

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique

Chief Justice

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaquul Islam

CIVIL APPEAL NO.07 OF 2009.

(From the judgment and order dated 29.04.2007 and 30.04.2007 passed by the High Court Division in Civil Revision No. 5369 of 2000)

Md. Shafiullah Patwari : Appellant.

=Versus=

Momin Mia and others : Respondents.

For the Appellant: Mr. Faruk Ahmed, Advocate,
instructed by Mr. Mohammad Ali
Azam, Advocate-on-Record.

Respondents : Not represented

Date of hearing and judgment : 23-08-2023

JUDGMENT

Hasan Foez Siddique, C. J: This appeal is directed against the judgment and order dated 29.04.2007 and 30.04.2007 passed by the High Court Division in Civil Revision No.5369 of 2000 disposing of the civil revision upon setting aside the ex-parte order passed in Pre-emption Miscellaneous Case No.66 of 1984 by the Assistant Judge, Kachua, Chandpur.

The relevant facts, for the disposal of the appeal, in short, are that one Md. Lutfur Rahman

Mir, predecessor of the defendant respondent Nos.1-10, filed a Miscellaneous case under section 96 of the State Acquisition and Tenancy Act against the plaintiff appellant and his brothers Torab Ali Patwari, Shahidullah and Jitu Patwari, defendant respondent Nos.11-13 respectively and some others in the Court of Assistant Judge, Kachua, Chandpur for pre-emption in respect of the land measuring an area of .20 acre of plot No.183 of khatian No.101 of Mouja-Khila. The Assistant Judge by his judgment and order dated 24.04.1988 allowed the pre-emption on contest against Torab Ali Patwari, Shahidullah Patwari and Jitu Patwari and ex-parte against the plaintiff appellant.

The appellant as plaintiff filed Title Suit being No.10 of 1996 in the Court of Assistant Judge, Kachua, Chandpur against the aforesaid Md. Lutur Rahman Mir and others for declaration that the judgment and order dated 24.04.1988 passed in the aforesaid Miscellaneous Case No.66 of 1984 was illegal, collusive, fraudulent and not binding upon the plaintiff. The Assistant Judge, by his judgment and decree dated 30.10.1997, dismissed the suit. Against which, the plaintiff appellant preferred Title Appeal

No.183 of 1997 in the Court of District Judge, Chandpur who transferred the appeal to the 1st Court of Subordinate Judge, Chandpur who, by his judgment and decree dated 03.08.2000, allowed the appeal and decreed the suit in terms of the prayer of the plaintiff appellant.

The respondent Nos.1-10 filed Civil Revision No.5369 of 2000 in the High Court Division against the plaintiff appellant and obtained a Rule. The High Court Division by a judgment and order dated 30.04.2007 disposed of the Rule upholding the judgment and order passed by the appellate Court in part. But it held "pre-emptees namely Torab Ali Patwari, Shahidullah Patwari and Titu Mia Patwari are bound by ex-parte order of pre-emption. Against the judgment and order passed by the High Court Division, the petitioner has preferred this appeal upon getting leave.

Mr. Faruk Ahmed, learned Advocate appearing for the appellant, submits that the pre-emptees of the aforesaid pre-emption case were Torab Ali Patwari, Shafiullah Patwari (appellant), Shahidullah and Jitu Patwari but notice upon the said pre-emption case upon Shafiullah Patwari was not served and the same was allowed

ex-parte against him and on contest against others. Since the notice upon Shafiullah Patwari was not served duly, the order of ex-parte pre-emption by the impugned judgment and order was liable to be set aside as whole, the High Court Division erred in law in setting the order of pre-emption partly.

No one appeared on behalf of the respondents.

It appears from the materials on record that Lutfor Rahman, predecessor-in-interest of the respondent Nos. 1 to 10, instituted pre-emption Miscellaneous case No.66 of 1984 against Torab Ali Patwari, Shafiullah Patwari (appellant), Shahidullah and Jitu Patowari and others and obtained an order of pre-emption on contest against Torab Ali Patwari, Shahidullah Patwari and Jitu Patuwari and ex-parte against Shafiullah Patwari. Shafiullah Patwari, knowing about the ex-parte order of pre-emption, filed instant suit for setting aside the aforesaid order of pre-emption on the ground of fraud which was dismissed in the trial Court and on appeal, by the Shafiullah Patwari, it was allowed. The appellate Court held that notice upon Shafiullah Patwari was not served duly.

Accordingly, it decreed the instant suit upon setting aside the order of pre-emption. Then the defendants-pre-emptors filed revisional application in the High Court Division and obtained Rule. The High Court Division disposed of the said Rule maintaining the order of pre-emption in part. The High Court Division, however, held that notice upon the pre-emptee Shafiullah was not duly served in the aforesaid pre-emption proceeding.

Since the Shafiullah Patwari challenged the entire order of pre-emption on the ground of fraud, it is to be adjudicated in this appeal as to whether the aforesaid order of pre-emption was obtained, without serving notice upon one of the pre-emptees Shafiullah Patwari or not and the said order should be set aside on the ground of fraud as a whole or not. Since it has been observed by the appellate Court as well as High Court Division that the notice upon aforesaid pre-emption proceeding was not duly served upon one of the pre-emptees, we are of the view that the ex-parte order of pre-emption was fraudulent one as a whole. Ex-parte order which has been obtained by practising fraud cannot be sustained in law as a whole. Chief Justice Edward Coke

proclaimed, "Fraud avoids all Judicial acts, ecclesiastical or temporal". It is well settled principle that a decree or order obtained by playing fraud on the court is a nullity and non-est in the eye of law. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated and cannot be allowed to stand. This is fundamental principle of law and needs no further elaboration, the High Court Division erred in law in maintaining the order of pre-emption partially.

In such view of the circumstances, we find merit in the appeal.

Thus, the appeal is allowed. The judgment and order dated 29.04.2007 and 30.04.2007 passed by the High Court Division in Civil Revision No.5369 of 2000 is hereby set aside.

C.J.

J.

J.

The 23rd August, 2023

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