

District- Dhaka

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr Justice Md Atoar Rahman

Civil Revision No. 4211 of 2005

Md. Borhanuddin @ Borhan Miah @
Boran Miah being dead his heirs 1(a)
Most. Honufa Begum and others

....plaintiff respondent petitioners

- versus-

Md. Abdul Hakim and another

...deponent appellant opposite parties

Mr. Mohammad Hossain, Advocate

... for the plaintiff respondent petitioners

Mr. Sumon Ali, Advocate with

Mr. Shehadri Chakravorty, Advocate

..... deponent appellant opposite parties

**Heard on; 18.01.2024, 05.02.2024,
15.02.2024 and 05.03.2024**

Judgment on: 19.03.2024

This Rule was issued upon an application under section 115(1) of the Code of Civil Procedure, 1908 calling upon the opposite party No 1 to show cause as to why the judgment and decree dated 27.07.2005 (decree signed on 03.07.2005) passed by the learned Additional District Judge, 1st Court, Dhaka in Title Appeal No 295 of 2003 allowing the appeal and modifying the judgment and decree dated 17.05.2003 (decree signed on 25.05.2003) passed by learned Senior Assistant Judge, Keraniganj, Dhaka in Title Suit No 105 of 1999 should not be

set aside and/or passed such other or further order(s) as to this court may seem fit and proper.

During issuance of the Rule an order was passed staying operation of the impugned judgment and order.

The short facts for the purpose of disposal of the Rule are that the suit land an area of 00.17 acres originally belonged to two brothers namely Kadir Baksh and Karim Baksh. In respect of such land CS Khatian No 470 was duly prepared and published in their names. Thereafter Kadir Baksh died before his marriage leaving said brother Karim Baksh and sister Kadbanu as his legal heirs. Karim Baksh and Kadbanu inherited 00.0567 acres and 00.0283 acres respectively from their brother. Thereafter Kadbanu transferred her entire share 00.0283 acres to her grandson the defendant No 1 Abdul Hakim on 13.12.1961 by a registered deed being heba-bill-awaj deed No 7681. But in the deed instead of 00.0283 acres, 00.0450 acres of land has been written. Karim Baksha being owner and possessor of (00.0850+00.0567) 00.1417 acres of land died leaving a son Borhanuddin Borhan the plaintiff No 1 and two daughters namely Jahura Khatun and Rabeya Khatun. Borhanuddin got 00.0709 acres and each of the daughters got 00.0354 acres. Rabeya Khatun transferred 00.0354 acres to her brother plaintiff No 1 by way of heba deed on 07.03.1971 and handed over possession thereto. But in the deed 00.0450 acres was written. Jahura Khatun on 18.05.1986 sold out her entire 00.0354 acres to the plaintiff

Nos 2 and 3 by a deed of sale No 1960 and handed over possession of the same to them. Defendant No 2 purchased 00.0250 acres of land from the plaintiff No 1. In this way the plaintiff No 1 got 00.0813 acres the plaintiffs No 2 & 3 00.0354 got acres and defendant No 1 & 2 got 00.0283 and 00.0250 acres of lands from the suit land. The plaintiff demanded partition on 28.07.1999, but the defendant denied to make partition of the land. So, the plaintiffs have filed this partition suit.

Defendant No 1 contested the suit by filing a written statement denying the materials allegations made in the plaint contending *inter alia* that the suit land originally belonged to Azmat Majhi who died leaving two sons namely Kadir Baksh and Karim Baksh and a daughter Kadbanu. But the CS Khatian of the suit land was prepared and published in the names of Kadir Baksha and Karim Baksha only. Since at the time of CS operation Kadbanu was leaving at her husband's house her name was not inserted in the CS khatian although she had inherited from her father. After demise of Kadir Baksha she became owner and possessor of $1/3^{\text{rd}}$ and Karim Baksha got $2/3^{\text{rd}}$ shares in the suit land. Kadbanu transferred 00.0425 acres of land by way of heba from her 00.0566 acres and after her death daughter Nafisa Khatun, mother of the defendant No 1, inherited her remaining 00.0141 acres of land. After the death of Nafisa Khatun, defendant No 1 became owner of 00.0566 acres which has been mutated in his name and he is

possessing the same separately. The plaintiffs have filed a false suit against the defendant which is liable to be dismissed with cost.

The learned Assistant Judge having concluded the trial decreed the suit in preliminary form and allotted 00.1167 acres of land in favour of the plaintiffs by his judgment and decree dated 17.05.2003, against which the defendant No 1 preferred an appeal being Title Appeal No 295 of 2003 before the learned District Judge, Dhaka. On transfer the appeal was heard by the Additional District Judge, First Court, Dhaka who by his judgment and decree dated 27.07.2005 having allowed the appeal allotted 00.0883 acres of land in favour of the plaintiffs by modification of the judgment and decree passed by the trial court.

Being aggrieved by and dissatisfied with the above judgment and decree passed by the learned Additional District Judge the plaintiffs-respondents moved to this court with this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present Rule and the order of stay.

Mr Mohammod Hossain, the learned Advocate appearing on behalf of the plaintiffs-respondants-petitioners submits that Kadir Baksa and Karim Baksa were the original owners of 00.17 acres of land described in the schedule to the plaint and accordingly CS khatian No 470 (Ext 1)) was duly prepared and published in their names. The defendant-appellant-opposite party could not prove by adducing any oral or documentary evidence that the said land originally belonged to

their father Ajmot Majhi. He referring to the case of *Akbar Ali and others Vs Zahrudin Kari and others, reported in 30 DLR (SC) 81* submits that according to section 103(b)(5) of the Bengal Tenancy Act every entry in a record of right finally published shall be evidence of matter referred to in such entry and shall be presumed to be correct until it is proved to be incorrect.

Mr Hossain further submits that the miscellaneous case papers (Ext Kha series) submitted by the defendant-opposite party are forged documents because, in these papers various anomalies are found which cannot be acceptable as evidence. Nevertheless, if for the sake of argument the said papers are taken into consideration the order of the miscellaneous case passed by the Court of third Munsif, Dhaka did not find that Ajmot Majhi was owner of the suit land. Moreover, as per the said order concerned SA khatian has not been corrected and the name of the defendant-opposite party No 1 or his grandmother Kadbanu has not been inserted although SA khatian does not create any title.

Mr Hossain concludes that considering the evidence adduced by both the sides and facts and circumstances of the case the learned trial Judge perfectly decreed the suit, but the learned Judge of the appellate court bellow wrongly allowed the appeal by the impugned judgment and decree which is liable to be set aside.

Mr Sumon Ali, the learned Advocate, appearing on behalf of the opposite party submits that the defendant No 1 filed the

miscellaneous case No 09 of 1969 in the Court of Third Munsif, Dhaka for correction of SA khatian stating that kadbanu Bibi as per Muslim law inherited 00.0566 acres of land which she had possessed separately by amicable partition with the co-sharers. In the said miscellaneous case the present plaintiff-petitioner admitted the claim of the defendant No 1 and the same was allowed by that court and on the basis of such order the concerned SA khatian has been corrected in the name of defendant No 1 comprising such land by which the ownership of Ajmot Majhi in the suit land was established.

Mr Ali further submits that the learned trial Judge without discussing the evidence decreed the suit as prayed for and the learned Judge of the appellate court considering the evidence and facts and circumstances rightly allowed the appeal and modified the judgment and decree passed by the trial court for which the rule is liable to be discharged.

I have heard the submissions advanced by the learned Advocates and perused the application and record along with the connected papers.

In the instant case the basic dispute is whether the suit land described in the schedule to the plaint originally belonged to Ajmot Majhi or his two sons namely Kadir Baksa and Karim Baksa. If it is found that not Ajmot Majhi but his two sons were the owners of the same, judgment and decree passed by the learned trial Judge would be

fond correct and if it is found that Ajmot Majhi was the original owner then judgment and decree passed by the learned Judge of the appellate court would be found correct as the genealogy of the parties is not disputed.

Admittedly the CS khatian No 470 in respect of the suit land was prepared and published in the names of Kadir Baksa and Karim Baksa, sons of Ajmot Majhi in equal shares.

I have gone through the judgment passed by the Hon'ble Apex court in the case of *Akbar Ali and others Vs Zahrudin Kari and others*, reported in 30 DLR (SC) 8, referred to by the learned Advocate for the petitioners, wherein it has been held that according to section 103(b)(5) of the Bengal Tenancy Act every entry in a record of rights finally published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved to be incorrect. Learned Advocate for the defendant-opposite party frankly admitting about the presumptive value of CS khatian states that the defendant-opposite party successfully proved that Ajmot Majhi was the original owner of the suit land and the CS khatian in respect of such land was wrongly recorded excluding the name of Kadbanu thereto.

Now I am to examine whether the learned Judge of the appellate court bellow committed any error of law holding that Ajmot Majhi was the original owner of the suit land.

On behalf of the defendant-opposite party No 1 two witnesses have been examined. DW 1 Abdul Hakim defendant No 1 himself and DW 2 Imam Uddin is a local. Both of them stated that they did not see Ajmot Majhi. Thus, by their oral evidence it is not proved that Ajmot Majhi was the owner and possessor of the suit land and CS khatian regarding the same was wrongly prepared and published excluding the name of Kadbanu. On the other hand, there is no documentary evidence in support of ownership of Ajmot Majhi of the suit land. Kadbanu in her life time did not challenge the CS khatian in any way though she was alive at least till 1969.

Admittedly Kadbanu transferred her land in favour of her grandson the defendant No 1 by the deed No 7681 dated 13.12.1961 (Ext Ka). In this deed quantity of transferred land has been shown as 00.0450 acres. The plaintiffs-petitioners claim that since Kadbanu inherited only 00.0283 acres from her brother Kadir Baksa and she did not inherit any portion of land from her father Ajmot Majhi as he was not owner of the suit land the defendant No 1 got only 00.0283 acres though in the deed 00.0450 acres of land has been written. On the other hand, the defendant No 1 claims that Kadbanu got 00.0566 acres of land by way of inheritance from her father and brother as the suit land originally belonged to Ajmot Majhi.

Be that as it may, the defendant No 1 claims that for correction of SA khatian in respect of the suit land he filed the Miscellaneous

Case No 09 of 1969 in the Court of Third Munsif, Dhaka as the name of Kadbanu, the proforma opposite party No 4, was not inserted in the said SA khatian. Certified copies of the connected papers of the said miscellaneous case have been marked as Ext Kha series. Since Kadbanu was owner of at least 00.0283 acres of land non-insertion of her name in the SA khatian was not proper. However, for better appreciation of the matter the paragraph 3 of the application of such miscellaneous case (Ext Kha) is quoted bellow:

“3. That the proforma opposite party No 4 is the daughter of late Ajmat and the sister of the original recorded tenants namely Kadir Baksha and Karim Baksha and according to Muslim Law the proforma opposite party No 4 inherited 5 annas 6 gandas 2 karas 2 kranti share of the property and which she possessed separately amicable partition with the co-sharers.”

It appears that in the application though stated that Kadbanu inherited 5 annas 6 gandas 2 karas 2 kranti share, but it was not specifically stated that Ajmot Majhi was the original owner of the case land from whom Kadbanu inherited and wrongly excluded her name from the CS khatian. Rather, it was stated that Kadir Baksa and Karim were the original recorded tenants. On perusal of the Ext Kha it further appears that this miscellaneous case No 09 of 1969 was filed on 13 January, 1970. I failed to understand if the case was filed on 13.01.1970 how it was numbered as 09 of 1969. Ext Kha(2) shows that

the Revenue Officer filed his report on 18.06.1970 in the Miscellaneous Case No 09 of 1969. But judgment passed by the Munsif in the Miscellaneous Case No 09 of 1970 allowing the same *ex parte* in part. On perusal of the Ext Ga it transpires that on the basis of the judgment passed by the Munsif Third Court CO (Rev) Keranigonj started Misc Case No 4(k) under section 54 of the State Acquisition and Tenancy Act by his order dated 07.06.1974. But in the said order it was stated that the said Misc Case {Misc Case No 4(k)} was started as per the judgment of the Third Munsif, Dhaka passed in the Misc Case No 09 of 1973. However, there is no final order of the said misc case initiated by the CO (Dev). More so, it is not clear that whether on the basis of above proceedings, whatsoever, the concerned SA khatian was corrected or not. It is to be stated that though in his report the Circle Officer mentioned that the present petitioner admitted the claim but there is no supporting paper and the miscellaneous case was disposed of *ex parte*.

Be that as it may, had it been proved that the concerned SA khatian was corrected in due process of law nevertheless, the defendant No 1 would not get more than 00.0283 acres of land as SA khatian does not create any title.

In view of the above facts and circumstances it appears that the learned Judge of the appellate court below committed an error of law having allowed the appeal holding that Ajmot Majhi was the original

owner of the suit land. Thus, there is substance in the Rule and accordingly the same should be made absolute.

Resultantly, the Rule is made absolute. Setting aside the judgment and decree dated 27.07.2005 (decree signed on 03.07.2005) passed by the learned Additional District Judge, 1st Court, Dhaka in Title Appeal No 295 of 2003 allowing the appeal and modifying the judgment and decree dated 17.05.2003 (decree signed on 25.05.2003) passed by learned Senior Assistant Judge, Keraniganj, Dhaka in Title Suit No 105 of 1999, the judgment and decree passed by the trial court is hereby affirmed.

Let the lower courts' records along with a copy of this judgment be transmitted at once.