

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 4171 of 1998

Dr. Md. Salemir Hossain Chowdhury and
others

..... Petitioners

-Versus-

Most. Honse Ara and others

..... Opposite-Parties

Mr. Muhammad Nawshad Zamir, Advocate
with

Mr. Mizanur Rahman, Advocate

Mr. Md. Tanvir Prodhan, Advocate

Mrs. Anika Tabassume, Advocate

... For the Petitioners

Mr. Mansur Habib, Advocate with

Mrs. Shimul Sultana, Advocate

... For the Opposite Parties

Judgment on 12.12.2024

In this revision Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and decree dated 08.09.1998 and 15.09.1998 respectively passed by the learned Subordinate Judge (now Joint District Judge), 3rd Court, Naogaon in Title Appeal No. 278 of 1993 allowing the appeal and thereby reversing the judgment and decree dated 30.09.1993 and 05.10.1993 respectively passed by the learned Senior Assistant Judge, Sadar, Naogaon in Other Class Suit No. 10 of 1991 dismissing the same should not be set aside

and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts of the case for disposal of this Rule, in short, are that the opposite party No. 1, as plaintiff instituted Other Class Suit No. 10 of 1991 in the Court of Senior Assistant Judge, Sadar, Naogaon for declaration of title in the suit land and for declaration that sale deed executed by pro-forma defendant No.5, if any, in favour of defendant No. 4 is forged, fraudulent, ineffective and not binding upon the plaintiff-opposite party, claiming that the schedule land appertaining to original Khatian No. 98 belonged to Tamizuddin Mondal, Baharuddin Mondal and Gazi Rahman Mondal in equal shares. S.A. record rightly prepared similar to C.S. record. Tamizuddin and then his wife Abiran died leaving two sons, pro-forma defendant No. 5, Tozammel and one Mohammad Ali and daughter Asia, Saleha and Renu who inherited the property. Baharuddin having died, his two wives, five sons including Abu Hanifa defendant No. 6 and eight daughters inherited his property. Gazi Rahman died leaving behind four sons and six daughters. Through amicable partition 'Ka' schedule property fell in the share of Tozammel Hossain, Asia Khatun, Afiron Bewa and Mohammad Ali. Mohammad Ali sold his share in the

property to defendant Ibrahim Noorani and others who remained in possession. Tomizuddin and others sold their share to pro-forma defendant No. 6. Pro-forma defendant No. 5 while in possession of 'Kha' schedule property, out of 'Ka' schedule sold his sixteen annas share measuring 1.33 acres to defendant No. 6 on 11.05.1983. Defendant No. 6 having remained in possession of 1.33 acres giving boundary, made a gift in favour of the plaintiff on 09.12.1990 by Hiba-bil-Ewaz in exchange of Jainamaj and tajbih and thereafter she erected brick wall on two sides and took preparation for constructing house on the suit land. When the husband of plaintiff came to know that defendant petitioners purchased the suit land from defendant No. 4, he asked defendant No. 1 about the sale. Defendant No. 5 denied to have sold the suit land to defendant No. 4. He asserted that he did not transfer the suit property to anybody except defendant No. 6. The plaintiff also came to know that the defendant petitioners in connivance with the employees of local settlement office mutated the khatian in their names and cancelled the mutation in the name of the defendant No. 6, for which title of the plaintiff has become clouded as transfer of the suit property by defendant No. 5 in favour of defendant No. 4 is collusive one and such transfer is not binding upon the plaintiff.

The defendant-petitioners contested the suit by filing written statement contending that the suit is barred under section 42 of the Special Relief Act. It is stated that the defendant No. 5 being the owner and having remained in exclusive possession of the suit property transferred the same to defendant No. 4 on 06.04.1970 and defendant No. 4 having purchased the property paid rents and mutated his name vide Mutation Case No. 79/IX/79-80. Thereafter, defendant No. 4 transferred the suit property to the defendant petitioner Nos. 1-3 on 09.01.1982. After purchase, the defendant petitioners made earth filling work and constructed brick wall, erected tinshed house, installed tube well and latrine and have been living therein. They mutated their names vide Mutation Case No. 100/83-84 and has been paying land revenues to the govt. The record of right created in favour of the defendant No. 6 vide Mutation Case No. 654/87-88 was objected to by the defendant petitioner Nos. 1-3 and the Revenue Officer after hearing cancelled the mutation in favour of defendant No. 6. The plaintiffs brought the suit without any title and possession and is therefore, liable to be dismissed.

The trial court framed five issues for determination of the dispute. In course of hearing, the plaintiff opposite parties adduced four witnesses

as P.Ws. and defendant petitioners examined three witnesses as D.Ws. Both the parties submitted documents in support of their respective claim which were marked as exhibits. The learned Assistant Judge, 1st Court, Naogaon after hearing the parties, dismissed the suit.

Being aggrieved by and dissatisfied with the judgment and decree dated 30.09.1993 and 05.10.1993 respectively, the plaintiff preferred Title Appeal No. 278 of 1993 before the learned District Judge, Naogaon which being transferred was heard by the learned Subordinate Judge, Naogaon (now Joint District Judge), 3rd court, who after hearing by the impugned judgment and decree dated 08.09.1998 and 15.09.1998 respectively allowed the appeal and decreed the suit by setting aside the judgment and decree of the trial court. At this juncture, the petitioner moved this Court by filing this application under section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of stay.

Mr. Muhammad Nawshad Zamir with Mr. Mizanur Rahman, Mr. Md. Tanvir Prodhan and Anika Tabassume, learned Advocates appearing for the petitioner submit that the plaintiff claimed the suit property on the basis of a Hiba-bil-Ewaz dated 09.12.1990 from defendant No. 6 Abu Hanif, who allegedly purchased the suit property along with other

property from defendant No. 5 by a registered deed dated 11.05.1983. On the other hand, the defendant Nos. 1-3 claimed that pro-forma defendant No. 5 Tozammel Hosssain sold the suit property along with other non-suited property measuring 1.11 acres to the defendant No. 4 by a registered deed dated 06.04.1970, who after purchase got his name mutated in the khatian and while in possession upon payment of rents to the government transferred the suit property under Khatian No. 301, Plot No. 1217 measuring 31 sataks to the defendant Nos. 1-3 by registered Deed No. 54 dated 09.01.1982.

He argued that the deed of defendant No. 4 is of the year 1970 and the sale deed of defendant Nos. 1-3 is dated 09.01.1982 earlier to the deed of Hiba-bil-Ewaz dated 09.12.1990 and sale deed of defendant No. 6 is dated 15.05.1983. Therefore, the deed of the defendants being earlier to the deed of plaintiff and defendant No. 6 shall get preference. Accordingly, the trial court rightly dismissed the suit finding that the plaintiff has no right, title and possession in the suit property, but the appellate court without going through evidences led by both the parties both oral and documentary made out a third case observing that taking advantage of burning of the concerned Registry Office, the defendant No.

4 in connivance with defendant Nos. 1-3 created a true copy of sale deed dated 06.04.1970 showing transfer of 1.11 acres land to defendant No. 4 Abdul Mazid and then obtained a sale deed No. 54 dated 09.01.1982 by the defendant No. 3 showing transfer of the suit property in their favour which is absolutely beyond the facts and circumstances of the case, oral evidences led by the parties as well as exhibits submitted by defendant Nos. 1-3.

He finally argued that when a party to the proceeding challenged validity of some the document produced before the court to be forged and fabricated, it was incumbent upon them to prove such allegation by proper evidence in accordance with law. In the instant case though Tozammel Hossain by filing written statement as well as on oath as P.W. 2 stated that he did not execute any deed and registered the same in favour of defendant No. 4 Abdul Mazid on 06.04.1970 transferring the suit land or any other property and claimed that the true copy of the sale deed dated 06.04.1970 in the name of Tozammel Hossain is forged and fabricated, he is to prove the same by evidence.

The appellate court instead of finding burden of proof by the defendant No. 5 and the plaintiff, shifted the burden upon the defendant

Nos. 1-4 to prove that the deed was genuine one and it was duly executed and registered by defendant No. 5 which is absolutely beyond the scope of law and beyond the provisions of law of evidence. The appellate court instead of considering the evidences both oral and documentary available in record, most unfortunately made a surgery on his own motion in respect of deed dated 06.04.1970 observing that true copy of the sale deed dated 06.04.1970 issued on two non-judicial stamps and a cartridge paper, first stamp in its endorsement, serial number has been written 731 by interpolation of figure seven and in that figure seven defers from next stamp No. 732 and also compared the signature of the Sub-Registrar contain in the true copy at the back side of first stamp and front side of last stamp and found dissimilarity between two signatures and also wrongly observed that the defendants did not take any step for examining the signature of Tozammel Hossain by sending the same to the hand writing expert which is in fact, the duty of the defendant No. 4 and the plaintiff who alleged the deed is forged one. As such, the appellate court by allowing the appeal and setting aside the judgment and decree of the trial court and decreeing the suit committed an error of law in the decision occasioning failure of justice.

Mr. Mansur Habib with Mrs. Shimul Sultana, learned Advocates appearing for the opposite parties submit that both the parties to the proceeding admitted that the concerned Sub-Registry Office was burnt in the year 1971 during war of independence, resultantly, all the documents whatever lying in Patnitola, Sub-Registry Office completely burnt into ashes. The plaintiff claimed that said deed dated 06.04.1970 has been created taking advantage of burn of the Sub-Registry Office. Accordingly, executants of deed dated 06.04.1970 by filing written statement as well as on oath stated that he did not transfer any property to the defendant No. 4 by the said deed and the deed is product of forgery. The defendant Nos. 1-4 could not bring any contrary evidence before the trial court to substantiate their claim that Tozammel Hossain actually executed the said deed in favour of the defendant No. 4 Abdul Mazid.

He further submits that defendant No. 6 Abu Hanif, the executants of the Heba-bil-Ewaz appeared in court and deposed as D.W. 3 and proved the deed of Heba-bil-Ewaz, but the defendant Nos. 1-3 on the basis of forged document tried to take over possession of the suit property, consequently, the plaintiff filed the instant suit for declaration. The trial court failed to appreciate the fact in its true perspective and

misdirected himself to find that the deed dated 06.04.1970 is genuine one which was executed by defendant No. 5 in favour of defendant No. 4, but the appellate court while allowing the appeal rightly held that in the absence of original deed alleged to have been executed by Tozammel Hossain, the defendant Nos. 4 and 1-3 ought to have proved the same by adducing evidence or taking recourse by sending the said deed for hand writing expert.

He finally submits that, the appellate court rightly found that there are some dissimilarity in the writing of the true copy in respect of serial number of stamp and signature of issuing authority which has created doubt about genuineness of the said deed and also found that the defendants are not in possession and the plaintiff is in possession though during pendency of suit and subsistence of order of status quo the defendant Nos. 1-3 forcibly entered into the suit land and made a hungama house, such encroachment in the eye of law is not legal possession of the defendants and rightly allowed the appeal and decreed the suit, as such, committed no error of law in the decision occasioning failure of justice, hence, the Rule is liable to be discharged.

Heard the learned Advocates of both the sides, have gone through the revisional application under Section 115(1) of the Code of Civil Procedure, plaint in suit, written statement, evidences both oral and documentary.

Both the parties admitted that the property originally belonged to three brothers namely, Tomizuddin Mondal, Baharuddin Mondal and Gazi Rahman Mondal in equal share and it is also admitted that Tozammel Hossain, defendant No. 5, Abu Hanif defendant No. 6, are legal heirs of original owner of the property and they inherited the suit property along with other property left by their predecessor. Both the parties unequivocally admitted that the suit property covered by S.A. Plot No. 1217 and R.S. Plot No. 1268 measuring 31 sataks belonged to Tozammel Hossain by inheritance. The plaintiff claimed that Tozammel Hossain while in possession and enjoyment by a registered deed dated 11.05.1983 transferred in total 1.33 acres of land including the suit land to Abu Hanif, defendant No. 6 at a consideration of Tk. 4,500/-. Abu Hanif while in possession by purchase, by a registered deed of Heba-bil-Ewaz dated 09.12.1990 (exhibit-'1-Kha') gifted the same to the plaintiff who is happened to be his cousin sister.

The instant suit was filed on 06.01.1991 just after 27 days of obtaining Heba-bil-Ewaz, claiming that Tozammel Hossain was in possession who transferred the same to Abu Hanif and Abu Hanif gifted the property to the plaintiff and she has been possessing the suit land by giving boundary wall and erecting a house thereon. The trial court in appreciating the fact rightly held that after obtaining Heba-bil-Ewaz within 27 days how it could be possible on the part of the plaintiff to construct boundary wall, fill in the land with sand or mud, constructed house and how she possesses the suit land. Moreover, the trial court found that P.W. 1 who is husband of the plaintiff when deposing stated that the plaintiff is not in possession. Supporting the statement, P.W. 3 also stated that the plaintiff is not in possession and the trial court held that a person having no possession in the property, at his or her instant suit for simple declaration of title is not at all maintainable.

The trial court also observed that defendant No. 5 while deposing as P.W. 2 did not seriously denied execution of sale deed by him in favour of defendant No. 4 on 06.04.1970. Impliedly the defendant Nos. 5 and 6 admitted the existence of said deed of the year 1970. However, it was incumbent upon the defendant No. 5 to prove that he did not execute the

same in favour of defendant No. 4 in the year 1970 by sending the deed in question for expert opinion calling relevant volume or thumb impression book from the Registry Office. The trial court also observed that the plaintiff though claimed title in the property by way of gift from defendant No. 6, but her deed is silent about specification of the property gifted to her. The appellate court in criticizing true copy of the deed dated 06.04.1970 observed that admittedly Patnitola Sub-Registry Office was burnt during war of independence in 1971, volume of the deed dated 06.04.1970 is not available in the Registry Office. The defendant Nos. 1-3 admitted that at the time of purchase by them on 09.01.1982 vendor Abdul Mazid could not show original deed to them and they also did not take any information from Sub-Registry Office about its existence and they did not also call for the treasury challan from the treasury and also did not take any step for sending the signature of Tozammel Hossain to the hand writing expert for opinion. D.W. 3 deposed that he was one of the attesting witness to the deed of the year 1970 as the deed in question is true copy it was not proved in accordance with law and also found that the defendants did not take any step for examining the copyist of the Registry Office and the comparer to the effect that they have prepared the true

copy in favour of defendant No. 4 and also found that the stamp contain serial No. 731 and 732, wherein, figure seven differs from each other, 731 has been written by interpolation of figure seven.

To appreciate the observations made by the appellate court, I have gone through the deed in question and find that the writer at first written the figure “7” (seven) in English, but subsequently it has been made as “৭” (সাত) in Bangla and there is no interpolation at all and for such reason a true copy of the deed cannot be said to be forged and fabricated and the signature of the issuing authority also did not differ from each other. Curiously enough, the appellate court utterly failed to find another document (exhibit-Ka (1)(Kha)) which is registration token No. 191980 issued by the Sub-Registrar on 06.04.1970. On the first page and at the back of the token, the defendant No. 5 put his signature as Tozammel Hossain, this document proves that Tozammel Hossain executed the sale deed on 06.04.1970 in favour of Abdul Mazid defendant No. 4 and presented the said deed before Sub-Registrar for registration acknowledging which Sub-Registrar issued this token to Tozammel Hossain to get the original deed after entering into volume and certificated by the Sub-Registrar under section 60 of the Registration Act. Since

Abdul Mazid is purchaser of the property said registration token was handed over to him to receive the original sale deed as and when it will be ready for delivery. The appellate court could have compared the signature contain in registration token (exhibit-Ka(1)(Kha)), with the signature on the written statement filed by the defendant No. 5, Tozammel Hossain and the signature contain on the deposition adduced before the trial court. To come into a definite conclusion I, on my own motion examined all those signatures contain in the evidence of P.W. 2, on the written statement and the registration token (exhibit-Ka(1)(Kha)) and find that all those signatures are of the same person. Had defendant No. 5 Tozammel Hossain not executed the disputed deed on 06.04.1970 in favour of defendant No. 4 Abdul Mazid, the Sub-Registry Office would not have issued a token to him on receipt of sale deed presented by Tozammel Hossain. From three documents; registration token, written statement and deposition of defendant No. 5 it is proved that Tozammel Hossain executed the sale deed dated 06.04.1970 in favour of Abdul Mazid and by the said deed Tozammel Hossain transferred the suit property measuring 31 sataks in the year 1970 who after purchase got his name mutated in the khatian vide Mutation Case No. 79/IX/79-80 and transferred the suit land

to defendant Nos. 1-3 by a registered deed dated 09.01.1982 (exhibit-Ka) who after purchase got their names mutated in the khatian by Mutation Case No. 100/83-84 and have been possessing the same. Since the plaintiff as well as the defendant No. 5 could not prove that the deed dated 06.04.1970 is forged one rather it is established from the evidences available in record that defendant No. 5 transferred the suit property in the year 1970 to defendant No. 4 he lost saleable interest in the property to be transferred in favour of defendant No. 6 in the year 1983. From record, it appears that the defendant acquired title on and from 06.04.1970 and finally 09.01.1982 by purchase from defendant No. 4. Therefore, on 11.05.1983 defendant No. 6 Abu Hanif by purchase from Tozammel Hosssain acquired no title in the suit property to be gifted in favour of the plaintiff in the year 1983. I find that the trial court rightly dismissed the suit finding no title of the plaintiff in the suit property, but the appellate court utterly failed to appreciate the provisions of law, evidences adduced by both the parties and failed to find that the true copy of deed dated 06.04.1970 supported by a registration token issued by the Sub-Registrar Office for delivery of original deed proved that Tozammel Hosssain transferred the property in favour of Abdul Mazid and he had no saleable

interest in the property to be transferred in favour of Abu Hanif on 11.05.1983. Hence, the plaintiff by way of gift from Abu Hanif acquired no title and possession in the property, as such, the appellate court committed error of law in the decision occasioning failure of justice.

Taking into consideration the above, I find merit in the rule as well as in the submission of the Learned Advocate for the petitioners.

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

The order of stay granted at the time of issuance of the Rule stands vacated.

Judgment and decree of the appellate court is hereby set aside and the judgment and decree of the trial court is hereby restored.

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