

Bench:

Mr. Justice Bhishmadev Chakrabortty

Civil Revision No.2821 of 2016

Mst. Anowara Begum being dead her heirs:

1(Ka) Akram Dider and others

.....petitioners

-Versus-

Md. Awal Sheikh and others

.....opposite parties

Mr. Md. Rafiqul Islam Faruk with

Mr. Md. Salahuddin, Advocates

..... for the petitioners

Mr. Abdul Barek Chowdhury with

Mr. Newaj Sharif, Advocates

..... for the opposite parties

Judgment on 26.05.2024

In this Rule opposite party 1 was called upon to show cause as to why the judgment and decree of the Additional District Judge, Court No.2, Bagerhat passed on 20.06.2016 in Title Appeal No.18 of 2005 allowing the appeal reversing the judgment and decree of the Senior Assistant Judge, Morrelgonj, Bagerhat passed on 07.02.2005 in Title Suit No.113 of 1998 dismissing the suit should not be set aside and/or such other or further order or orders passed to this Court seem fit and proper.

The plaint case, in brief, is that the suit property measuring 3.49 acres corresponding to SA *Khatians* 5, 170 and 171 originally belonged to Momin Uddin Sheikh. He died leaving behind his wife defendant 1 and two nephews, the plaintiff and non contesting defendant 3 as heirs. Defendant 2 is the nephew

(sister's son) of defendant 1. Defendants 1 and 2 understood that since Momin Uddin had no issue his properties could be devolved to the plaintiff and defendant 3 and for that reason they in connivence with Meher Ali Miah, maternal father-in-law of defendant 1 very secretly went to the Sub-Registry Office of Khulna and by false personation taking false signature and thumb impressions of Momin Uddin created 3(three) deeds of gift two dated 19.06.1980 and one dated 20.06.1980. After the death of Momin Uddin the plaintiff came to learn about those forged deeds on 15.01.1998. He then collected certified copy of deeds on 28.01.1998 and firmly learnt about the forgery. Although the lands were situated within the Morrelgonj Sub-Registry Office but the deeds were registered in District Registrar's Office, Khulna. If the thumb impressions of the deceased put in the deeds are compared with the registered *patta* dated 27.05.1955 executed by Momin Uddin and others the fact of forgery would come out. The defendants have no possession in the suit land. Hence the suit for declaration that the three deeds dated 19.06.1980 and 20.06.1980 are forged, fraudulent, collusive, illegal and not binding upon the plaintiff.

Defendants 1 and 2 contested the suit by filing written statements. In the written statements they denied the statements made in the plaint and further contended that the suit is not

maintainable without any prayer for declaration of title and partition. They contended that Momin Uddin and defendant 1 had no child. They brought up defendant 2 from his childhood as their own child. Defendant 2 resided with them and used to respect them like parents. Momin Uddin had arranged his marriage after attaining the age of majority and the couple lived with them. Momin Uddin decided to gift all his properties to defendants 1 and 2 and disclosed the fact to his local distinguished persons and relatives of the plaintiff as well. The plaintiff grew angry for it and threatened him with dire consequences. He gifted the suit property to defendants 1 and 2 on 18.06.1980 in presence of Meher Ali Miah and others and they gladly accepted it. The possession of the land was handed over to defendants 1 and 2. Out of fear he went to the District Registrar Office, Khulna and executed and registered the deeds of gift by putting his signatures and thumb impressions. They have been owning and possessing the suit land. They mutated their names in the concerned office. Defendant 2 mortgaged a part of suit property with Sonali Bank, Morrelgonj Branch and took loan therefrom with the knowledge of late Momin Uddin. The plaintiff by suppressing all these facts instituted the suit out of greed only to grab the suit property. The plaintiff filed a criminal case against the defendants which was

dismissed after investigation. The suit, therefore, would be dismissed.

On pleadings the trial Court framed only 3 issues; (i) whether the suit is maintainable in the present form? (ii) whether the suit is barred by limitation? (iii) whether the plaintiff is entitled to get decree as prayed for?

In the trial, the plaintiff examined 4 witnesses while defendants examined 6. The documents produced by the plaintiff were exhibits-1, 1(Ka), 1(Kha), 2, 3 and 4 and the documents of the defendants were exhibits-Ka, Ka(1), Ka(2), Ga and Ga(2). However, the Assistant Judge considering the evidence and other materials on record dismissed the suit. Against which the plaintiff preferred appeal before the District Judge, Bagerhat. The Additional District Judge, Bagerhat heard the appeal on transfer allowed the same and decreed the suit which prompted the defendants to approach this Court with this revision and the Rule was issued and an interim order was passed.

Mr. Md. Rafiqul Islam Faruk, learned Advocate for the petitioners takes me through the judgments passed by the Courts below and other materials on record and submits that the Court of appeal below in disposing the appeal mainly relied on the report of the expert. The expert opined that the thumb impressions of the executant put on the disputed deeds exhibits-Ka series are

dissimilar with his thumb impressions put on exhibit-4 but the report was not marked as exhibit and, therefore, it cannot not be taken as evidence for consideration. He then submits that the deeds of gift exhibit-Ka series have been registered in the Office of District Registrar, Khulna in 1980 under section 30 of the Registration Act, 1908 (the Act, 1908). In the written statement and evidence the defendants proved the reason for registering the deeds in Khulna instead of Morrelgonj. In registering the deeds in the district head quarter the provisions of law has not been violated. He then submits that for the sake of argument even the suit is decreed and the deeds under challenge are declared not binding upon the plaintiff, in that case he will get a part of land as heir of late Momin Uddin and as such the suit in the present form without declaration of title and partition is not maintainable. He further submits that in evidence the defendants proved possession in the suit land. Therefore, the suit without praying consequential relief is not maintainable. The specific case of the defendants that Momin Uddin looked after defendant 2 because he had no issue and gifted the property to the defendants have been proved by the evidence of witnesses. He refers to the cases of Ratan Chandra Dey and others vs. Jinnator Nahar and others, 61 DLR (AD) 116 and Kadbanu Bibi and others vs. Wazed Ali Sikder and others, 10 ADC 913 on point of maintainability of the suit. Mr. Islam finally

submits that in order to compare a thumb impression of a person with his admitted thumb impression, the impression put on the backleaf of the deed containing the number of the volume is to be sent to the expert. But here the thumb impression of Momin Uddin put on the backleaf of the deeds was sent to the expert to compare it with his admitted impression put on the overleaf of the *patta*. Therefore, the report on such documents is to be treated as incomplete and cannot be used in evidence to determine the genuineness of the disputed deeds. The Court of appeal below simply relied upon the report of the expert and allowed the appeal decreeing the suit and thereby committed error of law which has resulted in an error in such decision occasioning failure of justice. Therefore, it is required to be interfered with by this Court in revision.

Mr. Abdul Barek Chowdhury, learned Advocate for opposite party 1 opposes the Rule. He submits that this revision by the defendants is not maintainable because the findings of the Assistant Judge that the thumb impressions of Momin Uddin put in the disputed deeds are dissimilar with the impression put in the deed of 1955 exhibit-4 has not been challenged by the defendants in the appeal. Therefore, the instant revision cannot be maintained. He then refers to the provisions of section 30 of the Act, 1908 and submits that the land of the disputed deed is situated within the

Sub-Registry Office of Morrelgonj but those were registered in the District Registrar's Office, Khulna. But there is no explanation in the deeds that prevented the executant to register those in the Sub-Registry Office of Morrelgonj. The satisfaction of the Registrar is absent in the deeds which proves that defendants 1 and 2 executed and registered those deeds on false personation. Both the Courts below correctly believed the report of the expert about the thumb impressions of Momin Uddin. The Court of appeal below relied on the expert's report and allowed the appeal decreeing the suit which may not be interfered with by this Court in revision. Therefore, the Rule would be discharged.

I have considered the submissions of both the sides, gone through the materials on record, the law referred to and *ratio* of the cases cited by the learned Advocate for the petitioners. It is admitted that Momin Uddin was the original owner of the suit land and he had no issue. Defendant 1 is his wife and defendant 2 is the son of his sister-in-law. Plaintiff and defendant 3 are his nephews. One of the nephew of Momin Uddin as plaintiff instituted the suit after his death. In the suit he claimed that as an heir of Momin Uddin he will get a share after his death but defendants 1 and 2 created 3(three) deeds of gift in their names by false personation. The defendants' specific case is that Momin Uddin looked after defendant 2 like his son and the latter used to

respect him and defendant 1 as parents. He (Mominuddin) wanted to gift the land to defendants 1 and 2 but the plaintiff grew angry and out of fear he registered the deeds in the District Registrar's Office at Khulna inspite of Sub-Registry Office, Morrelgonj.

Section 30 of the Registration Act, 1908 (omitted in 1985) was in operation at the time of registration of the disputed deeds in 1980. Section 30(1) of the Act, 1908 provides that a District Registrar in his discretion can receive and register any document which might have been registered by any Sub-Registrar subordinate to him. The aforesaid provisions does not provide that satisfaction of the District Registrar has to be reflected in the deed. Here the deeds were registered by the District Registrar the land of which is situated in his district but within the jurisdiction of a Sub-Registry Office. The defendants' witnesses led corroborative evidence and proved that Momin Uddin was compelled to register the deeds in District Registrar's Office due to the threat of the plaintiff.

Mr. Chowdhury argued that since the petitioner did not challenge the findings of the Assistant Judge about dissimilarity of the thumb impressions of late Momin Uddin put in the disputed deeds with his admitted thumb impression put in the *patta* exhibit-4 as per expert report by filing appeal and as such he cannot file this revision challenging the appellate judgment and decree. It is

found that the Assistant Judge although found the thumb impressions dissimilar but ultimately he dismissed the suit assigning reasons. The final decision was in defendants' favour, so they did not prefer any appeal against the findings. The appellate Court allowed the appeal and set aside the judgment and decree passed by the Assistant Judge and consequently decreed the suit. Since the suit has been decreed in appeal, the defendants being aggrieved by challenged the same here under section 115(1) of the Code of Civil Procedure. Therefore, this revision is maintainable as well.

The moot question is to be decided here that whether the report of the expert (not exhibited) regarding thumb impressions put by Momin Uddin in the disputed deeds exhibits-Ka series with the admitted thumb impression put by him in the *patta* dated 27.05.1955 exhibit-4 is to be taken into account. It is found that the expert Faridul Islam, a Police Inspector and thumb impression expert of CID Bangladesh was examined as PW1 on oath. In evidence he supported the report dated 26.06.2002 but his report was not marked as exhibit by the learned Judge. Now the question comes whether it can be considered as evidence as per law. On going through the recorded evidence by the learned Judge I find that it was a mistake on the part of the Judge who did not mark it as exhibit. But it is not disputed by the parties that the expert

submitted a report on 26.06.2002 and he opined that the thumb impressions are dissimilar. The fate of a civil suit depends upon plaint, written statement and evidence of the witnesses both oral and documentary. It may not be disposed of relying only on the expert opinion. I failed to understand how an Additional District Judge disposed of the appeal relying only on the questionable expert opinion having other enough evidence on record. It is found that the thumb impressions put by Momin Uddin on the backleaf of the deeds of gift were sent to the expert to compare with the thumb impression put on the overleaf of the *patta* exhibit-4 where he was one of the executants. Although on the agreement of both the parties the impressions were sent to the expert but to determine the real question in controversy the thumb impression put on the backleaf of a deed which contain a number similar to the balam book are to be sent to the expert for comparison but here it was not done. The very sending of the thumb impressions for comparison was faulty. There were 3(three) executants of exhibit-4 and all of them put thumb impressions on the overleaf of the deed and those impressions do not bear any number and as such a confusion reasonably can arise if one of the impressions of those is sent to the expert for comparison. But the impression put on the backleaf of the deed contains a number and therefore if it is sent there would be no confusion. The report submitted by the expert,

even if, is taken as evidence it seems to me is totally an incomplete report. The expert just formed his opinion that those thumb impressions are dissimilar without assigning any reason. He ought to have mentioned the different signs of thumb impressions such as comparing delta, core and others which are required to find out similarity or dissimilarity of the thumb impressions. Therefore, I find that the opinion of the expert is not an opinion in the eye of law. Although forming opinion by a learned Judge himself without sending it to the expert is risky and hazardous but since this is a very old matter, I myself compared the thumb impressions put by the executant at the backleaf of the gift deeds with his admitted impression put on the backleaf of exhibit-4 by magnifying glass which I can do under section 73 of the Evidence Act. On enlarging the thumb impression of Momin Uddin on the backleaf of *patta* exhibit-4 as well as of the disputed deeds exhibit-Ka series, I find that those are similar considering delta, short ridge, core and island etc. but dissimilar with the overleaf of exhibit-4. The Assistant Judge correctly passed opinion about report but did not rely upon it to dispose of the suit. The learned Assistant Judge applied his judicial mind and took the correct decision against the plaintiff.

Apart from the above position, to prove the deeds exhibits-Ka, Ka(1) and Ka(2), the defendants examined DW2 Meher Ali

Miah, an attesting witness to the deeds. He successfully proved the execution and registration of those. He identified his signatures put on the deeds. He also supports the reason for registering the deeds in the District Registrar's Office Khulna. In cross examination nothing came out adverse. The evidence of this witness, a man of 72 years can safely be relied upon. His evidence has been corroborated by DWs 1, 3, 4 and 5 on material point. The possession of the land is also found in favour of the defendants because of corroborative oral evidence.

The plaintiff instituted the suit praying for declaration that the *heba* deeds are forged, fraudulent, collusive, inoperative and not binding upon the plaintiff. Admittedly, the plaintiff being the nephew of Momin Uddin is one of the heirs, if any property is found left by him. If he succeeds in the suit he will get a share of total land as heir. In a suit like this the plaintiff had to pray for declaration of title and partition of the suit land. The decree passed in this suit, if any would be fruitless without prayer for partition in the suit land. Moreover, the possession is found in favour of the defendants. Therefore, the suit in the present form is not also maintainable without prayer for recovery of possession.

The Additional District Judge misdirected and misconstrued in his approach of the matter relying only on the report submitted by the expert and thereby committed error of which has resulted

an erroneous decision occasion failure of justice. The above judgment must be interfered with.

In view of the discussion made hereinabove, I find substance in the submission of Mr. Islam. The Rule, therefore, merits consideration and accordingly it is made absolute. No order as to costs. The judgment and decree passed by the lower appellate Court is hereby set aside and those of the Assistant Judge are restored.

The order of stay stands vacated.

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