

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, 2023

Miscellaneous Case No. 08 of 2013

Bodiul AlamPetitioner

-Versus-

Md. Abdus Sabur & othersOpposite parties

This case came up for final hearing on 12.03.2023, 18.04.2023,
31.05.2023, 16.08.2023, 25.10.2023, 19.11.2023 and 12.11.2023.

In presence of

Mr. Anupam Nath ----- **Advocate for Petitioner.**

Mr. A.K.M Shajahan Uddin ----- **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 **15.07.2013** filed the present application **U/S 96 of State Acquisition and Tenancy Act, 1950** seeking pre-emption of the case land which was transferred by

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the opposite party No. 2 by way of registered **sale deed being No. 7032 dated 03.08.2009** in favor of Opposite party no.1

The petitioner filed this case depositing the actual transaction amount of **TK. 60,000/-** along with statutory compensation of **Tk. 15,000/-** and interest of **TK.19200** of **Total TK. 94,200/- vide Challan No. 82 dated 15.07.2013.**

Petitioner's case

1) The petitioner's case in brief is that land sought to be pre-empted under R.S Khatian No.90, plot No. 949 corresponding to B.S Khatian no. 53 and plot no. 757 originally belonged to Kamal Uddin who died leaving 02 sons namely Abdul Aziz and Abdul Munaf as his legal heirs. That Abdul Aziz died leaving a wife Mollica Khatun (O.P No.3), 05 sons namely Md Bodiul Alam (the petitioner), Abdul Gofur (O.P No.2) and O.P No 4/5 and 04 daughters O.P No.6-9 and Abdur Rahim died leaving the O.P No. 10-17 as his legal heirs. Thus the petitioner and the O.P no. 3-17 are co-sharers by way of inheritance to the disputed holding.

2) It is further case of petitioner that the Opposite Party No. 2 without serving any notice upon the petitioner transferred 2 Gondas or 4 satak land of the disputed plot **vide Deed no. 7032 dated 03.08.2009** in favor of opposite party no.1. That he 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 04.07.2013 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 case land.

Opposite parties Case :

3) **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

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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 Kamal Uddin whose name was duly published in R.S khatian no. 90. Kamal Uddin died leaving 02 sons Abdul Aziz and Abdul Munaf. That Abdul Aziz died leaving the opposite party no.2 and 4 sons and 4 daughters and a wife Mollica Khatun. Later on B.S record was published in their name.

4) Later on, the O.P No.2 has decided to sell the suit property and offered to purchase the same to the petitioner and other co-sharers but they refused to buy the same. Thereafter having taken consent of all co-sharers including petitioner, the O.P No.1 purchased the suit land **vide Kabala no. 7032 dated 03.08.2009** from O.P No.2. Thus the petitioner and other co-sharers were fully aware of the impugned transfer. The O.P no.1. has mutated the suit land in his name vide mutation Khatian no. 1192. He also developed the suit land which incurred costs of Tk.50,000. 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 liable to be dismissed.

Issues:

5) 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 petitioner is a co-sharer tenant by inheritance to the disputed holding?
- 5) Whether the case is barred by law of estoppel, waiver and acquiescence ?
- 6) Whether the Opposite party no.1 is entitled to any development cost ?

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7) Whether the petitioner may get the relief as prayed for?

Discussions and Decisions:

6) The petitioner in support of his case, examined 02 witnesses namely the pre-emptor **Bodiul Alam** as **Pt.W.1** and **Mirza Md Taher** as **Pt.W.2**. During examination of **Pt.W.1** the documents which were produced and proved have been marked as **Exhibit 1 to 4**. On the other hand, the opposite parties examined **02** witnesses namely **Abdus Sabur (Op.W.1)** and **Sultan Ahmed (Op.W.2)** before the court. During examination of **Op.W.1** the documents produced and proved has been marked as **Exhibit Ka-Ja.(ক-জ)**

7) ISSUE NO. 1 and 2)

“Whether the case is maintainable in its present form and law?”

“Whether the petitioner has cause of action 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.

8) This is an application U/S 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 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.

9) 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 without any notice transferred the case property by a registered deed on 03.08.2009 in favour of O.P No.1 who is totally a stranger to the disputed holding. This fact of secret transfer came to

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the knowledge of the petitioner on 04.07.2013 when he collected certified copy of the impugned deed. The O.P 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.

10) Issue No.4 : Whether the petitioner is a co-sharer tenant by inheritance to the disputed holding?

Admittedly land sought to be pre-empted originally belonged to Kamal Uddin and his name was duly recorded in R.S Khatian No.90 (**Exhibit -1**). It is also admitted by both party that Kamal Uddin died leaving 02 sons namely Abdul Aziz and Abdul Munaf as his legal heirs and their name were also duly recorded in the B.S Khatian. In view of B.S Khatian no.53 (**Exhibit-2**) it appears the fact to be true. Evidence shows that the petitioner is one of the sons of Abdul Aziz which clearly proves the fact that the petitioner is a co-sharer tenant by inheritance to the disputed holding. The opposite party did not oppose this very fact. Thus it is decided that the petitioner is co-sharer tenant by inheritance to the disputed holding. Accordingly this issue is decided in favor of the petitioner.

11) 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. **Section 96 of the Act**

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(Amendment 2006) provides that 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.

12) 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. Since no notice has been served upon the petitioner so the period of limitation for filing application for pre-emption would be two months from the date of knowledge of sale.

13) In this instant case, on perusal of **the Exhibit- 3**, it appears that the impugned Kabala was executed on **03.08.2009** but completion of sale u/s 60 of Registration Act was on **21.12.2011**. **From this it appears that right of pre-emption of petitioner was accrued on 21.12.2011. Pt.W.1 deposed in his examination in chief that “ ২০১৩ সনের এপ্রিলের শেষের দিকে ১ নং প্রতিপক্ষ নালিশী জমিতে মাপজোখ করে সীমানা পিলার দিতে গেলে আমি তাতে বাধা প্রদান করি। তাহাকে মাপজোখের কারণ জিজ্ঞাসা করিলে ১ নং প্রতিপক্ষ নালিশী জমি খরিদ করেছে মর্মে উল্লেখ করেন। পরে আমি ৪/০৭/২০১৩ ইং তারিখে নালিশী কবলার সি.সি সংগ্রহ করে জানতে পারি---**”In view of above deposition it appears that the petitioner wants to claim that he came to know about the sale on the last of April of the year 2013 which may be taken as his initial knowledge. The opposite party claims that since the case was filed not within two month of initial knowledge so this case is hit by limitation.

14) Per contra Pt.W.1 deposed that this case is not barred by limitation since it is filed within time from the date of knowledge of the sale. It is settled principle that the term **‘knowledge’** means actual and concrete knowledge which actually starts at obtaining the certified copy of the sale deed (**15 MLR 207**). In view of impugned sale deed (Exhibit-

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3), it appears that the petitioner on 04.07.2013 collected the certified copy and this case has been filed on 15.07.2013. Thus it can be said that the case was filed within time.

15) **In a case reported in 56 DLR 155**, it has been held that the date of obtaining certified copy of the sale deed will be considered as the date of knowledge and an application will not be barred if filed within two month from that date though the application might have been filed after several months from the date of initial knowledge.

In view of above discussion and decision, this court is of considered view that this case is in no way barred by limitation. In the light of above discussion this point is decided in favour of the petitioner.

16) **Issue No. 5), 6) and 7) :**

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

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

Whether the petitioner may get the relief as prayed for?

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 he has been ceased to be co-sharer due to separation of the Jama upon opening a new Mutation Khatian 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. 6888/2009 dated 09.11.2009**. It is argued that since the jama has been split 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.

17) Opposing this contentions, learned advocate for the petitioner argued that the pre-emptee has mutated the suit land 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.

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18) Evidence shows that O.P.W.1 has mutated the suit land in the year 2009 vide mutation Khatian no. 1192 (**Exhibit-Ga**). **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.

19) 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-Ga**, 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.

20) 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. In this circumstances now the question is -

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“ 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 ?”

21) **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 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.**” [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.

22) Lastly, the Opposite Party has claimed that the pre-emptee is entitled to get TK.50,000 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 incurred cost of Tk 50,000/- 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 rather O.P.W.2 admitted that “নালিশী জমি নাল। ধান চাষ হচ্ছে।” Considering these evidence on record, it appears to me that the claim of development cost is totally false

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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.

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. 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. 7032 dated 03.08.2009 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 and interest 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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