

15 SCOB [2021] AD 95

APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain

Chief Justice

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

CIVIL APPEAL NO. 210 OF 2010

(From the judgment and order dated 25.08.2009 passed by the High Court Division in Civil Revision No.4485 of 2004)

Md. Rabiul Islam and others Appellants

Vs.

Sultan Mahmud died leaving behind his heirs: ... Respondents
(1) Md. Abu Hasnat (Bulbul) and others

For the Appellants :Mr. A.S.M Khalequzzaman, Advocate, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record

For the Respondent Nos.1-8 :Mr. Sasti Sarker, Advocate, instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record

For the Respondent Nos.9-14 :Not represented

Date of hearing :The 12th January, 2021

Judgment on :The 12th January, 2021

Editor`s Note

In this case of pre-emption the core question is whether a pre-emption application under section 24 of the Non-Agricultural Tenancy Act, 1949 can be converted to section 96 of the State Acquisition and Tenancy Act, 1950. On the rejection of the case by the trial court the pre-emptor-appellant-petitioner filed an appeal before the learned District Judge of Kushtia and that was transferred to the learned Additional District judge. In the appellate court the preemptor filed an application to convert his case as mentioned above. The learned Additional District Judge rejected the application. Against the rejection order preemptor preferred Civil Revision before the HCD and the HCD made the rule absolute. After that, the pre-emptee-opposite parties, being aggrieved, preferred Civil Petition for Leave to Appeal before Appellate Division and obtained leave giving rise to the instant appeal. In the result, the Appellate Division allowed the appeal.

Key Words

Pre-emption; Conversion of pre-emption petition; Section 24 of the Non-Agricultural Tenancy Act, 1949; Section 96 of the State Acquisition and Tenancy Act, 1950

Section 96 and 89 of the State Acquisition and Tenancy Act, 1950:

From a conjoint reading of the above provisions of law it is divulged that sub-section 3 of Section 96 of the Act requires that an application for pre-emption must be accompanied by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @ 10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. Therefore, direction for depositing the rest statutory compensation deposit and consideration out of time would not cure the lacuna, thus, is also illegal and without jurisdiction. ... (Para 14)

Conversion of Pre-emption application filed under section 96 of the State Acquisition and Tenancy Act, 1950 to section 24 of the Non-Agricultural Tenancy Act, 1949:

The pre-emption application filed under section 96 of the Act, 1950 may be converted to a pre-emption case under section 24 of the Act, 1949 because the deposit of compensation would not be a impediment in case of such conversion allowing the amendment. ... (Para 15)

Conversion of application filed under section 24 of the Non-Agricultural Tenancy Act to section 96 of the State Acquisition and Tenancy Act, 1950:

It further be noted that the application filed under section 24 of the Act, 1949 may be converted to an application under section 96 of the Act, 1950 if such application for conversion is filed within 120 days, i.e. within period of limitation with rest of the deposit and concerned Court allowed the such application of conversation. The application for conversation cannot be allowed after the expiry of limitation as stipulated in the section 96 of the State Acquisition and Tenancy Act. ... (Para 16)

JUDGMENT

Md. Nuruzzaman, J:

1. This Civil Appeal, by leave, has arisen out of the judgment and order dated 25.08.2009 passed by the High Court Division in Civil Revision No.4485 of 2004 making the Rule absolute arising out of order No.6 dated 04.08.2004 passed by the Additional District Judge, 1st Court, Kushtia in Miscellaneous Appeal No.32 of 2004 rejecting an application dated 20.07.2004 for amendment of original pre-emption petition in Pre-emption Miscellaneous Case No.31 of 2002 of the Court of Assistant Judge, Bheramara, Kushtia.

2. Facts, leading to filing this civil appeal, in short, was that the land covering an area of 5.78 acres appertaining to S.A. Plot Nos.9683 and 9684 of S.A. Khatian No.2155 of Mouza Bahirchar, Paschim, under P.S. Bheramara originally belonged to one Tasirannessa who died leaving her husband Delwar Hossain, 5 sons namely Mufazzal Haque, Abdul Majid, Sultan Mahmud, Aminul Islam, Mehedi Hasan and two daughters, namely Jobeda Khatun and Roushanara. Thereafter, Delwar Hossain died leaving behind his above mentioned 5 sons and two daughters.

3. At the time of R.S. operation the said land of S.A. Plot Nos.9683 and 9684 were recorded in R.S. Plot Nos.103 and 109 and 110. The respondent was the co-sharer of the disputed land and holding. The vendor-petitioner No.7 transferred the disputed land to the pre-emptees. There are undivided dwelling homestead and pathway in the disputed land.

Knowing about the story of transfer the respondent obtained the certified copy of the same on 29.12.2002 and filed the application under section 24 of the Non-agricultural Tenancy Act.

4. The pre-emptee-opposite party Nos.1-6 contested the case by filing written statement denying the material statements made in the pre-emption case contending, *inter-alia*, that the pre-emptor is not the co-sharer of the disputed holding. The disputed land was not situated within the Municipal area. Knowing it fully well the pre-emptor had deposited only 5% of compensation money and filed an application under section 24 of the Non-Agricultural Tenancy Act. So, the case was not maintainable in law.

5. The trial Court rejected the pre-emption case being Miscellaneous Case No.31 of 2002 by the judgment and order dated 18.04.2004.

6. Feeling aggrieved by the judgment and order dated 18.04.2004 passed by the trial Court, the pre-emptor preferred Miscellaneous Appeal No.32 of 2004 before the Court of learned District Judge, Kushtia and it was transferred to the Court of learned Additional District Judge, First Court, Kushtia. Subsequently, the pre-emptor filed an application for amendment of the application for pre-emption for conversion of the said pre-emption application under section 24 of the Non-Agricultural Tenancy Act, 1949 (in short, Act 1949) in that place to 'insert' Section 96 of the State Acquisition and Tenancy Act, 1950 (in short, Act 1950) before the learned Additional District Judge, First Court, Kushtia who after hearing the parties by his judgment and order dated 04.08.2004 rejected the said application.

7. Against the judgment and order dated 04.08.2004 passed by the learned Additional District Judge, First Court, Kushtia in Miscellaneous Appeal No.32 of 2004, the pre-emptor-appellant-petitioner preferred Civil Revision No.4485 of 2004 before the High Court Division and obtained Rule.

In due course, a Single Bench of the High Court Division, upon hearing the parties, made the Rule absolute by the impugned judgment and order dated 25.08.2009.

8. The pre-emptee-opposite parties as appellants herein feeling aggrieved by the impugned judgment and order dated 25.08.2009 of the High Court Division preferred Civil Petition for Leave to Appeal No.2346 of 2009 before this Division and obtained leave, which gave rise to the instant appeal.

9. Mr. A.S.M. Khalequzzaman, the learned Advocate appearing on behalf of the appellants submits that the Section 96(3) speaks "An application made under section (1) shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court the amount of the consideration money or the value of the transferred holding or portion or share of the holding as stated in the notice under Section 89 or in the deed of transfer, as the case may be, together with compensation at the rate of ten per centum of such amount" here consequence is provided for non-compliance of the provision of the sub-section 96(3) and

this is mandatory and as such, the High Court Division committed an error of an important question of law occasioning failure of justice making the Rule absolute. He further submits that it is possible to convert the pre-emption petition under section 96 of the Act, 1950 to section 24 of the Act, 1949 but the High Court Division committed an error of an important question of law occasioning failure of justice making the Rule absolute and passed the impugned judgment and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

10. Contrariwise, Mr. Sasti Sarker, the learned Advocate appearing on behalf of the respondents submits that the pre-emptor filed an application for pre-emption under section 24 of the Act, 1949. The property under dispute is homestead land and the same is situated outside the municipality. That the lawyer on behalf of the pre-emptor filed an application under section 24 of the Act, 1949, which was a mistake on behalf of the learned Advocate for the pre-emptor. After so detection, the pre-emptor filed an application under section 96 of the Act, 1950. At this present case, the pre-emptor has filed an application for conversion at the appellate Court below. Facts remain that appeal is a continuation of the proceeding, in such view of the matter, the High Court Division rightly made the Rule absolute and also allowed the application for amendment petition and passed impugned judgment and order. He further submits that a pre-emption petition under section 24 of the Act, 1949 legally can be converted under section 96 of the Act, 1950 at any stage of the proceeding but the appellate Court below without considering the law point rejected the said application for amendment of the pre-emption petition and hence, the High Court Division rightly made the Rule absolute and allowed the application for pre-emption petition passed the impugned judgment and order and, as such, the instant appeal may kindly be dismissed.

11. We have considered the submissions of the learned Advocates of the respective parties. We have gone through the materials on records with impugned judgment and order of the High Court Division.

Having gone through the backdrops of the case in hand it reveals that in the appellate Court the pre-emptor as applicant filed an application for amendment of the application for pre-emption case to convert the pre-emption case under section 96 of the State Acquisition and Tenancy Act instead of section 24 of the Act, 1949 by inserting section 96 of the Act, 1950 in the place of section 24 of the Act, 1949. The Appellate Court after hearing both the sides rejected the application, however, in revision, the High Court Division allowed the application making the Rule absolute. Against the judgment and order of the High Court Division, the pre-emptee as petitioner filed Civil Petition for Leave to Appeal before this Division and obtained leave.

12. The leave was grated on the following grounds:

- I. For that the section 96(3) speaks “An application made under sub-section (1) shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court the amount of the consideration money or the value of the

transferred holding or portion or share of the holding as stated in the notice under section 89 or in the deed of transfer, as the case may be, together with compensation at the rate of ten per centum of such amount” here consequence is provided for non compliance of the provision of the sub-section 96(3) and this is mandatory and, as such, the High Court Division committed an error of an important question of law occasioning failure of justice and the impugned judgment and order is liable to be set aside.

II. For that it is possible to convert the pre-emptor petition under section 96 of the State Acquisition and Tenancy Act to section 24 of the Non-Agricultural Tenancy Act and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

13. It would be pertinent to quote the relevant portion of section 96 of the Act, 1950, thus, runs as follows:

“96. Right of Pre-emption – (1) If a portion or share of a holding of a raiyat is sold to a person who is not a co-sharer tenant in the holding, one or more co-sharer tenants of the holding may, within two months of the service of the notice given under section 98, or, if no notice has been served under section 98, within two months of the date of the knowledge of the sale, apply to the Court for the said portion or share to be sold to himself or themselves:

Provided that no application under this section shall lie unless the applicant is

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(a) a co-sharer tenant in the holding by inheritance; and

(b) a person to whom sale of the holding or the portion or share thereof, as the case may be, can be made under section 90:

Provided further that no application under this section shall lie after expiry of three years from the date of registration of the sale deed.

(2) In an application under sub-section (1), all other co-sharer tenants by inheritance of the holding and the purchaser shall be made parties.

(3) An application under sub-section (1) shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court-

(a) the amount of the consideration money of the sold holding or portion or share of the holding as stated in the notice under section 89 or in the deed of sale, as the case may be;

(b) compensation at the rate of twenty five per centum of the amount referred to in clause (a); and

(c) an amount calculated at the rate of eight per centum simple annual interest upon the amount referred to in clause (a) for the period from the date of the execution of the deed of sale to the date of filing of the application for pre-emption.”

14. From a conjoint reading of the above provisions of law it is divulged that sub-section 3 of Section 96 of the Act requires that an application for pre-emption must be accompanied

by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @ 10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. Therefore, direction for depositing the rest statutory compensation deposit and consideration out of time would not cure the lacuna, thus, is also illegal and without jurisdiction.

15. However, it is perhaps may be noted for the benefit of the judicial pronouncement that the pre-emption application filed under section 96 of the Act, 1950 may be converted to a pre-emption case under section 24 of the Act, 1949 because the deposit of compensation would not be a impediment in case of such conversion allowing the amendment.

16. It further be noted that the application filed under section 24 of the Act, 1949 may be converted to an application under section 96 of the Act, 1950 if such application for conversion is filed within 120 days, i.e. within period of limitation with rest of the deposit and concerned Court allowed the such application of conversation. The application for conversation cannot be allowed after the expiry of limitation as stipulated in the section 96 of the State Acquisition and Tenancy Act.

17. In the instant case the High Court Division in allowing the revisional application relied to the case of Abdus Sobhan Sheikh Vs. Kazi Moulana Jahedullah and others reported in 5 M.L.R.(HCD)140. We have gone through the principles enunciated in the case 5 M.L.R. (HCD) 140. The view taken by the learned Single Judge of the High Court Division in the 5 M.L.R. case seems to us not appropriate and squarely applicable in the instant case. In the reported case compensation was deposited in the trial Court after amendment by the order of the Court.

18. However, the case for conversion and amendment in hand the pre-emptor filed the application in the appellate Court for conversion of the said pre-emption application under section 24 of the Act, 1949 into an application under section 96 of the Act, 1950 and also prayed for depositing the rest of compensation amount which obviously in violation of statutory provisions as contemplated in section 96(3) of the State Acquisition of Tenancy Act, after the expiry of limitation of deposit of statutory compensation. If such deposit is allowed after expiry of limitation violating statutory provisions then the legal proposition as contemplated in the statute would be nugatory.

19. The learned Single Judge of the High Court Division while made the Rule absolute further took the views that filing of the pre-emption petition under section 24 of the Act, 1949 was a mistake of lawyer, appeal is the continuation of the proceeding, if the application for amendment is allowed such amendment would be treated as part of the original application as if the same was made in the application at the time of institution of the application for pre-emption, the above views are not disputed.

20. But the only legal question has not been answered by the High Court Division as to whether the statutory deposit of compensation would be allowed in violation the provisions as contemplated in the section 96 of the Act, 1950, the reply is negative, the State Acquisition and Tenancy Act is a special law wherein statutory provisions of deposition of compensation for the filing of pre-emption petition has been provided as condition precedent with consequence that provision would not be defeated for reasons as stated by the High Court Division.

21. Provisions of section 96 (3) provide that an application made under sub-section (1) of the section 96 of the Act, 1950 shall be dismissed unless the applicant or applicants, at the time of making it, deposit in the Court the amount of the consideration money or the value of the transferred holding or portion or share of the holding as stated in the notice under section 89 or in deed of transfer, as the case may be, together with compensation at the rate of ten percent centum of such amount, according to the above provisions, consequence, has been provided for non-compliance of the provision of law, in that view the provision is mandatory, the High Court Division missed the said provision of law at the time of deciding the revisional application, thus, committed an error of an important question of law.

22. This Division in the case of Akhtarun Nessa and another Vs. Habibullah and others reported in 31 DLR (AD)(1979)88 (para-28) has held:

“Further question for consideration is as to whether the direction given by the High Court Division for depositing the balance consideration money out of time is warranted by the law? Sub-section (3) of section 96 of the Act requires that an application for pre-emption must be accompanied by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. The direction for depositing the balance consideration money out of time is also illegal and without jurisdiction.”

23. We are, therefore, of the firmed view that the High Court Division committed error of law which calls for interference by this Division.

24. Accordingly, this appeal is allowed. However, without any order as to costs. The judgment of the High Court Division is set aside. The judgment of the lower appellate Court is affirmed.