

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqu Islam

CIVIL APPEAL NO. 336 OF 2016

(From the judgment and order dated 08.05.2012 passed by the High Court Division in Civil Revision No. 3750 of 2009)

Kohinur Begum Appellant

-Versus-

Most Majeda Khatun and others Respondents

For the Appellant : Mr. A.M. Aminuddin, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-record

For the Respondent No. 1 : Mr. Md. Moshfiqur Rahman Khan, Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-record

For the Respondent Nos. 2-9 : Not represented

Date of Hearing : 14.06.2023

Date of Judgment : 15.06.2023

J U D G M E N T

Md. Ashfaqu Islam, J: This civil appeal by leave is directed against the judgment and order dated 08.05.2012 passed by the High Court Division in Civil Revision No. 3750 of 2009 making the Rule absolute and thereby setting aside the judgment and order dated 08.07.2009 passed by the learned Joint District Judge, Dinajpur in Miscellaneous Appeal No.68 of 1993 disallowing the appeal and affirming the judgment and order dated 26.06.1993 passed by the

Additional Assistant Judge, Court No.1, Dinajpur in pre-emption Miscellaneous Case No. 10 of 1991 allowing the case.

The present appellant as pre-emptor filed Pre-emption Miscellaneous Case No. 10 of 1991 under section 24 of the Non-Agricultural Tenancy Act, 1949 praying for pre-emption of the case land before Additional Assistant Judge, Court No. 1, Dinajpur. Her case, in short, was that she was the co-sharer of the case holding while the pre-emptee-opposite party was stranger to that. The seller opposite party Nos. 2 and 3 sold the case land to the pre-emptee-opposite party No.1 beyond the knowledge of the appellant; no notice of that sale was served upon the pre-emptor. Knowing about that transfer the pre-emptor filed this case for pre-emption within the statutory period of limitation from the date of her knowledge about that transfer on depositing the requisite amount; the pre-emptor was otherwise entitled also to get pre-emption.

The pre-emptee opposite party No.1 contested that case by filing written objection. Her case, in short was that the pre-emption case was not maintainable as she

herself also was a co-sharer of the case land by virtue of inheritance and the appellant knew about the case transfer from the beginning and as such the pre-emption case was hopelessly barred by limitation also.

Pre-emption was allowed by the trial court. On an appeal the same was affirmed by the appellate court maintaining the decision of the trial court.

Being aggrieved with the said decisions of the appellate court the pre-emptee filed Civil Revision before the High Court Division and the high Court Division made the rule absolute by setting aside the judgment of the courts below and disallowed the pre-emption miscellaneous case.

Thus, the pre-emptor filed civil petition for leave to appeal before this Division and obtained leave giving rise to this appeal.

Mr. A.M. Aminuddin, the learned Senior Advocate appearing for the appellant contends that that the High Court Division erred in law in making the rule absolute by the impugned judgment reversing the concurrent findings of the fact of limitation merely on the

assumption, even without advertng to the evidences on record.

He further submits that the Revisional court cannot enter into question of fact to come to contrary finding of fact. But the Hon'ble High Court Division illegally allowed the revision on the ground of limitation regarding date of knowledge which was decided by the learned court below considering depositions of both the parties. As such the High Court Division erred in law in entertaining the Revisional application and in passing the impugned order which is liable to be set aside.

He further submits that the bottom line of findings of the trial court is that the Pre-emptor-appellant is the co-sharer by inheritance of the suit property and she filed the suit within the period of limitation as the pre-emptor came to learn the sale of the suit property on 09.05.1981 when the opposite party No. 1 disclose the same. Therefore, the pre-emptor filed the suit after the knowledge of the transfer of the suit property.

He further submits that the Pre-emptee-opposite party No. 1 failed to prove that the suit is barred by limitation as neither she served a notice upon the pre-

emptor under section 23 of the Non-agricultural Tenancy Act, 1949 nor she informed the pre-emptor on the subject of the sale of the suit property.

Next he submits that the pre-emptor filed the suit within the period of limitation i.e. after knowledge which was corroborated by the P.W-1, P.W-2 and P.W-3. The learned court below in its judgment and order stated that the pre-emptee-opposite party No. 1 did not produced the documents of notice under section 23 of the Non-agricultural Tenancy Act, 1949 thereby failed to prove regarding service of notice upon the pre-emptor.

Finally, he submits that it is long established principle that the date of knowledge about the sale of the land under pre-emption is a finding of fact and unless the findings suffers from infirmity or its perverse, the High Court Division will not interfere with the findings of the lower appellate court in its jurisdiction. The Hon'ble High court division arrived its conclusion completely based upon its own perception not on the basis of law using the words 'believable' or 'not true' etc.

On the other hand Mr. Md. Moshfiqur Rahman Khan, the learned Advocate appearing for the respondent No. 1 by supporting the impugned judgment and order passed by the High Court Division contends that the pre-emptor having intentionally abstained from depositing on oath in court to assert right of pre-emption and her alleged first knowledge of the Kabala under Pre-emption by being present in the sitting on 09.05.1981 and to deny her first knowledge and the co-sharership by inheritance, thus the deposition of pre-emptor's husband as P.W.1 was legally competent to assert those legal requirements.

He further submits that the pre-emption case was barred by limitation as first knowledge of pre-emptor about kabala in alleged sitting on 09.05.1981 at her residence as a fabricated and non believable story due to several cases and litigations were continuing amongst them.

He also submits that the pre-emptor and her sister got Heba Deed from Al-haj Md. Siddique admitting him owner by exchange do deprive the pre-emptee from her share in the case plot and courts below without considering that under Section 24(II) (A) the right of

pre-emption was not available against the pre-emptee who became co-sharer by inheritance which would be evident from the deed under pre-emption, a Benami Purchase.

We have heard the learned Advocates of both sides. Perused the papers/documents contained in the paper book.

As we have found that the trial court, on consideration of evidence adduced by both the parties allowed the case holding that the pre-emptee opposite party No. 1 was not co-sharer in the case land and that the pre-emptor filed this case for pre-emption within the statutory period of limitation from the date of her knowledge about the transfer in question.

It is also found that the appellate Court below affirmed the findings and decision of the trial court. But the High Court division set aside those concurrent findings and decisions of the courts of facts holding that the case of pre-emption was barred by limitation. The High Court Division made observations to the effect that the pre-emptor and the seller were full sisters and it was unbelievable that the full sister of the pre-emptor did not disclose about the transfer to her.

Mainly on the question of limitation fate of the pre-emption case was decided. On scrutiny of the plaint and the evidence we find that there was no divergence between the plaint and the evidence which would attract against the operation of Order VI, rule 7 of the Code of Civil Procedure. In strict compliance of order VI Rule 7 of the Code of Civil Procedure in the plaint the date of knowledge which has been severally mentioned has been corroborated by the P.W-1, P.W-2 and P.W-3. Therefore, order VI Rule 7 of the code has been complied with.

Order VI, Rule 7, enjoins:

"No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

In a recently delivered decision of Selina Gulshan vs. Mashiur Rahman 73 DLR AD 54 this Division maintained:

"Moreover, law in respect of pre-emption is, no matter whether any co-sharer was offered to purchase the property and/or he refused to do the same earlier that will, under no circumstances, create an estoppel/waiver. Because the right of the pre-emption accrued on and from the date of registering the deed under

section 60 of the Registration Act or from the date of knowledge of such transfer till 4(four) months thereafter. In the present case the deed was admittedly executed on 4.11.2007 and was endorsed in the volume under section 60 of the Act in 2011 and the pre-emptor having come to know about the transfer on 20.01.2011 the preemption case has been filled on 04.02.2011 which is very much within the period of limitation. So the submission of the learned Advocate for the petitioner that the pre-emption case is barred by waiver, estoppel and acquiescence has no ground to stand.”

In the plaint it has been categorically stated that on 09.05.1981 the pre-emptor came to learn the sale of the suit property when the opposite party No. 1 disclose the same which was corroborated by the P.W-1, P.W-2 and P.W-3. Being informed the pre-emptor filed the Miscellaneous Case on 06.07.1981 which is very much within the period of limitation. In view of above we hold that the trial court as well as the appellate Court below was correct in holding that the suit was not barred by limitation.

The positive findings of the courts below as mentioned above was wrongly interfered by the High Court Division in its revisional jurisdiction under Section 115

of the Code of Civil Procedure. The High Court Division totally misdirected itself in holding that the pre-emptor could not file the pre-emption case within the stipulated period of time prescribed for filing the same holding that the pre-emptor was unsuccessful to prove this case for pre-emption within the statutory period of limitation from the date of her knowledge about the transfer in question.

In view of the above, we find merit in the appeal.

Accordingly, the appeal is allowed.

The judgment and order dated 08.05.2012 passed by the High Court Division is hereby set aside and the judgment and decree passed by the Courts below are restored.

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