

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 522 of 2008

Most. Foyzunnesa being dead her heirs  
1(a) Md. Enamul Haq and others

.....Petitioners.

-Versus-

Md. Abdul Mozid being dead his heirs  
1(a) Rezaul Alom (Khasru) and others

.....Opposite parties.

Mr. Tapash Kumar Biswas, Advocate

.....For the petitioners.

Mr. Mohammad Eunos, Advocate

..... For the opposite parties.

Mr. Md. Harunur Rashid, Advocate with

Mr. Md. Abdur Rashid, Advocate

.. For the opposite party Nos.9-12.

Heard and judgment on 16<sup>th</sup> October, 2023.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 27.08.2007 passed by the Special District Judge, Patuakhali in

Title Appeal No. 217 of 1999 reversing those dated 23.08.1999 passed by the then Subordinate Judge, 2<sup>nd</sup> Court, Patuakhali in Title Suit No. 18 of 1994 decreeing the suit in part should not be set aside.

Petitioner as plaintiff filed Title Suit No. 18 of 1994 before the Court of the then Subordinate Judge, 2<sup>nd</sup> Court, Patuakhali against the opposite parties for partition in respect of  $9.32\frac{1}{2}$  decimals of land.

Plaint case in short, inter alia, is that A. Halim was the owner in C.S. Khatian No.17 of Bauphal Mouza of Patuakhali District, who died leaving behind 5 sons named Abdul Jobbar, Abdul Mannan, Din Mohammad, Abdus Sattar and Kofil Uddin, who were also the owners of C.S. khebot Nos. 6, 7 and 8. Halim also left behind 2 daughters named Jobeda Khatun and Azizunnesa. Abdul Jobbar then died leaving behind his brothers and sisters. Mannan got 1 anna 4 gonda and died leaving behind wife Zobeda, 2 sons Abdul Khalek and Abdul Lotif and 2 daughters Anjuman and Setara Begum. Zobeda died leaving behind 2 sons and 2 daughters. Abdul Khalek died leaving behind

defendant Nos. 7-11. Anjuman died leaving behind defendant Nos. 5-6. Jobeda Khatun got 1 anna 12 gonda from father Halim and made a gift in favour of defendant No.12 and thus after her death her husband Wadul Kazi got nothing and defendant Nos. 13-16 as such acquired nothing being successors to Wadul Kazi. Din Mohammad died leaving behind wife Fakrunnesa and son defendant Nos. 1-2. Fakrunnesa died leaving behind defendant Nos. 1-2. Sattar died leaving behind wife defendant No.4, daughter defendant No.3, brother Kofiluddin and sister Azizunnesa. Azizunnesa died leaving behind son defendant No.17 and daughters defendant Nos. 18-20. Azizunnesa got 13 gonda 1 kora 1 kranti from brothers Jobbar and Sattar and made a gift in favour of another brother Kofil. Thus plaintiff No.1 acquired 1 anna 13 gonda 1 kora 1 kranti from C.S. khebot 17.

It is further alleged that Jobeda transferred her share from C.S. Khebot Nos. 6, 7, 8 by way of gift infavour of 4 brothers Mannan, Din, Sattar and Kafil. Azizunnesa got 5 anna 14 gonda, 1 kora 12 till from each of the C.S. Khebot Nos. 6, 7, 8 and made a gift of the same in favour of brother Kofil Uddin. Kofiluddin had been in possession in his land acquired from C.S. Khebot Nos.

17/6-8 by creating homestead, digging pond, planting trees and by cultivating upon payment of rents. Kofiluddin made oral gift of his entire land in favour of his wife Salma Khatun and daughter plaintiff No. 1. Salma Khatun transferred her .80 acre in favour of daughter and son-in-law plaintiff Nos. 1-2 by registered heba-bil-awaz deed dated 15.05.1964. Thus plaintiffs acquired the entire land left by Kofiluddin. There is problem in joint possession and in paying rent with other co- sharers. Defendants denied partition on 31<sup>st</sup> Joishtho, 1396. Hence the suit is filed for partition on 27.07.1989.

Defendant Nos. 1, 41-42, defendant Nos. 5,8,11, defendant No.2 and defendant No.12 contested the suit by filing four sets of separate written statements denying the plaint case.

According to defendant Nos. 1, 41-42, the land of C.S. Khebot No. 17 was recorded in S.A. khatian No. 152 in which Kofil got 1 anna 4 gonda and Nurjahan got 1 anna 12 gonda owe money to defendant No.42, which having not been paid off defendant No.42 filed Money Suit No.35 of 1955 and obtained decree. The land of Kofil and Nurjahan measuring 4.04 acre was

sold in Execution Case No. 19 of 1957 which was purchased by defendant No.42 on 18.05.1958 and has been in possession. Samsul alias Badsha, son of Azizunnesa sold his share of .27 acre to defendant Nos. 41-42 by document dated 23.02.1971. Thus defendant No.42 by auction and kabala purchase acquired  $4.17 \frac{1}{2}$  acre of land. Halim had 4 anna interest in C.S. Khebot No.17 and he died leaving behind 5 sons and 2 daughters as his heirs. Jobbar died leaving behind 4 brothers and 2 daughters. Mannan died leaving behind wife Jobeda, 2 sons Khalek, Latif and 2 daughters Anjumannesa, Setara Begum. Jobeda Khatun died leaving behind daughter Nurjahan, 3 brothers Din Mohammad, Kofil, Sattar and sister Azizunnesa. Din Mohammad died leaving behind wife Fakrunnesa and son defendant No.122. Sattar died leaving behind wife Rawshan, daughter Fatema, brother Kofil and sister Azizunnesa. The land of C.S. Khebot Nos. 6, 7, 8 were recorded in S.A. khatian Nos. 149, 151, 150 respectively. Kofil from S.A. khatian No. 149, 150 transferred .86 acre of land in favour of defendant No.1 by document dated 26.12.1958. Fokrunnesa transferred 27 acre on 25.10.1966 in favour of Osman Bhuiya,

who died leaving behind defendant Nos. 1-2. Plaintiff has no title and possession in the suit land.

According to defendant No.2, Kofiluddin acquired 1 anna 17 gonda 2 kranti 13 till in C.S. Khebot No. 17 and died leaving behind wife Saleha alias Salma and daughter plaintiff No.1, who got 1 anna 18 gonda 2 kora 1 kranti 6 til and the rest portion of Kofil was acquired by defendant Nos. 1-2/5 and the predecessor of defendant Nos. 7-11. Kofil never made any gift. Kofiluddin sold 3.50 acre of land by 4 documents in favour of the predecessor of this defendant. The suit land was never sold in auction. Plaintiff No.1 has no title and possession in the suit land.

According to defendant Nos. 5, 8, 11, after the death of Halim each of his sons and daughters acquired 1 anna 1 gonda 1 kora 1 kranti and 6 gonda 2 kora 2 kranti respectively from C.S. Khebot No.17. Jobeda died leaving behind husband Wadud and Wadud died leaving behind defendant No. 12-26. Din Mohammad died leaving behind defendant Nos. 1-2 and wife Fokrunnesa. Sattar died leaving behind defendant Nos. 3-4. Mannan died leaving behind defendant Nos.5-6 in whose names record was not

prepared. Azizunnessa died leaving behind defendant Nos. 17-20. Defendant No.17 sold .27 acre on 23.02.1971 in favour of defendant No.7. Kofil sold 1.90 acre in favour of the predecessor of defendant Nos.7-11 by 2 documents dated 01.05.1958. Osman Gani was adopted son of Kofil and he made a gift in favour of Osman and record was prepared accordingly. Osman sold .11 acre of land in favour of the predecessor of defendant Nos. 5/7-11 by documents dated 25.09.1973 and 29.12.1974. Plaintiff No.1 has got no possession. No auction was held regarding suit land.

According to defendant No. 12, Jobeda transferred her share in favour of this defendant by way of heba. After Jobeda's death, the husband of defendant No.12 acquired nothing because of earlier gift and defendant Nos. 13-17 have also acquired nothing being the issues of second wife. This defendant has got a long possession in 1 anna 12 gonda and S.A. record was correctly prepared in her name. Mutation was done and she has been paying rent separately. No auction was held. The father of plaintiff No.1 filed Miscellaneous Case No.04 of 1953 in the 3rd Munsif court against the forged auction which was set aside on 24.09.1954. Plaintiff would get no remedy as was prayed.

The Subordinate Judge vide judgment and decree dated 23.08.1999 decreed the suit in part giving saham to the plaintiff for  $6.49\frac{1}{2}$  acres of land instead of  $9.32\frac{1}{2}$  acres of land.

Challenging the said judgment and decree defendant No.1 and 42 alone preferred Title Appeal No. 217 of 1999 before the Court of District Judge, Patuakhali, which was heard on transfer by the Special District Judge, Patuakhali, who by the impugned judgment and decree dated 27.08.2007 allowed the appeal and after reversing the judgment of the trial court dismissed the suit.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant Rule.

Mr. Tapash Kumar Biswas, the learned advocate appearing for the petitioner drawing my attention to the lower courts record and the impugned judgment submits that when plaintiff has successfully able to prove his case and the trial court rightly found that plaintiff being the daughter of admitted owner Kafiluddin got  $9.32\frac{1}{2}$  acres of land by way of heba and remaining in possession excepting  $.12\frac{1}{2}$  acres of land which was gifted to defendant No.43



to Nuria Primary School and accordingly gave a part decree on 06.44 acres of land and the plaintiff has accepted the said decree, the appellate court totally failed to understand the fact and scenario of this case and dismissed the suit on a presumptive assertion. The impugned judgment is not sustainable in law. The learned advocate further submits that when it has been denied by the plaintiff as well as contesting defendants that claim of the defendant Nos. 1 and 42 to the effect that Kafiluddin had a son named Osman Gani, to whom he transferred 38 decimals of land from plot No. 615 and 609 by way of patta deed dated 28.03.52 but taking into consideration of S.A. khatian No. 149 arbitrarily presumed that defendants (1 and 42) contention appears to be proved by way of documentary evidence. Moreover since said Osman Gani was not made a party in the suit, suit is hopelessly barred by bad for defect of parties. The appellate court without reversing the findings of the trial court most arbitrarily believed the unproved contention of the defendants (2 to 42) and allowed the appeal as well as dismissed the suit. The impugned judgment is thus not sustainable in law. The learned advocate further submits that when the defendants contention to the effect that suit

property was sold to an auction in a Money Execution Case No. 19 of 1957, from the Court of Subordinate Judge, 2<sup>nd</sup> Court, Barisal and thereby 4.04 acres of land was acquired by defendant No. 42 being not proved as been correctly held by the trial court upon considering the suit register and the information slip placed in court but the appellate court disbelieved the same and most arbitrarily dismissed the suit considering that Kafiluddin, the predecessor of the plaintiffs did not have any right, title and interest to transfer the property in favour of the plaintiff.

Mr. Mohammad Eunos, the learned advocate appearing for the opposite party although initially admits that the judgment passed by the appellate court on dismissing the partition suit arbitrarily is not correct in as much as if it is accepted that Kafiluddin, the predecessor of the plaintiffs lost his title and interest over the suit land in money execution case even then he acquired some lands, which may be inherited or acquired by the plaintiff as being the daughter of Kafiluddin. Nextly he submits that the appellate court being the last court of fact has rightly found that plaintiff failed to prove his case and as such the

appellate court has rightly disallowed plaintiffs case of partition of the suit land as they claimed.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

This is a suit for partition. There is no doubt that Kafiluddin was one of the co-sharer along with his other brother and sisters. Although all the defendants except defendant Nos. 1 and 42 accepted the plaintiffs contention but opposite party No.1 and 42 claimed that suit property was auctioned for want of money in Money Execution Case No. 19 of 1957 by the Court of Second Subordinate Judge, Barisal and defendant No.42 purchased 4.04 acres of land. Defendant No. 1-42 further claims that one Osman Gani Bhuiyan was an adopted son of the Kafiluddin, to whom he transferred 15 gondas of land by a registered kabala and accordingly S.A. khatian No. 149 was also prepared into his name, who subsequently transferred 0.27 acres of land to Fakrunnessa, mother of the defendant No. 1 and 2 vide registered sale deed dated 25.10.66.

In view of the above two contentions the main question to be decided in this case is that whether Kafiluddin lost his interest in Money Execution Case No. 19 of 57 and that he had a son named Osman Gani Bhuiyan to whom he transferred 15 gondas of land and thus the transfer of the said land to the plaintiffs by way of heba was not valid.

As and when it has been claimed that suit property was auctioned sold by Kafiluddin, noticing that it was a fraud, he filed a Misc. Case No. 4 of 1953 and got a decree from the Court of the then Munsif, 3<sup>rd</sup> Court, Patuakhali against the defendant No.1 and on 24.09.1954 the said fraudulent decree was set aside. Subsequently when another money decree was shown to have been instituted and defendant No. 42 claimed to have purchased 4.04 acres of land in auction from the said money execution case, plaintiffs tried to prove the same that it was not in existence and the alleged proceedings of money execution case was fraudulent, he brought an information slip from the court concerned.

Considering all these aspects of this case, the trial court found that there is no existence of the said decree in Execution Case No. 19 of 57 in the Court of Subordinate Judge, 1<sup>st</sup> Court,

Barisal and the documents submitted by the defendant No.42 in support of his purchase the said land in auction, found to be forged and concocted but the appellate court without proper noticing the above documents as well as reversing the said findings of the trial court most arbitrarily believed the said contention. The findings of the appellate court on this point is absolutely perverse and not in accordance with law.

Regarding the second point that Kafiluddin had a son named Osman Gani to whom he transferred 15 gondas of land and said Osman Gani's name was recorded in the S.A. khatian and thereafter he transferred 0.27 acres of land on 25.10.66 in favour of Fakrunnessa, the mother of the defendant Nos. 1 and 2, the appellate court although found that:

"এই বিবাদীপক্ষ হইতে নিম্নাদালতে ওছমান গণি ভূইয়া বরাবরীয় দানের সমর্থনে কোনও documents বা সাক্ষ্য প্রদান করা হয় নাই। কিন্তু আপীলকারী বিবাদী পক্ষ হইতে আপীল আদালতে আবেদন করে ইং ২৮/৩/৫২ তারিখের ১৭৬১ নং পাট্টা দলিলের সহি মোহরকৃত নকল দাখিল করিয়া Exhibit করিয়াছে যাহা অত্র আপীল আদালত কর্তৃক প্রদর্শনী নং- G হিসাবে চিহ্নিত করা হইয়াছে। প্রদর্শনী নং- G দৃষ্টে দেখা যায় যে, কফিল উদ্দিন তাহার পালক পুত্র ওছমান আলী বরাবরে ইং

২৮/৩/৫২ তারিখের পাট্টা মূলে সাবেক ৬১৫ ও সাবেক ৬০৯ দাগের মধ্য  
হইতে ৩৮ শতক জমি হস্তান্তর করেন।"

When the documents in support of the defendants contention not been pressed and proved by way of evidence before the trial court, the findings of the trial court on this aspect cannot be said to be illegal or arbitrary. It is contented by the defendant No.1 and 42 that Kafiluddin Bhuiyan transferred 15 gondas of land to Osman Gani Bhuiyan but upon perusal of the document dated 28.03.1952 (as Ext. G) it is found that 38 decimals of land was settled to one Osman Gani by one Kafiluddin and nowhere in the said document, it is found that Kafiluddin admits Osman Ali as his adopted son. Moreover all other defendants, excepting these two defendants, have denied this contention of the defendant Nos. 1 and 42. When the existence of Osman as an adopted son of Kafiluddin not been proved by proper evidence rather the deed dated 28.03.52 (Ext. G) does not prove that Osman Ali was admitted as a adopted son of Kofiluddin and that the defendants contention of transferring 15 gondas of land to Osman Gani not been proved from this documents, the findings of the appellate court on this contention is absolutely nothing but on presumption,

which is not sustainable in law. When Osman Gani is not found to be a co-sharer in the suit jote or an adopted son of Kafiluddin, the findings of the appellate court on the suit as bad for defect of parties got no meaning and accordingly dismissal of the suit on this point is apparently illegal and not sustainable in law.

In view of the fact and circumstances of this case when the trial court upon proper assessment of the evidence on record has found that the plaintiff has successfully able to prove his case and awarded his share and that findings was not been properly reversed by the appellate court in appeal, I am of the view that the judgment of the appellate court is not sustainable in law, which is liable to be set aside.

I thus find merit in this rule.

In the result, the rule is made absolute and the impugned judgment and decree passed by the appellate court is hereby set aside.

The order of status-quo granted earlier is hereby recalled and vacated.

Send down the L.C.R along with the judgment at once.