

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.3778OF 2008

In the matter of:

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

And

Md. Kashimuddin being dead his heirs- Md. Fazlul Karim and others

... Petitioners

-Versus-

Md. Dabirul Islam and others

... Opposite parties

Mr. J. K. Paul, Advocate

...For the petitioner Nos.1(a)-1(e).

Mr. Haripada Barman, Advocate

... For the opposite parties.

Heard on 06.01.2025 and 04.02.2025.

Judgment on 06.02.2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 21.08.2008 passed by the learned District Judge, Panchagram in Other Class Appeal No.01 of 2008 affirming the judgment and decree dated 18.11.2007 passed by the learned Assistant Judge, Atowari, Panchagarh in Other Class Suit No.19 of 2006 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that the petitioner as plaintiff instituted above suit for declaration that the registered kabala deed No.2315 dated 26.07.2006 executed by Provash Adhikari and Ratia Kanta Adhikari to defendant Nos.1-3 for 88 decimal land of 'Kha' schedule is collusive, unlawful without consideration and not binding upon the plaintiffs.

It was alleged that above Ratia Kanta Adhikari and Provash Adhikari the executants of above ineffective registered kabala deed had no title and possession in above 88 decimal land. Above property belonged to Shama Kanto Adhikari who died leaving 4 sons and 1 wife namely Nishi Kanto Adhikari, Ratia Kantao Adhikari, kaliketo and Alok and wife Monoggo Adhikari as heirs. Above Ratia Adhikari and Alope Adhikari were minor and above Monggo Adhikari on her behalf and on behalf of her above 2 minor sons Ratia and Alope along with her other two adult sons transferred 2.2 acres land by 3 registered kabala deeds dated 07.11.1975, 01.11.1978 and 03.01.1975 to the plaintiffs and plaintiffs are in possession in above land by mutating their names and paying rent to the Government. On 27.07.2006 defendants disclosed above registered kabala deed and threatened to dispose the plaintiffs.

Defendant Nos.1-2 contested the suit by filling a joint written statement alleging that Shema Kanto Adhikari was the owner and

possessor of total land of S. A. Khatian Nos.45 and 335 and he died leaving 4 sons and 1 wife and Alok Kanto Adhikari died leaving 1 son Provash Adhikari and while they were in possession in 1.15 acres land Ratia Adhikari and Alok Adhikari transferred 1.15 acres to the defendants land by registered kobala deed dated 26.07.2006. Plaintiffs do not have any title and possession in disputed 88 decimal land.

At trial plaintiffs examined 4 witnesses and documents of the plaintiffs were marked Exhibit Nos.1-5. On the other hand defendants examined 4 witnesses and documents of the defendants were marked as Exhibit No."Ka".

On consideration of facts and circumstances of the case the and evidence on record the learned Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree of the trial Court above plaintiffs preferred other Class Appeal No.01 of 2008 to the District Judge, Panchagarh who dismissed above appeal and affirmed the judgment and decree of the trial Court.

Being aggrieved by and dissatisfied with above judgment and decree of the Court of Appeal below above appellants moved to this court with this petition under Section 115 of the Code of Civil Procedure and obtained this Rule.

Mr. J. K. Paul, the learned Advocate for petitioner Nos.1(a) – 1(e) submits that admittedly disputed property belonged to Shama Kanto Adhikari and he died leaving 4 sons namely Srikanto Adhikary, Kalketo, Ratia Adhikari and Porvash Adhikari and the wife of Monoggo Adhikari. Monoggo Adhikari on her behalf as well as on behalf of her above two minor sons jointly with her two adult sons namely Srikanto Adhikari and Kalketo Adhikari transferred 2.10 acres land by 4 registered kabala deeds dated 07.11.1975, 01.11.1978 and 03.01.1975 (Exhibit No.2 series). Above Alok Adhikari after attaining majority died leaving one son Provash Adhikari. Above Provash Adhikari and Ratia Adhikari instead of recovery of possession of above property which was sold by Monoggo Adhikary mother of minors Alok and Ratia about 35 years back to the defendants by registered kobala deed dated 26.07.2006. On the strength of above registered kobala deeds from the persons who had no title and possession defendants threatened the plaintiffs with dispossession.

It has been admitted by above Provash Adhikari while giving evidence as PW4 that although they transferred 1.15 acres land to the defendants they could deliver possession of some land. The plaintiffs have in support of their continuous possession in above land they

have produced mutated Khatians and rent receipts and 4 PWs have given consistence evidence as to the possession of the plaintiffs.

On consideration of above facts and circumstances of the case and evidence on record the learned District Judge should have allowed the appeal, set aside the flawed judgment and decree of the trial Court and decreed the suit but the learned District Judge utterly failed to appreciate above materials on record properly and most illegally dismissed above appeal and affirmed the unlawful judgment and decree of the trial court which is not tenable in law.

Mr. Haripada Barman, learned Advocated for the opposite parties submits that plaintiffs have filed above suit challenging the legality and propriety of registered kabala deed dated 26.07.2006 executed by Provash Adhikari and Ratia Adhikari in favor of the defendants alleging that above document was without consideration, fraudulent and an ineffective document but the plaintiffs did not implead above Provash Chandra Adhikari and Ratia Adhikari as defendants in above suit and the suit was bad for defect of parties. In the plaint the plaintiffs have stated that the cause of action of above suit arose due to threatening him with dispossession. As such the plaintiffs should have sought an appropriate remedy with regard to the possession of above land. But the plaintiff did not seek any relief

for declaration of title and confirmation of possession and for above reason the instant suit was not tenable in law.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record including the pleadings, judgments of the courts below and evidence.

It is admitted that Shama Kanto Adhikari was the owner of disputed property who died leaving four sons namely Srikanto, kaliketo and minors and Ratia, Alok and 1 wife Monoggo Adhikari. It is also admitted that above Srikanto and Kaliketo and Monnoggo Adhikari for herself and for her above two minor sons transferred 2.1 acre land by registered kabala deeds (Exhibit 2 series) to the plaintiff in 1975 and 1978. It is also admitted that above Alope Adhikary died leaving one son Provash and above Provash Adhikari and Ratia Odhikari jointly transferred 1.15 acres land to the defendants Nos.1-3 by registered kabala deed dated 26.07.2006 (Exhibit No.3).

This suit is with regard to the property of above mentioned two minor sons of Shama Kanto Adhikari Namely Ratia and Provash. The property of a minor cannot be transferred by his or her guardian legal or defecto since the minor is a separate entity or person and such a transfer of the property of the minor is void and no lawful title passes by such a sale by a guardian of the minor. But if pursuant to above sale deed the possession of the land is delivered to the

transferee then the minor must recover possession of above land within three years after attaining majority. A minor must file a suit for recovery of possession of his land which was unlawfully transferred by his guardian within three years after attaining majority. If a minor long after attaining majority instead of recovery of possession of his transferred land mere transfers above property to another person that transfer cannot be regarded as lawful since the transferor had no possession in above land.

In this suit the plaintiff has challenged the legality and competence of Provash and Ratia to transfer 88 decimal land of "Kha" schedule alleging that above property was transferred by Monnoggo Adhikari on their behalf in 1975 and 1978 and delivered possession. But it turns out from registered kabala deed dated 26.07.2006 (Exhibit No."Ka") that by above deed Provash and Ratia transferred 1.15 acres land from S. A. Khatian Nos.45 and 335 but the plaintiffs have incorporated in the "Ka" schedule only 88 decimal land of S. A Khatian No.45 and there is no specific mention in the plaint as to remaining land of Exhibit No."Ka". No explanation has been provided in the plaint as to the land of S. A. Khatian No.335. As such above kabala deed of the defendants (Exhibit No."Ka") appears to be valid as far as land of S. A. Khatina No.335 is concerned.

It further turns out from the plaint that the plaintiffs sought a declaration against Exhibit No."Ka" that the same was without consideration, fraudulent and an ineffective document but the plaintiffs did not implead the executants of above deed namely Provash and Ratia as defendants. All the allegations made by the plaintiffs regarding above registered kabala deed dated 26.07.2006 (Exhibit No."Ka") could be answered by above Provash and Ratia but the plaintiff has sought a relief against them without impleading them in the suit and on above ground alone this suit was liable to be dismissed.

On the other hand learned Advocate for the opposite parties submits that besides above 88 decimal land Ratia and Provash had other land in the disputed Khatians since Shama kanto Adhikari had 3.26 acres land in the relevant in the C. S. khatians and plaintiffs claims only 2.10 acres land and if claim of the plaintiff is admitted even then defendant would have valid title in 1.15 acres land. But above claims were not reflected in the pleading of above suit. Plaintiffs appear to have admitted title of the defendants in the land of in S. A. Khatian No.335 and the plaintiffs and defendants become co-sharers in the property of Shama Kanto Adhikari.

In above view of the facts and circumstances of the case and evidence on record I hold that the ends of justice will be met if the

impugned judgment and decree are set aside and the suit is remanded to the trial Court for retrial after giving both parties an opportunity to amend their respective pleadings and adduce further evidence.

In above view of the materials on record I find substance in this petition under Section 115 of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute with cost of Taka 10,000/- (ten thousand) to be paid to the opposite parties by the petitioners.

The impugned judgment and decree dated 21.08.2008 passed by the learned District Judge, Panchagram in Other Class Appeal No.01 of 2008 affirming the judgment and decree dated 18.11.2007 passed by the learned Assistant Judge, Atowari, Panchagarh in Other Class Suit No.19 of 2006 is set aside and above suit is remanded to the trial Court for retrial after giving both parties an opportunity to amend their respective pleadings and adduce further evidence.

However, there will be no order as to cost.

Send down the lower Court's records immediately.