

**16 SCOB [2022] AD 77**

**APPELLATE DIVISION**

**PRESENT:**

**Mr. Justice Md. Nuruzzaman**

**Mr. Justice Borhanuddin**

**Ms. Justice Krishna Debnath**

**CIVIL APPEAL NO. 02 OF 2005**

(From the judgment and order dated 09.07.2002 passed by the High Court Division in Civil Revision No.714 of 1998).

**Abdur Rashid, Opposite Party No. 6 being dead his heirs  
Mohammad Hossain and others.**

**.....Appellants**

=Versus=

**Nurul Amin alias Abu Taher and others.**

**.....Respondents**

For the Appellants. : Mr. Md. Abdun Nur, Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

For Respondent No.1. : Mr. Khaair Ezaz Masud, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.

Respondent Nos. 2-56 : Not represented.

Date of Hearing : The 8<sup>th</sup> and 16<sup>th</sup> February, 2022

Date of Judgment. : The 23<sup>rd</sup> February, 2022

**Editors' Note**

The question came up for consideration in this case whether after transfer by pre-emptee opposite party no.1 to co-sharer opposite party no.6 the pre-emptory right of the pre-emptor exists or not. The Appellate Division examining section 90 and 96 of State Acquisition and Tenancy Act and the view taken by their lordship in the case of 50 C.W.N. 806 as well as 35 DLR 238 and also distinguishing the facts of 35 DLR (AD) 225 held that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated.

**Key Words**

Section 90 and 96 of the State Acquisition and Tenancy Act; pre-emptory right;

**Section 96 read with section 90 of the State Acquisition and Tenancy Act:**

**On perusal of proviso to Sub-section (1) of Section 96 of the State Acquisition and Tenancy Act it appears that the right of pre-emption is not available to a co-sharer tenant or tenants holding land contiguous to the land transferred unless he is a person to whom transfer of the holding or the portion or share thereof, as the case may be, can be made under section 90. ....(Para 16)**

**Our apex court denied right of pre-emption in the case when the vendee retransferred the land to the vendor and the right is barred by the principle of estoppel, waiver and acquiescence. ....(Para 17)**

**Section 96 of the State Acquisition and Tenancy Act:**

**We have no hesitation to hold that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated as because the subsequent transfer is subject to the right available against the original transfer and the subsequent transferee would be impleaded as party in the pre-emption proceeding and he would be entitled to get the consideration and compensation money as deposited by the pre-emptor.    ...(Para 23)**

**JUDGMENT****Borhanuddin, J:**

1. This appeal by leave has been filed against the judgment and order dated 09.07.2002 passed by a Single Bench of the High Court Division in Civil Revision No.714 of 1998 making the Rule absolute against the judgment and order dated 18.09.1997 passed by the Sub-Ordinate Judge, 1<sup>st</sup> Court, Laxmipur, in Miscellaneous (Pre-emption) Appeal No.38 of 1996 affirming the judgment and order dated 24.09.1996 passed by the Senior Assistant Judge, Laxmipur, dismissing the Miscellaneous Case No.47 of 1993 filed under Section 96 of the State Acquisition and Tenancy Act, 1950.

2. Relevant facts for disposal of the appeal are that the respondent No.1 herein as pre-emptor-petitioner filed the miscellaneous case on 05.07.1993 stating inter alia that one Boli Mia @ Boli Mohammad was the original owner of the case land who died leaving behind one son Suja Mia and the said Suja Mia died leaving behind pre-emptor Nurul Amin @ Abu Taher, Vendor-opposite party Sekandar Mia and opposite party nos.3-5 as heirs; Suja Mia transferred  $43\frac{1}{2}$  acres of land to the pre-emptor-petitioner by heba deed dated 18.02.1982 and thus the pre-emptor became a co-sharer of the holding by inheritance as well as on the basis of the heba deed; The pre-emptor had been serving in the Saudi Arabia since before the disputed transfer; Vendor-opposite party no.2 Sekandar Mia is the full brother of the pre-emptor-petitioner; Dispute relating to land exists between the brothers; The vendor opposite party no.2 transferred the case land to the pre-emptee-opposite party no.1 without serving statutory notice to the co-sharers; After returning home from Saudi Arabia, the pre-emptor came to know from his brother-in-law Noor Nabi on 12.05.1993 that the pre-emptee-opposite party no.1 disclosed to him that he has purchased the case land from the vendor-opposite party no.2; Knowing about the said transfer, the pre-emptor on search procured certified copy of the kabala deed from the Maizdi Sub-register Office though the case land situated within the territorial jurisdiction of Laxmipur Sub-register Office; Getting definite information, the pre-emptor filed application under section 96 of the State Acquisition and Tenancy Act for pre-emption affirming that the pre-emptee-opposite party no.1 is a stranger to the case land and the pre-emptor has got less than 60 bighas of land. By amending plaint of the case it is further stated that the subsequent transfer dated 21.06.1992 by the pre-emptee-opposite party no.1 in favour of the opposite party no.6 (predecessor of the appellants herein) is collusive and sham transaction.

3. That the pre-emptee-opposite party No.1 contested the case by filing written objection contending inter alia that the application for pre-emption is not maintainable, barred by limitation and also barred by the principle of estoppel, waiver and acquiescence. His specific case in brief is that the vendor-opposite party no.2 sold the case land to him in consultation with the pre-emptor and his karjokarok Noor Nabi; The vendor sold the land for sending the

pre-emptor to Saudi Arabia; The vendor by executing and registering kabala deed transferred the land to the pre-emptee-opposite party no.1; Thereafter, for necessity of money the pre-emptee-opposite party no.1 transferred the land to the opposite party no.6 Abdur Rashid on 21.06.1992 who is a co-sharer of the holding and as such the application for pre-emption is liable to be rejected.

4. The trial Court on consideration of the evidence on record held that the application for pre-emption is not time barred and transfer by the vendor to the pre-emptee was beyond the knowledge of the pre-emptor-petitioner. But the trial Court held that since the case land had been transferred by the pre-emptee-opposite party no.1 to the opposite party no.6, a co-sharer of the holding, the application for pre-emption is not maintainable.

5. Being aggrieved, the pre-emptor-petitioner as appellant preferred miscellaneous appeal in the Court of the learned District Judge, Laxmipur, which was on transfer ultimately heard and disposed of by the learned Sub-ordinate Judge, 1<sup>st</sup> Court, Laxmipur, who after hearing the parties affirmed the judgment of the trial Court that pre-emption is not tenable against a co-sharer.

6. Feeling aggrieved, the pre-emptor-appellant as petitioner moved before the High Court Division by filing revisional application and obtained Rule. After hearing the parties and perusing evidence on record, a Single Bench of the High Court Division made the Rule absolute by setting aside the judgment and order of the Courts below.

7. Having aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, successors of the co-sharer opposite party no.6 (who expired during pendency of the case before the trial Court) preferred instant civil petition for leave to appeal.

8. Leave was granted on the ground that prior to the filing of miscellaneous case on 05.07.1993 the pre-emptee transferred the case land to the co-sharer of the holding opposite party no.6 (in the miscellaneous case) on 21.06.1992 and as such no right of pre-emption was in existence on the date of filing of the miscellaneous case seeking pre-emption against the pre-emptee-opposite party and also on the ground that the High Court Division failed to consider the question of maintainability of the case on the background of the fact that when the miscellaneous case was filed against the pre-emptee he had no subsisting interest in the land sought to be pre-empted.

9. Mr. Md. Abdun Nur, learned Advocate appearing for the appellants submits that prior to the filing of the miscellaneous case on 05.07.1993 the pre-emptee transferred the case land to the opposite party no.6 (in the miscellaneous case) on 21.06.1992 who was undeniably a co-sharer in the holding and as such no right of pre-emption was available on the date of filing of the miscellaneous case seeking pre-emption against the pre-emptee-opposite party and thus the High Court Division erred in law in not holding that the miscellaneous case is not tenable in the eye of law. Relying on the decision passed in the case of Hafiz Ahmed Vs. Ahmedur Rahman & others, reported in 48 DLR 170, learned Advocate also submits that 'the vendor and the vendee are permitted to avoid accrual of the right of pre-emption by all lawful means and the vendee may sell the property to a rival pre-emptor with preferential or equal right to defeat the right for pre-emption of another co-sharer'. In support of his submissions, learned Advocate referred to the case of Shafi Khan Vs. Mannujan Hossain, reported in 35 DLR(AD)225 and the case of Hafiz Ahmed vs Ahmedur Rahman and others, reported in 48 DLR 170.

10. On the other hand, Mr. Khair Ezaz Masud learned senior Advocate appearing on behalf of the respondent no.1 submits that the subsequent transfer is subject to right available against the original transfer whether the transfer was made before or after filing of the pre-emption application and as such pre-emptor's application for pre-emption merits success, although the vendee-opposite party no.1 transferred the case land to his father opposite party no.6 Abdur Rashid who was a co-sharer in the holding by purchase, before the filing of the application for pre-emption. In support of his submissions, learned Advocate referred to the case of Hajera Bibi Vs. Noor Jahan Begum and others, reported in 35 DLR 238 and the case of Girija Nath Kundu Vs. Ahamad Ali Sardar and others reported in 50 C.W.N. 806.

11. Heard the learned Advocates, perused the evidence on record as well as the decisions cited by the learned Advocate for the parties. It appears that the trial Court though arrived at a finding that the pre-emptor had no knowledge about the disputed transfer and the case is not barred by limitation but dismissed the case holding that the opposite party no.6 was a co-sharer in the case land since before the transfer on 21.06.1992 as such prayer for pre-emption is not tenable.

12. The Appellate Court below affirmed the judgment of the trial Court that the miscellaneous case for pre-emption is not maintainable against a co-sharer inasmuch as opposite party No.6 admittedly was a co-sharer in the holding.

13. We have meticulously gone through the judgment passed by the High Court Division. The High Court Division in disposing of the civil revision decided two points of law.

14. The first one is whether the application for pre-emption is barred by limitation or not. The High Court Division after thorough discussions arrived at a finding that the miscellaneous case was filed within the time inasmuch as no statutory notice was served upon the pre-emptor-co-sharer and the pre-emptee disclosed about the transfer to the brother-in-law of the pre-emptor on 25.05.1993 and thereafter the pre-emptor on search procured certified copy of the deed from the Maizdi Sub-register Office on 27.05.1993 though the case land is situated within the territorial jurisdiction of Laxmipur, Sub-register Office.

15. The 2<sup>nd</sup> point which is vital and relevant to decide the controversy in the present case as to whether after transfer by pre-emptee-opposite party no.1 to co-sharer opposite party no.6 the pre-emptory right of the pre-emptor exists or not. The High Court Division after discussing the case reported in 48 DLR 170 and the case reported in 50 C.W.N. page 806 and also the case reported in 35 DLR 238 concurred with the views taken by their lordships in the case of Hajera Bibi Vs. Noor Jahan Begum and others, reported in 35 DLR 238 and thus made the Rule absolute by setting aside the judgment and order passed by the Courts below.

16. On perusal of proviso to Sub-section (1) of Section 96 of the State Acquisition and Tenancy Act it appears that the right of pre-emption is not available to a co-sharer tenant or

tenants holding land contiguous to the land transferred unless he is a person to whom transfer of the holding or the portion or share thereof, as the case may be, can be made under section 90. Again, Sub-section (10) of Section 96 provides that right of the pre-emption is not available in the following cases:

- (a) *a transfer to a co-sharer in the tenancy whose interest has accrued otherwise than by purchase; or*
- (b) *a transfer by exchange or partition; or*
- (c) *a transfer by bequest or gift (including Heba but excluding Heba-bil-Ewaj for any pecuniary consideration) in favour of the husband or wife or the testator or donor, or of any relation by consanguinity within three degrees of the testator or donor; or*
- (d) *a simple or complete usufructuary mortgage, or, until a decree or order absolute for foreclosure is made, a mortgage by conditional sale; or*
- (e) *a Waqf in accordance with the provisions of the Muhammadan Law; or*
- (f) *a dedication for religious or charitable purposes without any reservation of pecuniary benefit for any individual.*

17. Apart from this, our apex court denied right of pre-emption in the case when the vendee retransferred the land to the vendor and the right is barred by the principle of estoppel, waiver and acquiescence.

18. We have also gone through the judgment and order passed in the cited cases. In the case of Shafi Khan Vs. Mannujan Hossain reported in 35 DLR (AD) 225 referred by the learned Advocate for the appellants is a case of reconveyance wherein the land under pre-emption was sold by one Abdul Bari Khan to his nephew Ayesh Khan and the said Ayesh Khan retransferred the land to said Abdul Bari Khan one month before filing of the application for pre-emption as such this Division allowed the appeal by setting aside the orders allowing pre-emption. In that case, this Division observed that:

*“In the instant case, the learned Judges of the High Court Division placed reliance mainly on the decisions in the case of Girija Nath Kundu Vs. Ahamad Ali Sardar & others and Sk. Lokman Ali Vs. Abdul Motalib & another, both reported in 50 C.W.N, the former at page 806 and the latter at page 807, decided by two different single Benches of the Calcutta High Court. But it is found that in neither of these two cases there was any reconveyance or re-sale to the original vendor, but the lands were retransferred to different persons other than the original vendor.”*

19. So it is clear that the Apex Court distinguished between the circumstance ‘reconveyance and re-sale to the original vendor’ and ‘retransfer to different persons other than the original vendor’. Provisions relating to pre-emption in the case of ‘reconveyance and re-sale to the original vendor’ and ‘retransfer to different person other than the vendor’ are not same. On perusal of the case of Hajera Bibi Vs. Noor Jahan Begum and others reported in 35 DLR 238 it appears that the petitioner Hajera Bibi was a co-sharer in the holding and

opposite party No.3 Abdul Khaleque transferred the case land by registered kabala to opposite party no.2 Syed Habibur Rahman and by another registered kabala opposite party no.3 Abdul Khaleque transferred a portion of land under khatian No.165 to opposite party Syed Mohibur Rahman. Opposite party no.3 Abdul Khaleque was also a co-sharer of the holding. Opposite party no.2 Syed Habibur Rahman was a stranger who transferred his purchased land to opposite party No.1 Noor Jahan Begum (opposite party no.10 in the said pre-emption case) on 26.08.1972. Thereafter, on 17.09.1973 the petitioner filed application under section 96 of the State Acquisition and Tenancy Act for pre-emption depositing consideration money. In that case the contention of the opposite party No.1 Noor Jahan Begum was that since Syed Habibur Rahman already transferred his interest to Noor Jahan Begum before filing of the application for pre-emption by the petitioner Hajera Bibi and as such the application for pre-emption was not maintainable and barred by limitation. The trial Court dismissed the case on the ground of limitation and the Appellate Court below held that since Syed Habibur Rahman sold the case land to Noor Jahan Begum before filing of the application for pre-emption the miscellaneous case is not maintainable. In deciding the case a Single Bench of the High Court Division referring the judgment of Civil Appeal no.50 of 1982 (Shafi Khan Vs. Mannujan Hossain) observed that:

*“In the judgment, the appellate Division has referred to the cases of Girija Nath Kundu and Sheikh Lokman Ali referred to earlier and has distinguished the facts of the case before it from the facts of those two cases on the ground that in neither of the cases there was any ‘reconveyance or re-sale’ to the original vendor but the lands were ‘re-transferred’ to different persons other than the original vendor. In the instant case before me also there was no ‘reconveyance or re-sale’ of the lands sought to be pre-empted to the original vendor but the lands were transferred to another stranger Nurjahan Begum. The Appellate Division has not disapproved the decisions of Girija Nath Kundu and Sheikh Lokman Ali and has made a distinction between these two cases and the case before it. I, with respect, agree with the principle of law laid down in those two reported cases. Following decision of Shiekh Lokman Ali in which case also the second transfer was made before an application for pre-emption was made, I hold that the petitioner Hajera Bibi’s right to pre-empt subsists even though the second transfer was made before her filing of the application for pre-emption. In this view of the matter, I agree with the learned Advocate for the petitioner Mr. Khondakar Mahbubuddin Ahmed that the Courts below have taken an erroneous view of law and there has been an error of law apparent of the face of the record.”*

20. In the instant case before us the Appellate Court below placed reliance in the case reported in 48 DLR 170, wherein it is observed that:

*“The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right.”*

21. In the 48 DLR case one Nazamat Ali gifted the case land to his daughter-in-law

Najuma by a deed of gift dated 31.01.1980 who gifted the same to her husband by another deed of gift dated 07.04.1980. Thereafter, the pre-emptor Ahmedur Rahman filed application for pre-emption on 30.03.1981 claiming himself as a co-sharer. It appears that his lordship in passing the judgment reported in 48 DLR 170 quoted the aforementioned portion from the case of Bishan Singh, reported in AIR 1958(SC)838. In deciding the case reported in 48 DLR 170 his lordship refused the prayer for pre-emption mainly on the ground that the impugned deed was deed of gift and the same was not pre-emptable. In the case of Girija Nath Kundu Vs. Ahamad Ali Sardar, reported in 50 C.W.N. 806, his lordship observed:

*“As soon as a transfer of a share in a holding is effected a right to pre-empt immediately accrues to the co-sharer tenants and any subsequent transferee of the property must take it subject to that right. If at any time after an application for pre-emption has been made it comes to the notice of the co-sharer applicants for pre-emption that the property has been again transferred there is nothing in the section as it stands, to prevent the subsequent transferee from being made a party to the proceedings, as was done in the case with which we are now dealing, and it seems to me that section 26F(5) of the Act was expressly framed to provide that in certain suitable cases the money which had been deposited might be paid to a subsequent transferee.”*

22. In deciding the case reported in 35 DLR 238 his lordship taking into consideration of the above cited decision and an unreported case of Shafi Khan Vs. Mannujan Hossain (Civil Appeal No.50 of 1982), subsequently reported in 35 DLR(AD)225, observed as under:

*“The petitioner Hajera Bibi’s right to pre-empt subsists even though the second transfer was made before her filling of the application for pre-emption.”*

23. In the present case the vendor-opposite party Sekandar Mia sold the case land to pre-emptee-opposite party Feroj Mia who was a stranger in the case land and said Feroj Mia transferred the land to opposite party no.6 Abdur Rashid, predecessor of the present appellants, on 21.06.1992 who was a co-sharer in the holding as such considering the view taken by their lordship in the case of 50 C.W.N. 806 as well as 35 DLR 238 and also distinguishing the facts of 35 DLR (AD) 225, we have no hesitation to hold that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated as because the subsequent transfer is subject to the right available against the original transfer and the subsequent transferee would be impleaded as party in the pre-emption proceeding and he would be entitled to get the consideration and compensation money as deposited by the pre-emptor.

24. Considering the facts and circumstances of the case and for the reasons stated above, we are of the view that the High Court Division rightly and legally passed the impugned judgment and order dated 09.07.2002 in Civil Revision No.714 of 1998.

25. Accordingly, the appeal is dismissed.

26. However, without any order as to costs.