17 SCOB [2023] HCD 199

HIGH COURT DIVISION
First Appeal No. 32 of 2004

Sirajul Haque alias Sirajul Haque Howlader and others
.....appellants
-Versus-
Zulekha Begum and others
.....respondents

Mr. Md. Israfil Hossain, Advocate.
.....for the Appellants
Mr. Md. Zakaria Sarkar, Advocate.
.....for the Respondents

Judgment on 23.08.2022

Present:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice Md. Ali Reza

Editors' Note:
The respondent Nos. 1-4 as plaintiffs filed a Title Suit for declaration that the documents mentioned in the schedule Nos. 1-6 to the plaint are forged. They claimed that Rustom Howlader, who was their father, and the father of the defendant Nos. 1 and 6 also, died at the age of 110. From 20 years before his death he was completely unable to walk or move because of his dire sickness along with blindness and was completely bed ridden. He lived with the defendants in a mess till his death and taking such advantage of his illness those impugned documents were obtained. On the other hand defendants claimed that Rustom Howlader was never sick or bed ridden or blind and was always healthy and performed his own work by himself before his death. The trial Court decreed the suit mainly on the finding that Rustom Howlader was sick from 1980 till his death and he had no normal sense or consciousness. The High Court Division assessing the evidence on record found that the plaintiff had failed to prove that Rustom Howlader was completely sick and bed ridden. It also found that plaintiffs had failed to discharge their onus under sections 101 and 103 of the Evidence Act to prove that the signatures given by Rustom Howlader in all the documents are false. Finally, the Court found that the suit was barred by limitation and consequently set aside the judgment and decree of the trial Court.

Key Words:
Rule 46, 48 of the Registration Rules, 1973 and section 69 of the Registration Act, 1908; Sections 101 and 103 of the Evidence Act; Section 3 of the Transfer of Property Act and Section 68 of the Evidence Act; Section 114(g) of the Evidence Act; Order 3 Rule 2 of the Code of Civil Procedure; Section 85 of the Evidence Act; Section 120 of the Evidence Act; Husband instead of wife or wife instead of husband shall be competent witness; Article 120 of the Limitation Act, 1908;

Rule 46, 48 of the Registration Rules, 1973 and section 69 of the Registration Act, 1908:
Law is settled that identifier or witness of a document is not supposed to know the contents of the document but the identifier according to the Registration Rules is held to be the best competent person in whose presence the executant goes with the execution process before the registering officer. (Para 18)

Sections 101 and 103 of the Evidence Act:

According to the provisions laid down in sections 101 and 103 of the Evidence Act, the entire onus was upon the plaintiffs to prove that the signatures given by Rustom Howlader in all the documents are false because it is their specific case that Rustom Howlader never appeared in public due to his serious ailment and indisposition and blindness and even he was to be taken to the toilet by somebody else and remained bed ridden from 1980 until his death. Plaintiffs had to take resort to expert opinion in order to discharge their initial onus under section 101 of the Evidence Act to prove that those impugned documents were executed not by Rustom Howlader but by an imposter with a scheme to grab the property and Rustom Howlader was completely unable to perform his own affairs due to his serious illness. Law says when the initial onus is discharged by the plaintiff the onus then shifts upon the defendants to show the contrary. (Para 19)

Section 3 of the Transfer of Property Act and Section 68 of the Evidence Act:

The law on attesting witness is guided by section 3 of the Transfer of Property Act and Section 68 of the Evidence Act. The scribe will not be an attesting witness unless he intends to sign the deed as such. In other words a scribe can play the dual role of a scribe and an attesting witness. (Para 20)

Section 114(g) of the Evidence Act; Order 3 Rule 2 of the Code of Civil Procedure read with section 85 of the Evidence Act; Section 120 of the Evidence Act:

Husband instead of wife or wife instead of husband shall be competent witness:

Learned Advocate for the respondent strongly argued that defendant No. 1 Sirajul himself did not come before the court to depose in support of his case and adverse presumption can be drawn under section 114(g) of the Evidence Act for his non examination in the case despite being an important witness. A Power of Attorney given by defendant No. 1 to D.W. 1 through notary public bearing registration No. 135 of 2003 dated 28.06.2003 is kept in the record and under Order 3 Rule 2 of the Code of Civil Procedure read with section 85 of the Evidence Act this power of attorney bears weight. Now question arises whether D.W. 1 being wife of defendant No. 1 holds the same status of defendant No. 1 while deposing in the suit. Question of adverse presumption shall not arise if DW 1 holds the same position. Section 120 of the Evidence Act provides that husband instead of wife or wife instead of husband shall be competent witness. So according to the facts and circumstances of the instant case section 120 shall prevail over section 114(g) of the Evidence Act and the question on adverse presumption as argued does not arise. (Para 21)

Section 114(e) of the Evidence Act:

It has been asserted in paragraph Nos. 14(ka)(6) of the written statement that Rustom Howlader filed Title Suit No. 126 of 1996 against Thana Education Officer, Madaripur and filed application for temporary injunction not to remove the Char Ghunshi Government Primary School. The temporary injunction was rejected against which Rustom Howlader filed Miscellaneous Appeal No. 41 of 1996 in the Court of District Judge, Madaripur. The appeal failed. Then he preferred Civil Revision No. 3104 of 1998 before this Court. The Rule issuing order dated 09.08.1998 is exhibit-Ja and after his death his substituted heirs extended the order of *status quo* till disposal of the rule on 21.08.2000 which is exhibit-Ja(1). Those are public documents and under section 114(e) of the Evidence Act carry presumptive value of its contents and it is to be presumed that Rustom Howlader sworn affidavit in exhibit-Ja until and unless the contrary is proved

by reliable evidence and thus it appears that he was never that sick as has been alleged by the plaintiffs. (Para 23)

The admission of Rustom Howlader that he executed those documents cannot be avoided when plaintiffs could not establish a definite and clear case on Rustom Howlader's sickness. The execution is admitted and plaintiff had no knowledge on execution or passing of consideration being third party to the document. Plaintiffs cannot question about the consideration because it was between parties to the document. The transferee is to prove the payment of consideration when the transferor challenges the same. In the instant case, if the plaintiffs could prove by cogent and credible evidence that Rustom Howlader was seriously ill and blind from 1980 till his death, in that case the onus would lie upon the defendant to prove the payment of consideration. (Para 24)

Article 120 of the Limitation Act, 1908:
According to paragraph No. 7 of the plaint, cause of action arose on 14.07.2002 after having knowledge from the sub-registry office. But on perusal of the records it appears that the certified copies of exhibit-2 and 2(ka) were obtained on 17.07.1995. The certified copies of exhibit-2(Ga) and exhibit-2(Gha) were obtained after filing of the suit on 05.07.2003 and 03.07.2003 respectively. Thus it can be held that the cause of action of the suit is definitely false and the suit is barred by law of limitation. The beneficiaries of exhibit-2(Gha) dated 19.12.1982 being defendant Nos. 4-5 are the sons of plaintiff No. 3 Sahaton and the husband of plaintiff No. 2 Rahaton was the identifier to exhibit-Gha dated 15.09.1994. So it raises serious doubt on the story of cause of action and as such it is held that the suit is barred by limitation under Article 120 of the Limitation Act.
(Para 27)

JUDGMENT

Md. Ali Reza, J:

1. This appeal at the instance of defendant Nos. 1-3 is directed against the judgment and decree dated 28.09.2003 passed by the Joint District Judge, Court No. 1, Madaripur in Title Suit No. 06 of 2002 should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The respondent Nos. 1-4 as plaintiffs filed Title Suit No. 06 of 2002 in the Court of the then Subordinate Judge, Court No. 1, Madaripur for declaration that the documents mentioned in the schedule Nos. 1-6 to the plaint are forged, false, fraudulent, inoperative, illegal, without jurisdiction and not binding upon the plaintiffs.

3. The case of the plaintiffs, in short, is that Rustom Howlader who was the father of plaintiffs and defendant Nos. 1 and 6 died at the age of 110 years. He had been suffering from serious illness for about 20 years before his death. He could not walk or move and had no consciousness. His wife Boru Bibi died during his life time. Rustom Howlader died leaving behind 02(two) sons and 04(four) daughters. Plaintiffs are daughters of Rustom Howlader and they lived in their husbands' houses. Rustom Howlader used to live with his sons in one mess. Defendant No. 1 is educated and very cunning person. Taking the advantage of his father's illness he tried to grab the ancestral property. Defendant No. 1 used to try to convince his elder brother Defendant No. 6 by various inducements and money. After Rustom's death

when the plaintiffs went to their father's house and requested for distribution of their ancestral property, defendant No. 1 used to rely on various excuses upon different pretexts. On the eve of completion of the present survey, the plaintiffs through their husbands and the sons came to know that defendant No. 1 was trying to grab the suit land on the basis of various forged documents. Thereafter, plaintiffs inquired into the sub-registry office and received the certified copies of the impugned documents and obtained definite knowledge. Defendant No. 1 managed to obtain gift deed No. 7255 dated 19.12.1983, Heba-bil-Ewaz deed No. 1966 dated 13.02.1984 and other documents bearing Nos. 1371, 7220, 3341, 1912 dated 13.04.1997, 19.12.1982, 15.04.1993, 09.05.1995 respectively beyond the knowledge of the plaintiffs in collusion with scribe Habibur Rahman. Rustom Howlader never executed and registered any document in favour of the defendants nor was paid any consideration for that purpose. Defendant No. 1 fabricated those documents to deceive the plaintiffs from their paternal property. Rustom Howlader never delivered any possession in favour of the defendants. Minor defendant Nos. 2 and 3 acquired no title by the impugned documents. As Rustom was very old and insane and of unsound mind there was no question of his conducting the cases. The papers of Title Suit Nos. 10 of 1990, 18 of 1990, 83 of 1992, Title Appeal No. 49 of 1996, Civil Revision No. 126 of 1996 are manufactured documents in the name of Rustom Howlader. Defendant No. 1 completed master degree but despite passing his M.A. he instead of involving himself in any service is doing agricultural work to grab the paternal property. Rustom Howlader was educated but lost his eye sight in his old age and could not put his signature. Defendant No. 1 had signed in some places of the resolution book of the Char Ghunshi Government Primary School as president. If the signature of the resolution is compared with the signatures of Rustom Howlader given in the impugned documents as executant, it is understood that defendant No. 1 himself signed the name of his father and obtained those documents. Defendant Nos. 1-3 had no capability to pay any money to Rustom Howlader. Rustom Howlader did not execute any Arpannama in favour of Char Ghunshi Mosque or Primary School. Defendant No. 1 has created the documents of mosque and school after obtaining the impugned forged documents in his name so that the local people do not go against him. Defendant Nos. 4 and 5 created the gift deed dated 19.12.1982. Rustom Howlader never attended any marriage ceremony after 1980 nor signed in any marriage certificate. He himself never opened any bank account. Rustom Howlader's appearance and filing of Title Suit No. 126 of 1989 or deposing as PW1 on 07.10.1991 or praying for non prosecution of the suit on 09.11.1991 or filing affidavit on 24.11.1991 are false and those documents are not genuine because at that time he was completely bed ridden. Defendant No. 1 concocted all the documents and did not appear before the Court for fear of being caught on the allegation of forgery. Cause of action arose on 14.07.2002 when plaintiffs at first came to know about the impugned documents. Hence the suit was filed.

4. On the other hand, 04(four) sets of written statements were filed by the defendants. One was filed by defendant Nos. 1-3, defendant Nos. 4, 5, 6 filed another 3(three) sets of written statements separately. Defendant Nos. 4-6 did not contest the suit. Defendant Nos. 1 and 6 are sons of Rustom. Defendant Nos. 2 and 3 are grandsons of Rustom and sons of defendant No. 1 Sirajul. Defendant Nos. 4 and 5 are also grandsons of Rustom and sons of plaintiff 3 Shahaton.

5. The case of the contesting defendant Nos. 1-3 is that Rustom was never sick or bed ridden due to old age before his death. He was always healthy and successful in his work. He used to go to the Hon'ble Supreme Court and Madaripur Court to conduct his own cases. He also used to visit the educational office. Rustom Howlader himself filed written statement in Title Suit No. 83 of 1992 which was dismissed later on. He was the life time president of the

Char Ghunshi Government Primary School. He was defendant No. 28 in Title Suit No. 15 of 1990 and the same was dismissed. He gifted some land to the Char Ghunshi Mosque. When the mosque was destroyed in the river, he later donated more land to rebuild the mosque. Rustom Howlader filed Title Suit No. 126 of 1996 on behalf of Char Ghunshi Government Primary School. He preferred Miscellaneous Appeal No. 41 of 1996 in the Court of District Judge, Madaripur and Civil Revision No. 3104 of 1998 before this Court. He managed accounts in various banks during his life time. He maintained Savings Account No. 6591 in Takerhat Agrani Bank. He attended the wedding ceremony of his granddaughter Fahima. Even after he had transferred the property by the impugned deeds in favour of defendant Nos. 1-5, he still had many properties left which have been being enjoyed by his heirs. Defendant No. 1 and his wife took care of Rustom. Having been satisfied with the care and behavior of defendant No. 1 Rustom wanted a prayer mat and a tajbih and after receiving the same Rustom transferred 4.85 acres of land by a Heba-bil-Ewaz deed on 13.02.1983 in favour of defendant No. 1 and delivered possession. Rustom sold 1.60 acres of land to defendant Nos. 2-3 by kabala dated 15.09.1984. These defendants also purchased 1.73½ acres of land from Rustom by kabala dated 09.05.1995 and got possession. Rustom also sold 0.81½ acres of land to defendant No. 2 on 13.04.1997. Rustom made gift in favour of defendant Nos. 1, 4 and 5 by deed Nos. 7220 and 7255 dated 19.12.1982. Rustom transferred 0.33 acres of land to Char Ghunshi Government Primary School by Arpannama dated 26.10.1996. Defendants never practised any fraud on execution and registration in obtaining the impugned documents. Defendant Nos. 4 and 5 got title and possession in the land covered by the documents executed by Rustom and defendant No. 4 took loan from Janata Bank by mortgaging the same. Rustom was never sick. He cast his vote in different elections on his own foot till 1996. He presided over the meeting as president of the managing committee of the Char Ghunshi Government Primary School on different dates. He also took loan from Utrair Branch, Bangladesh Krishi Bank on 31.03.1984 and repaid the same. He attended in the marriage ceremony of the daughter of defendant No. 6 and signed in the marriage certificate. Rustom filed Title Suit No. 126 of 1989 against gift deed Nos. 7220 and 7255 dated 19.12.1982 and Heba-bil-Ewaz deed No. 1166 dated 13.02.1983. He deposed in that suit on 07.10.1991. Defendant No. 1 Sirajul filed written statement in the suit. Subsequently, both parties came to a compromise through the mediation of the relatives. According to the terms and conditions of the compromise, suit was dismissed for non prosecution and Rustom himself through an affidavit admitted those 03(three) documents on 24.11.1991. In the document dated 05.09.1994, the husband of plaintiff No. 2 was an attesting witness. Plaintiff filed the instant suit upon false claim. The suit being false is liable to be dismissed with cost.

6. The Trial Court framed as many as six issues as to maintainability, defect of party, limitation, whether the impugned documents are forged and obtained by practicing fraud and forgery, whether the claim of the plaintiff is proved to be genuine, whether plaintiffs can get the relief prayed for.

7. During trial, plaintiff examined 03(three) witnesses and contesting defendant Nos. 1-3 examined 05(five) witnesses and both the parties adduced documentary evidence in order to prove their respective cases.

8. The trial Court decreed the suit by judgment and decree dated 28.09.2003 mainly on the finding that Rustom Howlader was sick from 1980 till his death and he had no normal sense or consciousness and admittedly he was a wealthy man and defendant No. 1 and his wife had served Rustom Howlader with due care till his death which was their duty and in such circumstance it is not understood as to why Rustom Howlader transferred the land

covered by the documents in favour of defendants in lieu of such duty although such transfer made out of love and affection is not unusual and further found that since plaintiffs alleged that those documents were obtained by forgery, the onus is upon the defendants to prove that those documents were executed and registered by Rustom Howlader himself. The Court also found that no explanation was offered by the defendants as to why defendant No. 1 Sirajul was absent in the Court and further found that the documents were obtained without consideration because Rustom Howlader executed those documents only with satisfaction and further found that defendant No. 1 himself signed in the resolution book of the school in his name or in the name of his father and the attesting witness as well as scribe to the impugned documents named Habibur signed his name dimly without address to avoid future trouble of committing forgery. The Court also found that defendants did not take possession in the suit land during the life time of Rustom Howlader and defendants did not formally prove the impugned documents and since defendants did not mention the name of Noor Mohammad in their written statement, they are not entitled to raise this question and the Court further found that the suit is maintainable even though no relief was prayed for by the plaintiffs with regard to the Arpannama deeds executed in favour of Char Ghunshi Mosque and School and again found that defendants have got to prove that the impugned documents were executed and registered by Rustom Howlader and those documents were not forged and also found that Rustom Howlader although executed and registered the Heba-bil-Ewaz and gift deeds but those were not acted upon for want of possession.

9. Being aggrieved by and dissatisfied with the judgment and decree dated 28.09.2003 passed by the trial court, the contesting defendant Nos. 1-3 as appellants preferred the instant appeal before this Court.

10. The learned Advocate Mr. Md. Israfil Hossain appeared on behalf of the appellants and learned Advocate Mr. Md. Zakaria Sarkar appeared on behalf of the respondents.

11. The learned Advocate for the appellants submits that Rustom Howlader was never sick and blind in his old age and the case of the plaintiffs that he was very sick and suffered diseases and blindness in his last 20(twenty) years is blatant lie. He further submits that since the executant was not insane and disabled, the impugned documents are valid in law. Rustom executed those documents in a healthy and conscious state of mind. He also submits that the plaintiffs could not make out any case that the impugned documents were executed by false personation. Rustom Howlader never lost his eye sight and he was very much competent to deal with the worldly affairs. He argued that the rule of balance of preponderance of evidence or the best evidence rule stands in favour of the appellants. He further submits that plaintiffs had to take the aid of the expert opinion to prove their own case. He went through the entire documentary evidence and submitted that the entire documentary evidence, if had been considered by the trial court the result of the case would have been otherwise. He also referred and went through the entire oral evidence adduced by both the parties and finally submits that the impugned judgment is bad in law and liable to be set aside. He has referred the case of Sushil Chandra Nath Vs. Sanjib Kanti Nath and another reported in 27 BLD(AD) 197 in support of his submissions.

12. The learned Advocate for the respondents submits that the trial Court upon perusal of the pleadings and considering evidence both oral and documentary adduced by the parties correctly decreed the suit. Referring to the relevant portion of the judgment he sharply and strongly argued that burden of proof lies on the shoulder of the defendants to show that the documents were duly executed by Rustom Howlader upon receiving the consideration with

satisfaction. Referring the evidence of D.W. 1, he further submits that defendant No. 1 is the beneficiary of the document and he had to be present before the Court but despite having chances, he was absent and for such reason an adverse presumption can easily be drawn that in the event of his presence the result of the case would be fatal for him. He also referred exhibit-Chha and submitted that the signatures as shown to be given by Rustom in several places in the resolution book are not similar and the finding of trial Court on this aspect is sound and legal. He also referred exhibit-Yeo, Ta, Tha and argued that the Heba-bil-Ewaz deed was not acted upon because according to exhibit-Yeo the consideration of such document was not proved to be passed and further submitted that according to the admission of D.W. 1, it appears that Rustom Howlader was in home when the suit was dismissed for default as evident from Exhibit-Tha. He again submits that the entire onus is upon the defendants to show that Rustom Howlader had more land than what was transferred by those impugned documents. This big amount of land which was shown to have been transferred is very unusual and trial Court rightly passed the judgment. He again submits that P.W. 1 was corroborated by P.W. 2 and P.W. 3 who are the most competent witnesses. Defence case was not proved in evidence because defendant No. 1 was not examined. He took us through the grounds taken in the appeal and submitted that those grounds are not valid grounds according to law and the same does not deserve any reasonable consideration by this court. Defendants have failed to prove their case. He finally submits that the judgment passed by the trial court is based upon proper appreciation of pleadings and evidence and the same having been passed upon proper application of judicial mind would not be interfered with by this court and as such the appeal is liable to be dismissed with cost.

13. In support of his submission he has cited the case of Shah Mofizuddin Vs. Afil Uddin, 9 DLR 522; Abdul Mannan Sheikh Vs. Solemon Bewa, 59 DLR 392; Amirun Nessa Vs. Golam Kashem, 42 DLR 499 and the case of Nurul Islam Vs. Azimon Bewa, 51 DLR 451.

14. We have heard the learned Advocates, perused the evidence both oral and documentary, carefully gone through the impugned judgment, examined all other connected and relevant papers of the record and the concerned law.

15. It is admitted that Rustom Howlader died leaving behind 04(four) daughters who are the plaintiffs in the suit and 02(two) sons who are defendant Nos. 1 and 6. The specific case of the plaintiffs is that the impugned documents executed in favour of defendant Nos. 1-5 by Rustom Howlader were obtained by fraudulent means and methods. It is also the case of the plaintiffs that Rustom Howlader died when he was about 110 years old and before 20(twenty) years of his death he was completely unable to walk or move because of his dire sickness along with blindness and he was completely bed ridden and could not perform any worldly affairs due to the complete lack of consciousness and even he was to be carried to the toilet and he lived with his sons in a mess till his death and taking such advantage of his illness those impugned documents were obtained by the defendants. P.W. 2 Adel Uddin Howlader who was considered to be a disinterested witness by the trial Court has stated in his examination-in-chief that Rustom Howlader was sick from 1980 and lost his eye sight and he had no normal sense and was never recovered till his death. P.W. 3 who is a distant cousin of both the parties also supported P.W. 1 and P.W. 2. On the other hand, the case of the defendants is that Rustom Howlader was never sick or bed ridden or blind and was always healthy and performed his own work by himself before his death. D.W. 2 neighbor, D.W. 3 the first degree cousin of both the parties, D.W. 4 and D.W. 5 corroborated D.W.1 to prove that Rustom Howlader was not that sick as has been alleged by the plaintiffs. Now it appears

that the main question in this case is to determine whether Rustom Howlader was actually dreadfully sick or not.

16. Plaintiff produced the certified copy of Heba-bil-Ewaz deed dated 13.02.1983 (exahibit-1), certified copy of kabala dated 15.09.1994 (exhibit-2), certified copy of kabala dated 09.05.1995 (exhibit-2(ka)), certified copy of kabala dated 13.04.1997 (exhibit-2(kha)) the original of which were tendered by the contesting defendant Nos. 1-3 and marked as exhibit-Ga, Gha, Gha(1), Gha(2) respectively and all those documents were executed by Rustom Howlader in favour of defendant Nos. 1-3. Plaintiff also filed the certified copy of gift deed 7220 dated 19.12.1982 (exhibit-2(Ga)) and certified copy of gift deed 7255 dated 19.12.1982 (exhibit-2(Gha)) executed by Rustom Howlader in favour of defendant No. 1 and defendant Nos. 4-5 respectively. But neither defendant No. 1 nor defendant Nos. 4-5 produced those documents before the court. Exhibit 2(Ga) and Exhibit-2(Gha) cover the area of 4.74 acre and 1.50 acre of land respectively.

17. Defendants also produced original Arpannama dated 09.05.1995 (exhibit-Uma) executed by Rustom Howlader to the Char Ghunshi Masque, counter foil of a chaque of savings account No. 6591 of the Agrani Bank of Takerhat Branch, Madaripur exhibit-Cha showing last withdrawal of tk. 1500/- (fifteen hundred) in 1993, the resolution book (exhibit-Chha), orders dated 09.08.1998 and 21.08.2000 passed by this Court in Civil Revision No. 3104 of 1998 (exhibit-Ja), (exhibit-Ja(1)) respectively, kabinnama of the marriage of the son of plaintiff No. 3 wherein Rustom Howlader was witness (exhibit-Jha), Judicial acts done in Title Suit No. 126 of 1989 on 07.10.1991, 09.11.1991, 23.02.1992 (exhibit-Yeo, Ta, Tha) respectively.

18. In the additional written statement filed by defendant Nos. 1-3 it was asserted that in kabala dated 15.09.1994 exhibit-2 and Gha the husband of plaintiff No. 2 named Jaynuddin is the identifier and witness. Identification of executants is governed by Rule 46 of the Registration Rules, 1973 derived from section 69 of the Registration Act, 1908 (Act XVI of 1908). The registering officer being satisfied asks the identifier to mention the name of the executant and accordingly thumb impression is done under Rule 48 with serial number. Jaynuddin is also a witness to exhibit-Gha. Defendant filed the original document. Plaintiffs also filed a certified copy of the same. It is true that law is settled that identifier or witness of a document is not supposed to know the contents of the document but the identifier according to the Registration Rules is held to be the best competent person in whose presence the executant goes with the execution process before the registering officer. On 18.08.2003 D.W. 1 stated in examination-in-chief that Jaynuddin who is the husband of plaintiff No. 3 was identifier and witness to exhibit-Gha dated 15.09.1994 but she was not cross-examined on this point and she denied the suggestion that Jaynuddin's name has been appeared in the document by means of forgery. Thus it is apparently clear that the specific case of the plaintiffs on Rustom Howlader's serious sickness and inability to move after 1980 till his death falls through. The finding of the trial Court does not appear to be satisfactory on this point. Jaynuddin did not come before the Court to deny his identification in exhibit-Gha wherein D.W. 5 Habibur is scribe and witness as well.

19. The statement of plaint is vague. It has been averred in paragraph No. 5 of the plaint that any other document except the disputed gift deed, Heba-bil-Ewaz and kabala deeds shall be deemed to be false, fabricated, fraudulent and forged. From reading of the amendment of the plaint with respect to the statement on the signature of Rustom Howlader done in the resolution book it seems that there is an implied admission that in some places Rustom

Howlader put his signature and his presence and signature are not altogether denied. Resolution book is marked in evidence as exhibit-Chha. D.W. 4 Motiar Rahman deposed in support of exhibit-Chha. Question of examination of the signature of Rustom Howlader through expert was reasonably raised from the side of the defence. According to the provisions laid down in sections 101 and 103 of the Evidence Act, the entire onus was upon the plaintiffs to prove that the signatures given by Rustom Howlader in all the documents are false because it is their specific case that Rustom Howlader never appeared in public due to his serious ailment and indisposition and blindness and even he was to be taken to the toilet by somebody else and remained bed ridden from 1980 until his death. Plaintiffs had to take resort to expert opinion in order to discharge their initial onus under section 101 of the Evidence Act to prove that those impugned documents were executed not by Rustom Howlader but by an imposter with a scheme to grab the property and Rustom Howlader was completely unable to perform his own affairs due to his serious illness. Law says when the initial onus is discharged by the plaintiff the onus then shifts upon the defendants to show the contrary. It is very surprising that plaintiffs never ever uttered any word as to what disease their father actually suffered. Rustom Howlader admittedly was a wealthy man. It is unbelievable that he suffered his last 20(twenty) years without any help from any doctor. Plaintiff could examine any doctor in support of their case. But they did not even mention any name of any doctor who treated their father. Although the question on expert opinion was raised but the trial Court did not pay any attention to it. Learned Advocate for the appellant submitted that the trial Court was wrong in traveling in less important places and failed to point out the main question considering the circumstance of the case. He has referred the case of Sushil Chandra Nath Vs. Sanjib Kanti Nath and another reported in 27 BLD(AD) 197 and submitted that it was the bounden duty of the plaintiffs to obtain the expert opinion in order to prove their own case. We have gone through the decision and find merit in his submission.

20. D.W. 5 Habibur Rahman is the witness to Heba-bil-Ewaz dated 13.02.1983 (exhibit-Ga), both scribe and witness to kabala dated 15.09.1994 (exhibit-Gha), both scribe and witness to kabala dated 09.05.1995 (exhibit-Gha(1)), witness to kabala dated 13.04.1997 (exhibit-Gha(2)) and witness to Arpannama dated 13.04.1997 (exhibit-Uma). The law on attesting witness is guided by section 3 of the Transfer of Property Act and Section 68 of the Evidence Act. The scribe will not be an attesting witness unless he intends to sign the deed as such. In other words a scribe can play the dual role of a scribe and an attesting witness. Plaintiffs say that defendants obtained the impugned documents in collusion with the scribe. Trial Court disbelieved D.W. 5 on the finding that he has signed dimly in the documents for fear of being caught on the allegation of forgery but failed to appreciate that he himself came before the Court to prove the documents and exhibits-Gha and Gha(1) clearly show that he is the scribe of Madaripur Sadar Sub-Registry office holding membership No. 236. So he is an easily identifiable person and the finding of the trial Court on D.W. 5 was misconceived.

21. Learned Advocate for the respondent strongly argued that defendant No. 1 Sirajul himself did not come before the court to depose in support of his case and adverse presumption can be drawn under section 114(g) of the Evidence Act for his non examination in the case despite being an important witness. A Power of Attorney given by defendant No. 1 to D.W. 1 through notary public bearing registration No. 135 of 2003 dated 28.06.2003 is kept in the record and under Order 3 Rule 2 of the Code of Civil Procedure read with section 85 of the Evidence Act this power of attorney bears weight. Now question arises whether D.W. 1 being wife of defendant No. 1 holds the same status of defendant No. 1 while deposing in the suit. Question of adverse presumption shall not arise if DW 1 holds the same position. Section 120 of the Evidence Act provides that husband instead of wife or wife

instead of husband shall be competent witness. So according to the facts and circumstances of the instant case section 120 shall prevail over section 114(g) of the Evidence Act and the question on adverse presumption as argued does not arise.

22. Defendants have asserted in paragraph No. 14(ka)(10) of the written statement that Rustom Howlader had many properties left after the land transferred by the impugned documents in favour of the defendants. Trial Court also noticed that Rustom Howlader was a rich wealthy man. Plaintiffs tried to make out an impression that defendant Nos. 1-5 took away all the land of Rustom Howlader by virtue of those impugned documents. It was the duty of the plaintiffs to figure out the entire property belonging to their father. But plaintiffs did not take any step to show that Rustom Howlader owned such quantum of land or the entire land has been taken away by those impugned documents.

23. It has been asserted in paragraph Nos. 14(ka)(6) of the written statement that Rustom Howlader filed Title Suit No. 126 of 1996 against Thana Education Officer, Madaripur and filed application for temporary injunction not to remove the Char Ghunshi Government Primary School. The temporary injunction was rejected against which Rustom Howlader filed Miscellaneous Appeal No. 41 of 1996 in the Court of District Judge, Madaripur. The appeal failed. Then he preferred Civil Revision No. 3104 of 1998 before this Court. The Rule issuing order dated 09.08.1998 is exhibit-Ja and after his death his substituted heirs extended the order of *status quo* till disposal of the rule on 21.08.2000 which is exhibit-Ja(1). Those are public documents and under section 114(e) of the Evidence Act carry presumptive value of its contents and it is to be presumed that Rustom Howlader sworn affidavit in exhibit-Ja until and unless the contrary is proved by reliable evidence and thus it appears that he was never that sick as has been alleged by the plaintiffs.

24. It appears from the record that Rustom Howlader filed Title Suit No. 126 of 1989 for declaration against the gift deed Nos. 7255, 7220 dated 19.12.1982 (exhibits-2(Ga), 2(Gha)) respectively and Heba-bil-Ewaz deed dated 13.02.1983 (exhibit-Ga) and as P.W. 1 he deposed in the suit on 17.10.1991 and in that suit he filed an application for dismissal of the suit for non-prosecution on 09.11.1991 contending that there was an arbitration held between the parties with the help of local respectable persons and he would not proceed with the suit and the same was marked in evidence as exhibit-Yeo and in support of exhibit-Yeo he sworn an affidavit on 24.11.1991 which is exhibit-Ta and subsequently the suit was dismissed for default on 23.02.1992, the order of which was marked in evidence as exhibit-Tha. From a combined reading of exhibit-Yeo, Ta, Tha, it appears that although he made allegation that he did not receive consideration but subsequently he admitted the documents exhibit-2(Kha), 2(GA) and 2(Gha). Exhibit-Yeo is a deposition on oath with an application for dismissal of the suit for non prosecution and exhibit-Ta is an affidavit sworn in the suit. In the case of Alimuzzaman Vs. Musudur Rahman reported in 8 LM(AD) 164 it has been held by our Honourable Appellate Division in paragraph No. 10 that *"An admission of a person is admissible in evidence as against him, though it can be explained away by the maker thereof or the person against whom it is sought to be proved. According to me, the same principle applies to an admission in a signed pleading, or in affidavit, or in any sworn deposition given by a party in a prior litigation, though it is capable of rebuttal. The assertion of a right, whether in a pleadings or other statements, is relevant under section 13 of the Evidence Act and is, therefore, legally admissible in evidence. An admission contained in a plaint or written statement or an affidavit or any sworn deposition given by a party in a prior litigation will be regarded as an admission in a subsequent action, though it is capable of rebuttal."* The admission of Rustom Howlader that he executed those documents cannot be avoided

when plaintiffs could not establish a definite and clear case on Rustom Howlader's sickness. The execution is admitted and plaintiff had no knowledge on execution or passing of consideration being third party to the document. Plaintiffs cannot question about the consideration because it was between parties to the document. The transferee is to prove the payment of consideration when the transferor challenges the same. In the instant case, if the plaintiffs could prove by cogent and credible evidence that Rustom Howlader was seriously ill and blind from 1980 till his death, in that case the onus would lie upon the defendant to prove the payment of consideration.

25. Defendant Nos. 4-5 being sons of plaintiff No. 3 Shahaton although filed written statement but did not contest the suit. They have supported the case of contesting defendant Nos. 1-3. Defendant Nos. 4-5 also did not file their deed of gift 7220 dated 19.12.1982 the certified copy of which was filed by plaintiffs as exhibit-2(Gha). Defendant No. 1 also did not file his deed of gift 7255 dated 19.12.1982. The contesting defendant Nos. 1-3 filed their 04(four) other documents in original which were marked in evidence as exhibit-Ga, Gha, Gha(1), Gha(2) and the plaintiffs also filed the certified copies of those documents which are exhibits-1, 2, 2(ka), 2(kha). The execution of those documents are proved by the other convincing and supporting documentary and oral evidence. It was decided in the case of Shishir Kanti Paul Vs. Nur Mohammad reported in 55 DLR(AD) 39 that a registered document carries presumption of correctness of the endorsement made therein. One who disputes this presumption is required to dislodge the correctness of the endorsement. Plaintiffs completely failed to dispute the presumption of correctness of the documents of defendant Nos. 1-3. This 55 DLR case has been affirmed in the case of Sultan Ahmed Vs. Mohammad Shajahan reported in 3 LM(AD) 463.

26. This is a suit for declaration that the impugned documents mentioned in the schedule to the plaint are forged, fraudulent, collusive and not binding upon the plaintiffs. The suit was filed on 21.08.2002. In the instant suit plaintiffs ought to have made the Char Ghunshi Mosque and Char Ghunshi Government Primary School and Nur Mohammad party to the suit and prayed relief against exhibit-Uma. If exhibit-Uma remains undisturbed the case of defence that Rustom Howlader was healthy and competent stands good and the case of the plaintiffs comes undone. In the instant case after the written statement as well as additional written statement was filed by the defendant Nos. 1-3, plaintiffs although amended the plaint on several occasions but did not make them party to the suit or pray any relief against exhibit-Uma. Nur Mohammad is one of the recipients of exhibit-Gha(2).

27. According to paragraph No. 7 of the plaint, cause of action arose on 14.07.2002 after having knowledge from the sub-registry office. But on perusal of the records it appears that the certified copies of exhibit-2 and 2(ka) were obtained on 17.07.1995. The certified copies of exhibit-2(Ga) and exhibit-2(Gha) were obtained after filing of the suit on 05.07.2003 and 03.07.2003 respectively. Thus it can be held that the cause of action of the suit is definitely false and the suit is barred by law of limitation. The beneficiaries of exhibit-2(Gha) dated 19.12.1982 being defendant Nos. 4-5 are the sons of plaintiff No. 3 Sahaton and the husband of plaintiff No. 2 Rahaton was the identifier to exhibit-Gha dated 15.09.1994. So it raises serious doubt on the story of cause of action and as such it is held that the suit is barred by limitation under Article 120 of the Limitation Act.

28. This is not a case to be decided upon giving emphasis on oral evidence. It is not proved in evidence that Rustom Howlader was ever sick as alleged by the plaintiff rather all the documentary evidence along with the oral evidence explicitly shows that Rustom Howlader was a physically fit person and could perform his daily affairs himself. The recital of the impugned documents shall prevail over the oral evidence. D.W. 2 and D.W. 3 supported the case of possession of the contesting defendant Nos. 1-3. D.W. 2 has got land adjacent to the suit land. He stated in his examination-in-chief that plaintiffs have no possession in the disputed land but on this point he was not cross-examined with a single word. D.W. 3 who is the first degree cousin of both plaintiffs and defendant No. 1 and 6 also supported the possession of the defendants in his examination-in-chief but he was also not cross-examined on that point. Thus it transpires that the possession of the defendants is admitted by the plaintiffs. Trial court failed to consider this simple but material aspect affecting the merit of the case. The finding on constructive possession of the plaintiff arrived at by the trial Court was uncalled for because plaintiffs did not make out any case to ascertain how much land the propositus actually owned. It is admitted that defendant No. 1 and his wife paid respect and took proper care of Rustom Howlader and the defendant Nos. 1-3 being transferees of exhibit-Ga, Gha, Gha(1), Gha(2) as well as son and grandsons of Rustom Howlader admittedly lived in the same mess in one house. There is no case on the part of the plaintiffs that defendant Nos. 1-3 ever maintained any bad relation with Rustom Howlader. The Trial Court also observed that Rustom Howlader being satisfied with defendant Nos. 1-3 transferred the suit land covered by those impugned documents. In the instant case, the oral evidence is evenly balanced. It is presumed that no formal delivery of possession by Rustom Howlader was required to be proved in the instant case because both the executant and transferees live together in the same house. Document presupposes possession and it is the very old maxim that possession goes with title. Possession is presumed to be in favour of such person who has got better title.

29. In the instant case defendants did not file and prove exhibit-2(Ga) and 2(Gha) but proved exhibit-Ga, Gha, Gha(1), Gha(2). Although defendants did not prove exhibit 2(Ga) and 2(Gha) as per law but that does not create any right to the plaintiffs to get a decree to the effect that those are not binding upon them because the they failed to prove their case. Moreover, we observed earlier that the suit is hopelessly barred under article 120 of the Limitation Act and consequently the plaintiffs' suit fails as a whole.

30. Trial Court erred in law in decreeing the suit upon wrongful consideration. The finding of the trial Court is self contradictory. Trial Court misconceived the law and facts of the case and arrived at a wrong conclusion. The impugned judgment and decree call for interference by this Court. From the discussions made above we find merit in the appeal.

31. In the result, the appeal succeeds and accordingly the same is allowed. The judgment and decree dated 28.09.2003 passed by the Joint District Judge, Court No. 1, Madaripur in Title Suit No. 06 of 2002 decreeing the suit is hereby set aside.

32. Send down the lower Courts' record with a copy of the judgment.