

Misc Pre-emption 08/2010

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 : 29th day of November, 2022

Miscellaneous Case No. 08 of 2010

Abu JahurPetitioner

-Versus-

Mohammad Ali Abbas & others**Opposite parties**

This case came up for final hearing on **28.11.2012, 07.08.2013, 19.03.2014,**
14.08.2014, 15.03.2021; 06.11.2022 and 20.11.2022 .

In presence of

Mr. A.K.M Shajahan Uddin **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 an application Under Section 96 of State Acquisition and Tenancy Act, 1950.

1. The petitioner on 21.07.2010 filed this application **U/S 96 of State Acquisition and Tenancy Act, 1950** seeking pre-emption of the scheduled land of the application which was transferred by way of registered **sale deed being No. 4637 dated 20.04.2010** in favor of **opposite party no.1** by the **opposite party no. 2-5.**

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The petitioner has filed this case depositing the actual transaction amount of **TK. 3,00,000/-** along with statutory compensation amount of **Tk. 75,000/-** and also 8% simple annual interest for 91 days of **Tk 6,000/- i.e Tk 3,81,000/-** in total **vide Challan No. 54 dated 20.07.2010.**

Case of the Petitioner

2. **The petitioner's case in short** is that land sought to be pre-empted along with other lands belonged to Basanta Kumar and Rasik Chandra and their name were recorded in RS Khatain no.615, 446,475 and 427/1 wherein each was owner of 11. (8 Ana) shares. Rasik Chandra died leaving 02 sons namely Jogesh and Pulin as his legal heirs. That Basanta Kumar , Jogesh and pulin transferred property in favour of **Kushum Bala Baidhya** by way of registered deed dated 01.04.1942.

3. The further case of petitioner is that land under R.S khatian no.743 belonged to Fazar Ali Mainuddin and orthers. Mainuddin got 8 decimals of R.S plot no.2133 and Fazar Ali got 7 decimals of R.S plot no. 2134 and accordingly their name was duly recorded in the said R.S Khatian. Mainuddin died leaving a son Sair Ahmed. Later on Fazar Ali and Sair Ahmed transferred their shares to Kushum Bala Baidhya by dint of kabala no.1610 dated 16.03.1953. Thereafter Kushum Bala Baidhya transferred lands in favour of Abul Khair, Khairul Bashar, Khairul Amin, Hamdu Mia and Sirazul Haq by way of Kabala no. 6348 dated 30.10.1958. Accordingly their names were duly recorded in B.S khatian no. 94 and 566. That Abul Khair died leaving behind a wife, **a son the petitioner** and 05 daughters **O.P no. 6-11**. The petitioners purchased the share of Khairul Amin and Sirazul Haq. Hamdu Mia, Khairul Amin and Sirazul Haq died leaving the O.P. no 12-30 as their legal heirs. The petitioner purchased land from the O.P no 12-20 by way of Kabala dated 15.06.2010. Thus the petitioner became a co-sharer tenant to the disputed holding by way of inheritance and by purchase.

4. It is further case of the petitioner that **the opposite party no. 2-5** without serving any notice upon the petitioner most secretly transferred the scheduled land vide **deed no. 4637 dated 20.04.2010** in favor of **opposite party no.1**. The petitioner finally came to know as to the said transfer **on 01.06.2010** collecting certified copy of alleged deed from

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the sub-registry office. It is further claimed that the petitioner is a co-sharer tenant to the disputed holding whereas the opposite party no.1 is a stranger. The petitioner feels great necessity of the land transferred. Thus the petitioner being a co-sharer tenant by inheritance to the disputed holding is entitled to pre-empt the transfer made on 20.04.2010 as per provision of section 96 of the SAT Act 1950.

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 O.P No.1 is a co-sharer in the disputed holding and he is not a stranger; for this, the petition is hit by the concerned provision of law. Besides this the suit is a premature case and also barred by principle of waiver and acquiescence for which it is liable to be rejected.

6. By denying all averments of the application, the positive case of the opposite party no.1 is that the O.P No. 2-5 before transfer of the suit land, discussed the matter with all other co-sharers and offered them to buy the same. When they refused to buy only then OP.No.1 agreed to purchase the said land. The Op. No.1 purchased the land in presence of and within the full knowledge of the petitioner. The O.P no.1 after purchase developed the land with cost of TK. 2 Lacs. Moreover he has mutated his name regarding the suit land. Since the Jama has been separated, the petitioner cannot be said to be a co-sharer to the disputed holding and for this he is not entitled to pre-empt the land.

7. It is further case of the O.P no.1 that the petitioner's case is a premature one. It is further case that though the impugned deed reveals Tk.3 lacs as consideration amount but the actual consideration of the disputed sale was 17,10,000/-. The O.P no.1 has more 1. (Four Kani) lands surrounding the suit land. He has been possessing those land having mutated the same. The petitioner has no necessity of the disputed land whereas the O.P no.1 needs the lands. The petitioner with ulterior motive and undue benefit has filed this

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petition. Thus the petitioner is not legally entitled to pre-empt the suit land and for this, it shall liable to be dismissed.

Issues:

8. 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 :

- 1) Whether the case is maintainable in its present form and law ?
- 2) Whether the petitioner has cause of action to file this petition?
- 3) Whether the case is barred by provision of limitation?
- 4) Whether the case is barred by principle of waver and acquiescence ?
- 5) Whether the petitioner is a co-sharer tenant to the disputed holding by inheritance?
- 6) Whether the Opposite party No.1 is entitled to any development cost ?
- 7) Whether the petitioner may get the relief as prayed for?

Discussions of Evidence:

9. The pre-emptor **Abu Jahur** examined herself as **Pt.W.1 and Milan Kanti Dev as P.W.2** before this court. **During examination of Pt.W.1** the following documents were produced and proved, which have been marked as Exhibits:-

1. C. C of R.S Khatian no. 446,427/1, 745, 615 and 743	Exhibit 1 (series)
2. C. C of B.S Khatian no. 566 and 94	Exhibit 2 (series)
3. C. C of Deed no. 4637 dated 20.04. 2010	Exhibit 3
4. C. C of Deed no. 1633 dated 01.04.1942	Exhibit 4
5. C. C of Deed no. 1610 dated 16.03.1953	Exhibit 5
6. C. C of Deed no. 6348 dated 30.10.1958	Exhibit 6
7. C. C of Deed no. 5578 dated 09.08.1973	Exhibit 7
8. C. C of Deed no. 7166 dated 12.06.1978	Exhibit 8
9. C. C of Deed no. 6935 dated 15.06.2010	Exhibit 9
10. Rent receipts (10 Nos.)	Exhibit 10

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10. On the other hand, the opposite parties examined **03** witnesses namely **the attorney of O.P No.1, Md. Atiqul Mulla (OP.W.1), Md Ali Akber (OP.W.2) and Habibur Rahman (O.P.W.3)** before the court. During examination of **Op.W.1 and O.P.W.2** the following documents were produced and proved, which have been marked as exhibits:-

1. Deed of Power of Attorney	Exhibit Ka
2. C.C of Deed no. 4637 dated 20.04.2010	Exhibit Kha
3. C.C of Mutation Khatian no. 1366	Exhibit Ga
4. DCR and Rent receipts	Exhibit Gha Series
5. Revocation Letter of Power of Attorney dt. 15.03.21	Exhibit Uma
6. C.C of Deed no. 3653 dated 05.04.2011	Exhibit Cha
7. C.C of Deed no. 826 dated 12.02.205	Exhibit Chha
8. C.C of Deed no. 4650 dated 20.04.2010	Exhibit Ja
9. C.C of Deed no. 8508 dated 14.08.2011	Exhibit Jha
10. C.C of Deed no. 15792 dated 16.08.2010	Exhibit Nio
11. C.C of Deed no. 5470 dated 09.05.2010	Exhibit Ta
12. C.C of Deed no. 584 dated 03.06.2010	Exhibit Tha
13. C.C of Deed no. 9469 dated 17.08.2010	Exhibit Da
14. C.C of Deed no. 4655 dated 20.04.2010	Exhibit Dha
15. C.C of Deed no. 6582 dated 03.06.2010	Exhibit Na
16. C.C of Deed no. 14159 dated 29.12.2010	Exhibit Tow
17. C.C of Deed no. 941 dated 27.01.2011	Exhibit Tha
18. Photocopies of Cheque and Pay Order	

Decision with Reasons

11. **Abu Jahur (Pt.W.1)** for the petitioner and **the attorney Md. Atiqul Mulla (OP.W.1) and Md Ali Akber (OP.W.2)** for the opposite parties have given statements admitting the facts of the application and written objections respectively.

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12. Issue no. 1 and 2 :

1. Whether the case is maintainable in its present form and law?
2. 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 U/S 96 of the **SAT Act, 1950** where the petitioner claims the right of pre-emption of the land transferred being a co-sharer by inheritance to the disputed holding of which this Court has jurisdiction of adjudication. The petitioner by way of **Challan** has deposited the actual consideration amount together with compensation and interest 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 -5 without any notice secretly transferred the case property by way of **registered deed no. 4637 dated 20.04.2010** 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 **01.06.2010** when he collected certified copy of the impugned deed. 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 wherefrom 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

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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.

15. Issue No.3 : “ Whether the case is barred by provision of limitation?”

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.

16. Section 96 of the Act (Amendment 2006) the limitation period for filing an application for pre-emption by a co-sharer tenant in the holding by inheritance is two 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 two months from the date of service of such notice.

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. It is claimed by the petitioner that matter of impugned sale came to his knowledge when he collected the certified copy of the said deed from concerned sub-registry Office. **Exhibit-3** reveals that certified copy of the impugned deed was collected on **01.06.2010** and this case was filed on **21.07.2010**. It appears that this case was filed within two months of knowledge of sale. Thus it is my considered view that this case has been filed within the statutory period time and it is not barred by limitation. In the light of above discussion this point is decided in favour of the petitioner.

18. Issue No 5 :

“Whether the petitioner is a co-sharer tenant in the disputed holding by inheritance? ”

The petitioner claimed that he is co-sharer to the disputed holding by way of inheritance and by purchase. In support of his claim he has submitted R.S and B.S khatians and the

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relevant documents. In view of R.S Khatian no. 615, 446, 475 and 427/1 marked as **Exhibit 1, 1(ka), 1(kha) and 1(Ga)**, it appears that land sought to be pre-empted belonged to one Basanta Kumar and Rasik Chandra and they were owner of 11 (8 Ana) shares in the said R.S Khatian. It is further claimed that the son of Rasik Chandra namely Jogesh and Pulin and Basanta Kumar on 01.04.1942 transferred lands in favour of **Kushum Bala Baidhya** by way of Kabala. **Exhibit-4** proves that fact to be true.

19. Again in view of Exhibit 1(Gha) it seems that property under R.S khatian no.743 belonged to Fazar Ali Mainuddin and orthers. It is claimed that Fazar Ali and Mainuddin's son Sair Ahmed transferred lands to **Kushum Bala Baidhya** by dint of kabala no.1610 dated 16.03.1953. **Exhibit-5** proves that fact to be true.

20. In view of **Exhibit-6** , it transpires that that **Kushum Bala Baidhya** transferred lands in favour of Abul Khair, Khairul Bashar, Khairul Amin , Hamdu Mia and Sirazul Haq by way of Kabala no. 6348 dated 30.10.1958. Accordingly their names were duly recorded in the B.S khatian no. 94 and 566. **Exhibit-2 and Exhibit -2(ka)** proves the fact to be true. That Abul Khair died leaving behind a wife, **a son the petitioner** and 05 daughters O.P no. 6-11. It appears from the schedule of petition that lands to be pre-empted belonged to B.S Khatian no. 94 and 566. The evidences do not show that the petitioner has no subsisting interest to the disputed holdings. Since the petitioner is an heir of B.S recorded owner Abul Khair, he is no doubt a co-sharer tenant to the disputed holdings by inheritance. The oral evidences regarding this are of not much effect in this scenario. In the light of above discussions, this Court finds that the petitioner is a co-sharer tenant by inheritance to the disputed holding.

21. During argument 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- Ga** shows that suit land has been mutated in the name of O.P no.1 **vide Mutation case no. 4535/2010 dated 30.01.2011**. It is argued that since the jama has been splitted up and new separate holding is created the petitioner

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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.

22. 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.

23. Evidence shows that O.P.W.1 has mutated the suit land during pendency of the present suit vide **Mutatuion Khatian no. 1366 dated 30.01.2011 (Exhibit-Ga)**. **The opposite party claimed that** the said mutation Khatian was opened within the knowledge of petitioner. But this contention appears to me not beleivable 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.

24. **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

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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.”

25. In view of above discussion and decisions it is my considered view that though the O.P. no.1 mutated the suit land, the parent jama is not separated and petitioner's co-sharership cannot be said to be ceased. In such situation there is no doubt that the petitioner is a co-sharer tenant by inheritance to the disputed holding. **Thus this point has been decided in favour of the petitioner.**

26. **Issue No. 4 :**

Whether the case is barred by principle of waver and acquiescence ?

The opposite party claimed that though the petitioner is a co-sharer tenant to the case holding but this case is barred by principle of waiver and **acquiescence**. In support of his claim Op.W.1 states in his depositions that “এই ভূমি থেকে বিক্রি করার প্রয়োজনে প্রতিপক্ষগণ তাদের শরীকদের প্রস্তাব করেছে। ২-৫ নং প্রতিপক্ষের পক্ষে প্রার্থীক অন্যান্য শরীকদের উক্ত সম্পত্তি বিক্রয়ের জন্য প্রস্তাব করেন। সেই হিসাবে ১ নং প্রতিপক্ষ শরীকগণের সাথে যোগাযোগ করেছে। নালিশী জায়গা দলিল করার পূর্বে ২ লক্ষ টাকা বিক্রেতাকে প্রদান করে। ঐ টাকা লেনদেনের সময় প্রার্থীক উপস্থিত ছিল এবং লেনদেন তার মাধ্যমেই হয়েছে। ”

27. From these statements it seems that before transfer of disputed land , the petitioner himself on behalf of transferors O.P no.2-5 made offer of purchase to other co-sharers. The Op. No.1 purchased the lands discussing with all co-sharers including petitioner and that petitioner was himself present at the time of payment of consideration of TK.2 lacs to Op.No-2-5. It is claimed by the pre-emptee O.P no.1 that since the petitioner from very beginning was aware of the sale; he himself was present at the time of transaction of Tk.2 lacs; he never intended to buy the same at that time and after discussion and taking due consent of the petitioner, the Op. No.1 purchased the suit land; such attitude of the petitioner proves the very fact that he has willfully waived his right of pre-emption and his due consent encouraged the Op.No.1 to buy the disputed land. For this, the opposite party claimed the case to be barred by principle of waiver and acquiescence.

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28. This stand of the opposite parties has been strongly opposed by the petitioner. Learned advocate for the petitioner argued that before sale is completed under the Registration Act, the right of pre-emption does not accrue to the petitioner. The fact of primary discussion with petitioner before sale and offer to buy to other co-sharers and his unwillingness to buy the same is totally immaterial in this regard. It does not curtail the statutory right of pre-emption of the petitioner.

29. **Now the question is whether unwillingness to purchase the same and inducing the pre-emptee Op.No.1 to purchase the same constitutes waiver, acquiescence or estoppel and the same defeats the right of pre-emption of the petitioner in this case.**

30. **In this regard my answer is in the negative. This view finds support from the decision of Appellate Division in the case reported in 60 DLR (AD) 73 wherein it was held that** “ 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 it's 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. The bare requisite for extinction or demolition of right lies in the accrual or existence of such right.”

31. In view of above decision, it is my considered view that since the conduct of petitioner that his unwillingness to purchase the case land and inducement of the O.P no.1 to purchase the same is the event happened before the accrual of right of pre-emption that is before the completion of impugned sale it does not constitute waiver, acquiescence or estoppel and the same does not defeats the right of pre-emption of the petitioner. **Thus this point is also decided in favour of the petitioner.**

32. **Issue no. 6 :**

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“ Whether the opposite party No.1 is entitled to any development cost ? ”

It is the duty of the Opposite parties to prove the fact that he has developed the suit land before the institution of the present case. In support of this claim Op.W.1 and Op.W.2 deposed in their chief that after purchase the case land he developed the same by filling up with sand and it cost him of Tk.2 lacs. For this the O.P no.1 claimed TK 2 lacs as development cost. But this claim appears to me not believable at all. Because Op.W.3 deposed very confidently that the case land is a paddy land and he himself cultivates the land. Such admission of Op.W.3 clearly indicates that the suit land is low land in nature. Moreover opposite parties could not produce any such independent witnesses who were directly or indirectly involved with the task of development of case land. Even the O.P could not show any reliable documentary evidence such as purchase voucher of sand in support of their development. Considering all these facts it appears to me that the O.P has hopelessly failed to prove the matter of development of the suit land. He just claimed it orally but in reality he did make no development at all to the suit land. For this my considered view is that O.P is not entitled to get any development cost. Thus this point is also decided in favour of the petitioner.

33. Issue No.7 :

“ Whether the petitioner may get the relief as prayed for?”

In the light of the above discussion and also considering the decisions of the foregoing points this Court finds that there is no bar here to allow the instant application for pre-emption filed by the petitioner on the ground of co-sharer tenant by inheritance to the disputed holdings regarding the schedule property. 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

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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. 4637 dated 20.04.2010** 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 case is thus disposed of.

Typed & Corrected by me

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

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