

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 1460 of 2004

Md. Sukur Ali Shaikh being dead his legal heirs: 1(a) Mst. Khodeza Khatun and others

... Petitioners

-Versus-

Most. Sarifan Nesa and others

...Opposite-parties

Mr. Shasti Sarker, Advocate

...For the petitioners

Mr. Md. Israfil Hossain, Advocate

...For the opposite-parties.

**Heard on 07.03.24, 10.03.24, 12.03.24,
23.04.2024 and Judgment on 25th April, 2024.**

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 29.10.2003 passed by the learned Joint District Judge, 1st Court, Pabna in Other Class Appeal No. 38 of 1991 disallowing the appeal and thereby affirming the judgment and decree dated 25.03.1991 passed by the learned Assistant Judge, Chatmohar Upazilla, Pabna in Other Class Suit No. 67 of 1989 decreeing the suit should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very short compus. The predecessor of petitioner Nos. 1 and 2 along with other petitioners, as plaintiff, filed Other Class Suit No. 67 of 1989 in the Court of Assistant Judge, Chatmohar Upazilla, Pabna against the opposite-parties, as defendant, for declaration of title in the suit property and for further declaration to the effect that Deed of Gift No. 6117 dated 24.11.1988 executed by defendant No. 1 in favour of defendant Nos. 2 and 3 is false and fabricated and the said deed is not binding upon the plaintiffs, claiming that the suit property originally belonged to one Kuni Bewa wife of Gupi Shaikh who died leaving only son Momin Shaikh. Momin Shaikh while in possession and enjoyment of the property died leaving only son Faruk Shaikh, father of plaintiff No. 1. During S.A. operation tasks of recording his name was entrusted with defendant No. 1, Habej Uddin who assured the father of the plaintiff that S.A. Khatian correctly prepared in the name of Faruk Shaikh who paid rents for the suit land through defendant No. 1. Father of the plaintiff Faruk Shaikh was not a man of sound mind. After the death of Faruk Shaikh the defendants threatened the plaintiffs with dispossession, consequently, the

plaintiff filed Criminal Miscellaneous Case No. 26 of 1989 under Section 144 of the Code of Criminal Procedure wherein an order was passed in favour of plaintiff. After expiry of 60 days the order lost its force naturally. After 60 days the defendant again threatened the plaintiff with dispossession. When the plaintiff asked the defendants as to why they are threatening with dispossession, the defendant No. 1 disclosed on 05.07.1989 that S.A. Khatian stands recorded in his name and he made a Heba-bil-Ewaz Deed No. 6117 dated 24.11.1988 transferring the property in favour of his 2 daughters, the defendant Nos. 2 and 3. Earlier the plaintiffs were not aware about the wrong record of S.A. Khatian in the name of defendant No. 1. Such wrong record of right created cloud in the title of the plaintiff, hence the present suit for declaration of title.

The defendants contested the suit by filing written statements denying all the material allegations made in the plaint contending inter alia that the suit is not maintainable in its present form. The suit is barred by law of limitation and has no cause of action.

It is stated that the property belonged to Kuni Bewa. Kuni Bewa died leaving only son Hanif Shaikh who inherited the suit

property. Hanif Shaikh while in possession of the suit land died leaving only son, the defendant No. 1 Habej Shaikh. S.A. record relating to suit land correctly recorded in his name. The defendant No. 1 had been in possession of the suit property on payment of rents to the government with the knowledge of plaintiff. While the defendant No. 1 was in possession and enjoyment of the suit land by a registered Heba-bil-Ewaz Deed No. 6117 dated 24.11.1988 gifted the property to his 2 daughters, the defendant Nos. 2 and 3. After making gift defendant Nos. 2 and 3 got their names mutated in the khatian and paid rents to the government. The plaintiffs have no title and possession in the suit property and they are not legal heirs of Kuni Bewa and they used to live in a different village other than the concern village of the disputed property, as such, the suit is false and fabricated one and liable to be dismissed.

The trial court framed 5(five) issues for determination of the dispute between the parties. In course of hearing, the plaintiff examined 5(five) witnesses including plaintiff No. 1 as P.Ws and the defendants examined 3(three) witnesses as D.Ws. The plaintiffs filed some documents and got only one document marked as exhibits. On

the other hand, the defendants though filed documents in support of their respective claim but none of the document has been marked as exhibit by the trial court. The trial court after hearing by its judgment and decree dated 25.03.1991 dismissed the suit.

Being aggrieved by and dissatisfied with the impugned judgment and decree of the trial court, the plaintiff preferred Other Class Appeal No. 38 of 1991 before the Court of learned District Judge, Pabna. Eventually, the said appeal was transferred to the Court of learned Joint District Judge, 1st Court, Pabna for hearing and disposal who upon hearing by the impugned judgment and decree dated 29.10.2003 disallowed the appeal affirming the judgment and decree passed by the trial court. At this juncture, the petitioners, moved this Court by filing this revisional application and obtained the present Rule and order of stay.

Mr. Shasti Sarker with Mr. Laxman Biswas, learned Advocates appearing for the petitioners submit that the trial court considering evidence of P.W.1 observed that Kuni Bewa had only son named Momin Shaikh. Said fact also corroborated by P.W.2, an old man of 78 years and also P.W.3, but the courts below disbelieved

the fact that Momin Shaikh was only son of Kuni Bewa and the plaintiff No. 1 is grandson of Momin Shaikh. He further submits that all the P.Ws in a chorus corroborated each other that Gopi Shaikh had 2 wives Kuni Bewa and Surovi Bewa. Momin Shaikh was son of Kuni Bewa and Hanif was son of Surovi Bewa. Therefore, Habej Shaikh, the defendant No. 1 being son of Hanif Shaikh he did not inherit the property of Kuni Bewa. He further submits that local U.P. Chairman also issued a certificate to that effect stating that Kuni Bewa had only son Momin Shaikh and he also deposed before the trial court as P.W.5 in support of the certificate issued by him.

He finally submits that had the trial court as well as the appellate court appreciated the evidence in its entirety would have found that the plaintiff could able to proof his case that Kuni Bewa had only son Momin Shaikh. Momin Shaikh died leaving son Faruk Shaikh and Faruk Shaikh died leaving the plaintiff. It is also argued that both the courts below failed to find that record of right is not document of title. In the instant case, the defendant No. 1 though claimed that his father was son of Kuni Bewa but no evidence to that effect adduced before the trial court and in the absence of contrary

evidence of the plaintiff, the court below ought to have believed the case of the plaintiff and decreed the suit, as such, in not doing so the court below has committed error of law in the decision occasioning failure of justice.

He argued that the document in support of respective cases of the parties though filed before the trial court lying with the lower court records, but those documents of both the parties have not been marked as exhibits. In this situation the courts below failed to adjudicate the matter in dispute in accordance with law and prayed for sending the suit on remand to the lower court for fresh hearing affording opportunity to the parties to get their pleading suitably amended and the documents filed by them exhibited.

Mr. Md. Israfil Hossain, learned Advocate appearing for the opposite-parties submits that it is the case of the plaintiffs, and they are to prove their case independent of the case of the defendants and they cannot depend on the case of the defendants or their documents. He argued that in the instant case the plaintiffs could not prove by any evidence both oral and documentary that their predecessor Momin Shaikh was only son of Kuni Bewa and they also could not

produce any document showing that Momin Shaikh as son of Kuni Bewa possessed and enjoyed the property by any manner and could not produce a single paper showing payment of rents to the government and also other documents to substantiate their claim that Momin Shaikh was only son of Kuni Bewa. On the other hand, the defendant No. 1 categorically stated that his father Hanif Shaikh was only son of Kuni Bewa and he had been in possession of the suit property more than 100 years right from his father Hanif Shaikh on payment of rents to the Jaminder and after SAT Act came into force to the government and the government recognizing Habej Shaikh as tenant under it correctly prepared S.A. khatian in the name of the defendant No. 1. The defendant No. 1 while in enjoyment of the property as heir of Kuni Bewa gifted the same in favour of the defendant Nos. 2 and 3 by a registered Heba-bil-Ewaz Deed No. 6117 dated 24.11.1988. As such, the trial court as well as the appellate court rightly dismissed the suit and disallowed the appeal as the plaintiffs utterly failed to prove their case by any evidence.

Heard the learned Advocates of both the parties, have gone through the revisional application, plaint in suit, written statement,

evidences of the parties and the impugned judgment and decree passed by both the courts below.

Admittedly, suit property originally belonged to one Kuni Bewa wife of Gupi Shaikh as possessor. Main dispute between the parties is limited within the question whether Momin Shaikh is only son of Kuni Bewa or Hanif Shaikh is son of Kuni Bewa. The plaintiff claimed that Kuni Bewa died leaving only son Momin Shaikh. Momin Shaikh died leaving only son Faruk Shaikh. Faruk Shaikh died leaving the plaintiffs and claimed that Gupi Shaikh had another wife named Surovi Bewa. Hanif Shaikh was only son of Surovi Bewa. Hanif Shaikh died leaving defendant No. 1 Hajej Shaikh. The defendant No. 1 being son of Surovi Bewa he did not inherit any property left by Kuni Bewa. To substantiate the claim, the plaintiff No. 1, Sultan deposed as P.W.1 who in his examination-in-chief stated that Gupi Shaikh had two wives one Kuni Bewa and another Surovi Bewa. Kuni Bewa died leaving Momin Shaikh grandfather of the plaintiffs and by successive inheritance they acquired the property and have been possessing the same for more than statutory period of limitation.

Other P.Ws like P.Ws.2-4 also stated that they heard that Kuni Bewa had only son Momin Shaikh and Hanif Shaikh was son of Surovi Bewa. In cross-examination P.W.1 Sultan said that he could not say the name of children of Surovi Bewa. He also stated that defendant No. 1, Habej is his uncle and he is older to him by 32-40 years. He stated that he had no knowledge how many wives Gupi Shaikh had. P.W.2 in cross said that he did not see Hanif Shaikh and also said that Hanif Shaikh was son of Gupi Shaikh. P.W.3 said that defendant No. 1 is older to him by 7 and 8 years. He saw the mother of defendant No. 1, but did not see the father. Later on he said that he did not see Surovi Bewa. P.W.4 also stated that he heard that Gupi Shaikh had 2 wives Surovi Bewa and Kuni Bewa and also heard that Surovi had son Hanif and Kuni Bewa had a son Momin and stated that he had no knowledge about such fact. P.W.5 Chairman Union Parishad aged about 35 years deposed in support of certificate issued by him stating that Momin Shaikh was son of Kuni Bewa, but he could not justify the certificate before the court when deposing and facing cross-examination.

He clearly stated that he relied on a report of local member and he has no knowledge about the fact. In cross P.W.1 stated that before the death of his father Faruk Shaikh, they shifted from village Baluchar to singrai and since then they have been residing there. During life time of his father he got married and used to live in the house of father in law and stated that at present he is living there and his brother living in another place and could not say in what manner the plaintiffs are possessing the suit property. On the other hand, the defendants in support of their claim submitted some documents which have been considered by both the courts below but not marked as exhibits. The documents are C.S. Khatian No. 646 in the name of Kuni Bewa wife of Gupi Shaikh. S.A. Khatian No. 753 in the name of defendant No. 1 Habej Pramanik. Three rent receipts showing payment of rents to the Jaminder in the name of Kuni Bewa. Fifteen rent receipts showing payment of rents in the name of defendant No.1 Habej Pramanik starting from 1957 upto 09.08.1989. R.S. Khatian No. 1094 in the name of Habej Pramanik, Mutation Khatian No. 1213 in the name of defendant Nos. 2 and 3 and D.C.R. in their names.

The trial court observed that had the plaintiffs' predecessor Momin Shaikh son of Kuni Bewa and Faruk Shaikh is son of Momin Shaikh, by successive inheritance rents for the land in question ought to have been paid by Momin Shaikh, thereafter Faruk Shaikh and then the plaintiff and all the rent receipts showing payment of rents ought to have been laid with them. But a series of rent receipts are coming from the custody of the defendant No. 1, which supported the case of the defendant No. 1 that he by successive inheritance from his predecessor Kuni Bewa has been possessing the suit land recording his name in S.A. and R.S. khatians. The plaintiffs even their predecessor Faruk Shaikh did not raise any objection against the record of right prepared in the name of defendant No. 1 after the SAT Act came into force. Had the plaintiffs in possession and enjoyment of the property they could have made payment of rents and got the khatian prepared in their names or in the event of finding the record of right wrongly recorded in the name of the defendant could have filed objection before the settlement officer or before any civil court, but after long time when the defendant No. 1 gifted the property to his 2 daughters they came with the claim for declaration

of title in the property. However, the plaintiffs though examined 5 witnesses as P.Ws including plaintiff No. 1, but none of the oral evidence proved the fact that Kuni Bewa died leaving only son Momin Shaikh.

In the absence of a clear proof on the part of the plaintiff it is difficult to hold that Momin Shaikh is only son of Kuni Bewa. It is not disputed that the defendant No. 1 is a man of 110 years old when deposed as D.W.1. All other P.Ws are less older than defendant No. 1. None of the P.Ws born before defendant No. 1 and they had no knowledge who son of Kuni Bewa, but from the documents submitted by defendant No. 1, it is conceivable and considerable that Kuni Bewa had only son Hanif Shaikh. Hanif Shaikh died leaving defendant No. 1 Hanej Shaikh as he could produce rent receipts showing payment of rents right from the period of Kuni Bewa and the rents paid by him upto 1989. The plaintiffs could not submit any document contrary to the documents submitted by the defendants. Because of this situation, I also find no earthly reason to interfere with the judgment and decree of both the courts below, wherein, both the courts below upon assessment of evidences concurrently

found that the plaintiffs could not prove their case independent of the case of the defendants.

It is true that the documents filed by the defendants and the plaintiffs have not been properly entered in evidence by marking the same exhibits. But both the courts below have taken those documents into consideration and considering those documents passed the judgment. However, to appreciate the submissions and prayer of the learned Advocate for the petitioners, I have gone through the entire fact of the case including evidences both oral and documentary to see whether in the event of sending the suit on remand for fresh hearing affording further opportunity to the parties to get their pleading amended and to lead further evidence both oral and documentary, the purpose of the parties will serve and there is any possibility of getting result otherwise. The answer is negative, because the plaintiffs had no other documents to be produced before the court except oral evidence which are available in record, a khatian in the name of Momin Shaikh as son of Gupi Shaikh for non-suited property and C.S. khatian in the name of Kuni Bewa wife of Gupi Shaikh which is not disputed rather admitted by both the

parties. Therefore, to make the said khatians as exhibits the suit is not required to be sent back to the trial court on remand for fresh trial.

Apart from this I find that this is a suit of the year 1989, for long passage of time all the P.Ws except P.W.5 may not be available, as such, there is no possibility of recording further evidence of P.Ws rather it will be an act of opening a new gate giving an undue advantage to the plaintiff to reopen a case by producing a new set of witness. Not only that, since both the courts below considered the documents filed by the parties in their judgment and not denied by the plaintiff, the prayer for remand and allowing the prayer to send the suit back will be a never ending process of litigation.

Taking into consideration the above, this Court finds no merit in the Rule as well as in the submissions of the learned Advocate for the petitioners to interfere with the concurrent findings of the courts below.

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

Order of *stay* granted at the time of issuance of the Rule stand vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.

Helal-ABO