

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 : 30th day of March, 2023

Miscellaneous Case No. 03 of 2012

Nur BegumPetitioner

-Versus-

Md. Moniruzzaman & others**Opposite parties**

This case came up for final hearing on **26.08.2015, 03.01,2022, 26.10.2022,**
23.01.2023, 26.01.2023; 27.02.2023 and 28.03.2023.

In presence of

Mr. A.K.M Shajahan Uddin ----- **Advocate for Petitioner.**

Mr. Amit Kumar Dhar -----**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.

The petitioner on **29.03.2012** filed the present application **U/S 96 of State Acquisition and Tenancy Act, 1950** seeking pre-emption of the land as prescribed in the schedule of the application which was transferred by the opposite party no. 2-4 by way of registered **sale deed being No. 2491 dated 07.03.2012** in favor of Opposite party no.1

The petitioner filed this case depositing the actual transaction amount of **TK. 1,00,000/-** along with statutory compensation of **TK. 33,000/-** of **Total TK. 1,33,000/- vide Challan No. 524 dated 29.03.2012.**

Petitioner's case

1) The petitioner's case in brief is that land sought to be pre-empted originally belonged to R.S recorded owner Rahim Box died leaving 02 sons namely Jager Hossain and Zamir Hossain and their name were duly recorded in B.S Khatian no. 491. Zamir Hossain died leaving behind a wife Latima Khatun, 05 sons namely Abdul Mabud, Abdul Monaf, Abdul Jabbar (O.P No.2), Abbas Ali (O.P no. 3) Abdul Jalil and 03 daughters namely **Nur Begum (Petitioner)**, Momtaz Begum (O.P No. 14) and Hazera Khatun (O.P no.4). Abdul Jalil died leaving the Opposite party no. 7-13 as his legal heirs. The opposite parties no. 15-34 are the heirs of B.S recorded tenants. Thus the petitioner and the O.P no. 2-14 are co-sharers by way of inheritance to the disputed holding.

It is further case of the petitioner that the opposite party no. 2 -4 without serving any notice upon the petitioner transferred $2\frac{1}{2}$ decimals land of the disputed plot **vide Deed no. 2491 dated 07.03.2012** in favor of opposite party no.1. That she is a co-sharer by inheritance to the disputed holding whereas the **O.P No.1** is a stranger. The petitioner feels great necessity of the land transferred. The petitioner finally came to know as to the said transfer on 21.03.2012 collecting certified copy of alleged deed. As the transferee is a stranger purchaser to the disputed holding of which he is a co-sharer by inheritance as such, as per provision of section 96 of the SAT Act 1950 he is entitled to pre-empt the transfer made by the Kabala dated 07.03.2012.

Opposite parties Case :

2) 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 petitioner's case also barred by law of estoppel, waiver and acquiescence. By denying all averments of the application, the positive case of the opposite party no.1 is that suit land originally belonged to Rahim Box, Basir Ullah and Amir Ali. Their name were duly published in R.S khatian no. 631. That khatian contained of total 6.76 acre lands which was amicably partitioned among the three brothers and accordingly Rahim Box got the suit land. That Rahim Box died leaving behind 02 sons Jager Hossain and Zamir Hossain and 03 daughters namely Rabeya Khatun, Nasuba Khatun and Asia Khatun as his legal heirs.

3) It is further case of the O.P that Zamir Hossain died leaving behind a wife Latima Khatun, 05 sons namely Abdul Mabud, Abdul Monaf, Abdul Jabbar (O.P No.2), Abbas Ali (O.P no. 3) Abdul Jalil and 03 daughters namely Nur Begum (Petitioner), Momtaz Begum (O.P No. 14) and Hazera Khatun (O.P no.4). Thereafter Latima Khatun died leaving her sons and daughters as her legal heirs. By amicable settlement Abdul Jabbar, Abbas Ali and Hazera Khatun got the suit lands of disputed plot no. 1938. Later on, the O.P no.2-4 has decided to sell the suit property and offered to purchase the same to the petitioner and O.P no 5/6 but was refused. Having taken consent of all co-sharers, the O.P No.2-4 transferred the suit land **vide Kabal no. 2491 dated 07.03.2012** in favor of opposite party No.1. The O.P no.5/6 became witnesses to the said transfer deed. The petitioner was fully aware of the impugned transfer. The O.P no.1 has mutated the suit land in his name vide mutation Khatian no. 2187. He also developed the suit land which caused costs of Tk. 5,00,000/ Being induced by the petitioner, O.P no.1 has purchased the suit land. The petitioner has no need of the suit land. Thus the petitioner is not legally entitled to pre-empt the suit land and for this, it shall be liable to be dismissed.

Issues:

4) 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 by inheritance to the disputed holding?
- e) Whether the case is barred by law of estoppel, waiver and acquiescence ?
- f) Whether the Opposite party no.1 is entitled to any development cost ?
- g) Whether the petitioner may get the relief as prayed for?

Discussions and Decisions:

5) In support of his case, the pre-emptor **Nur Begum** examined himself as **Pt.W.1** before this court. **During examination of Pt.W.1**, the documents which were produced and proved have been marked as **Exhibit 1 to 3**. On the other hand, the opposite parties examined **02** witnesses namely **Md. Moniruzzaman (Op.W.1)** and **Abdul Jabbar (Op.W.2)** before the court. During examination of **Op.W.1**, the documents produced and proved has been marked as **Exhibit Ka and Kha**.

6) Now let us see in brief the oral evidences of both parties. The pre-emptor **Nur Begum (Pt.W.1)** stated in her examination chief that the suit land measuring 14 decimals of R.S plot no. 1938 originally belonged to Rahim Box who Rahim Box died leaving two sons Jamir Hossain and Zakir Hossain whoes name were duly published in B.S Khatian. Then Jamir Hossain died leaving a wife Latima Khatun, 05 sons and 03 daughters. She is one of the daughters of Jamir Hossain. She is a co-sharere tenant to the disputed holding as heir of Jamir Hossain. She further deposed that she hearing the impugned sale, she collected certified copy of the said deed on 31.03.2012. Thereafter on 24.03.2012 she asked

the preemptee to execute the sale deed in her favor but she was refused. she further states that the opposite party no. 2 -4 without serving any notice upon the petitioner most secretly transferred the suit land **vide deed no. 2491 dated 07.03.2012** in favor of opposite party no.1. She denied all material allegations stated in the Written objection.

7) In her cross, **Pt.W.1** stated that the suit property still is low land. She denied such suggestions of O.P that she had no necessity of the suit land; she was fully aware of the impugned sale before transfer; after purchase of the suit land O.P no.1 has developed the suit land which caused cost of T. 5 lacs and the impugned transfer was done within her full knowledge.

8) **Md Moniruzzaman (O.P.W.1)** stated in his examination in chief that suit land belonged to Rahim Box who died leaving behind 02 sons Jamir Hossain and Zager Hossain and 03 daughters. Jamir Hossain died leaving 05 sons Abdul Jabbar, Abbas Ali, Abdul Mabud, Abdul Monaf and Abdul Jalil and 03 daughters namely Nur Begum (the petitioner), Momtaz Begum and Hazera Khatun. By amicable settlement , Abdul Jabbar, Abbas Ali and Hazra Khatun got the suit land and transfered the same vide Kabala no. 2491 dated 07.03.2012 in favor of O.P. no.1. The other brother and sister of the petitioner was witness in the said deed of transfer. Before purchase of the suit land, he informed the matter to the petitioner and accordingly the petitioner being a pardanshin lady assured him not to come there and induced him to purchase the suit land. Thereafter he mutated the suit land in his name. He further states that he developed the suit land by filling up with soil which caused cost of Tk.5 lacs. He prayed dismissal of the case.

9) **In his cross, O.P.W.1 stated that** suit land belonged to Rahim Box who died leaving 02 sons namely Jager Hossain and Zamir Hossain whose name was duly recorded in B.S Khatian no. 491. That Zamir Hossain is the father of petitioner Nur Nahar Begum. The petitioner is a co-sharer tenant in the disputed holding. The suit land is petitioner's ancestral propety. He further states that without issuing any notice to the petitioner, he purchsed the suit land on 07.03.12 from O.P no. 2-4. After purchase he got possession of

the suit land and he has another land beside the suit land. He denied such suggestions of petitioner that he does not need the suit land. He again states that he is a marine Engineer and stays in Singapur. He has his own house beside the suit land and he has almost 2 acres of land.

10) **Abdul Jabbar (O.P.W.2) deposed in his chief that** the petitioner is his full sister. All the family members together had taken the decision of the impugned transfer in favor of O.P.No.1. The petitioner was fully aware of the impugned sale.

11) **In his cross,** he states that before transfer of the suit land, they did not issue notice to other co-sharers. **Nur Begum is a co-sharer tenant by inheritance to the disputed holding.** He denied the suggestions that they secretly transferred the suit land and it was not within the knowledge of Nur Begum. Muniruzzaman is a stranger to the suit land and he is not a co-sharer.

Decision with Reasons

12) **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.

13) 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 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.

14) 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 by way of inheritance. The opposite party no.2-4 very secretly and without any notice transferred the case property by a registered deed on 07.03.2012 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 21.03.2012 when he collected certified copy of the impugned deed. On 24.03.2012 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?

15) In regard to point of limitation, the opposite party did neither raise this question in his writtern objection nor in the examination in chief. During arguments learned advocate for the O.P was completely silent about this point. I have gone through the records meticulously. Considering the evidence on the records it appears to me the petitioner has filed this instant case within the statutory period. Thus it is my considered view that this case is not barred by limitation. In the light of above discussion this point is decided in favour of the petitioner.

16) **Issue No d) : Whether the petitioner is a co-sharer tenant by inheritance to the disputed holding ?**

The petitioner has claimed that he is entitled to pre-empt the case property as co-sharer tenant to the disputed holding by inheritance. This fact was not denied by the opposite parties. Admittedly the suit property originally belonged to Rahim Box whoes name was duly recorded in **R.S Khatian no. 631. Exhibit-2 proves** the facts true. Again it is admitted that Rahim Rahim Box died leaving 02 sons namely Jager Hossain and Zamir Hossain and their name were duly recorded in **B.S Khatian no. 491. Exhibit-3** proves the fact as true. Again it admitted by both parties that Zamir Hossain died leaving behind a wife Latima Khatun, 05 sons namely **Abdul Mabud, Abdul Monaf, Abdul Jabbar, Abbas Ali , Abdul Jalil** and 03 daughters namely **Nur Begum (Petitioner)**, Momtaz Begum and **Hazera Khatun. From the abvoe discussions** it is crystal clear that that petitioner being daughter of B.S reccorded owner Zamir Hossain is a co-sharer tenant by inheritance to the disputed holdings. Thus this point is decided in favour of the petitioner.

Issue No. e), f) and g) :

Whether the case is barred by law of estoppel, waiver and acquisance ?

Whether the Opposite party no.1 is entitled to any development cost ?

Whether the petitioner may get the relief as prayed for?

17) These issues are taken up together for convenience. Learned Advocate for the opposite parties argued that though the petitioner is a co-sharer tenant by inheritance to the disputed holding but his co-sharership has been ceased due to separation of the Jama upon opening a new Mutation Khatin in the name of the O.P no.1. **Exhibit Kha** shows that suit land has been mutated in the name of O.P no.1 **vide Mutation case no. 1-2470/2015 dated 13.12.2015**. It is argued that since the jama has been splitted up and new separate holding is created the petitioner cannot be said to remain a co-sharer to the disputed holding . For this the petitioner has no right at all to pre-empt the case land.

18) Opposing this contentions, learned advocate for the petitioner argued that the pre-emptee has mutated the suit land during pendency of the suit and without serving any notice upon the petitioner as is required u/s 117 of the State Acquisition and Tenancy Act 1950. Since the mutation khatian was opened non-compliance of the said provision, the parent jama is to be deemed to remain intact and the co-sharership of the petitioner has not been ceased. Thus the petitioner's right of pre-emption will never be defeated by the said mutation khatian.

19) Evidence shows that O.P.W.1 has mutated the suit land during pendency of the present suit vide mutation Khatian no. 2187 **dated 13.12.2015 (Exhibit-Kha)**. **The opposite parties claimed that** the said mutation Khatian was opened within the knowledge of petitioner. But this contention appears to me not believable at all. Because the Opposite parties could not show any reliable evidence establishing the fact that he has served the required notice upon the petitioner regarding the mutation khatian. Thus there is no doubt here that the O.P managed the alleged mutation khatian ex-parte without proper service of notice upon the co-sharers including the petitioner. Since provision of section 117 of SAT Act 1950 was not properly complied with by the O.P, the parent jama remains intact and the petitioner continues to be a co-sharer to the holding in question and his right of pre-emption remains unaffected. This view finds support from a decision reported in **33 DLR (AD) 323** wherein it has been held that " Unless it is satisfactorily proved that the parent jama has been separated in accordance with the provision of sec 117(c) of the SAT Act on proper service of notices upon all the co-sharers, the parent jama remains intact and a co-sharer to the holding continues to be a co-sharer to it and his right of pre-emption remains unaffected.

20) **Again in a case reported in BCR 1981 (AD) 195 , it has been held** that " the right of pre-emption is not affected by the ex-parte order of sub-division of holding during the pendency of Pre-emption proceeding. Sub division of holding u/s 117(1)(c) of the SAT Act does not bar the exercise of the right of pre-emption."

21) In the light of above discussion and decisions it is my considered view that though the O.P. no.1 has mutated the suit land vide **Exhibit-kha**, the parent jama is not separated and petitioner's co-sharership cannot be said to be ceased. As such his right of pre-emption will not be defeated.

22) Again learned advocate for the O.P. No.1 submitted that the pre-emptor is not entitled to pre-empt the case land since it is barred by the principle of waiver and acquiescence or estoppel. It is claimed by the Opposite parties that the suit land was primarily offered to the petitioner but he refused to buy the same. Thereafter being encouraged and consented by the petitioner and within his full knowledge, the pre-emptee has purchased the suit land from O.P.No 2-4. In this circumstances now the question is -

“ whether the conduct of the petitioner such as unwillingness to purchase the case land and inducing the purchaser pre-emptee to purchase the same constitutes waiver, acquiescence or estoppel and the same defeats the right of pre-emption of the petitioner ?”

23) **Considering the facts and circumstance of the case and evidence on record my answer regarding the above question is in the negative.** It has been frequently and constantly held by our Superior court that “ right of pre-emption accrues on the date of registration of the sale deed. The pre-emptive right of purchase of the case land accrued to the pre-emptor only after the case land was sold to the purchaser by its owner and not before. Pre-emptive right does not exist before sale and so it is not enforceable before sale. Any such right before sale is an inchoate and immature right. **Hence no conduct of the pre-emptor before sale of the case land refusing to purchase the same or consenting to the sale in question to other can constitute waiver , acquiescence and estoppel demolishing his right of pre-emption.**” [60 DLR (AD) 73]. In view of the above decision, the contention that this case is barred by principle of waiver , acquiescence and estoppel is not tenable at all. Thus it my considered view that right of pre-emption of the petitioner cannot be held to be defeated by waiver, acquiescence or estoppel.

24) Lastly, the Opposite Party has claimed that the pre-emptee is entitled to get TK.5 lacs as development cost of the suit land which was vehemently opposed by the pre-emptor petitioner. Though in the written objection and deposition it was claimed by O.P.W.1 that he developed the case land by filling up it with soil which caused cost of Tk 5 lacs but in support of this claim the O.P could not produce any independent witnesses who witnessed the event or any other reliable evidence in support of that claim. Even the O.P.W.2 also did not utter a single word regarding the development of the case land by the pre-emptee. Considering these evidences on record, it appears to me that the claim of development cost is totally false and baseless. Thus it is decided that after purchase, the pre-emptee did make no development work in the case land and for this he would not be entitled to get any development cost.

25) 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. Accordingly, these points are also decided in favour of the petitioner.

As a result, the petitioner's case succeeds.

C.F. paid is correct.

Hence,

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. 2491 dated 07.03.2012 do hereby vest in the petitioner free from all encumbrances.

Nur Begum -VS- Md Moniruzzaman
Pre-emption Misc. Case No. 03/2012

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 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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