

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 2752 OF 2010

IN THE MATTER OF:

An application under section 115(1) of the
Code of Civil Procedure.

(Against Decree)

-And-

IN THE MATTER OF:

Md. Abdul Sobhan Khan died leaving behind
his legal heirs: 1(a)-1(i)

--- Plaintiff-Respondent-Petitioner(s).

-Versus-

Siddiqur Rahman, the defendant No. 1 died
leaving behind his legal heirs: 1(Ka)-1(Jha)
and Ali Akbar, the defendant No. 2 died
leaving behind his legal heirs: 2(Kha)-
2(Uma) and others

--- Defendant-Appellant-Opposite Parties.

Mr. M. Tashdid Anwar with

Mr. Muktadir Mohsin, Advocates

---For the Plaintiff-Respondent-Petitioners.

Mr. Md. Mubarak Hossain, Advocate

--- For the Defendant-Appellant- O. Ps.

**Heard on: 02.11.2023, 04.01.2024,
28.01.2024, 31.01.2024 and 07.02.2024.**

Judgment on: 12.02.2024.

At the instance of the present plaintiff-respondent-
petitioner, Md. Abdul Sobhan Khan who died leaving behind his
legal heirs who have been substituted as petitioner Nos. 1(a)-1(i),
this Rule was issued upon a revisional application filed under

section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1(Ka)-1(Jha) to show cause as to why the impugned judgment and decree dated 25.03.2010 passed by the learned Additional District Judge, Court No. 3, Comilla in the Title Appeal No. 05 of 2007 allowing the said appeal and thereby reversing the judgment and decree dated 28.09.2006 passed by the learned Assistant Judge, Homna, Comilla in the Title Suit No. 06 of 1999 decreeing the suit should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the predecessor of the present petitioner as the plaintiff filed the Title Suit No. 99 of 1997 in the court of the learned Assistant Judge, Laksam, Comilla for declaration of title upon the suit land described in the schedule of the plaint. The plaint contains that the suit land was originally owned by one Golam Karim Khan and C. S. Khatian No. 91 was prepared in his name who died leaving behind his only son Ali Azam Khan and a daughter who inherited the suit land. Ali Azam Khan died leaving behind his widow Ambia Khatun and a daughter Nurennessa alias Nurun Nahar and a sister Wahedernessa. The said Nurennessa alias Nurun Nahar became owner of the suit property by way of inheritance and she claimed that she had an amicable partition.

She, thereafter, transferred her land measuring 46 decimals to the plaintiff-petitioner (now deceased) by a registered sale deed dated 25.01.1996 (Exhibit- 1) and the predecessor of the substituted petitioner has been possessing the suit land.

The suit was contested by the present defendant Nos. 1 and 10 by filing a written statement contending, *inter alia*, that the suit is not maintainable in the present form without partitioning the suit land among the co-sharers. It is further contended that Abdur Rahim Kha and Golam Karim Kha were the owners of 556 decimals of land and C. S. Khatian No. 91 was published in their names. Abdur Rahim Kha died leaving behind his sons Abdul Latif Khan, A. Barek Khan and Mofiz Khan. Therefore, the suit land was inherited by them in the share of $\frac{1}{3}$ and they were in possession of the suit land. In the course of inheritance, the said Azam Kha got $186\frac{1}{3}$ decimals and the daughter Nurunnessa @ Nurun Nahar got $92\frac{1}{3}$ decimals. The said Azam Khan died leaving behind his widow Ambia Khatun and a daughter Nurun Nahar and Wahedernessa as a sister. Accordingly, Nuren Nahar inherited $92\frac{2}{3}$ decimals. She

transferred her inherited suit land by the registered sale deed dated 09.01.1964 (Exhibit- 1) land measuring 42 decimals. She also transferred by another sale deed dated 18.05.1964 and also sold by the registered sale deed dated 21.05.1964 land measuring 46 decimals. Accordingly, Nurun Nahar sold out of all her property. Therefore, she had no property remained by the sale deed dated 25.01.1996 in favour of the present plaintiff-petitioner.

The title suit was heard by the learned Assistant Judge, Homna, Comilla who heard the parties and obtained the evidence from the parties in support of the respective cases. After completion of the hearing, the learned trial court decreed the suit in favour of the present plaintiff-petitioner by his judgment and decree dated 28.09.2006. Being aggrieved the present defendant-opposite party No. 1 (being dead and substituted) preferred the Title Appeal No. 05 of 2007 in the court of the learned District Judge, Comilla which was subsequently heard by the learned Additional District Judge, Court No. 3, Comilla who also heard the parties and examined the documents adduced and produced by the parties and came to a conclusion to allow the appeal and

thereby reversing the judgment and decree of the learned trial court by his judgment and decree dated 25.03.2010.

This revisional application has been filed by the plaintiff-respondent-petitioner under section 115(1) of the Code of Civil Procedure and this Rule was issued thereupon.

Mr. M. Tashdid Anwar, the learned Advocate, appearing along with the learned Advocate, Mr. Muktadir Mohsin, submits that the learned appellate court has failed to appreciate that the vendor of the said Kabala through which the petitioner purchased the suit land and she herself was examined as a witness before the learned trial court and she also clearly admitted that she delivered possession to the predecessor of the present petitioner and allowed the appeal by relying upon three deeds which were not at all exhibited and proved by complying the provisions of the Evidence Act before the learned trial court which is illegal and detrimental towards the petitioner, as such, the same is liable to be *set aside*.

The Rule has been opposed by the present opposite party No. 1 (now deceased and substituted).

Mr. Md. Mubarak Hossain, the learned Advocate, appearing for the opposite party Nos. 1(Ka)-1(Jha), submits that

the suit land was sold by Nurun Nahar by executing 3 sale deeds on 09.05.1964, 18.05.1964 and 21.05.1964, as such, the said vendor Nurun Nahar had no title and possession upon the suit land and the plaintiff, therefore, cannot get suit property in the year of 1996, as such, the Rule should be liable to be discharged.

The learned Advocate also submits that the vendor Nurun Nahar @ Nurunnessa in her deposition deposed that admittedly the suit land was transferred by her on 18.05.1964 and the other 2 deeds to different persons but the learned trial court misread and misconstrued the evidence adduced and produced by the present opposite parties but the present petitioner obtained the present Rule by misleading the court, as such, the Rule is liable to be discharged.

The learned Advocate also submits that the present plaintiff-petitioner and the defendant-opposite party No. 1 are full-brothers and the suit land was not partitioned among themselves, as such, the title suit simplicitors cannot be maintainable.

Considering the above submissions of the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1)

of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and decree and also perusing the materials available in the lower court records, it appears to this court that the present petitioner as the plaintiff filed the Title Suit No. 99 of 1997 in the court of the learned Assistant Judge, Laksam, Comilla for declaration of title upon the suit land described in the schedule of the plaint. It further appears that the plaintiff produced sale deed No. 1765 dated 25.01.1996 for the land measuring 46 decimals. However, the present opposite parties contended that the said vendor Nurun Nahar had no title and possession upon the suit land which she transferred to the present defendant opposite parties by executing and registering 3 deeds. It further appears that the said Nurun Nahar was examined as PW-2 on 30.07.2006 and on the said date she was recorded as a woman aged of approximately 48 years on 30.07.2006 when she denied in cross-examination that ...“সত্য নয় যে, উক্ত তিনটি দলিলমূলে আমি আমার প্রাপ্য সমুদয় সম্পত্তি বিক্রি করেছি। আমি আলী আকব-রর দলি-লর বিরু-দ্ধ মামলা করেছি। উক্ত মামলা চলছে।”...

In view of the above factual aspects, this court has to take a decision that the said PW-2 Nurun Nahar could sell the property to the present defendant-opposite party in the year 1964.

I have carefully examined the sale deed dated 25.01.1996 which was validly executed by the plaintiff and has exhibited as Exhibit-1. The factual aspects also desire an explanation of whether the said Nurun Nahar has transferred the land to the present plaintiff-petitioner when the present defendant-opposite party contended that the land owned by Nurun Nahar was earlier sold by executing 3 deeds in the year 1964. Accordingly, the learned trial court could properly examine the documents and also depositions of PWs and DWs. The defendant-opposite party No. 1 was under an obligation to produce valid documents before the learned trial court which was executed in the year of 1964. PW-2 Nurun Nahar was examined on 30.07.2006 when her age was recorded as PW-2 approximately 48 years old which is an important aspect of this case as there are claims and counterclaims about the deeds between the parties. The learned appellate court below allowed the appeal by *setting aside* the judgment of the learned trial court and came to a conclusion that the said PW-2 had no property to sell by herself in the year 1996. However, the learned courts below came to a conflicting decision on the basis of the following findings:

The learned trial court decreed the suit filed by the present plaintiff-petitioner on the basis of the following findings:

...“The defendant claimed that Nurunnahar sold 42 decimals of land to Ali Akbar by an executed Kabala dated 18.05.1964 but after perusal of the record and documents the court found that there is no existence of that said Kabala dated 18.05.1964. The learned lawyer of the defendant did not say anything about this Kabala during the argument to the court. Therefore, the defendant did not prove his claim about the Kabala on 18.05.1964.”...

However, the learned appellate court below came to a conclusion to allow the appeal preferred by the present defendant-opposite parties and came to a conclusion to allow the appeal on the basis of the following findings:

...“বিজ্ঞ সহকারী জজ প্রদত্ত রায় পর্যালোচনায় দেখা যায় যে, তিনি তার রা-য় ইহা সাব্যস্ত ক-রন যে, তর্কিত দলি-লর দাতা নুরুন্নাহার পি. ডব্লিউ-২ দলি-লর সম্পাদন ও স্বাক্ষর স্বীকার করায় এবং ৪৬ শতক ভূমি বাদী বরাবর বিক্রী করে দখল দিয়েছেন বলে উল্লেখ করায় বাদীর দখ-লর বিষ-য় আর কোন প্রমা-ণর আবশ্যিকতা নেই। কিন্তু তিনি তার রা-য় পি. ডব্লিউ-২ নুরুন্নাহার কর্তৃক নালিশা খতিয়া-নর নালিশা দা-গর ক-তক ভূমি অপরাপর গ্রহীতাগণ বরাব-র বিক্রীর বিষয়ে স্বীকৃত থাকা

সম্পর্ক -কান আ-লাচনা ক-রননি। এমতাবস্থায়, বিবাদী আপীল্যান্ট পক্ষের বিজ্ঞ কৌশলী আপীল শুনানীকালে যে যুক্তি দেখিয়েছেন উক্তরূপ যুক্তির গ্রহণযোগ্যতা রয়েছে দেখা যায়।”...

From the above conflicting decisions by both the learned courts below, both the courts below came to their conclusion to decree the suit and to allow the appeal on the basis of the earlier deeds executed in the year 1964. Under the provisions of the Evidence Act, the parties who assert a fact must prove it by providing evidence both documentary and oral evidence by way of depositions in the learned trial court.

In this regard, from the lower court records, it appears that the present defendant-opposite parties asserted 3 deeds executed by the defendants but failed to produce the said 3 deeds in support of their assertions. The plaintiff-petitioner could provide a document being Exhibit-1 which was admitted by the PW-2 as valid and credible evidence to support the plaintiff's case. The learned Advocate for the opposite parties submits that the plaintiff and the defendants are full-brothers and the defendants contended that there is no mention of boundary in the deeds executed in the year 1996 in favour of the plaintiff-petitioner. The learned appellate court below examined the said

evidence/documents which were not exhibited in support of the defendants' case, therefore, came to a conclusion to allow the appeal by reversing the judgment of the learned trial court. On the other hand, the learned trial court decreed the suit filed by the present plaintiff-petitioner on the basis of the witness statements as to valid transfer in favour of the present plaintiff-petitioner, as such, decreed the suit. I, therefore, do not find that the learned trial court committed an error of law by decreeing the suit on the basis of the evidence adduced and produced by the parties.

I also consider that the claim of the defendant-opposite parties could not adduce any evidence under the provisions of the Evidence Act by producing any evidence that should have been exhibited as exhibits, thus, the learned appellate court below committed an error of law by *setting aside* the judgment and decree passed by the learned trial court on the basis of the evidence, as such, the learned appellate court below committed an error of law by reversing the judgment and decree passed by the learned trial court.

I, therefore, do not consider that this Rule needs further consideration. I am, therefore, inclined to interfere upon the

impugned judgment and decree passed by the learned appellate court below.

Accordingly, I find merit in the Rule.

In the result, the Rule is hereby made absolute.

The judgment and decree dated 28.09.2006 passed by the learned Assistant Judge, Homna, Comilla in the Title suit No. 06 of 1999 decreeing the suit is hereby upheld and confirmed.

The impugned judgment and decree dated 25.03.2010 passed by the learned Additional District Judge, Court No. 3, Comilla in the Title Appeal No. 05 of 2007 allowing the appeal and thereby reversing the judgment and decree of the learned trial court is hereby *set aside*.

The interim order passed by this court at the time of issuance of the Rule to maintain *status quo* in respect of the possession and position of the suit land is hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower court records along with a copy of this judgment and order to the learned courts below immediately.