



## Star LAW report



LAW week



# The right of preemption is hit by the principle of estoppel and waiver

**High Court Division (Civil Revisional Jurisdiction)**  
**The Supreme Court of Bangladesh**  
**Civil Revision No 5039 of 1998**  
**Sree Amumulla Chandra Halder**  
**V**  
**Md Mohsin Ali Mondal & others**

**Before Justice Khonkder Musa Khaleid**  
**Date of judgement: March 6, 2002**  
**Result: Rule discharged**  
**State Acquisition and Tenancy Act, 1950**

### Background

Khonkder Musa Khaleid, J: This Rule was obtained by the preemptor-petitioner of the Misc. Case No 36/94 upon making an application for revision under Section 115(1) of the Code of Civil Procedure against judgement and order dated 13-7-1998 passed by the learned District Judge, Sirajganj in Misc Appeal No 37/97 upholding those of the Senior Asstt Judge, Ullapara, Sirajganj, in the above stated preemption case passed on 10-7-1997.

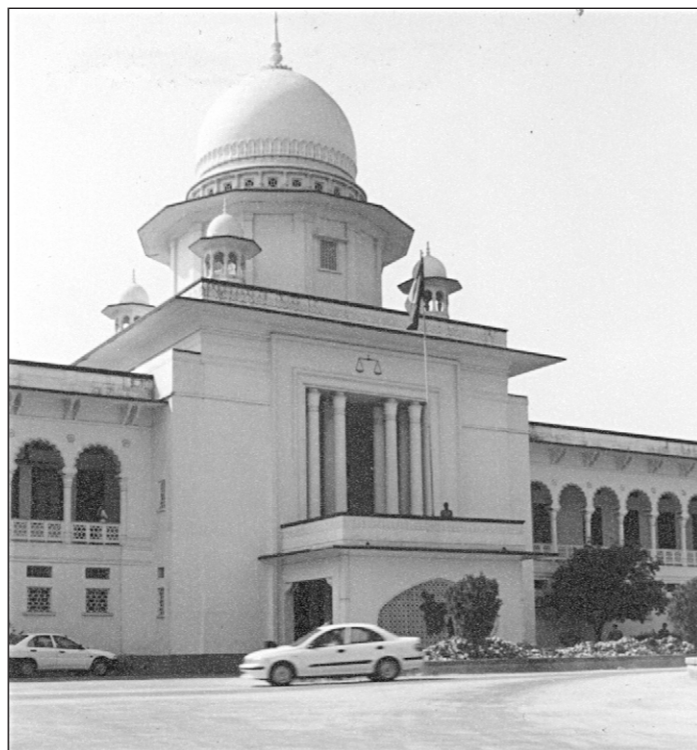
Essential facts for disposal of this Rule are that the petitioner Amumulla Chandra Halder filed the aforesaid case on 31-10-1994 to have the case land measuring 21 decimals preempted which was transferred by his brother PW 2 Sarat Chandra to the stranger O. P. on 1 Mohsin Ali Mandal on 13-9-1994 by a registered kobala. The petitioner is a co-sharer in the case holding and he deposited the consideration amount of the kobala under preemption amounting to Tk 7,000/- along with statutory compensation as required under section 96 of the State Acquisition and Tenancy Act.

The O. P. No. 1 Mohsin Ali Mondal contested the case stating, inter alia, that the deposit of money was insufficient as the consideration of the sale was fixed at Tk 40,000/- which was actually paid by the transferee and also stated in the bainaptra executed prior to the execution of the sale deed. It is contended further that the petitioner, being full brother of the vendor, was aware of the sale transaction from the very beginning and knew about the agreement for sale at that time, the petitioner not only consented to the sale transaction but also refused to purchase the case land. Due to such knowledge and consent of the co-sharer petitioner the sale deed was executed and registered showing lesser amount of consideration than actually paid.

The learned Asstt Judge recorded evidence of 3 witnesses for the petitioner and 6 witnesses of the O. P. No. 1 and after hearing, he dismissed the Misc. case with the findings that the case land under preemption being a homestead land, preemption under Section 96 of the State Acquisition and Tenancy Act is not maintainable. That the petitioner knowing fully well about the actual sale value of Tk 40,000/- deposited only Tk 7,000/- with compensation thereof which was inadequate and that he did not exercise option to purchase the case land at that time. On appeal by the petitioner, the learned District Judge upheld the judgement sustaining two grounds out of the aforesaid 3, holding that the right of preemption is hit by the principle of estoppel and waiver and that the deposit of the preemption case being inadequate the preemption case is not maintainable.

Being aggrieved, the petitioner has filed this revisional application challenging legality and propriety of the impugned judgement and order.

Mr Md Fazul Karim, the learned Advocate appearing on behalf of the petitioner, submits that the courts below have overlooked the specific provision of Section 96(3) (a) of the State Acquisition and Tenancy Act wherein the consideration of the kobala under preemption together, with compensation thereof is necessary to be deposited at the time of submitting application for preemption. Since the petitioner has complied with this legal require-



ment, the question of inadequate deposit does not arise.

On this question Mr Md Israfil Hossain the learned Advocate appearing on behalf of the petitioner No 1 has made submissions supporting the findings of the learned courts below and further contended that the actual consideration money for the sale transaction has been proved to be at Tk 40,000/- and since transaction took place with the consent of the co-sharer petitioner and there was no apprehension of the case land being preempted, the consideration money of Tk 7,000/- was written in the kobala in question to avoid registration cost, subsequently, when the vendor, brother of the petitioner left the country for India, the petitioner taking advantage of quoting low price in the kobala, filed the present preemption case for illegal gain.

### Deliberation

On perusal of the certified copy of the oral evidence adduced before the learned trial court it appears that there was an agreement in between the parties for the execution and registration of a sale deed and the said bainaptra dated 14.2.1994 has been produced and admitted in evidence. It transpires that the consideration money settled in between the parties is stated to be Tk. 40,000/- in the bainaptra and earnest money of Tk. 18,000/- was paid on the date of agreement. In this respect, several witnesses including the scribe of the sale deed and bainaptra (OPW 6) and attesting witness of bainaptra (OPW2) gave uncontroverted testimony about payment of Tk. 40,000/- as consideration of the transaction. Both the courts below have found concurrently that the case land was sold at Tk. 40,000/- out of which Tk. 18,000/- was paid in advance on the date of execution of bainaptra. I do not find any reason to disagree with such finding arrived at on the basis of credible evidence on record. But the fact remains

that the transferee is not entitled to claim consideration money in excess of the amount mentioned in the deed of transfer itself as contemplated under proviso to the subsection 3 (b) of section 96 of the State Acquisition and Tenancy Act. Besides the basic requirements of making deposit is provided in sub-section 3(a) of section 96 of the State Acquisition and Tenancy Act which runs as follows:

"An application made under sub-section 1 shall be dismissed unless the applicant or applicants, at the time of making it deposited in the court the amount of consideration money or the value of the transferred holding as stated in the notice under section 89 or in the deed of transfer as the case may be together with compensation of the rate of ten percentage of such amount."

In view of the aforesaid legal provision what ever may be the actual payment of consideration, the parties are bound by the recital of the kobala in question and if the consideration written in the kobala is deposited along with the statutory compensation, such deposit cannot be considered to be insufficient or inadequate in accordance with law. So, the submission of the learned Advocate for the petitioner is acceptable on this point.

So far the second ground taken by the learned appellate court is concerned, it appears that the petitioners' right of preemption is said to have been barred by the principle of waiver and acquiescence as it has been found by evidence that the petitioner refused to purchase the case land at the time of payment of earnest money and that the sale transaction was completed with a consent and full knowledge of the co-sharer petitioner. It appears that both the courts below have concurrently found on the basis of available evidence on record that the petitioner was not only aware of the transfer made by his own brother but he had also given consent to the transaction having involvement in the negotiation. On perusal of the evidence, it appears that there are sufficient corroborative evidences in proof of such contention. So, I am not inclined to interfere with such contention.

So, I am not inclined to interfere with such concurrent findings of fact arrived at by the courts below. The learned Advocate for the petitioner has not been able to point out any misreading or non-consideration of the evidence by the courts below effecting decision of the case. The learned Appellate court appears to have relied upon the decision given by their lordships of the Appellate Division of the Supreme Court in the case of Akhlaasur Rahman and others Vs. Serazuddin and others reported in 42 DLR (AD) Page 189. It is held that a preemptor may be held to be estopped from enforcing his right of preemption if he abandons such right either expressly or by implied conduct. Their lordship held in that reported case that the acquiescence implies that if a person abstained from interfering while a violation of his legal right is in progress it operates by way of estoppel. In the instant case, there are adequate evidence on record to prove that the petitioner had knowledge of the sale made by his brother and he gave consent to the sale in question waiving his preferential right of purchase. Thus I find that the learned appellate court had made the reported case applicable properly and the concurrent findings of fact arrived at by the courts below in this respect do not call for interference under the revisional jurisdiction.

### Decision

For the reasons stated above, I do not find any legal infirmity in the impugned judgment and order passed by the learned Appellate Court and as such it should be maintained.

In the result, the Rule is discharged without any order as to cost.

Mr Md Fazul Karim, Advocate with Mr Khandker Aminul Haque, Advocate for the petitioner. Mr Md Israfil Hossain, Advocate for the opposite parties.

## RIGHTS investigation



# Numerous laws have done little to stop violence against women and children



AMEENA ISLAM

As her husband is an expatriate man used to live alone abroad, the young housewife lived in fear. Her fear proved right when one night last summer a gang of miscreants stormed into her house. The goons raped the woman and left her in a pool of blood.

The woman - her name withheld for protection - was battered but not down. She joined her family in the efforts to see that the culprits are punished. One day the village elders held a "Salish" or village court to deal with the case. The housewife hoped that the elders would punish the attackers. In this case she proved wrong. The unofficial village court identified the rapists and asked them to pay Tk. 10,000 in compensation to the woman. At the same time the elders held the woman responsible for the sexual assault on her. She was ordered to be lashed 100 times. Months after the incident, the sufferer left her own village in northwestern Sirajganj district, where the rapists rattled their swords. "Everybody in my village know what had happened and who are the culprits, but I got no justice," says the battered woman.

The tale of teenage Fahima - not her real name - shocked many in Bangladesh recently. On March 3, 2002, three young men kidnapped the girl from outside her house at city's Mirpur and raped her. The attackers warned the girl to keep silent about the attack or else she will be killed. However, the word of the attack went out. The girl's family took her to task blaming her for luring the men to set their sight on her. The family reminded her that she should not have gone out of her house late in the evening. Unable to bear the double humiliation, the girl committed suicide.

Such violence against women in Bangladesh is rising. Women and

children are the main victims of abduction while many kidnapped women are raped and killed by the abductors. Children are usually kidnapped for ransom. Women become the targets of rapists. Women are attacked because they reject marriage proposals from men they don't like. In some recent cases, revenge against political rivals was the motive.

"The incidents of abduction and sexual attacks on women and children make them feel insecure. It's also one of the worst forms of violation of human rights," says Sultana Kamal, executive director of Ain O Shalish Kendra. Another teenage girl from Asashuni upazila in Satkhira district was abducted in a dispute over the possession of a shrimp farm claimed by her family and its rivals. The rivals arrived to look for her father. They seized her after failing to get the man.

The kidnappers kept the student of class six confined in a darkened room for more than two months. The incident changed the girl's life. Even though she was finally freed, she is not the girl she was before the attack. She has suffered mental disturbance. And since the release she has been in the care of Bangladesh National Women Lawyers Association, a civil rights group.

The harm caused by such attack goes beyond physical. It affects the minds of the victims most. Professor Hamida Akhtar Begum of Psychology department of Dhaka University says an abducted woman loses everything - her dignity, self-esteem, social position and normal life. "The incident of kidnapping changes her life forever. She never returns to normalcy," she observes. The abductors do not spare even the young ones.

They target girls and women irrespective of their age, religion, caste, creed and profession. Many of the abducted women, especially who are young in age, are trafficked to other countries and forced into prostitution. Bangladesh National Women Lawyers Association says about 25,000 women and children are trafficked every year from Bangladesh. Some of them are kidnapped before trafficking and others are trapped with lucrative job offers.

"Over the years more than six lakh women and children have been trafficked to India, Pakistan, Middle East and Malaysia, and a good number of them are abducted and forcibly trafficked," informs an official of the association.

In March 2002, a young housewife of Fatullah, Narayanganj was abducted by a notorious gang of criminals. They kept her confined for two weeks and then released. They unleashed inhumane torture on the victim whose husband works in Canada. While giving her statement to a magistrate, the woman narrated the torture she had to endure during the confinement. She burst into tears recalling the dark episode of her life. Psychologist Hamida Akhtar Begum said the victims of abduction can suffer from post-traumatic disorder. The bitterness keeps coming back to them and they can't sleep, can't eat and easily gets upset. There are instances that families do not help the victims to recover from the shock.

Bangladesh has laws providing for stiff penalties for abduction of women and children. According to Women and Child Repression Prevention Act 2000, the maximum punishment for abduction is death sentence. But there are a few instances of execution of this law.

There is a provision of sending kidnap victims to safe custody under appropriate authority of the government, although the victims are generally kept confined in prison in the name of safe custody causing further sufferings to them. The arrangement of keeping such victims under the supervision of government rehabilitation centers is inadequate.

It is alleged that the victims are sent to 'safe custody' without taking their opinion and the entire process of providing legal services to them is not friendly or sympathetic for women. Sources at the Bangladesh National Women Lawyers Association said they recorded total 2783 incidents of women repression in the year 2001 and total 204 were incidents of abduction. Unfortunately, only 122 cases were filed in connection with these abductions. In the same year, a total of 27 people were awarded life term jail, one 14 years jail, and 16 others 7-10 years jail in abduction cases.

Another NGO report reveals that a total of 203 women were abducted in six months till June 2002. The statistics show a gradually increasing trend in such crimes despite the existence of tough laws. Women organisations suggest that the existing laws be enforced strictly to punish the abductors while there must be adequate government arrangements for treatment and rehabilitation of the kidnap victims.

-NewsNetwork

## FOR YOUR information



# Amendments of the Constitution



By all counts, the constitution has been subjected to far-reaching changes from the mid-seventies to the late eighties, including changes in the four fundamental principles. Principles of socialism and secularism have been re-interpreted or deleted and the independence of the judiciary impaired through amendments. Most of the other changes have been characterised as 'for personal' and not 'national' reasons.

The Constitution, since coming into force on the 16th December, 1972, has been amended thirteen times:

u i. for changing the form of government from parliamentary to presidential and back again to parliamentary [Constitution (Fourth Amendment) Act, 1974, (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1986 (Act XXVIII of 1991)];

u ii. Twice for validating acts and deeds, and orders and laws passed during the martial law regimes [Constitution (Fifth Amendment) Act, 1979, (Act I of 1979) and Constitution (Seventh Amendment) Act, 1986 (Act of 1986)];

u iii. Twice for qualifying an individual who was otherwise disqualified to hold a particular constitutional post [Constitution (Sixth Amendment) Act, 1981 (Act XIV of 1981) and Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991)];

u iv. for the return of the Chief Justice to the Supreme Court [Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991)];

u v. for creating the post of Vice President and then abolishing it [Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively];

u vi. for limiting the terms for the office of the President and that of Vice President [Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991)];

u vii. for extending the period to 120 days from 60 that may intervene between the end of one session and the first sitting of Parliament in the next session and then restoring the earlier provision [Constitution (Fourth Amendment) Act, 1974 (Act II of 1974) and Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), respectively]; and

u viii. for providing a Non-party Caretaker Government before holding the general election for Parliament [Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996)].

u ix. Part VI that deals with the judiciary, the least "dangerous" part of the government, was amended at twenty-one different places.

Courtesy: ERGO, Legal Counsellor.

## Tough criterion for bank directors

The bank reforms committee has recommended some new criterion for bank directors. The committee has recommended that a person cannot sit on a bank board if he is convicted on criminal charge or found involved in forgeries, financial crimes or other irregularities or declared bankrupt by any court. The committee has also suggested that a director would need to hold at least bachelor's degree or its equivalent and ten years management or professional experience. A person with any track record of breaking any rules, regulations or notification of any regulatory body would also be barred from becoming bank director. Moreover, a bank cannot have more than one member of a family on its board. A director can hold his post for a maximum six years and can be re-elected provided he is kept away from the board for at least two years. Directors will also require submitting an annual undertaking stating that they have not defaulted on loans taken from any bank of financial institutions. The committee made the recommendation to ensure good corporate governance in banks. *Daily Star, 2 February*

## WTO rules to take tool on farming

Some aspects of the World Trade Organisation (WTO) agreement are feared to raise the cost of farm output and curb farmer's rights in developing countries including Bangladesh. The agreement will come into effect from January 2006. Speakers at a regional workshop apprehended that the agreement on Trade Related Intellectual Property Rights (TRIP) would enable the inventing organisations or companies to prevent farmers of Bangladesh and other least developing countries from using part of their harvest as seeds. They told that the rule that even in such a context the government has very few policies and legislative preparations in place to protect the age old traditional economic sector like agriculture. The speakers observed that the government should persistently advise the farmers and other traditional livelihood earners to help protect their rights. The two day workshop "Protecting Farmers Rights: Issues and options" was organised by Bangladesh Environmental Lawyers Association (BELA) in collaboration with the South Asian Watch on Trade, Economics and Environment (SAWTEE), the Ministry of Environment, UNDP and the Ford Foundation. Intellectual property rights experts and environmentalists from Bangladesh, Nepal, India, Pakistan and Sri Lanka participated in the workshop. *Daily Star, 2 February*

## Petroleum Act 1974 to be amended

The government has decided to amend the Petroleum Act 1974 to ensure energy security and make it available to common people. State Minister for Energy A.K.M. Mosarraf Hossain said this while inaugurating a workshop on the Petroleum Act. He also informed that an energy regulatory commission would be formed shortly to restructure the energy sector. The commission will determine the price of petroleum products. *Financial Express, 2 February*

## 1533 acid attacks in 7 years

About 1533 girls and women fall victims of acid attacks across the country during 1996-2002 period. The shocking figure came from a daylong workshop titled "Violence against Women: Acid Attack". NGO Coalition on Beijing plus Five and Bangladesh Human Rights Organisation jointly organised the workshop. The workshop was aiming to raise public awareness against the heinous crime. *Daily Star, February 01*

## PP and APP to be appointed by PSC

Public Prosecutors and Assistant Public Prosecutors will be appointed by the Public Service Commission (PSC) in future to ensure justice. The post of Court Inspector will be abolished. No PP and APP will be allowed to conduct any private case. Law Minister Barrister Maudud Ahmed said this while inaugurating newly built building of Narayanganj Bar Association. President of the Bar Association Advocate Mohammad Suruj Ali and State Minister for Industries Professor Razaul Karim also attended the ceremony. *Daily Ittefaq, 29 January*

## HR violation claims 62 lives

About 62 people of the country were killed in the month of January in human rights violation related incident. Among them 12 died in jail and in police custody, 10 in political incidents, 3 for dowry related offences, 9 in rape cases and 3 in violation of human rights in the Chittagong Hill Tracts (CHT). Odhikar, a human rights organisation revealed the statistic based on newspaper reports. In a separate survey Bangladesh Nari Pragati Sangha said 100 women were tortured in the country in the month of January. *Bangladesh Observer, 01 February*

## Thousands are in 10 SW prisons

About 15,000 under trial prisoners have been languishing in ten prisons of the south-west region of the country. The number of inmates is four times higher than the actual accommodation capacity. Seven out of these ten prisons were established in British Period. The century old prison buildings have become deteriorated making them totally unfit for human living. The jail inmates are living there in inhuman condition for years together as the criminal cases remained pending against them. The reason behind the backlog of cases is shortage of adequate number of magistrates. *Bangladesh Observer, 01 February*

## Cabinet Okays energy body law

The proposal for enacting the Bangladesh Energy Regulatory Commission Act 2003 was approved by the cabinet. The draft paper on the proposed Energy Regulatory Commission (ERC) was finalised by Energy and Mineral Resource Ministry and Power Ministry. The ERC would be an independent body like the Election Commission, Telecommunication Regulatory Commission and Privatisation Commission and it would be empowered to oversee the energy, power, gas and petroleum sector and their development works. The commission would also ensure the proper utilisation of energy and creation of a competitive market. The proposed commission would fix the price of energy products but the government would be able to interfere in the fixation of price by enhancing or reducing tax on those products. *Bangladesh Today, 04 February*

## CEC terms the UP polls futile exercise

Chief Election Commissioner MA Syed dismissed the ongoing Union Parishad polls as 'more or less a futile exercise'. He told the elections do not reflect people's choice while referring to reports from the media and the independent election monitors on pools-related violence across the country. He also pointed out that civil and police administration has failed to provide a level-playing field for the contestants. He blamed the government's lack of sensitivity for the widespread disorder during the polls. At least 12 people including a police constable were reportedly killed and hundreds other injured in pools related violence. *Daily Star, 04 February*

## Body to control high-rise building

The government has formed a committee to formulate environmental guideline for the construction of high-rise building in the country. The 13 member committee has representation from all the utility service of the government, few ministries, a representative from the Real Estate and Housing Association of Bangladesh (REHAB) and an expert from the Bangladesh University of Engineering and Technology (BUET). The guideline would be formulated in line with the Environmental Conservation Act 1995 and Conservation Guideline 2000. The guideline would specify where and how a high-rise building be constructed keeping in mind all the environmental aspect of the project. A Joint Secretary of the Environment and Forest Ministry will head the committee. The committee will submit its report to the ministry within next two month. *Financial Express, 04 February*

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