

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No.867 of 2017

Md. Harun Mridha and others

.....petitioners

-Versus-

Md. Ali Kha and others

.....opposite parties

Mr. Mohammad Eunos, Advocate

..... for the petitioners

Mr. Abdul Barek Chowdhury with

Mr. Nawaj Sharif, Advocates

..... for opposite parties 1-6

Judgment on 04.08.2024

This Rule at the instance of the defendants was issued calling upon the plaintiffs to show cause as to why the judgment and decree of the Special District Judge, Barishal passed on 23.10.2016 in Title Appeal No.19 of 2016 dismissing the same affirming the judgment and decree of the Senior Assistant Judge, Sadar, Barishal passed on 29.11.2015 in Title Suit No.105 of 2008 decreeing the suit for partition should not be set aside and/or such other or further order or orders passed to this Court seem fit and proper.

The plaint case, in brief, is that 18.92 acres of land was recorded correctly in the name of Maheruddin alias Mafizuddin to the extent of 8 annas and Saferuddin and Aminuddin to 4 annas each. Mafizuddin thus got 9.46 acres in his share. He had two wives Barujan and Hamidunnessa. Through registered *haba* dated

18.03.1920 he handed over his 14 annas share to Barujan and 2 annas to Hamidunnessa. Hamidunnessa died leaving behind Mafizuddin as heir. In the life time of Mafizuddin his two daughters and wife Hamidunnessa died and as such they did not inherit his land. His wife Barujan became the sole heir of his total land. After Barujan's death her two brothers Ayzaddin and Reazuddin inherited the property left by her. Ayzaddin and Reazuddin remained in possession and sold out 6.95 acres to Mahabbat Ali Kha through a *kabala* dated 24.01.1925 and handed over possession thereof. Mahabbat Ali Kha sold out 1.93 acres to Kasem Ali Mridha, the predecessor of the contesting defendants through a *kabala* dated 16.03.1925 . In RS operation record has been prepared in the name of Kashem Ali to the extent of 10 annas share instead of 6 annas. Mahabbat Ali remained owner in possession of 3.42 acres and died leaving behind his 3(three) sons and 3(three) daughters, plaintiffs herein. RS *khatian* 106 has been prepared in the name of the plaintiffs for 1.31 acres and for Kashem Ali to the extent of 2.92 acres. The plaintiffs have been enjoying the suit land measuring 3.32 acres but the defendants refused to partition the suit land lastly on 05.05.2008, hence the suit for partition claiming *saham* to the extent of 3.32 acres.

Defendants 1(Ka)-1(Cha) and 2-14 contested the suit by filing written statement denying the averments made in the plaint.

They further contended that Mafizuddin had 2(two) wives. His first wife Barujan had a son namely Abdus Salam and daughter Kulsum. His second wife Hamidunnessa had a daughter named Noor Bhanu. Mafizuddin gifted his total share to his 2(two) wives Barujan to the extent of 14 annas and Hamidun Nessa of 2 annas. On his death his two wives Barujan, Hamidunnessa, son Salam and two daughters Kulsum and Noor Bhanu became heirs. Barujan died leaving his only son Salam and daughter Kulsum as heirs. Subsequently, Salam died leaving behind no issues and consequently his sister Kulsum got his share. On the death of Hamidunnessa her only daughter Noor Bhanu became her heir. She died unmarried and as such her sister Kulsum and 2(two) maternal uncles Ayzaddin and Reazuddin became his heirs. Thus Kulsum got 10 annas and Ayzaddin and Riazuddin got 6 annas share in the suit land. Ayzaddin and Reazuddin sold out their shares to Mahabbat Ali through a *kabala* dated 24.01.1925. Subsequently Mahabbat Ali sold his share to Kashem the son of Kulsum Bibi and handed over possession thereof. On the death of Kulsum, Kashem became heir and thus he got 8 annas share by way of purchase and inheritance. Defendants 1-14 are the heirs of Kashem Mridha. They are owners in possession of 8 annas share measuring 9.46 acres out of 18.92 acres. The land of the aforesaid *khatian* has been subsequently recorded in RS *khatian* measuring

16.62 acres and they got 8 annas share measuring 8.31 acres of land. They have dwelling houses, ponds and trees in the suit land and they paid rent in *ejmali* to the concerned. The plaintiffs instituted the suit on false statement and as such it would be dismissed.

On pleadings, the trial Court framed 5(five) issues. In the trial the plaintiffs examined 3 witnesses and their documents were produced as exhibits 1-8 series. The defendants also examined 3 witnesses and their documents were exhibits-‘Ka’ series to ‘Ga.’ However, the Assistant Judge decreed the suit for partition. Being aggrieved by the defendants preferred appeal before the District Judge, Barishal. The Special District Judge, Barishal heard the said appeal on transfer and dismissed it affirming the judgment and decree passed by the trial Court. In this juncture, the defendants approached this Court with this revision and obtained this Rule with an *interim* order of stay of the impugned judgment and decree.

Mr. Mohammad Eunos, learned Advocate for the petitioners takes me through the judgments passed by the Courts below and submits that as per the statement made in the plaint it remains 14.74 acres of land in the suit *khatian* Mafizuddin got 8 annas share therefrom measuring 7.37 acres. As per the deed of gift from Mafizuddin, Barujan got 6.45 acres and Hamidunnessa

got .92 acres. After the death of Hamidunnessa, Mafizuddin got her share of .92 acres. On the death of Barujan and Mafizuddin their only daughter Fuljan got 8 annas share therefrom measuring 3.225 acres of land and her two brothers Ayzaddin and Reazuddin got 1.6125 acres each. The aforesaid two brothers sold out 1.93 acres to Mahabbat Ali on 24.01.1925 through exhibit-4. Although the plaintiffs claimed 5.35 acres through purchase but actually through *kabala* 3.225 acres was transferred to them. Therefore, they can claim only 1.295 acres. They can get a decree to that extent only but both the Courts below without taking the aforesaid fact into account decreed the suit giving *saham* to the plaintiffs to the extent of 3.32 acres which cannot be sustained in law. Therefore, the Rule may be made absolute in part.

Mr. Nawaj Sharif, learned Advocate for the opposite parties opposes the Rule and submits that both the Courts below concurrently found that the plaintiffs became owner and possessor of 5.35 acres by way of purchase and therefrom he sold out 1.93 acres to Mahabbat Ali, the predecessor of the defendants and it remains 3.32 acres to them and accordingly decreed the suit. The finding of both the Courts below is based on evidence and materials on record and well founded. Mr. Sharif then submits that the defendants although claimed that Kulsum a daughter of Barujan inherited the property on the death of Mafizuddin and

Barujan but failed to prove it in evidence. After the death of Mafizuddin and his two wives, their property directly devolved upon the two brothers of Barujan Bibi namely Ayzaddin and Reazuddin who sold a part of it to Mahabbat Ali. Mahabbat Ali subsequently sold a part of it to Kashem Mridha. Therefore, there could be no reason of preparation of the record of rights in the name of Kashem Mridha or their heirs more than the land they have purchased. Mr. Sharif further submits that Kashem Mridha admitting title of Mohabbat Ali through Ayazddin and Reazuddin in respect of whole share purchased land measuring 1.93 acres now he cannot disown the original deed in the name of Mahabbat Ali and claim more property through Kulsum Bibi. He refers to the case of the Privatization Commission vs. Golam Mostafa and others, 31 BLD (AD) 173 and relied on the *ratio* laid therein that a party cannot both approbate and reprobate. He cannot say at one time that a transaction is valid to obtain some advantage to which he could only be entitled on the footing that it is valid, and subsequently for the purpose of securing some further advantage disagreeing with the claim. Mr. Sharif finally submits that the submission made by Mr. Eunos is beyond the pleadings and as such the Rule would be discharged and the judgments passed by the Courts below be affirmed.

I have considered the submissions of both the sides and gone through the materials on record. Both the parties admit that Mafizuddin had 8 annas share in the land of CS *khatian* 15 measuring an area of 18.92 acres and thus he got 9.46 acres therefrom. The plaintiffs claimed that on the death of Mafizuddin and his two wives, the whole property was inherited by the brothers of Barujan namely Ayzaddin and Reazuddin. During possession and enjoyment they sold out 6.95 acres to Mahabbat Ali who therefrom sold 1.93 acres to Kashem Ali Mridha, predecessor of the contesting defendants. The defendants claimed that on the death of Barujan and Mafizuddin, Fuljan got 8 annas share therefrom and Ayzaddin and Reazuddin got 4 annas each. They claimed that Ayzaddin and Reazuddin transferred their share to Mahabbat Ali through exhibit-4 which they were entitled to. Since the defendants claimed that on the death of Barujan and Mafizuddin their daughter Kulsum got share, the onus lies upon them to prove it. On going through the evidence, I do not find that the defendants produced any documentary evidence in the Court in support of the claim. I do not find anything in the record that Kulsum was alive during the lifetime of Mafizuddin or she inherited the property left by him. Moreover, the claim of the plaintiffs that Kulsum and Fuljan died before the death of Barujan and after her (Barujan) death Ayzaddin and Reazuddin inherited

her share is found corroborative by evidence of plaintiffs' witnesses. On going through the contents of exhibit-4(Ka), registered deed dated 18.03.1920, it is found that Kulsum was satisfied by his father Mafizuddin otherwise. On scanning the evidence as a whole it is difficult to hold that Fuljan was alive after the death of Barujan and Mafizuddin. So the claim of the defendants that Fuljan got 8 annas share left by Barujan and Mafizuddin do not stand. The share as has been calculated and argued by the leaned Advocate for the petitioners to show that the plaintiffs have only 1.295 acres of land and they can get a decree to that extent is beyond the pleadings. Moreover, the defendant-petitioners contested the suit and prayed for its dismissal. Therefore, here they cannot claim that plaintiffs are entitled to get a decree to the extent of 1.295 acres. The claim of the plaintiffs through Mahabbat Ali through exhibit-4 dated 24.01.1925 is well founded. Since the defendants' predecessor claimed suit land by way of purchase from Mahabbat Ali admitting his title as has been incorporated in the purchase deed, now they cannot claim that Ayzaddin and Reazuddin sold out excess share to Mahabbat Ali through exhibit-4 to take advantage of the erroneous record of right. The record is found to have been prepared erroneously in the name of the defendants' predecessor for more land than that they purchased through *kabala*. The record of rights prepared in



the name of the predecessor of the defendants namely Kashem Ali Mridha is found erroneous as per their claim through registered *kabala*. The petitioners claimed through his predecessor who purchased it from Mahabbat Ali but they are claiming land as per record which is more than the quantum described in the *kabala*. The above claim of the defendants cannot be accepted and rightly rejected by the trial Court. The trial Court correctly assessed the evidence both oral and documentary and decreed the suit giving *saham* to the plaintiffs to the extent of 3.32 acres which has been affirmed by the appellate Court. I find no wrong in the in the judgments passed by the Courts below for which those can be interfered with by me in revision.

Therefore, this Rule bears no merit and accordingly it is discharged. No order as to costs. The judgments passed by the Court below in hereby affirmed.

The order of stay stands vacated.

Communicate this judgment and send down the lower Courts' record.