14 SCOB [2020] AD

APPELLATE DIVISION

PRESENT:
Mr. Justice Muhammad Imman Ali.
Mr. Justice MirzaHussainHaider.
Mr. Justice Abu BakarSiddiquee.

CIVIL APPEAL NO.17 OF 2010.
(From the judgment and order dated 22.04.2009, passed by the High Court Division in First Miscellaneous Appeal No. 224 of 2001**).**

Abul Kasem Md. Kaiser .....**Appellant**.

-Versus-

Md. Ramjan Ali and others. : .....**Respondents**.

For the **Appellants**.	:	Mr.ProbirNeogi, Senior Advocate,instructed by Mrs.SufiaKhatun, Advocate-On-Record.
For **Respondent Nos.1-5**	:	Mr. M. QumrulHaqueSiddiqui, Advocate instructed by Mr. ZainulAbedin, Advocate-On-Record.
Respondent Nos.6-19	:	Not represented.
Date of Hearing	:	21st& 22nd January,2020.
Date of Judgment	:	05February, 2020

Pre-emption, Extinguishment of Co-sharership;

The 62 DLR case has not overruled the contention that 'only by a partition suit or partition deed the co-sharership is extinguished'. So in this case by separating the Jama the pre-emptor and/or his predecessor having already lost her/his character of co-sharership in the case jote so the pre-emptor is no more a co-sharer and as such his right to pre-empt as a co-sharer does not exist anymore ... (Para-41)

Not only separation of Jama/Khatian by a party will cause him to cease to be a co-sharer in the jama but co-sharership will also be ceased by a final decree in a partition suit or by a registered deed of partition. That means either of the two will cause a person to cease his co-sharership in the case jote. ... (Para-41)

The appellant cannot take the plea of non-service of notice upon the other party once he has taken benefit of such mutation or separation of "Jama". Such plea,if any, can be taken only by the party affected by it or to whose disadvantage the same has been obtained and upon whom the notice was required to be served. But not the person at whose prayer separation has been made and who takes the benefit of such separation. ... (Para-16)

J U D G M E N T:

MIRZA HUSSAIN HAIDER J.:

1.This appeal, by leave, is directed against the judgment and order dated 22.4.2009, passed by the High Court Division in First Miscellaneous Appeal (FMA) No. 224 of 2001 allowing the appealand setting aside the order of the learned Subordinate Judge, Second Court, Manikganjby which the pre-emption Miscellaneous Case No. 5 of 2001was allowed.

2. Short facts, leading to this appeal, are:

That, the present appellantfiled Pre-emption Miscellaneous Petition No. 6 of 1998 in the 1st Court of Subordinate Judge (now Joint District Judge), Manikganj which subsequently being transferred to the 2nd Court of Subordinate Judge, Manikganjwas renumbered as Pre-emption Miscellaneous Petition No. 5 of 2001, against the present respondents claiming pre-emption in respect of .16 acre of land appertaining to SA Plot Nos. 767 and 763 of SA Khatian Nos. 4, 5, 6and 201 underBandutiaMouja.

3. It is stated in the pre-emption petition that the original owner of the case land was Abdul MoyedBiswas who transferred .16 acre of land (.12 acre from Plot No. 767 and .04 acre from Plot No. 763) to RawshanJahanMalek by a registered deed dated 10.3.1978, who, subsequently exchanged the same with the Pre-emptor-appellantby a deed of exchange (Ewaz) dated 19.1.1987. That Abdul MoyedBiswas, the original owner, also transferred another .16 acre of land (.12 acre from Plot No. 767 and .04 acre from Plot No. 763), as described in the schedule annexed to the petition, to RoyesUddin, Saiful Islam, Shofiqul Islam and RokeyaBegum by another deed dated 10.3.1978 which they, in their turn subsequently, transferred to the pre-emptee-respondent Nos. 1-5 by deed dated 13.11.1987. It was further stated that before the said transfer to the pre-empteesno notice was served upon the pre-emptor.Hence, the petition for pre-emption.

4. The pre-emptee-opposite party-respondents contested the case by filing written objection denying the material allegations made in the pre-emption petition contending, *inter alia*, that the pre-emptor who got his portion of land by Ewaz with a co-sharer, is not a co-sharer in the case land. So, he has no preemptory right over the case land. It is further contended that RowshanJahanMalek, from whom the pre-emptor got his land by Ewaz, having already mutated her name before making the ewaz, and the pre-emptor himself also having got his name mutated by JamaBhag Case No. 32/1987-88 and thereby opening a new holding being No. 631, has lost his co-ownership. Thus the pre-empteesprayedfor dismissal of the petition.

5. The trial Court after hearing the parties and on perusal of the materials on record allowed the case by judgment and order dated 19.3.2001. The pre-emptee-respondents being aggrieved by and dissatisfied with the same preferred First Miscellaneous Appeal Nos. 224 of 2001 before the High Court Division.

6. A Division Bench of the High Court Division heard the aforesaid appeal and allowed the same by the impugned judgment and order dated 22.4.2009 and set aside the order of the trial Court and thereby dismissed the pre-emption case.

7. Being aggrieved by and dissatisfied with the aforesaid judgment and order of the High Court Division, the pre-emptor preferred Civil Petition for Leave to Appeal No. 1449 of 2009

before this Divisionwherein leave was granted to consider whether separation of jama by mutation without physical division of land by partition decree or by deed extinguishes the right of pre-emption, as decided in 62 DLR(AD)250 and also to consider whether the High Court Division failed to distinguish between co-sharer in the holding and co-sharer in the land and thereby took the view that co-sharership in the land cannot exist without co-sharership in the holding and once the jama is separated, person in possession of the portion of a piece of land ceases to be a co-sharer in the land.Hence this appeal.

8. Mr. ProbirNeogi, the learned Senior Advocate appearing on behalf of the pre-emptor-appellant, submits thatin view of the decision of this Division reported in 62 DLR (AD) 250separation of Jama by mutation without physical division of the land by partition decree or partition deed does not extinguish the right to pre-emption as such the decision of the High Court Division is liable to be set aside. He next submits that the High Court Division in its decision relied on the principle laid down in the case reported in54 DLR 181and 55 DLR 214but such principle has been overruled by this Division in the case reported in62 DLR (AD) 250. He further submits that the High Court Division failed to distinguish between 'co-sharer in the land' and 'co-sharer in the holding' and took the erroneous view that "co-sharership in the land cannot exist without co-sharership in the holding and once the "Jama" is separated, persons in possession of portion of a piece of a land ceases to be co-sharers in the land." So, the judgment and order of the High Court Division is liable to be set aside.

9. On the other hand Mr. QumrulHoqueSiddique, learned Advocate appearing on behalf of the pre-emptee-respondents, submitsthatthe High Court Division rightly decided that through mutation the jama has been separated and through separation of "Jama" (holding) the pre-emptor had sub-divided the original holding, so he has ceased to be a co-sharer of the holding of the land sought to be pre-empted, and thereby hehas lost the right of pre-emption. He next submits that the case reported in 62 DLR (AD) 250 and those of 11 DLR (SC) 78, 52 DLR (AD) 41, 35 DLR (AD) 230 and 33 DLR (AD) 323 are distinguishable in view of the facts and circumstances of the present case. So, the High Court Division was right in allowing the appeal.

10. Considering the submissions advanced by the learned advocates for both the parties and on perusal of the materials on record it appears that admittedly, Abdul MoyedBiswas was the owner of .90 acre of land (.36 acre of land of SA Plot No.767 under SA khatian No. 4, 5 and 201 and .54 acre of land in SA Plot No. 763 under SA khatian No. 6) who transferred .16 acre of land to RowshanJahanMalek by deeds dated 10.3.1978 [Exhibits-1 (ka) &1(kha)] who, in her turn exchanged the same with the pre-emptor-appellant, AbulKasem Md. Kaiser, by a deed of exchange dated 19.1.1987 (Exhibit-1) and as such, the pre-emptor-appellant has been owning and possessing the same since then. Abdul MoyedBiswasalsotransferred another .16 acre of land to RoyesUddin and others by another deed of the same date i.e. 10.3.1978 who, in their turn, transferred the same to Md. Ramzan Ali,Md.DeloarHossen, Abdul Latif, Md. AnwarHossen and AfrozaAkter (pre-emptee Nos. 1-5) by deed dated 13.11.1997 [Exhibit-1 (Ga)] which is the subject matter of this pre-emption case.

11. It further appears that the pre-emptor appellant separated his Jama by mutation (Exhibit-Ka). But relying on the principle laid down in the case reported in 62 DLR (AD) 250, the pre-emptor-appellant claimed that mere separation of the Jama shall not take away his right of pre-emption as the land sought to be pre-empted has not been separated by physical division by means of partition decree or by partition deed without which co-sharership does not cease to exist.

12. On the other hand the pre-emptee-respondents claimthat RowshanJahanMalek, from whom the pre-emptor-appellant got his portion of land by Ewaz, got the "Jama"separated before the Ewaz was made and after exchange the pre-emptor also got his name mutated by filing an application before the Assistant Commissioner (Land) and is accordingly paying rents in the separated Jama. Thus he has ceased to be a co-sharer in the case land.

13. It appears from the record that such separation has been admitted by the pre-emptor-appellant in his evidence as PW-1 saying "আক্তার জাহান মালেক তাহার খরিদা নালিশী ৭৬৩/৭৬৭ নং দাগের ১৬ শতাংশ সম্পত্তি বিগত ১৯.১.১৯৮৭ তারিখে আমার নিকট এওয়াজ মূলে হস্তান্তর করে এবং আমি তথায় বসতবাড়ি নির্মাণ করিয়া বসবাস করিয়া আসিতেছি। আমি উক্ত সম্পত্তি বাবদ নাম খারিজের দরখাস্ত এসিল্যান্ড এর নিকট দিয়াছি। তবে তাহা আমার খাজনা আদায়ের সুবিধার জন্য (আপত্তিসহকারে)। উক্ত দরখাস্ত আমার নিজের হাতে লিখা।"(underlined for emphasis).

14. It also appears that the pre-emptor appellant claimed that though he separatedthe"Jama"of the land in question,but such separation has not been made following the proceduresas detailed in section 117(1)(c) of the State Acquisition and Tenancy Act (SAT Act). On examination of section 117 of the SAT Act it appears that the same has laid down the procedure for subdivision of joint tenancy stating '*No mutation can be made or no Jama/holding can be separated without subdivision of the holding and the revenue officer cannot initiate the procedure of such subdivision without an application of the person who wants his holding to be separated'*.

15. Thus there is no other way by which mutation or separation ofthe"Jama" can be made without subdivision of holding under section 117 of the SATAct.In the present case the appellant admitted that he applied tothe Assistant Commissioner (Land) for separation of "Jama" of his exchanged land and the concerned officer subdivided/separated the holding following the prescribed procedures of law. Once the Jama is separated, at the risk and benefit of a person, he cannot now say that the separation was not done following the procedure laid down in section 117(1)(c) of the SAT Act. In this respect the principle is he who takes advantage of his own act/action cannot subsequently claim that such act/action was not done in accordance with law as he is estopped from claiming so under section 115 of the Evidence Act.

16. Moreover, the appellant cannot take the plea of non-service of notice upon the other party once he has taken benefit of such mutation or separation of "Jama".Such plea,if any, can be taken only by the party affected by it or to whose disadvantage the same has been obtained and upon whom the notice was required to be served. But not the person at whose prayer separation has been made and who takes the benefit of such separation.

17. Apart from this aspect it appears from the contention of the pre-emptee respondent that the property was mutated in the name of RowshanJahanMalekand then it has been again mutated in the name of the pre-emptor vide Mutation Case No. 32/1987-88 (Exhibit "Ka") which has been proved by the Kanungo of the land office of ManikganjSadar(OPW 2) on the basis of SA record after the pre-emptor exchanged the same and got possession along with the houses situated thereon and as such the pre-emptee contended that the pre-emptor thus falls within the purview of section 24(11)(a) of the Non-Agricultural Tenancy Act, 1949(NAT Act).

18. In the present case, admittedly the pre-emptor became a co-sharer in the case land not by purchase but by exchange. So his existing interest in the case jote has accrued otherwise

than by purchase and as such he falls within the prohibition of section 24(11)(a) of the NAT Act wherein it has been provided that: " Nothing in this section shall apply to (a) a transfer to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase." Meaning it has protected such transfer if the existing interest of such co-sharer claimant accrues otherwise than by purchase. 19. This provision clearly enumerates the cases and classes of transfer which are not affected by this section 24 and on which no right of pre-emption arises under this Act. Again this Division in the case of **SM Bashiruddin Vs. Z. Islam Chowdhury (35 DLR(AD)230)** protected a transfer to a co- sharer in the tenancy from pre-emption holding that "Transfer of a portion of share of the non agricultural land to a stranger opens right of pre-emption to one or more co-sharer tenants of such land but when a portion or share of such land is transferred to a co-sharer in the tenancy, this is protected."

20. However, in respect of the terms "Co-sharer in land" and "Co-sharer in holding" it is necessary to mention that under section 24 of the Non-Agricultural Tenancy Act (NAT Act)the legislature used the term 'land' saying 'one or more co-sharer tenants of such "land" may within 4 (four) months apply to the Court for pre-emption'. Whereas under section 96 of the SAT Act the term "holding" has been used saying 'a co-sharer tenant in the holding by inheritance may apply for pre-emption'.The distinctive feature in these two provisions of law is clearly in respect of the term 'co-sharer tenant of such land' in one and 'co-sharer tenant in holding' in the other.

21. The term 'holding' has been defined in section 2(13) of the SAT Act in following terms:

"holding means a parcel or parcels of land or an undivided share thereof, held by a raiyat or an under-raiyotand forming the subject of a separate tenancy".

Whereas the term 'non-agricultural land' has been defined in section 2(4) of the NAT Act, in general terms saying " Non-agricultural land means land which is used for the purpose not connected with agriculture or horticulture and includes any land which is held on lease for purpose not connected with agriculture or horticulture irrespective of whether it is used for any such purpose or not," but it does notinclude homestead/land as described in clauses, a, b and c of the said provision. But, the term 'non-agricultural land', as has been used in section 24 of the NAT Act, has not been interpreted elsewhere. In section 24(1) of the NAT Act the term "Non Agricultural land" has been used, not "Non Agricultural Tenancy". This has been done by the legislature intentionally only to keep the number of pre-emptors limited to the co-sharers in the land, so that the land on pre-emption may not become unfit for use.

22. The legislature has consciously used the distinctive term "non agricultural land" not "tenancy". A Non Agricultural tenancy may be owned and possessed separately by different owners by constructing their respective houses registering as separate holdings under the Municipal/Pourashouva Act but "Jama" of the tenancy, as khatian, remaining undivided with liability of paying rents jointly. That means there remains nothing common amongst the co-sharer tenants excepting their joint liability of paying rents, and thereby they cease to be co-sharers for all practical purpose thereby debarring all other co-sharers from pre-empting the transfer to a stranger. By using the expression "Non Agricultural land" the legislature has recognized the same as an entity or unit separate from "Non Agricultural tenancy". 23. Thus, it is clear that the right of pre-emption under section 24 of the NAT Act has been provided only to the co-sharer tenants in the land. But in the present case "Jama" of the case land being separated by RowshanJahanMalek, earlier to her exchange with the pre-emptor and thenthe pre-emptor himself again having separated his "jama" after the exchange, he or his predecessor is no more a co-sharer in the land and as such though he may be a co-sharer in

the tenancy, the right of pre-emption did not accrue to him and as such his application for pre-emption cannot succeed.Again in the case of **Aminullah vs. SerajulHuq and others,** reported in **65 DLR (AD) 82** it has been held: *"the word 'one or more co-sharer tenants of such land' occurring in section 24 of the Act means a co-sharer in the 'plot'not the 'holding' as mentioned in section 96 of the Act"* (underlined for emphasis).

24. On the other hand, though the term "khatian" has not been defined in the statute but it generally means a document prepared by the government which contains 'complete information regarding the land or property'. In the "Glossary of Certain Settlement and Vernacular Terms"in common use in the sub-continent and well known in the Bengal Tenancy Act, the word 'khatian' has been described as under:

"Khatian is the form in which the record-of-rights is prepared, showing all the details relating to any particular 'interest'."

In the 'আইনশব্দকোষ'compiled and edited by Mr. Justice Muhammad HabiburRahman and Dr. Anisuzzaman, the meaning of the term 'Khatian' has been given as under:

"খতিয়ান জমি-জমার বিবরণ সংবলিত জরিপকালে প্রণীত সরকারি দলিল। খতিয়ানে জমির দাগ নম্বর, পরিমাণ, প্রকৃতি, খাজনার পরিমাণ, প্রজা ও ভুম্যধিকারীর নাম ইত্যাদি লিপিবদ্ধ থাকে।"

25. So, from the above meanings of the term 'khatian' it can be concluded saying Khatianis a 'form' prepared and maintained by the government containing the complete information regarding the land or property with the name and particulars of the owner/tenants and possessor.Khatian is prepared and published generally on the publication of record of rights and when the "Jama" is separated by mutation in accordance with law.

26. In the record of rightsa particular plot may be recorded in different khatians under the name of different tenants.If that be so then another question may arise as to whether co-sharershipof those tenants extends to the whole of the plot or only to that portion of the plot which has been recorded in a particular khatian?In this respect it is pertinent to see what is the intention of the legislature behind incorporation of provision with regard to pre-emption?

27. Onreading all the statutes dealing with pre-emption, it appears that the legislature incorporated the same to provide privilege to the co-sharers over the strangers in purchasing/enjoying the land/property that has been sold out by one or more of his co-sharer(s) to stranger(s) and also to prevent the stranger(s) from coming into such co-sharership. Entrance into co-sharership is possible as long as the land remains undivided but it is not possible rather it becomes impossible as soon as such land has been separated or physically partitioned by demarcation.In such case co-sharership extends only to the portion of the plot that has been recorded in a particular Khatian and has not been separated by creating new "jama".

28. Now,it is necessary to seewho is a "co-sharer tenant of land" and what has been meant by "co-sharer tenant in the holding". Generally co-sharer means joint owners (in Bengali what is called "kwiKevkwiKcÖRv").When the term is used in respect of property it means-'a person who shares his right, title and interest with some other person(s) ina holding or plot or in an undivided share thereof'.Land in connection with section 24 of the NAT Act, appears to be a plot or a parcel of plots owned by two or more co-sharers jointly. So, in order toexercise the right of pre-emption under the aforesaid Act, the person so claimingmust be a co-sharer inan undivided plot or parcel thereof.

29. Side by side it is also to be seen whether such co-sharershipcomes to an end, if so, how?In **54 DLR 181** case it has been observed that 'the word land as used in section 24 of NAT Act should not mean the quantum of land in one plot only. As the word co-sharer always implies the existence of more than one person jointly owning, similarly, such joint ownership may be in respect of land in one plot or in several plots. The land is always recorded under a holding for the purpose of revenue record and payment of rents. This holding may be joint or of several persons. The holding of any land could only be sub divided and rents distributed in accordance with the procedure spelt out under section 117 of the SAT Act which will affect the land appertaining to such holding.

30. A holding is popularly known as "Khatian" comprising of such land. The concept of co-sharer cannot be conceived independent of any holding or tenancy. If the holding is recorded in the name of more than one person then each of such person or their successors in interests becomes co-sharers to each other in such land. Such co-sharer will be deemed to continue as such co-owner in both holding as well as in land so long the holding will continue to be joint.

31. Contrary to such proposition, that sub-division of such holding will not affect the land in any way is fallacious in as much as sub-division of the holding and creation of new plot in subsequent survey or by mutation by the acts of parties, the previous co-sharer in the holding and/or the land cannot be deemed to still continue as such co-sharer'.

32. From the discussions made above it is clear that co-sharershipof a plot/holding definitely comes to an end with mutation of the holding and separation of Jama.In case of holding, as it relates to section 96 of the SAT Act, it obviously comes to an endby separation of Jama/mutation or by final decree in a partition suit or by a registered partition deed and in case of Plot, as it relates to section 24 of theNAT Act, it comes to an end when any of those measures take place which are applicable in the case of section 96 of the SAT Act and also by physical partition by the co-sharers by demarcation. Otherwise, if the quantum of land, as recorded in one plot in the name of more than one person in a survey, is deemed to be an independent unit and in the joint ownership of those persons as recorded, then till partition by metes and bounds to declare all such land still joint for the purpose of pre-emption will go against the public policy as well.

33. In the present case,RawshanJahanMalek, with whom the pre-emptor-appellant exchanged his portion of land,by dint of which he claims to be a co-sharer,physically partitioned her portion of land from those of the land in question and accordingly got her name mutated by opening a separate jama. Thereafter the pre-emptor in his turn, after exchange, also split up his Jama and got his name mutatedas evident from Exhibit 'Ka' and such physical partition and mutation was complete and continuedtill filing of the pre-emption case. So, neither RowshanJahanMalek was,northe pre-emptor-appellant is, a co-sharer in the jote of RoyesUddin Ahmed and others in the land in question.

34. As the Jama of Khatianhas been split up vide Exhibit "Ka" in respect of the case land and separate khatian in their respective names have been opened before the transfer to the pre-emptee and consequent thereto they ceased to be co-sharers in the case khatianandboth of them lost their character as a co-sharer in the case land and as such neither of them had/has the right of pre-emption. This Division in the case of **Alfazuddin Ahmed Vs. AbdurRahman and others (55 DLR(AD)108)** has taken such view. Similar view was also taken by this Division in several other cases as referred to by Mr. Siddique. Interestingly

none of those decisions have been overruled by this Division. The trial court having failed to consider thisaspect, erroneously allowed the pre-emption case which the High Court Division considered and set asideupon allowing the appeal.

35. The learned Advocate for the pre-emptor appellant contended that the principles laid down in the **54 DLR 181** and **55 DLR 214**caseshave been overruled by the case reported in **62 DLR (AD) 250**. On perusal of all the decisionsit appears that in**54 DLR 181**case pre-emption was sought for where the land was partitioned earlier by *final decree passed in a partition suit which terminatedthe co-ownership in such land till subdivision of rents takes place.* And the principle laid down in the **55 DLR 214**case relates to *separation of jama or sub-division of a holding or tenancy made under section 117(1)(c) of the State Acquisition and Tenancy Act and on such separation the co-sharership in such land came to an end.*

36. Whereas the moot question in **62 DLR (AD) 250**case was whether a final decree in a partition suit or a registered partition deed puts an end to the co-sharership in the land so partitioned or such co-sharership continues till separation of the Jama.ThisDivision in the aforesaid case held that "a final decree in a partition suit or a registered deed of partition puts an end to co-sharership extinguishing his right of pre-emption." In the said case no question as to whether co-sharership in a land comes to an endby mere separation of the Jama/mutation without a decree in partition suit or by a registered partition deed was raised.So, the case reported in **62 DLR (AD) 250**has not overruled the principle laid down in the case reported in **54 DLR.** Rather that has dealt with only to the extent that a decree in partition suit or a registered partition deed is enough to separate the co-sharership in the land.

37. But the principle laid down in the **55 DLR 114**case has not been overruled apparently by the aforesaid decision of 62 DLR. In the case of **Alfazuddin Ahmed Vs. AbdurRahman 55 DLR(AD) 108**, this Division held that '…… because of the decree in the partition suit as there has been ceasing of the co-sharership of the parties and that the pre-emptors got the Jama of the khatian split up in respect of their land and got a separate khatian/Jama opened in their names before the transfer in question to the pre-emptee and consequent thereupon they ceased to be the co-sharers in the case khatian.' From the above finding it can be easily concluded that by partition decree or partition deed co-sharership ceases but the finality of such ceasing occurs by splitting up of the Jama/khatian.

38. Accordingly, it cannot be said that co-sharership does not cease bymere separation of the Jama/khatian by mutation, which in the present case has already been done firstly by RowshanJahanMalek, the predecessor of the pre-emptor appellant and subsequently by the pre-emptor-appellant himself. Thus the pre-emptor appellant having got the already separated property by exchange cannot be said to be a co-sharer in the property in question. Moreover, the facts of the present case beingquite distinguishable from those of the **62 DLR (AD) 250**case,the pre-emptor cannot take advantage of the said decision.

39. Another important aspect of this case is that the pre-emptor's claim to be a co-sharer in the case land by exchange not by purchase from RowshanJahanMalek who, before exchanging the same with the pre-emptor, got her Jama separated/split up and the pre-emptor after the exchange also got his name mutated by Exhibit "Ka" and thereby also got his jama/khatian separated by which he ceases to be a co-sharer in the case jote. This Division in the case of **Abdul Munim alias TanuMiah Vs. MahfuzurRahman and others (1 ADC 515)** held "Since in the instant cases the holding in question has been separated or sub-divided upon opening a new khatian at the instance of the pre-emptor, the pre-emptor ceased

to be a co-sharer in the holding in question." The facts of the present case are similar to those of the aforementioned reported cases.

40. Again in the case of **Hiran Chandra Dey and others Vs. Md. Abdul Quyum and another (54 DLR(AD)126)** this Division held "In pre-emption proceeding one is deprived of one's property through the coercive process of the Court, unless pre-emptor has a positive case of his being a co-sharer the Court upon finding a prima facie case of co-sharer is not permitted by law to grant pre-emption."

41. From a reading of the aforesaid decisions namely, **55 DLR(AD)108(Alfazuddin Ahmed Vs. AbdurRahman)**, **1 ADC (Abdul Munim alias TanuMiah Vs. MahfuzurRahman and others (1 ADC 515), 54 DLR (AD)126 (Hiran Chandra Dey and others Vs. Md. Abdul Quyum and another) and 62 DLR(AD)250**cases, it appears that this Division held that not only separation of Jama/Khatian by a party will cause him to cease to be a co-sharer in the jama but co-sharership will also be ceased by a final decree in a partition suit or by a registered deed of partition. That means either of the two will cause a person to cease his co-sharership in the case jote. Thus, the **62 DLR** case has not overruled the contention that 'only by a partition suit or partition deed the co-sharership is extinguished'. So in this case by separating the Jama the pre-emptor and/or his predecessor having already lost her/his character of co-sharership in the case joteso the pre-emptor is no more a co-sharer and as such his right to pre-empt as a co-sharer does not exist anymore.

42. Following the above position it appears that the pre-emptor's prima facie case of co-sharership having not been proved he is not permitted by law to succeed in this case.

43. Thus the finding and decision arrived at by the High Court Division being based on proper appreciation of fact and law the same does not call for any interference by this Division.

44. Accordingly, this civil appeal is dismissed without any order as to costs.