

(2023) 01 GAU CK 0004

In the Gauhati High Court

Case No : Regular First Appeal No. 138 Of 2019

Mustafa Sahidul Islam

APPELLANT

Vs

Musstt. Manuwara Begum And 5 Ors.

RESPONDENT

Date of Decision : 05-01-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 89, 96, Order 41 Rule 1, Order 41 Rule 27

Citation : (2023) 01 GAU CK 0004

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : P K Kalita , A Biswas

Final Decision : Disposed Of

Judgement

1. Heard Mr. P.K. Kalita, learned Sr. Counsel appearing for the appellant/plaintiff. Also heard Mr. A. Biswas, learned counsel for the respondents/defendant.

2. This appeal under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, 1908 has been preferred against the impugned Judgment and Decree, dated 31.07.2019, passed by the learned Civil Judge, Morigaon, in T.S. No. 4/2017, whereby dismissed the suit of the appellant/plaintiff.

APPELLANT/PLAINTIFF'S CASE:

3. The case of the appellant/plaintiff in a nutshell is that he and the respondent Nos. 1 to 3, who are his sister, brother in-law and nephew respectively, are co-sharers/co-pattadars of a plot of land measuring 1 Bigha 1 Katha out of 2 Bighas covered by Dag No. 60 of Periodic Patta No. 109 of Moirabari Town Kissam under Moirabari Mouza in the District of Morigaon, Assam, which is hereinafter referred to as the suit land. The appellant and the respondent No. 2 acquired 1 Bigha of the suit land from the previous owner and pattadar, namely Geeta Kumari Borah by right of purchase while the respondent Nos. 2 and 3 acquired rest of the 1 Bigha of the suit land by right of purchase from said Geeta Kumari Borah. The entire 2 Bighas of land was jointly possessed by the appellant and the

respondent Nos. 1 to 3 having their respective houses and shops over it, which are rented out to different tenants. But, the respondent Nos. 1 to 3 taking advantage of absence of the appellant, who resides in Guwahati in connection with his profession, sold off 1 Bigha 1 Katha of land out of the 2 Bighas to the respondent Nos. 4 to 6 by executing a sale deed bearing sale deed No. 348, dated 13.02.2017.

4. The appellant invoked his right of pre-emption by performing Talab-i-Mowasibat in the presence of witnesses but the defendant Nos. 4 to 6 refused to reconvey the suit land as has been envisaged under Section 226 of the Mahomedan Law.

5. Having no other alternative, the appellant filed a Title Suit being T.S. No. 4/2017 before the Court of learned Civil Judge, Morigaon. The respondent Nos. 1 to 6 contested the suit by filing written statements.

6. The learned trial Court after consideration of the pleadings framed the following issues-

- (1) Whether there is cause of action for the suit?
- (2) Whether the suit is barred by law of limitation and other provisions of law?
- (3) Whether plaintiff is entitled to pre-emption and khas possession as prayed?
- (4) Whether the plaintiff is entitled to decree/relief as prayed for? To what other relief/reliefs plaintiff is entitled?

7. The appellant examined himself as P.W. 1, but, the evidence of the other P.Ws was expunged. After consideration of the pleadings and the evidence on record, the learned trial Court vide Judgment and Decree, dated 31.07.2019 dismissed the suit of the appellant.

ARGUMENTS:

8. Mr. P.K. Kalita, learned Sr. Counsel appearing for the appellant/plaintiff, submitted that the learned trial Court decided the entire suit on the basis of the decision on issue No. 3 without appreciating the evidence on record, but, on the misinterpreted concept of pre-emption under Mahomedan Law. Mr. Kalita submitted that the right of pre-emption is a right of substitution and it prevents the introduction of a stranger into a residential house and to bring the property under one owner. Mr. Kalita further submitted that the learned trial Court decided the aforesaid issue on the basis of adverse presumption without appreciating the contents of the exhibited documents. Mr. Kalita also submitted that the learned trial Court has failed to appreciate the crucial fact that the appellant is the co-sharer/co-pattadar of the suit property (Shafi-i-Sharik) along with the defendants No. 1, 2 and 3. Mr. Kalita, learned Sr. Counsel, has drawn attention to the evidence of P.Ws 2 and 3, who were witnesses to the plaintiff's conveyance of his intention to exercise the right of pre-emption to the defendants No. 1, 2 and 3 as well as the vendee defendants No. 4, 5 and 6 as he is the co-pattadar with

possession of the suit land raising houses and shops thereon. However, Mr. Kalita submitted that their evidence was expunged by order, dated 09.08.2018 for their inability to appear on a few dates fixed for their cross-examination by the defendants, which led to miscarriage of justice in respect of the lawful claim of the plaintiff. Mr. Kalita, therefore, vehemently submitted that a chance may be given to the plaintiff to cross-examine them by remitting back the matter. Learned Sr. Counsel has relied on the judgment rendered by the Hon'ble Supreme Court in Sanjay Kumar Singh Vs. The State of Jharkhand, reported in 2022 0 Supreme(SC) 216.

9. Per contra, Mr. A. Biswas, learned counsel appearing for the respondents/defendant, submitted that the evidence on record shows that the plaintiff had not performed Talab-i-Mowasibat and that he made a formal demand to the defendants and requested them to reconvey the suit land to him in presence of two witnesses and then, as pleaded, he completed Talab-i-Ishhad. Mr. Biswas further submitted that the plaintiff had never lodged any complaint with the Senior Sub- Registrar, Morigaon regarding any incident that took place on 28.02.2017 when the defendants No. 4, 5 and 6 made attempt to take delivery of possession of the suit land with the plaintiff, who raised objection to it. Mr. Biswas submitted that before making a proposal for sale of the suit land by the exclusive owners/the defendants No. 1 and 2 approached the plaintiff to enquire if he desired to purchase the land, but he refused to purchase and advised them to find some suitable buyer to purchase the land and therefore, he was aware of the execution of the agreement for sale followed by execution of the sale deed with the buyers, i.e., defendants No. 4, 5 and 6. Mr. Biswas has relevantly relied on the following judgments rendered in (1) Nurul Islam Mazarbhuiya and Ors. Vs. Sahab Uddin Choudhury, reported in 2015(5) GLT 163; (2) Ajijur Rahman Barbhuiya Vs. Haji Moshaid Ali Laskar and Ors., reported in AIR 1991 Gauhati 66; (3) Satish Kumar Gupta and Ors. Vs. State of Haryana and Ors., reported in (2017) 4 SCC 760; (4) State of Gujarat and Anr. Vs. Mahendrakumar Parshottambhai Desai(D) by L.Rs, reported in AIR 2006 SC 1864; (5) Union of India Vs. Ibrahim Uddin and Anr., reported in (2012) 8 SCC 148; (6) Ali Hussain Mazumder Vs. Abdul Matlib Mazumder and Ors., reported in 2018 (3) GLT 522; (7) Mohd. Noor and Ors. Vs. Mohd. Ibrahim and Ors., reported in (1994) 5 SCC 562; (8) Radhakishan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi, reported in AIR 1960 SC 1368 and (9) Kumar Gonsusab and Ors. Vs. Mohammed Miyan Urf Baban and Ors., reported in (2008) 10 SCC 153.

10. I have given due consideration to the above arguments advanced by the learned counsel of both sides and perused records including the impugned judgment and decree as well as the citations.

11. A perusal of the pleadings of the plaintiff and the defendants No. 1 to 6, it is revealed that the plaintiff and the defendants No. 1, 2 and 3 are close relatives being belonged to the same family and the defendants No. 4, 5 and 6 are purchasers of the suit land from the defendants No. 1, 2 and 3. The plaintiff in

his plaint and evidence as P.W. 1 claimed to be the joint pattadar of the suit land measuring 1 Bigha 1 Katha out of a plot of 2 Bighas covered by Dag No. 60 of P.P. No. 109, located at Moirabari Town Kissam under Moirabari Mouza, District Morigaon, Assam, out of which 1 Bigha was purchased from the original pattadar Smti. Geeta Kumari Borah jointly by himself and defendant No. 1, his sister while another 1 Bigha of land was purchased jointly by defendant Nos. 1 and 2 from the said original pattadar namely Geeta Kumari Borah by executing two separate sale deeds, followed by delivery of possession.

12. It is noticed that Ext.-1, certified copy of the registered sale deed shows that the defendants No. 1, 2 and 3 sold the suit 1 Bigha 1 Katha myadi land in favour of the defendants No. 4, 5 and 6, on 12.01.2017, out of 2 Bigha land covered by Dag No. 60 of P.P. No. 109 of Moirabari town Kissam under Moirabari Mouza, which is described in the schedule of the suit land, whereas Ext. 2, certified copy of jamabandi shows that the names of the plaintiff and the defendants No. 1, 2 and 3 were mutated as co-pattadars against 1 Bigha of land by purchase from the original pattadar namely Smti. Geeta Kumari Borah out of her said 2 Bighas of land covered by the same dag and patta Nos. These facts have come in the evidence of P.W. 1, plaintiff. However, the plaintiff has not examined any witness concerned of the office of the Sub-Registrar, Morigaon and office of the Circle Officer (Revenue), Laharighat to prove the aforesaid two documents although their examination was necessary in view of denial by the defendants that plaintiff was the joint pattadar of the suit land along with the defendants No. 1, 2 and 3 and primary documents were being not produced as well as non-examination of the original pattadar (seller) namely, Smti. Geeta Kumari Borah.

13. It is a settled principle of law that a person can only transfer to other person a right, title or interest in any tangible property which he is possessed of to transfer it for consideration or otherwise. It is prima facie noticed that on the date of sale of the suit land, the defendants No. 1, 2 and 3 as it appears had no exclusive subsisting right, title or interest over it and further, there is no evidence to show that division of share with metes and bounds amongst the co-pattadars was effected.

14. On the other hand, from the evidence of D.W. 1, it appears that by Ext. 'Ka', registered sale deed, dated 11.06.1996, defendants No. 1 and 3 purportedly purchased the suit land from the pattadar Smti. Geeta Kumari Borah followed by delivery of possession to them. However, the aforesaid purchased land schedule does not tally with the schedule of the suit land. Additionally, later on, by Ext. 'Kha', sale deed, dated 11.02.1997, D.W. 1 purchased 2 Kathas 10 Lechas land on 11.02.1997 from one Abdul Kuddush (not examined) followed by delivery of possession, which was purportedly a part of the suit patta. It further appears that Ext. 'Ga', certified copy, has been exhibited as Ext. 2 by P.W. 1, plaintiff as discussed above. However, as it appears from the evidence of D.Ws 1 and 2, the defendants No. 4, 5 and 6 purchased the suit land by executing a registered sale deed, dated 13.02.2017, vide Ext. 'Gha' from the defendants No. 1, 2 and 3, but

the aforesaid schedule of the land mentioned in Ext. 'Gha' was modified by a registered deed, dated 06.07.2017, vide Ext. 'Unga' inserting the names of the defendants No. 1, 2 and 3 on the north in place of Abdul Kadir Master, who is shown resident/land owner on the north of the suit land. It is noticed that this schedule modification deed (Ext. 'Unga') was executed between the same parties on 06.07.2017 after the plaintiff instituted the Title Suit No. 04/2017 on 12.04.2017.

15. It is further noticed that D.W. 1, in his cross-examination, inter-alia, stated that the plaintiff purchased the suit land from Udbav Bora and Gita Kumari Bora, son and daughter-in-law of Harendara Nath respectively and out of the same dag No. purchased 2 ½ Kathas land. Accordingly, the plaintiff has been in possession of the aforesaid purchased plot of land by raising Assam Type pucca house and let out to tenants. He further stated that he sold out 6 Kathas of land on 13.02.2017 and on the following day, delivered possession to the purchasers-defendants No. 4, 5 and 6 with the help of the Circle Officer (Revenue) and Mandal. A perusal of the evidence of D.Ws 1 and 2, it is revealed that the aforesaid sale of land was effected with consent of the plaintiff and at his initiative and further, when he declined to purchase it. It is, however, noticed that the plaintiff did not stand even as witness to execution of the sale deeds exhibited by the defendants nor the defendants as has been omitted by the plaintiff, no official of the offices of Sub-Registrar, Moirabari and Circle Officer (Revenue) concerned was examined to effectively establish the purported executions of the aforesaid exhibited registered instruments and as pleaded, followed by delivery of possession to the purchasers officially. Neither party exhibited any document in testimony of delivery of possession of land after execution of the sale deeds nor examined any independent witness in proof of mode of possession although there is respective claim of physical possessions thereon.

16. In the instant suit, the basic issue, inter-alia, is whether the plaintiff, who is claimed to be the co-sharer has right to pre-emption of the suit land sold by defendants No. 1, 2 and 3 in favour of the defendants No. 4, 5 and 6 vide Ext. 'Gha' the registered sale deed, dated 13.02.2017 and if so, whether the aforesaid registered instrument is liable to be cancelled declaring the same to be illegal and void. So far the first part is concerned, it appears that the learned trial Court omitted to frame a specific issue as to whether the plaintiff is the co-sharer/co-pattadar of the suit land, which has an intimate bearing on the issue No. 3 and the issue whether the sale deed, dated 13.02.2017 could be declared as illegal and void.

17. With regard to the right of pre-emption, it may be noted that it is a preferential right to acquire the property by substituting the original vendee. Where the plaintiff, alleged pre-emptor has sufficient evidence to establish his right, he may demand his right of pre-emption by adducing some amount of evidence. Therefore, the burden of prove lies on him to establish it. On perusal of

the pleadings of both sides, it is revealed that the plaintiff claimed his right of pre-emption orally conveying his intention in presence of two witnesses namely (1) Tarekul Islam (P.W. 2) and (2) Hussain Mohammad Ahia (P.W. 3) to the defendants before and immediately after the sale was effected following the rules of Talab-i-mowasibat and talab-i-ishhad. This plea is, however, denied by the defendants pleading that the plaintiff declined to exercise his aforesaid right of pre-emption and himself consented to the sale transaction by arranging/ contacting prospective buyers and finally, to the vendee defendants No. 4, 5 and 6. It may be reiterated herein that in the sale deed, dated 13.02.2017, the plaintiff, who is the brother of the vendor, defendant No. 1, did not stand as attesting witness to its execution and the plaintiff termed its execution as behind his back, who claims to have the right of pre-emption.

18. In Paragraph No. 13 of Ali Hussain Mazumder (supra), a single Bench of this Court reproduced the definition of Section 226 of the Principles of Mahomedan Law by Mulla which relates to definition of Pre-emption as hereinbelow extracted-

"13.....

"S.226. Pre-emption. The right of shuffaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which had been sold to another person."

Section 231 of the Principles of Mohammedan Law by Mullah prescribes as follows:

"S.231. Who may claim pre-emption. The following three classes of persons and no others, are entitled to claim pre-emption, namely:-

(1) A co-sharer in the property (w) [shafi-i-shark]:

A Mukarraridar (lessee in perpetuity) holding under a co-sharer has no right to pre-empt as against another co-sharer (x);

(2) A participator in immunities and appendages, such as a right of way of a right to discharge water (y) [shafi-i-khalit];

(3) Owners of adjoining immovable property (z) [shafi-i-jar], but not their tenants (a) nor persons in possession of such property without any lawful title

(b) [Baillie, 481]. A wakif or mutawalli is not entitled to pre-empt, as the wakf property does not vest him (c)

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal share of the property in respect of which the right is claimed [Baillie 500]."

19. In Paragraph No. 2 of Mohd. Noor (supra), the Honb'le Supreme Court held that-

" 2. Right of pre-emption has not been looked upon favourably as it operates "as a clog on the right of the owner to alienate his property". In Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi [AIR 1960 SC 1368 : (1961) 1 SCR 248] , it was observed that "to defeat the law of pre-emption by any legitimate means" was not fraud. Therefore, availability of this weak or archaic right has to be construed strictly. In the Act, there is no provision extending the benefit of pre-emption to agricultural holdings. A person claiming pre-emption, therefore, has to squarely fall within the four corners of the provisions contained therein.

20. In Paragraphs No. 19 and 20 of Kumar Gonsusab (supra), the Hon'ble Apex court held as follows (relevant part)-

"19. We should not be unmindful of the fact that there are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. It is well settled that it would be open to the pre-emptee, to defeat the law of pre-emption by any legitimate means, which is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means.

20. That apart, it is now well settled that the right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts cannot go out of their way to help the pre-emptor."

21. In Paragraph No. 14 of Radhakishan Laxminarayan Toshniwal (supra), the Hon'ble Apex court held as follows (relevant part)-

"14.The right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts could not go out of their way to help the pre-emptor."

22. In Paragraph No. 20 of Nurul Islam Mazarbhuiya (supra), a single Bench of this Court held as hereinbelow extracted-

"20. Talab-i-mowasibat and talab-i-ishhad are conditions precedent for exercise of the right of pre-emption. Talab-i-mowasibat may not be performed in the presence of witnesses and it is enough if the pre-emptor makes known his intention in some way. However, the essence of talab-i-ishhad is that it should be performed before at least two witnesses. On certain occasions, talab-i-ishhad may combine with talab-i-mowasibat as in the case where at the time of talab-i-mowasibat, the pre-emptor had an opportunity of invoking the witnesses in the presence of the seller or the buyer or on the premises to attest the talab-i-mowasibat and the witnesses are, in fact, invoked to attest it."

23. In Paragraph No. 10 of Ajijur Rahman Barbhuiya (supra), a single Bench of this Court held as hereinbelow extracted-

"10. It is well settled that the law relating to exercise of right of pre-emption is of a highly technical nature. Talab-i-mowasibat and talab-i-ishhad are conditions

precedent for exercise of the right of pre-emption. The rules relating to aforesaid two talabs must be strictly complied with. Presence of the witnesses at the time of talab-i-ishhad is also important. It is for the pre-emptor to prove the fulfilment of all the requirements to sustain his claim for pre-emption. However, once the pre-emptor succeeds in adducing satisfactory evidence in regard to fulfilment of the aforesaid requirements, his claim cannot be rejected on hypertechnical interpretation of the formalities or on microscopic examination of the evidence to find some fault here or there. In any event, the Court should examine the evidence and materials on record in regard to the observance of the formalities in a judicial manner keeping in view the practical and real state of affairs and also the fact that when the Mahomedan Law has given such a right to a person, it should not be whited away by insisting hyper-technical and unrealistically strict compliance of the formalities accompanied with its exercise. It must be remembered that "formalities" after all are only formalities intended to serve some ostensible purpose and once that purpose is served, these should not be allowed to be used to take away the legal right of a claimant. "Formalities" in no case should be allowed to operate beyond the field allotted to them by law."

24. In Paragraphs No. 19 and 20 of Satish Kumar Gupta (supra), a division Bench of this Court held as hereinbelow extracted-

"19. The other part of the impugned order permitting additional evidence and remanding the case for fresh decision is uncalled for. No case was made out for permitting additional evidence on settled principles under Order 41 Rule 27 CPC. The provision is reproduced below:

"27. Production of additional evidence in appellate court.—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, The appellate court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.

20. It is clear that neither the trial court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to be necessary to pronounce

the judgment. Additional evidence cannot be permitted to fill in the lacunae or to patch up the weak points in the case [N. Kamalam v. Ayyasamy, (2001) 7 SCC 503, pp. 514-16, para 19]. There was no ground for remand in these circumstances.”

25. In Paragraph No. 12 of Mahendrakumar Parshottambhai Desai (supra), a division Bench of this Court held as hereinbelow extracted-

12. Mr Sorabjee appearing on behalf of the respondents rightly submitted that Order 41 Rule 27 of the Code of Civil Procedure cannot be invoked by a party to fill up the lacunae in his case. The State found itself in a dilemma when confronted with two sets of documents conflicting with each other. There was no plea that the documents sought to be produced by way of additional evidence could not be produced earlier despite efforts diligently made by the State or that such evidence was not within its knowledge. In fact no ground whatsoever was made out for adducing additional evidence, and the sole purpose for which the State insisted upon adducing additional evidence was to persuade the Court to accept the point of view urged on behalf of the State, since the evidence on record did not support the case of the appellant State. Having considered all aspects of the matter we are satisfied that the High Court rightly rejected the applications filed by the State for adducing additional evidence at the stage of appeal which was intended only to fill up the lacunae in its case.

26. In Paragraphs No. 36, 37, 38 and 48 of Ibrahim Uddin (supra), the Hon’ble Supreme Court held as hereinbelow extracted-

“Order 41 Rule 27 CPC

36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a

document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence.

48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."

27. It is noticed that the plaintiff has claimed to be the co-sharer/co-pattadar of the suit land, which is a commercial plot of land at Moirabari Town, along with the defendants No. 1, 2 and 3, who are close relatives and further, that he has been possessing the suit land by raising houses thereon. The plaintiff has, therefore, claimed his right to pre-emption over the suit land which the defendants No. 1, 2 and 3 have sold out to the defendants No. 4, 5 and 6 by executing two separate sale deeds as stated above. Therefore, the plaintiff has been asserting his purported right of pre-emption, which according to him, conveyed his aforesaid intention in presence of, inter-alia, two witnesses, namely Tarikul Islam (P.W. 2) and Hussain Mohammad Ahia (P.W. 3), who are material witnesses and P.W. 4 in the suit but, by order, dated 09.08.2018, their evidence stood expunged as they were not produced for cross-examination by the defendants despite granting of several opportunities. Therefore, without their complete evidence on the issue of pre-emption along with the evidence of P.W. 1 it has become inconvenient for this appellate Court to decide it effectively.

28. A perusal of the suit record and the issues framed, it is revealed that the learned trial Court omitted to frame specific issues as to whether the plaintiff is a co-pattadar /co-owner of the suit land and whether the plaintiff is entitled to a declaration that the Sale Deed, dated 13.02.2017 is illegal, void and not binding upon the plaintiff, which are the crux issues between the parties.

29. In the premises, the appeal stands allowed and the matter is remitted back to the learned trial Court with direction to allow the appellant/plaintiff with a cost of Rs.5,000/- (Rupees Five Thousand) as condition precedent to be paid to the defendants to produce P.Ws No. 2, 3 and 4 for the purpose of their cross-examination by the defendants and also to allow re-examination of the D.Ws, if so desired and then, to render a fresh judgment on the contesting issues of the parties preferably within a period of 6(six) months or alternatively, if so desired by both the parties to refer to the mediation centre for resolution of their grievances in issue in terms of Section 89 of the CPC.

30. Be it mentioned here that no observation made in course of this Judgment and Order shall have any bearing on the judicial discretion of the learned trial Court.

Accordingly, the appeal stands disposed of.

Return the LCR.