points are taken up together for the sake of brevity in discussion.

Now the petitioner is praying to pre-empt the case property as co-sharer tenant to the disputed holding by inheritance and also by purchase. The Opposite parties have challenged the contention of the petitioner and claimed he is a co-sharer tenant to the disputed holding. The petitioner tried to prove the fact that he is the co-sharer tenant to the disputed holding by producing **Exhibit 1(series) to Exhibit-7**. From the R.S Khatian marked as **Exhibit 1, 1/Ka and 1/Kha**), it is found that, the scheduled property is duly recorded in the name of Amin Ullah. It is admitted by both the parties that Amin Ullah died leaving behind two sons namely Siddik Ahmed and Sayed Ahmed who also died leaving behind a son **Md. Solaiman (the pre-emptor)** two daughters Mahsum Khatun and Achiya Khatun as his legal heirs. In view of **Exhibit- 2, 2/ka and 2/kha**, the P.S Khatian has been duly recorded in the name of Siddik Ahmed and Solaiman (the petitioner). Again in view of B.S Khatian no. 1047, 1015 and 1046 (**Exhibit No. 3, 3/ka, 3/kha**), it is found that the scheduled property was duly recorded in the name of the pre-emptor petitioner along with other co-sharer tenants. Thus it is crystal clear that that petitioner is a co-sharer tenant by inheritance to the disputed holdings.

21) Besides this, Exhibit- 5, reveals that Achiya Khatun one of the sisters of petitioner, has transferred her entire share which she got by inheritance, in favour of the petitioner by a registered deed on 05.10.1988. Thus the petitioner becomes a co-sharer

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tenant to the disputed khatian no.800 corresponding to B.S khatian no. 1047 by way of purchase.

22) The oral evidences in this case are of not much effect in this scenario. In the light of above observation, in this instant case, this Court finds that the petitioner is a co-sharer tenant by inheritance to the disputed holdings comprising the schedule property as it evident from the **Exhibit 3 and 3/Ka and 3/Kha**. He is also a co-sharer tenant to the disputed holding by purchase. In absence of any contradictory evidence from the side of the opposite party, this Court has no hesitation to hold that the petitioner fulfills the criteria to claim pre-emption in respect of the schedule property on the ground of co-sharer tenant.

23) In the light of the above discussion and also considering the decisions of the foregoing points this Court finds that there is no bar to allow the instant application for pre-emption filed by the petitioner on the ground of co-sharer tenant by inheritance and partly by purchase to the disputed holdings regarding the schedule property. Accordingly, these points are also decided in favour of the petitioner.

24) It is pertinent to mention here that during pendency of the case, the schedule property has been again transferred in favor of opposite party no.26. Since the transfer occurred pendency of this case it is hit by principle of *lis pendence*. No right title and interest has been accrued in favour of the opposite party no.26 regarding transferred case property.

25) It is further stated that the petitioner will be entitled to withdraw **TK 8,800/-** out of total deposited amount since he left his right of pre-emption for rest 02 decimals in the impugned deed of transfer.

As a result, the petitioner's case succeeds.

C.F. paid is correct.

Hence,

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it is ORDERED

that the pre-emption application filed by the petitioner be and the same is allowed on contest against the opposite party no.1 and ex-party against the rest without any order as to costs.

The right, title and interest in respect of the schedule property, which accrued to the opposite party No.1 by virtue of the impugned deed of sale being no. 2987 dated 06.05.2022 do hereby vest in the petitioner free from all encumbrances.

The opposite party No.1 is directed to execute and register the sale deed in favor of the petitioner in respect of the case land within 60 days from this order failing which the petitioner shall get it executed and registered through court in accordance with law.

The opposite party no.1 is at liberty to withdraw the consideration amount together with the compensation as calculated herein above with respect to the pre-empted property.

The petitioner may get possession in the land through court on filing further application.

The petitioner is allowed to withdraw Tk.8800/- deposited for rest of the 02 decimals which was left out from the claim of pre-emption.

The case is thus disposed of.

Typed & Corrected by me

Md. Hasan Zaman
Senior Assistant Judge,
Senior Assistant Judge, 2ndCourt,
Patiya , Chattogram.

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