

3 SCOB [2015] HCD 59**HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)**

Civil Revision No. 706 Of 1998

Mr. Goutam Kumar Roy, Advocate.
For the petitioners.**Sree Monohar Chandra Biswas &
others**Mr. Kalipada Mridha, Advocate.
For the opposite parties.

.....Petitioners.

Sreemati Laxmi Rani Sikder & others.Heard on: The 27th November, 7th and 8th
December, 2014, 11th, 12th and 14th
January, 2015.

....Opposite parties.

Judgment on : The 31st March, 2015.**Present:****Justice Md. Emdadul Huq****Deed of Gift:**

There is nothing on record to show that Promoth Nath was a man of unsound mind or that plaintiff had any relationship with Promoth Nath whatsoever so as to take him to the Sub-Registry office and to fraudulently get the kabala executed by Promoth Nath. Defendants never raised any question on this aspect in any manner.

The above statement of the executant considered with the rent receipts showing payment of rent for the suit land by the plaintiff for the years 1981 to 1994 and the fact of silence of the two sons of Promoth Nath (defendant No.1 and 2) in not challenging plaintiff's kabala and the fact of physical possession of the plaintiffs lead me to conclude that plaintiffs' purchase is genuine and that their kabala dated 07.06.1980 was acted upon and that the earlier deed of gift dated 10.01.1979 purportedly made by Promoth Nath in favour of his son was a mere paper transaction so far the suit land is concerned.

... (Para 58 & 59)

Judgment**Md. Emdadul Huq, J:**

1. The Rule issued in this Civil Revision is about sustainability of the judgment and decree dated 26-01-1998 by which the learned Additional District Judge, Magura allowed Title Appeal No. 182 of 1996 and thereby dismissed Title Suit No. 89 of 1994 on reversing the judgment and decree dated 7-10-1996 passed by the learned Assistant Judge, Mahammadpur, Magura in the said suit in favour of the plaintiff-petitioners.

2. **Plaintiffs Case:** In the above noted suit the petitioners as plaintiffs prayed for the following three relieves:

- (1) declaration of their title to and conformation of possession over the suit land measuring 20 decimals as described in the schedule to the plaint,

(2) a declaration that the two transfer documents in respect of the suit land being the deed of gift dated 10-01-1979 purportedly executed by Promoth Nath in favour of his son being defendant No. 2, Amal Kumar and the registered kabala dated 27-07-1994 executed by defendant No. 2 in favour of his brother's wife being Laxmi Rani, defendant No. 2(ka), are collusive, void and not binding upon the plaintiffs, and

(3) for a permanent injunction restraining the defendants from disturbing plaintiffs possession over the suit land.

3. The plaintiffs claim that they have purchased the suit land by a kabala dated 07.06.1980 executed by the original owner Promotha Nath being the father of defendant Nos. 1 and 2. Since purchase, plaintiffs have been in continuous possession and paid rent to the Government. But, in the 1st part of Jasitha, 1401 B.S., the defendant Nos. 1 and 2 threatened to dispossess the plaintiffs and to sell out the suit land. Later on, plaintiffs came to know that defendant Nos.1 and 2 have created a false and collusive transfer deed dated 27.07.1994 in favour of defendant No. 2(ka) being wife of defendant No.1 on the basis of a deed of gift dated 10.01.1979 purportedly executed by their father Promoth Nath in favour of one of his son being defendant No.2. Hence the suit.

4. **Case of defendant No. 2(ka).** This defendant, Laxmi Rani, is the wife of defendant No. 1 Subodh Kumar. She was impleaded in the suit as added defendant on the basis of one of two the disputed transfer documents being the kabala dated 27-07-1994 executed in favour of her by her husband's brother defendant No. 2 Amal Kumar.

5. This defendant admits the original ownership of Promoth Nath Sikder. But she denies title and possession of the plaintiffs by virtue of plaintiffs kabala dated 07-06-1980. She contends that the suit is not maintainable and that it is barred by limitation and bad for defect of party.

6. She claims that her father-in-law Promoth Nath, by a registered deed of gift dated 10-01-1979, transferred the suit land along with other lands in favour of his son Amal Kumar (defendant No.2) from whom she has purchased the suit land and other lands by a kabala dated 27-07-1994. Since then she has been possessing the suit land through a bargader named Abdul Khaleque.

7. **Deliberation at the hearing in Revision:** At the hearing of this Revision, Mr. Goutam Kumar Roy, the learned advocate for the petitioner-plaintiffs, submits that the appellate Court failed to consider that this suit was instituted on 07.07.1994 and that the contesting defendant No. 2(ka) claims the suit land after institution of the suit on the basis of the kabala dated 22.07.1994 and therefore this transfer is hit by section 52 of the T.P.Act, 1882 (**shortly the Act, 1882**).

8. Mr. Roy, the learned advocate next submits that the appellate Court also failed to consider that defendant No.1, being vendor of defendant No.2 (ka) never contested the suit nor did appear as a witness to support the case of the alleged gift by his father in favour of himself or to support the subsequent transfer in favour of his brother's wife being the contesting defendant No.2 (ka).

9. Mr. Roy, the learned advocate, further submits that the appellate court also failed to consider that the plaintiffs have produced sufficient and credible evidence to prove their title

and possession and that the alleged deed of gift dated 10-01-1979 by the original owner in favour his son (defendant No.2) was never acted upon.

10. In support of his submission Mr. Roy, the learned advocate, refers to the cases of Abdul Mazid Howlader and others vs. Lehaj Uddin Howlader and others reported in 16 B.L.D (AD)(1996), page-197 and to the case of Afaz Uddin Molla and others vs. Moyez Uddin reported in 1985 BLD(AD), page-54.

11. **In reply** Mr. Kalipada Mridha, the learned advocate for the opposite party defendant No. 2(ka), submits that the appellate Court, upon discussion of the oral and documentary evidence on record, rightly held that the deed of gift dated 10-01-1979 executed by the admitted owner Promoth Nath in favour of his son (defendant No.2) was a deed prior to that of plaintiffs' kabala dated 27-06-1980 and therefore no title passed on to the plaintiffs.

12. Mr. Mridha,, the learned advocate, next submits that the possession of defendant No.2(ka) has been proved by credible witnesses and therefore no interference from this Court is necessary on those questions of fact.

Findings and decisions in Revision:

13. The impugned judgment passed by the appellate Court is one of reversal. So I have perused all the materials on record including the judgments passed by the courts below and the evidence adduced by the parties.

14. Admittedly the suit land belonged to Promoth Nath which is further evidenced by the exparte decree obtained by Promoth Nath in Title Suit No. 461 of 1968 (Exhibit-1-1(ka) in respect of correction of the S.A. record wrongly prepared in the names of one Mohiuddin and others.

15. Both the parties claim their title and possession as the successor-in-interest of the admitted owner Promoth Nath. The plaintiffs claim the suit land on the basis of the kabala dated 07.06.1980 (Exhibit-2) executed by Promoth Nath himself. On the other hand, claim of the defendant No.2(ka) is based on the gift deed that was executed by the same owner before the kabala of the plaintiffs i.e. by the deed of gift dated 10-01-1979 (Exhibit-ka) in favour of defendant No. 2 being the son of Promoth Nath. Defendant further claims that she purchased the suit land the kabala dated 27.07.1994 from the said son of Promotha Nath.

16. So the principal issue before this court is whether plaintiffs have acquired any title to the suit land by virtue of their kabala dated 07-06-1980 which is subsequent to the disputed deed of gift dated 10-01-1979 in favour of defendant's vendor.

17. On this question of fact, the trial Court has endeavored to decide as to whether the respective title documents of the parties was acted upon and accordingly focussed its discussion on the possession aspect.

18. The trial Court, with reference to the statements of the P.Ws. and D.Ws., recorded findings to the effect that the plaintiffs could prove their possession by producing credible oral evidence and also the rent receipts (Exhibit- 3 and 3(ka)). The trial Court disbelieved the D.Ws. upon recorded reasons that D.Ws. 1-4 were interested witnesses and D.W. 5 made statements contradictory to those of D.W.1 being husband of the contesting defendant No.2(ka).

19. On the contrary, the appellate Court recorded a finding that the deed of gift dated 10-01-1979 executed by Promoth Nath in favour of his son defendant No. 2 being vendor of defendant No. 2(ka) is a document prior to that of plaintiffs' kabala dated 07-06-1980 and therefore the deed of gift is to be pre-sumed as valid unless the plaintiffs can prove that the said gift deed was fraudulent.

20. I agree with the above reasoning of the appellate court with regard to the presumptive value of the said deed of gift and plaintiff's burden to disprove it. In discharging the said burden, plaintiffs appears to endeavored to prove their possession over the suit land.

21. But the appellate court discarded credibility of the P.Ws. on the reason that they have made statements contradictory to one another with regard to the relevant aspects of plaintiffs' possession, namely whether the plaintiffs particularly plaintiff No.1 (P.W.1) himself cultivated the suit land or through the bargardar, and the time of cultivation and the person who actually ploughed the land.

22. The appellate Court further recorded a finding that the plaintiff No. 1 as P.W. 1 could not state the date of the alleged threat and the cause of action of the suit.

23. Thus it is evident that the oral evidence with regard to possession is part of the material evidence on the fact-in-issue. The findings of the appellate court as the last court on the question of fact is to be generally taken as correct, unless such finding suffers from the defect of non consideration or misreading of material evidence.

24. On perusal of the evidence on record, it is revealed that the appellate court has not only misread the evidence on record but also recorded distorted version of the deposition of the P.Ws. This will be clear from the following discussion.

25. The appellate Court has recorded the following findings (*underlines added*):

“বাদী..... আরজিতে বলিয়াছেন নিজ চাষাবাদে নালিশী জমি দখল করে। অথচ জেরায় বলিয়াছেন নিজ হাতে নালিশী জমি চাষ করি না। নালিশী জমিতে প্রথমে দখলে যাওয়া তখন নালিশী জমিতে কি ফসল ছিল, কে ফসল করে, নালিশী জমির ফসল বাদী কর্তৃক ভাগ নেওয়া, বর্তমানে নালিশী জমিতে কি ফসল আছে, এর পূর্ববর্তী কয় এক বছরে কি ফসল কে কিভাবে বুনে ও তোলে, নালিশী জমি কাহার দ্বারা চাষ করা হয় এই সব বিষয়ে পি ডব্লিউ. ১, ২, ৩ ও ৪ এর জেরায় অনেক পার্থক্য পরিলক্ষিত হয়। পি ডব্লিউ ৩ এবং ৪ জেরায় বলিয়াছেন নালিশী জমি চাষ করে তবিবর অথচ পি, ডব্লিউ, ১ এবং ২ তবিবর নালিশী জমি চাষ করে তাহা বলে নাই”।

26. The above findings of the appellate Court is the result of misreading and non-consideration of the text of the deposition of the P.Ws. as quoted below.

27. P.W. 1 being plaintiff No. 1 in the line of his plaint, stated in examination in chief as follows:

“এই জমি দখল করি। আমরা উত্তর পাশ থেকে .২০ শতক খাই। নাম পত্তনের জন্য ৪৬১/৬৮ নং মামলার রায় ডিক্রি ১নং বিবাদীর কাছে চাইতে যাই। রায় ডিক্রি দেয় নাই। অন্যত্র হস্তান্তরের ও আমাদের বেদখলের ভয় দেখায়.....”।

28. “P.W. 1 stated in cross-examination as follows:

“..... নিজ হাতে জমি চাষ করিনা। লোকজন ও ছেলে চাষ করে। এই জমি নিজ চাষাবাদে আছে। আমি নিয়েছি ০৭.০৬.১৯৮০ সালে। জমিতে আমন ধান ছিলে। ধানের রাজভাগ দেয় প্রমথনাথ নিজে ও তাহার ছেলেরা ফসল ভাগ করিয়া দেয়। রাজভাগ নেওয়া সাক্ষীর কাছে দেখেছে। চলতি জরিপ ১৯৯৫ সালে শুরু হয়। চলতি জরিপ বাংলা ১৪০২ সালে শুরু হয়। জরীপের আগেই নাম পত্তন শুরু করতে যাই ইং ১৯৯৫ সালে। নাম পত্তন করিতে যাই তখন ১নং বিবাদীর কাছে কাগজপত্র চাই।..... ১ নং বিবাদী বলেছে জমি পাবেনা.....”

29. The above deposition of P.W. 1 clearly refers to the time of the alleged threat and the mode of his possession. He has stated the detailed manner of his cultivation, i.e. at the time of immediately after purchase from Promoth Nath and also at the subsequent times.

30. P.W. 2 শচীন্দ্র চন্দ্র পাঁড়ে is a resident of the suit village and owner of the contiguous land. In his examination in chief and cross examination on 22.07.1996, P.W. 2 supported possession of the plaintiffs. He stated as follows:

“নালিশী জমির পাশে আমার জমি আছে। বাদীরা এ জমি দখল করে। অমল লক্ষীরানী এ জমি খায় নাই। প্রমথ নাথ শিকদারের লেখা চিনি। দলিলে পমথ নাথের সই আছে।

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প্রমথ নাথ ১২/১৪ বছর এগ মারা যায় অনুমান। বর্তমানে দখল মনোহর বিশ্বাস (plaintiff/P.W.1) তাহার ১৫/১৬ বৎসর হয় দখল। মনোহর যখন জমি খরিদ করে তখন আউশ আমন ধান ছিল..... এ বৎসর আশ্বিন মাসে ধান কাটে মনোহরের ছেলে

..... এখন নালিশী জমিতে আউশ আমন আছে। মনোহরের বড় ছেলে ধান বোনে। ধানের আগে খেসাড়ী কালাই। খেসাড়ীর আগে আউশ আমন ছিল।..... ঐ আউশ ধান কাটে হিমাংশু, সুধাংশু ও জনে কাটে। আউশ ধান কাটার সময় পাশে বিশ্ব তবিবর ছিল”।

31. P.W. 3 (সুধীর কুমার বিশ্বাস) and P.W. 4 Bishwa Nath Kumar are co-villagers of the plaintiffs. They made statements similar to those of P.W. 2 and supported plaintiffs possession from the time of their first possession and also the fact of their present possession and the fact that two persons named Harbilash and Tabibar were workers under plaintiff Monohor.

32. P.W.4 further stated in cross-examination as follows:

“সাক্ষী সুধীর (P.W.4) আমার চাচাতো ভাই। মনোহরের প্রথম দখল জানি তখন আমার বয়স ১৬/১৭ বছর। মনোহর যখন জমি নেয় তখন ধান ছিল জমিতে বৈশাখ মাসে ধানের বর্গা ভাগ মনোহরকে সুধীর বাবু ১নং বিবাদী”।

33. The misreading of the oral evidence of P.W.4 by the appellate court is evident with regard to its finding about the relationship of plaintiff and P.W. 4. The appellate court recorded a perverted finding that “পিডব্লিউ ৪ বাদীর চাচাত ভাই”

34. But P.W. 4 in fact stated that “সাক্ষী সুধীর (P.W. 3) আমার চাচাত ভাই” and P.W.4 nowhere stated his relationship with the plaintiff.

35. There is nothing on record to show that any of the three co-villagers (P.W. 2-4) are interested witness or their testimony can be otherwise discredited.

36. All the 4 P.W's consistently stated that plaintiffs have been in possession of the suit land since immediately after purchase from Promoth Nath 15/16 years ago i.e. in 1980, that at the time of purchase there was paddy on the land previously grown by Promoth Nath, that after harvest this paddy was divided between the vendor and the plaintiff, that at the time of such division, son of Promoth Nath himself i.e. Subodh (defendant No. 1) was present.

37. All the 4 P.W's consistently stated the manner of plaintiffs' possession that plaintiff himself cultivates the land with the help of his son and some time with the help of others like Harbilash and Tabibar. This aspect of the evidence was also misread by the appellate court.

38. On the contrary, D.W. 1 being Subodh Kumar (defendant No.1) and the husband of contesting defendant Laxmi Rani No.2(ka) deposed on behalf of Laxmi Rani. He made contradictory statement with regard to the mode of possession of his wife. In examination in chief, he stated that..... “আব্দুল খালেক বিশ্বাস এই জমির বর্গা করে তাহার মাধ্যমেই দখল করি। অমল কুমারের (defendant No.2) দখল দেখেই লক্ষীরানী কিনেছে।”

39. But, in cross-examination D.W. 1 stated that “লক্ষীরানী কোন মাসে প্রথম দখলে যায় বলিতে পারিনা লক্ষীরানী বর্গা দেয় নাই।”.

40. D.W. 2 Abdul Khaleque stated that he had been cultivating the land as bargader under Laximi Rani for the last two years i.e. before his deposition on 31-08-1996 and before that he had been a bargadar under Amal Kumar.

41. D.W. 3 Prohash Kumar stated that Laximi Rani possesses the suit land through the bargader Mj-mL. But D.W.3 is silent asto whether this bargadar was ever in possession under the vendor Amal. However in cross –examination he stated that “২নং বিবাদীর শশুর আমার আপন খুড়তুতো ভাই। গত শ্রাবন আগে চৈত্র মাসে লক্ষীরানী আঃ খালেককে বর্গা দেয়.....।”, Which means that he is a close relative of defendant No.2 i.e. brother of D.W.1 and hence an interested intents.

42. D.W. 4 stated that he is a day laborer working at the house of Laximi Rani and that he, on behalf of Laxmi Rani collected paddy from bargadar Khaleque. This witness is clearly an interested witness.

43. D.W. 5 stated that he holds land near the suit land and that Laxmi Rani possess the suit land through bargader Khaleque and that before her, Amal used to possess the suit land. D.W.5 appears to be a disinterested witness but made statements which is vitally contradictory to D.W.1 with regard to bargadar.

44. The vendor of Laxmi Rani being defendant No. 2 has not come up to contest the suit or to give testimony.

45. All the 5 D.W's (D.W.1-5) stated about possession of Laxmi Rani (defendant No. 2ka). But D.W. 1 husband Laxmi Rani clearly made contradictory statement about such possession through bargadar Abdul Khaleque (D.W.2), in that D.W. 1 denied cultivation through any bargadar “লক্ষীরানী বর্গা দেয় নাই”.

46. Again the bargadar (D.W.2) claimed to be the bargadar under Laxmi Rani and also under her vendor Amal i.e. brother of D.W. 1. But all the other D.W's are silent about the bargadarship of Khaleque (D.W.1) under Amal.

47. Evidently the testimony of the D. W's are inconsistent and also condictory to the deposition of D.W.1.

48. The above discussion of the evidence on record clearly show that the appellate Court totally misread the material oral evidence on record and also recorded distorted version of material of the deposition of P.W's.

49. The trial Court recorded its finding correctly on the basis of the evidence on record with regard to possession.

50. I agree with the finding and decision of the trial Court that the plaintiffs have been able to prove their possession.

51. Apart from the aspect of physical possession of the plaintiff, the other important aspect of the scenario is that the plaintiffs are not in any way connected with the admitted owner Promoth Nath. So, in ordinary course, they are not expected to possess the suit land or to pay any rent or to have the custody of the rent receipts. The two rent receipts Exhibit- 2 and 2(ka) show that Monohor (plaintiff No.1) had paid rent for the suit land recorded in the name of Mohiuddin and others in the year 1981 and lastly paid rent in 1994. These two documents corroborate the fact of plaintiff's possession.

52. The rent receipts, Exhibit-3 and 3ka showing payment of rent by plaintiff No.1 (Monhor) in the name Mohiuddin Nw are consistent with the decree (Exhibit-2 and 2(ka) obtained by Promoth Nath against Mohiuddin and others in whose names the S.A record was wrongly prepared. The rent receipts and the decree are also consistent with the claim of the plaintiffs and statement of P.W.1 that they requested the defendants for delivering the copy of the decree for obtaining mutation in favour of this plaintiffs.

53. The other document being the deed of gift dated 10-01-1979 (Exhibit- Ka) shows that Promoth Nath made a gift in favour of his son Amal Kumar (defendant No.2) and thereby transferred 20 decimals out of the non disputed Plot No. 679 and 20 decimals out of the suit Plot No. 771. But the said donee has not contested the suit nor was he produced by the contesting defendant No. 2(ka) as a witness.

54. It is noted that the manner of recording the signature of Promoth Nath as the executant of the said deed of gift on various pages particularly of page No.2 and 3 raises a suspicion. Because location of the signatures on these two pages (No.2 and 3) show that there are uneven indenture around the three sides of the signatures indicating that the signatures might have been taken on the two blank pages and thereafter the writings were recorded. It is noted that page No.3 contains the description of the land transferred i.e. the suit land and another parcel of land. Such manner of signature is clearly different to the those of the first and the last page. This aspect of the signatures was not noticed by the courts below.

55. It is further noted that the particulars with regard to stamp vendor and the date of purchase of stamp of the said deed of gift further show that the 1st and last sheet of the document were purchased on 04-01-1979 and those of the aforesaid 2nd and third pages containing different manner of writing and signature were purchased on 22-12-1978 from a different vendor.

56. Such different dates on the stamp-papers by itself do not negate the validity of a document, but strengthens the suspicion expressed above.

57. The above suspicion is re-inforced when considered with the statement made by the same executant Promoth Nath in the affidavit portion of the plaintiff's kabala dated 19.06.1980 that "..... এই সম্পত্তি আমার হস্তান্তর করিবার অধিকার আছে". This significant statement clearly indicates that the executant has asserted that he had not previously transferred the suit land to any other person and thus Promoth Nath denied the truth of making gift of the suit land as claimed by the defendant.

58. There is nothing on record to show that Promoth Nath was a man of unsound mind or that plaintiff had any relationship with Promoth Nath whatsoever so as to take him to the Sub-Registry office and to fraudulently get the kabala executed by Promoth Nath. Defendants never raised any question on this aspect in any manner.

59. The above statement of the executant considered with the rent receipts showing payment of rent for the suit land by the plaintiff for the years 1981 to 1994 and the fact of silence of the two sons of Promoth Nath (defendant No.1 and 2) in not challenging plaintiff's kabala and the fact of physical possession of the plaintiffs lead me to conclude that plaintiffs' purchase is genuine and that their kabala dated 07.06.1980 was acted upon and that the earlier deed of gift dated 10.01.1979 purportedly made by Promoth Nath in favour of his son was a mere paper transaction so far the suit land is concerned.

60. The appellate court failed to consider the above material evidence on record and erroneously reversed the judgment of the trial court, and such reversal has occasioned failure of justice. So interference is necessary in this Revision.

61. The above view is supported by the principle laid down by the Appellate Division in the case of Md. Afazuddin Molla and others vs. Mayezuddin Sheikh being dead his heirs and others (1985 (BLD)(AD) page-55, para-16) and in a number of other subsequent cases.

62. I hold that the deed of gift dated 10.01.1979 and also the kabala dated 20.07.1994 executed by defendant No. 2 in favour of defendant No.2(ka) so far these documents relate to the suit land, are not binding upon the plaintiffs.

63. Accordingly I conclude that the impugned judgment and decree passed by the appellate Court is not sustainable and liable to be set aside and that of the trial Court is to be upheld.

64. However it appears that the trial court, in the order portion, did not record any declaration about the two disputed deeds. The order portion of the trial court should be in conformity with the correct findings of the trial court and should be accordingly modified.

65. In the result, the Rule is made absolute. The judgment and decree dated 26-01-1998 passed by the learned Additional District Judge, Magura in Title Appeal No. 182 of 1996 is hereby set aside. The judgment and decree dated 07-10-1996 passed by the learned Assistant Judge, Mohammadpur, Magura in Title Suit No. 89 of 1994 is hereby upheld with the modification in the order portion of the Judgment passed by the trial Court that the deed of gift dated 10-01-1979 executed by Promoth Nath in favour of defendant No. 2 Amal Kumar, so far it relates to the suit land, and the kabala dated 27-4-1974 executed by defendant No. 2

Amal Kumar in favour of defendant No. 2 (ka) Laximi Rani so far it relates to the suit land, are declared to be not binding upon the plaintiffs.

66. No order as to costs.

67. Send a copy of this Judgment along with the lower court records.