

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 443 of 2011

Mohammed Ali Sikder being dead his heirs:

1(Ka) Nazrul Islam and others

.....petitioners

-Versus-

Abdul Khaleque Kazi son of late Tozammel  
Kazi being dead his heirs:

1(Ka) Md. Moksed Kazi and others

.....opposite parties

Mr. Md. Jahangir Alam, Advocate

..... for the petitioners

Mr. Ahmed Nowshed Jamil with

Mr. H.M. Borhan, Advocates

..... for opposite parties 1(Ka)-(Cha)

Judgment on 09.07.2024

This Rule at the instance of defendants 1-6, 8-9 and 10 was issued calling upon plaintiff-opposite parties 1(Ka)-1(Ja) to show cause as to why the judgment and decree of the Joint District Judge, Court No.1, Bagerhat passed on 30.06.2010 in Title Appeal No.182 of 1996 allowing the appeal reversing the judgment and decree of the Senior Assistant Judge (in-charge) Kachua, Bagerhat passed on 27.07.1996 in Title Suit No.21 of 1989 dismissing the suit for declaration of title and partition should not be set aside and and/or such other or further order or orders passed to this court may seem fit and proper.

The predecessor of opposite parties 1(Ka)-1(Ja) as plaintiff instituted the aforesaid suit stating that the suit land measuring 2.565 acres out of 11.49 acres of plots 799, 985, 1002, 1088, 1110,

1112,  $\frac{984}{1010}$ ,  $\frac{1088}{1322}$ , 1089 appertaining to CS *khatian* 618, SA *khatian* 615; plots 9-13, 39, 40, 576, 577, 579, 580, 582, 583 and 587 appertaining to CS *khatian* 345, SA *khatians* 307/308; plot 118 appertaining to CS *khatian* 290, SA *khatian* 251; plot 42 appertaining to CS *khatian* 275, SA *khatian* 233; plots 39 and 41 appertaining to CS *khatian* 323, SA *khatian* 289; plot 44 appertaining to CS *khatian* 321, SA *khatian* 287 of Mouja 69 Tengrakhali under Kachua police station within the district of Bagerhat as described in the schedule to the plaint are the suit lands. Araj Ali Sikder and Nawab Ali Sikder had 8 annas share each in the land of CS *khatian* 618 measuring 2.83 acres. Roimon Bibi, Menhajuddin, Daliluddin and Kaderuddin were the owners in possession of 6.68 acres of CS *khatian* 345. Romon Bibi, Menajuddin, Daliluddin, Kaderuddin and Hashem Ali Hajra were owners in possession of .32 acres of CS *Khatian* 290. Roimon Bibi died leaving behind two sons Araj Ali and Nawab Ali. Araj Ali and Nawab Ali were owners in possession of .26 acres, 1.30 acres and .14 acres, in equal share of CS *khatians* 275, 323 and 321 respectively and thus Araj Ali Sikder became owner in possession of 3.4350 acres including .05 acres by settlement. Araj Ali transferred 3.4350 acres to this daughter Fuljan Bibi and son-in-law Akub Ali through *heba* dated 13.05.1947. Akub Ali transferred 1.6925 acres to his maternal aunt Fuljan through *kabala* dated 13.05.1959. Fuljan transferred .43 acres to Sayedunnesa on

13.05.1947 through a *heba*. Fuljan Bibi got married with Khayer Ali and thereafter with plaintiff 2 Abdul Khaleque Kazi. She died leaving behind a son, *i.e.*, defendant 49(Ka) and husband Abdul Khaleque Kazi and they inherited the land measuring  $2.72\frac{1}{2}$  acres. Plaintiff and defendant 49(Ka) sold out .38 acres to defendant 49 and they remained in possession of .585 acres and 1.755 acres respectively. The defendants claimed title over the suit property on 30 Chaitra, 1395 BS and refused to apportion the same. Hence, the suit for declaration of title and partition claiming his *saham* to the extent of .585 acres out of 11.42 acres as described in the schedule to the plaint.

Defendants 1-6, 8-9 and 10 contested the suit by filing written statement contending that Araj Ali and Nawab Ali were owners in possession of the property equally. The deed of *heba* dated 13.05.1947 has been concocted and created by Fuljan and Akub Ali which has been cancelled in 1947. Akub Ali in the similar way created another deed of *heba* on 17.06.1947. But he did never possess the suit property as per the aforesaid deeds. Fuljan Bibi never became owner of Akub Ali's property by purchase deed dated 13.05.1959. Plaintiff and defendant 49(Ka) did not become owner of the suit property. Akub Ali executed and registered a lifetime *patta* to Araj Ali to remove the cloud of his title over the suit property. Araj Ali had been all along in possession of the suit property. Nesar Ali Sheikh collusively created a deed of *heba* in his

name showing his wife Majhu Bibi as donor and got it registered on 16.08.1954. SA *khatian* was prepared in the names of Araj Ali's heirs. The plaintiff raised objection against the said record under section 19 of the State Acquisition and Tenancy Act which was rejected. Only CS *khatian* 618 and SA *khatian* 307 were prepared in the names of the heirs of Araj Ali with some variations in the share. All the remaining property has been recorded properly. Araj Ali died leaving behind three daughters namely Baru, Majhu and Fuljan and brother Nawab Ali as heirs and accordingly they have been enjoying their respective shares. Since the plaintiff has no title and possession in the suit land, the suit would be dismissed.

Defendant 49 contended that he purchased  $(.12+.26)=.38$  acres of land on 14.08.1975 and 18.02.1976 respectively from the recorded tenant through *kabalas* and has been in possession. He prayed for *saham* to that extent.

Defendants 17-19, 21-27, 29-31, 33-36 and 37 contended that they are owners in possession of 3.6592 acres of land by way of inheritance and purchase and they prayed for *saham* by paying Court fees.

Defendants 42-48 and 52 claimed that they are owners in possession of  $.76 \frac{1}{3}$  acres of land by way of inheritance from their predecessors. Their predecessors purchased those from the recorded tenants and they prayed for *saham* to that extent.

On pleadings the trial Court framed 7(seven) issues. In the trial the plaintiff examined 4(four) witnesses and his documents were produced as exhibits-1-4. On the contrary, documents of different sets of defendants were as exhibits-Ka-Uma and A-F. However, learned Assistant Judge dismissed the suit only on two grounds, *i.e.*, the suit is bad for defect of parties and that the plaintiff did not prove exhibit-1, the deed of gift of 1961 through which the plaintiff's predecessor accrued title in the suit land.

Being aggrieved by the plaintiff preferred appeal before the District Judge, Bagerhat. The Joint District Judge, Court No.1, Bagerhat heard the appeal on transfer who by the judgment and decree under challenge in this revision allowed the appeal and set aside the judgment and decree passed by the trial Court and allocated *saham* to the plaintiff to the extent of .49 acres; to defendants 17-19, 21-27, 29-31, 33-36 and 37 for 3.6592 acres; defendant 49 to .39 acres and defendants 42-48 and 52 to .6725 acres.

Mr. Md. Jahangir Alam, learned Advocate for the petitioners takes me through the judgments passed by the Courts below and other materials on record and submits that these defendants are the son of Nawab Ali who was a recorded tenant and enjoyed equal share with his brother Araj Ali. They would get  $\frac{1}{3}$  share of the land left by Araj Ali because he had no son. He refers to exhibit-3, *i.e.*, the deed of gift dated 13.05.1947 through which Araj Ali had

shown to have gifted his total share measuring 3.3850 acres to one of his daughter and grandson, and submits that the aforesaid deed excluding other 2 (two) daughters is found suspicious. Moreover, the plaintiff through evidence failed to prove the document. He refers to exhibit-D, a registered *patta* alleged to have been executed and registered by Fuljan and Aqub Ali to its original owner Araj Ali and submits that within a few days of the alleged deed of gift the *pattan* was given which proves exhibit-3 forged, collusive and has been created to grab the property left by Araj Ali and to exclude the defendants to enjoy his share. It is not an old document of 30 years and as such it does not come within the meaning of section 90 of the Evidence Act. The trial Court correctly considered the documents and assessed evidence of parties and dismissed the suit. But the Court of appeal below without adverting the findings of the trial Court decreed the suit and thereby committed error of law resulting in an error in such decision occasioning failure of justice and as such the judgment and decree passed by the appellate Court is required to be interfered with by this Court in revision.

Mr. Ahmed Nowshed Jamil, learned Advocate for opposite parties 1(Ka)-1(Cha) on the other hand opposes the Rule. He submits that the findings and decision of the trial Court on the issue that the suit is bad for defect of parties has been adverted by the Court of appeal giving cogent reasoning. A suit for partition cannot be dismissed only on the point of defect of parties. In respect of

other findings passed by the trial Court Mr. Jamil submits that all the subsequent deeds are based on the deed of gift dated 13.05.1947. There is endorsement in the deeds about Fuljan and Aqub's entitlement of the suit land from Araj Ali through the aforesaid deed of gift. The deed of gift exhibit-3 has been acted upon because subsequently a series of transfer have been made and in the body of those deeds there is endorsement of it. The findings of the trial Court about exhibits-1 and 4 is not correct because the plaintiff proved the transfer of Aqub Ali through exhibit-1 dated 13.05.1959. Aqub Ali transferred his share measuring 3.385 acres to Fuljan and in the body of the deed there is an endorsement of deed of gift. In the appellate Court, PW1 was recalled and examined and the deed dated 05.05.1961 exhibit-4 has been proved in accordance with law. Therefore, the appellate Court reversed the findings of the trial Court and decreed the suit allocating *saham* to the plaintiff and the defendants who claimed *saham* by paying *ad valorem* Court fees. There is no error in the impugned appellate judgment and as such Rule would be discharged.

I have considered the submissions of both the sides and gone through the materials on record. It is found that there is no dispute between the parties regarding ownership of the land by Araj Ali and Nawab Ali in equal shares and both of them had 3.385 acres of land in the suit schedule. The defendants who claimed *saham* by paying *ad valorem* Court fees admits the case of the plaintiff and claimed

land as heirs and by way of purchase. In support of their claim the parties produced documents. The plaintiff and the defendants who got *saham* in the appellate Court basically relied on the deed of gift exhibit-3 given by Araj Ali to his daughter Fuljan and grandson Akub Ali. The dispute is mainly between the plaintiff and the contesting defendants who are petitioners herein. The petitioners raised objection about the deed of gift exhibit-3 and claimed that the plaintiff's predecessor Fuljan and Akub Ali created it to deprive the present defendants from the share of Araj Ali because he had no male issues. In the absence of any male issues  $\frac{1}{3}$  share of Araj Ali would be devolved upon his full brother Nawab Ali and after his death to these defendants. The learned Advocate for the petitioners vehemently argued that the transactions are suspicious because the deed of gift exhibit-3 was executed and registered on 13.05.1947 and the recipients of the gift gave *pattan* to Araj Ali on 17.06.1947 through exhibit-D *i.e.*, after one month only. If exhibits-3 and D are considered together the forgery would come out.

It is admitted fact that Araj Ali had no male issue. He understood that after his death  $\frac{1}{3}$  of his share would be devolved upon his brother Nawab Ali and on his death to his nephews, the petitioners. So he decided to gift his land to his daughter Fuljan and grandson Akub Ali and accordingly he did it (exhibit-3). The deed of gift dated 13.05.1947 exhibit-3 has been duly exhibited without any objection. During his lifetime Araj Ali wanted to enjoy the land



under exhibit-3 and for that reason he took it *pattan* from Fuljan and Akub Ali through exhibit-‘D’. Araj Ali accrued no title through the *patta* because it was a *maydi* patta that he would enjoy the land during his lifetime. He correctly took it *pattan* keeping into mind that after his death ownership of the land would automatically go to Fuljan and Akub Ali. From exhibits-1, 2 and 4 *i.e.*, the subsequent transfers, I find that in all the deeds there are endorsements of the deed of gift exhibit-3. There could be no reason to hold that the deed of gift was not acted upon. It is well settled principle that allegation of forgery is to be proved by that person who alleges it. The defendants failed to prove in evidence that any forgery was committed in the execution and registration of exhibit-3 which is the basis of plaintiff’s title. Although, this is a suit for partition and most of the defendants claimed *saham* by paying *ad valorem* Court fees but the learned Assistant Judge dismissed the suit as a whole which is beyond the settled principle laid by our Apex Court. This suit is not also bad for defect of parties because all of the necessary parties have been impleaded in the suit. The findings of the appellate Court to that effect is correct.

On going through the exhibits and oral evidence led by the parties, I find that the plaintiff has been able to prove his title as well as possession in the suit land and the Court of appeal below on correct appreciation of fact and law allowed the appeal decreed the suit and allocated share to the plaintiff as well as to the defendants

who prayed for *saham*. I find no misreading and non consideration of evidence or other materials on record for which the decision passed by the Court of appeal could have been otherwise.

In view of the discussion made hereinabove, I find no merit in this Rule. Accordingly, the Rule is discharged. No order as to costs. The judgment and decree passed by the lower appellate Court is hereby affirmed.

The order of status *quo stands* vacated.

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