IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

Civil Revision No. 5900 of 2007

Md. Shah Alam and others

.... Petitioners

-Versus-

Md. Nazrul Islam and others

..... Opposite parties

Mr. Khondkar Shamsul Hoque Reza, Advocate

… For the Petitioners

Mr. Moinul Islam, Advocate

… For the Opposite parties

Mr. Md. Firoz Hossen, Advocate

....For the added Opposite parties

Heard on: 19.05.2024, 23.05.2024, 26.05.2024 and 27.05.2024.

Judgment on: 02.06.2024.

Sashanka Shekhar Sarkar, J:

This Rule is directed against the judgment and decree dated 19.11.2007 (decree signed on 20.11.2007) passed by the learned Additional District Judge, Barguna in Title Appeal No. 07 of 2006 allowing the appeal by reversing those of dated 28.11.1995 (decree signed on 30.11.1995 passed by the learned Joint District Judge, 2nd Court, Barguna in Title Suit No. 14 of 2000 dismissing the suit.

Facts, relevant for disposal of this Rule, are that, the petitioners as plaintiffs filed Title Suit No. 14 of 2000 in the court of Joint District Judge, 2nd Court, Barguna for declaration of title to and partition of “Ka” schedule land and for declaration that “Kha” schedule deed in respect

“Gha” schedule land is void, collusive, inoperative and not binding upon the plaintiffs by presenting a plaint contending that the predecessor of the plaintiffs and the opposite parties No. 2-13 named Sarup Ali became the owner of 8 annas share from 5.02 acres of land of S.A. Khatian 415 of S.A. Plots No. 2146 and 2176; 14 annas from 4.01 acres of land of S.A. Khatian No. 417 of S.A. Plots No. 781, 782, 766, 782/817 and 781/899; 14 annas from 8.83 acres of S.A. Khatian 119 of S.A. Plots No. 2024, 2025, 2026, 2027, 2018 and 2033; 8 annas from 4.55 acres of land of S.A. Khatian No. 258 of S.A. Plots No. 2149, 2177, 2179, 2077/2370, 2412 and 2185/2422, full share of 5.27 acres of land of S.A. Khatian No. 149 and 171 of S.A. Plots No. 166, 176, 182, 188, 237, 309, 310, 381 and 406. In the above way he became the owner of total 22.90 acres of land at Chalbhanga and Hori Mrittunjoy mouja.

The predecessor of the plaintiffs and defendant Nos. 2-13 Sarup Ali while was owning and possessing the said land died leaving behind one son Fazlul Karim, two daughters Safia Begum and Mostafa Begum and two sons and a daughter of another daughter Jarina Khatun. On the death of Sarup Ali his son, two daughters and deceased daughter’s sons and daughter obtained their respective shares as per Mislim Faraj i.e. son Fazlul Karim inherited 9.16 acres and rest 13.74 acres of the land were inherited by three daughters each having 4.58 acres (deceased daughter’s sons and daughter proportionately). The plaintiffs asked the defendants No. 2-13 to have their share partitioned amicably but they refused the proposal on 07.07.2000 and then the plaintiffs having no other alternative constrained to file the suit for declaration of title and partition of the suit land.

The defendant Nos. 30, 31, 33, 34, 37, 41, 45-48, 50, 51, 76, 80 and 81 contested by filing written statements denying all the material

allegations of the plaint and contended that they have purchased 5.06 acres of land from the heirs of Fazlul Karim and are in enjoyment and possession by erecting dwelling houses, digging ponds etc. within the knowledge of the plaintiffs. Sarup Ali bequeathed his entire landed property to his only son Fazlul Karim on 04.11.1970 by wasiyatnama in presence of the plaintiffs but the plaintiffs by concealing the same filed the suit with the object to have undue benefit. The property in question was bequeathed to Fazlul Karim by wasiyatnama which has been acted upon duly. Fazlul Karim became the absolute owner and on his death, his heirs being the owners have transferred the same to the contesting defendants and the defendants have been enjoying and possessing within the knowledge of all. So the suit is liable to be dismissed.

The Joint District Judge, 2nd Court, Barguna on considering the pleadings of the parties, framed the following issues for adjudication:

1) Whether the suit is maintainable in its present form and manner?
2) Whether the suit is barred by limitation?
3) Whether the wasiyotnama was made on the consent and within the knowledge of the heirs of Sarup Ali?
4) Whether there is any right, title, interest and possession of the plaintiffs in respect of the suit land?
5) Whether the suit is liable to be decreed as prayed for?

The trial Court on hearing the parties and considering the evidences and materials on records was pleased to dismiss the suit on contest against the defendant Nos. 30, 31, 33, 34, 37, 41, 45-48, 50, 51, 70, 80 and 81 and ex parte against the rest discussing all the above issues vide judgment and decree dated 28.11.2005 (decree signed on

30.11.1995) as against that Title Appeal No. 07 of 2006 filed by the plaintiffs and was allowed decreeing the suit as against that the contesting defendant No. 30, 31, 33, 34 , 37, 41, 45, 48, 50, 51, 76, 80 and 81 being petitioners have preferred this Civil Revision and obtained the instant Rule.

During pendency of this Rule the defendant Nos. 2-13 of the suit came up with an application for addition of party in the Rule and accordingly they have been added as opposite parties No. 14-23 vide order dated 13.02.2014.

Mr. Khandaker Shamsul Haque Reza, the learned Counsel appearing for the petitioners submits that admittedly the father of the plaintiffs and the defendant Nos. 2-13 named Sarup Ali was the owner of 22.90 acres of land. It is also admitted that he died leaving behind one son named Fazlul Karim, two daughters Safia Begum and Mostafa Begum and also two sons and a daughter of another deceased daughter Jarina Khatun as legal heirs. Sarup Ali being the absolute owner of 22.90 acres of land out of total 33.70 acres of different Khatians and Plots, bequeathed his entire 22.90 acres landed property by wasiyotnama to his only son Fazlul Karim with the consent of his other legal heirs. Fazlul Karim being the absolute owner transferred 5.06 acres of land by several transfer deeds to the petitioners who being the bona fide purchasers have been owning and possessing but the plaintiffs having been ill advised and purposefully long after 30 years of execution of wasiyatnama filed the suit. The daughters of Sarup Ali those who had signed on wasiyatnama as attesting witnesses did not raise any objections but their genealogical heirs long after 30 years of execution of wasiyatnama filed the suit for undue benefit. Sarup Ali lawfully bequeathed his entire property to his only son Fazlul Karim and his

heirs being the owners lawfully transferred to the contesting defendants. Mr. Raza lastly submits that since the wasiyatnama was executed on the consent of the predecessor of the plaintiffs and has been acted upon and by dint of which having accrued vested right to transfer, have transferred to the contesting defendants so they are not entitled to any reliefs and the Rule is liable to be made absolute by setting aside the decree passed by the court of appeal below.

Mr. Moinul Islam, the learned Counsel appearing for the plaintiffs opposite parties No. 1-13 submits that admittedly Sarup Ali was the owner of 22.90 acres of land out of total 33.70 acres from different khatians and plots. Sarup Ali admittedly died leaving behind one son, two daughters and two sons and one daughter of another deceased daughter Morjina, who died before his death. The plaintiffs are legal heirs of Sarup Ali and on his death they are entitled to have their respective shares as per muslim faraz in respect of 22.90 acres of land. As per muslim faraz, his only son Fazlul Karim is entitled to get 9.16 acres and each daughters are entitled to get 4.58 acres. Mr. Moinul Islam further submits that Sarup Ali bequeathed his entire landed property to his only son Fazlul Karim by wasiyotnama on 04.11.2017 and though on the wasiyotnama his daughters signed as attesting witnesses but as long as his heirs did not give consent to the same, should not be considered as valid one. He further submits that the facts remains that the daughters of Sarup Ali endorsed wasiyatnama during his life time but after his death neither they nor their heirs endorsed wasiyotnama. So as per law, the wasiyotnama was not acted upon and since the wasiyotnama was not acted upon, the claim of the predecessor of the defendants to have obtained through wasiyatnama was illegal and the transfer so made to others was also illegal.

Mr. Islam futher submits that a muslim cannot bequeath his entire property to anybody without the consent of his legal heirs. He is only entitled to bequeath $\frac{1}{3}$ of his property to the stranger or anybody else where the consent need not required to be obtained from his prospective heirs but whenever the bequeath by any means exceeds more than $\frac{1}{3}$, in that case, the consent of the prospective heirs should be obtained. Since the admitted legal heirs of Sarup Ali challenges that no such endorsement was given and filed suit, in that case, the question of endorsement given by the heirs of the testator before his death is not justified. Mr. Islam lastly submits that mere signature of the heirs of testator on wasiyatnama does not mean to have obtained consent and so far as he is alive, his testamentary right will not be effective. After his death, the testamentary right to be effective subject to the consent of other legal heirs. Since after the death of the testator, no such endorsement was obtained, rather the plaintiffs claimed their respective shares by filing a suit with a prayer for cancellation of wasiyatnama, deemed to have given no endorsement and as such the Rule is liable to be discharged by upholding the judgment and decree of the court of appeal below.

Added opposite parties No. 14-22 (the defendants No. 7, 4, 6, 9, 3, 8, 10, 12 and 13) did not contest the suit by filing any written statements. So their positive case is not present before the court. However, Mr. Md. Firoj Hossain the learned Counsel appearing for the added opposite party Nos. 14-22 submits that the predecessor of the opposite party Nos. 14-22 namely Fazlul Karim obtained the entire 22.90 acres of land of Sarup Ali by way of wasiyatnama. The other heirs of Sarup Ali had given endorsement in respect of execution of

wasiyatnama infavour of Fazlul Karim. Long after of the death of testator, the heirs of attesting witnesses i.e. the daughters, heirs of Sarup Ali, as plaintiffs filed the suit which is not maintainable because their predecessor as already have given consent to the wasiyotnama has been lawfully acted upon and by virtue of the said lawfully executed wasiyatnama have transferred some lands from 22.90 acres to different persons. Mr. Firoz Hossen lastly submits that the heirs of Fazlul Karim are in exclusive possession on the suit land and the plaintiffs never got possession. So the right, title and interest accrued in their favour by virtue of wasiyatnama should not be hampered in any manner and as such the Rule should be made absolute.

We have heard the learned Advocates of all the parties, perused the judgment and decree of both the courts below and the citations referred to.

On the backdrop of the case as already been elaborated, the following issues are mainly required to be adjudicated:

1) Whether Sarup Ali was the owner of 22.90 acres of land ?
2) Whether he had bequeathed his entire property to his only son fazlul Karim by a wasiyatnama and the same was, on his death, legalized with the consent of the other heirs ?
3) Whether a muslim can bequeath his entire property without the consent of his legal heirs?
4) Whether the bequeath made by Sarup Ali by wasiyotnama was acted upon in any point of time?
5) Whether the wasiyotnama is proved that had not acted upon in accordance with law are the plaintiffs entitled to have declaration and partition in respect of their respective shares?

All the above issues are being disposed of together with the following findings and observations;

Trial Court in adjudicating of the suit found that since the other heirs of Sarup Ali had given their signatures as attesting witnesses on wasiyotnama means, the wasiyotnama was acted upon on their consent and found that by virtue of the said wasiyatnama, Fazlul Karim became the absolute owner and possessor of the entire landed property and transferred some lands from the same to others was lawful. The other heirs of the testator Sarup Ali on the very day of execution of wasiyotnama had given their consent, so the suit by their heirs after long lapse of time is hopelessly barred by law of limitation.

The court of appeal below decreed the suit holding that testator Sarup Ali admittedly was the owner of 22.90 acres of land and he died leaving behind one son, two daughters and two sons and a daughter of another deceased daughter Jarian Khatun. Sarup Ali bequeathed his entire 22.90 acres of land by executing a wasiyotnama in favour of his only son Fazlul Karim which he should not have done because a muslim has only right to bequeath $\frac{1}{3}$ of his entire property and to do so, need not require to obtain any consent to any parties or any of his heirs but whenever it exceeds $\frac{1}{3}$ of his entire property, it requires to have consent of his other heirs and the said consent not necessary during his life lime but on his death. The court of Appeal below also found that two daughters of Sarup Ali made signatures on wasiyatnama as attesting witnesses but there is no evidence as to whether on the death of the testator they had given consent on the wasiyatnama and accordingly found the wasiyatnama was not acted upon.

We have meticulously perused the judgments and decree of the courts below. Now it requires to examine whether, the court of appeal below committed any error of law resulting in an error in the decision occasioning failure of justice in decreeing the suit. Section 117 of Mollah's Principles of Mohammedan Law, 23th edition provides bequeath to heirs. For ready reference the same is quoted below:

Section 117. Bequests to heris: "A bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.

A bequest to an heir, either in the whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extend only and binds his or her share. Neither inaction nor silence can be the basis of implied consent."

Section 118 of the laws provides for limit of testamentary power. For ready reference the same is quoted below;

Section 118. Limit of testamentary power: "A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."

In the case of Nurjahan Begum and another Vs. Aminul Hoque and others report in 22 BLC (AD) 169 it has held, "A will is a document in which a person specifies the method to be applied in the management and distribution of his estate after his death. A bequest to an heirs is not valid unless the others heirs also consent to the bequest after the death of the testator." In the case of Daulot Ram Khosan Chand Vs. Abdul Kayum Nurudin and others reported in Bombay series page 497 it has held, " Where a Mohomedan by his will bequeaths

more than one third of his whole property to stranger, the consent of his heirs to such bequest, required by the Mohammedan law, need not be express; It may be signified by conduct showing a fix and unequivocal intension. Such a consent, all through given after the property bequeath has been attached in execution of a decree against a testators heirs is good, and does not amount to an alienation such as is prohibitated by section 276 of the Code of Civil Procedure ."

On meticulous perusal of the pleadings of the parties, evidences and materials on records as well as the concerned laws it appears that testator Sarup Ali admittedly died leaving behind one son, two daughters and two sons and a daughter of another deceased daughter. The plaintiffs do not dispute the wasiyotnama but disputes of its legality and validity. The petitioners filed suit for partition and also for cancellation of wasiyatnama. We find that the plaintiffs are undeniable heirs of Sarup Ali, the testator of wasiyatnama and they are entitled to get their respective shares from their predecessor. The moot question is whether their claimed share as has been ignored by the bequest of Sarup Ali by wasiyatnama was acted upon. If the wasiyatnama was acted upon, in that case, the plaintiffs have no case to claim their share, but as it is found that wasiyatnama was not duly acted upon in that case, as per muslim Faraz, the plaintiffs are highly entitled to get their respective shares. So we are basically confined on the particular point of law that whether the wasiyotnama alleged to have been executed by Sarup Ali in favor of his son Fazlul Karim was legally acted upon and whether by the said wasiyotnama he obtained the entire property.

As already elaborated that Sarup Ali bequested his entire property to his only son which the law does not allow because the bequests of his entire property by wasiyatnama after his death without consent of his other heirs is not a valid wasiyotnama in the eye of law. A muslim has liberty to bequest 1/3 of his entire property to others for many purposes such as welfare etc. but more than 1/3 of his entire property if he wants to bequest to anybody

else (it may be his son and any other close relative), requires consent. We find that on the death of Sarup Ali, Fazlul Karim in no point of time could obtain consent from the plaintiffs who are admittedly the heirs of Sarup Ali (daughters) as a legal bindings stipulated in section 118 of Mohammedan law.

So on considering the entire facts and circumstances of the case and the law related there to, we are of the view that the plaintiffs are entitled to get their respective shares in respect of the property of Sarup Ali as per muslim Faraz in accordance with law.

It is noticed that the present petitioners purchased 5.06 acres of land from the heirs of Fazlul Karim. Fazlul Karim being the only son of Sarup Ali was legally entitled to get 9.16 acres of land out of 22.90 acres. So admittedly purchased 5.06 acres of land by the petitioners by several deeds to be deducted from 9.16 acres obtained by Fazlul Karim from his father.

So we find no merit in the Rule.

In the result, the Rule is discharged.

However without any order as to costs.

The judgment and decree passed by the court of appeal below is maintained.

The order of stay granted at the time of issuance of the Rule is hereby recalled and vacated.

Send down the Lower Courts Records along with a copy of this judgment at once.

(Mr. Justice Sashanka Shekhar Sarkar)

I agree.

(Mr. Justice Md. Badruzzaman)