

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

First Appeal No. 589 of 2018
In the matter of:

Jahanara Begum died her heirs- Md.
Asraf Hossain alias Babul and others.

..... Plaintiff-Appellants.

Vs.

Monira Begum and others.

..Defendant-Respondents.

Mr. Uzzal Bhowmick, Advocate
(Appearing Virtually).

...For the Plaintiff-Appellants.

Mr. Md. Nurul Huda, Advocate
(Appearing Virtually).

..For the respondent No.1.

Present (Physically in Court Room):

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice Ahmed Sohel

Heard on 18.01.2022 and 23.01.2022.
Judgment on: 24.01.2022.

SHEIKH HASSAN ARIF, J

1. This appeal, at the instance of the plaintiffs in Title Suit No. 50 of 2014, is directed against Judgment and decree dated 23.09.2018 passed by the First Court of Joint District Judge, Patuakhali in the said title suit thereby dismissing the same.

2. Background Facts:

- 2.1 Facts, relevant for the disposal of the appeal, in short, are that the predecessor of the appellants filed the said Title Suit No. 50 of 2014 seeking a declaration that the

registered heba deed mentioned in schedule-Ka to the plaintiff is illegal, void, fraudulent etc. The case of the plaintiff, in short, is that she is the owner of six decimal land under hal dag (latest plot) No. 3990 under S.A. Khatian No. 1622/2 under J.L. No. 38, Mouza-Patuakhali, District-Patuakhali by virtue of purchase from Altaf Talukder and others vide registered purchase deed No. 1852 dated 04.05.1998. Accordingly, the same was recorded in her name in the record of rights concerned. That the plaintiff has her husband, one son, and three daughters, namely Masuma Begum, Monira Begum and Kohinur Begum. That she married off her son and daughters and they have their children. That her second daughter, Monira Begum (defendant No. 1), is a different type of person and she married without consent of the parents. That the plaintiff has been suffering from cancer and that when she visited Dhaka for her treatment leaving defendant No. 01 at her house, some documents, deeds and pictures of the plaintiff went missing. It is believed by the plaintiff that the said documents and pictures were stolen by the said defendant No. 1. That defendant No. 01, in the meantime, took Tk. 3 lakh from plaintiff and when she came back from Dhaka and was taking rest, she was taken to doctor by defendant

No. 01 on 11.04.2013 and she took her thumb impressions on stamp and cartridge papers. Thereafter, the plaintiff realized that by using the said papers and thumb impressions, defendant No. 1 created a registered heba declaration in her favour, being registered deed No. 2042/13 dated 11.04.2013, and started claiming ownership of the suit property. That the said defendant No. 01, on 20.03.2014, claimed that she became owner of the said property and that she was in a position to keep others in the house or push them out. That knowing this, the plaintiff became more sick and disclosed it to other members of the family including her husband, Md. Anowar Hossain Mridha. That her husband obtained the certified copy of the said heba deed and, accordingly, she filed the said suit for cancellation of the said heba deed. That the said heba deed was fraudulently obtained by defendant No. 01 by gaining over the plaintiff, who was old and pardanashin lady. That the said defendant No. 01 did such fraudulent act with the help of deed writer Md. Elias Hossain, who was the deed writer of the husband of defendant No. 01. That the witness of the said heba deed are the confidants and relatives of defendant No. 01 and her husband. That the suit property was the only property of the plaintiff and that the defendant

No. 01, by committing such fraud, took away the said property. That by such documents, defendant No. 01 did not get any possession and that the possession of the property was never handed over in her favour. That the plaintiff knew nothing about the said deed until 20.03.2014 when defendant No. 01 threatened her that she could evict them if she wished. Accordingly, the plaintiff filed the said suit for declaration that the said heba deed was fraudulent, void etc.

2.2 The suit was contested by defendant No. 01 by filing written statement. The case of defendant No. 01 is that her husband used to live in Saudi Arabia and they decided to purchase a land for their residence. That since her husband was a member of joint family, the suit property was purchased by them in the name of her mother vide registered deed No. 1852 dated 04.05.1998 out of the money sent by her husband. That the plaintiff did not pay any consideration money for the said purchase. That the plaintiff had a very small job and she was sick for long time and was suffering from financial crises. That the husband of defendant No. 01 helped the plaintiff for her treatment with financial support and purchased the said property in the

name of plaintiff and opened holding number in her name. That since the plaintiff became very sick, she often expressed her desire to return the said property in favour of defendant No. 01 and that the plaintiff had never seen even the purchase deed No. 1852 dated 04.05.1998 which was released from the registry office by the defendant No. 01 and was kept in her custody as advised by the plaintiff. That the plaintiff then executed the said heba deed in favour of defendant No. 01, being the disputed heba deed No.2042 dated 11.04.2013, thereby transferring the said property in favour of defendant No. 01 and, accordingly, the defendant No. 01 was living along with her family in the house thereon. That the plaintiff sometimes visited the said house. That after execution of the said heba deed, other daughters of the plaintiff started mental torture on her and under their pressure, the plaintiff filed the said suit seeking cancellation of the said heba deed. Accordingly, the suit is liable to be dismissed.

2.3 Upon above contesting pleadings, the Court below framed four issues in the following terms, namely:-

- i) Whether the suit is maintainable in its present form and nature;

- ii) Whether the suit is barred by limitation ;
- iii) Whether the heba deed mentioned in schedule 'Ka' is fraudulent, illegal and ineffective;
- iv) Whether the plaintiff is entitled to get relief as prayed for.

2.4 To prove the case, plaintiff herself deposed as P.W. 1 and produced three more witnesses (P.W.2-P.W 4) including her husband. However, during pendency of the suit, the plaintiff died and, accordingly, her heirs (except defendant No. 01) were substituted as plaintiffs. To contest the case, defendant No. 01 deposed herself as D.W.-1 and produced two more witnesses including her husband (D.W.-2-D.W.3). In support of plaintiffs' case, the plaintiffs produced various documents including the certified copy of the said disputed heba deed (Exhibit-01) and they were marked before the Court below as Exhibit-1 to Exhibit-6. On the other hand, the defendant produced various documents including the original copy of the said baya deed (Exhibit-ka-1) and they were marked by the Court below as Exhibits-Ka to Exhibit-Gha. Thereupon, the Court below, after hearing the parties, dismissed the suit vide impugned Judgment and decree dated 23.09.2018 mainly on the ground that the predecessor of the plaintiffs, namely Jahanara Begum, was

an educated and employed woman and as such it was not believable that she would sign on papers or put her thumb impression without understanding the consequence thereof and that the other circumstances, as proved by the parties, indicated that the plaintiffs failed to prove their case. Being aggrieved by such dismissal of the suit, the plaintiffs, namely the heirs of original plaintiff (except defendant No. 01), preferred the instant appeal before this Court.

2.5 The appeal is contested by defendant No. 01-respondent through learned advocate Mr. Md. Nurul Huda.

3. **Submissions:**

3.1 Mr. Uzzal Bhowmick, learned advocate appearing for the appellants, has made the following submissions:

(a) That the Court below dismissed the suit mainly on some assumptions and not on evidences on record. According to him, the original plaintiff, namely Jahanara Begum, being a pardanashin lady, the onus to prove that she independently exercised her desire to execute the said heba deed in favour of the defendant No. 01 was shifted on defendant No. 01 and, accordingly, it was the defendant No. 01 who was

required to prove that the said heba deed was executed by her mother on her own volition, which, according to the learned advocate, the defendant No. 01 failed to discharge. Accordingly, he submits, the Court below committed gross illegality in dismissing the suit.

- (b) That there was a fiduciary relationship between the said Jahanara Begum and defendant No. 01 and that the evidences produced by the plaintiffs sufficiently proved such fiduciary relationship. Accordingly, it was the defendant No. 01 who was required to prove that the said heba deed was not obtained by gaining over the said Jahanara Begum through undue-process. This aspect having been completely ignored by the Court below, the impugned judgment and decree cannot sustain in the eye of law. In support of his submissions as regards pardanashin lady and fiduciary relationship, he has referred to four decisions of our Appellate Division and High Court Division, namely the decisions in **Siddique Ahmed Chowdhury vs. Gani Ahmed, 33 DLR (AD)-1, Rokeya Khatun vs. Alijan, 34 DLR (AD)-266, Abdul**

Matleb vs. Matiar Rahman, 6 DLR-202 and Ayani Dasi vs. Arena Bala Dasi, 12 DLR-603.

- (c) By referring to the deposition of P.W.-2 (the husband of late Jahanara Begum), learned advocate submits that the deposition of P.W.-2 as regards giving the said heba deed in favour of defendant No. 01 has also been misquoted by the learned judge below in that although the P.W.-2 denied the suggestion of the learned advocate for the defendant No. 01 to the effect that no irregularity took place in executing the said heba deed, the Court below mentioned in the judgment that P.W.-2 had admitted that no irregularity took place.
- (d) That it is apparent from the disputed heba deed that none of the family members was witness to the execution of the same. Rather, some outsiders were shown as witnesses in the said heba deed. Therefore, it is apparent that the said heba deed was created secretly beyond the knowledge of other family members and as such the Court below having ignored this aspect completely, the impugned judgment and decree cannot sustain in the eye of law.

3.2. As against above submissions, Mr. Md. Nurul Huda, learned advocate appearing for the defendant- respondent No. 1, has made the following submissions:

- (i) That according to the evidence of P.W.-02, the donor- Jahanara Begum was a conscious lady and she was employed in a service as Family Planning Officer. Therefore, she cannot claim to be a pardanashin lady as has been held by our Superior courts in the above referred cases as cited by the learned advocate for the appellant, particularly when she herself filed the said suit seeking cancellation of the disputed heba deed.
- (ii) That the evidences adduced by the parties clearly proved that the said Jahanara Begum executed the said heba on her own volition, particularly when it was proved before the Court relying on evidences that she signed the said heba deed and put both her signature and thump impression jointly on the photograph and the paper of the heba deed. Therefore, the case of the plaintiffs that some thump impressions were taken from her when she was unconscious, cannot be believable by any reasonable person.

- (iii) By referring to the particular deposition of P.W.-2 (husband of late Jahanara Begum and substituted plaintiff No. 01) as regards his admission of having the ticket of heba deed in his possession, he submits that the Court below has rightly held that since the ticket concerned of the said heba deed was still in possession of P.W.-2, it was proved that the heba deed was executed with the knowledge of the said P.W. 2 and other family members. This being so the Court below has committed no illegality in dismissing the suit.
- (iv) By referring to the depositions of the witnesses as well as the contesting case of the parties before the Court below through their pleadings, he submits that there was no case of fiduciary relationship between the donor-Jahanara Begum and defendant No. 01 inasmuch as that Jahanara Begum was an educated and employed lady and that during her sickness, she was only financially supported by the defendant No. 01.
- (v) That the deed in question was not obtained by defendant No. 01 fraudulently, but her mother

executed the same on her own volition with her independent decision. That had it been obtained fraudulently by defendant No. 01, she would not have disclosed the fact of such execution of heba deed in her favour before the death of Jahanara Begum, and this aspect having rightly been addressed by the Court below in disbelieving the case of the plaintiff, this Court has got nothing to interfere with the impugned judgment and decree.

4. **Deliberations, Findings and Orders of the Court:**

- 4.1 It appears from the submissions of the learned advocate for the appellant that he has basically relied on the point that the said Jahanara Begum was a pardanashin lady and as such the onus of proving the execution of the said heba deed on her own volition was shifted on the defendant No. 01 and that defendant No. 01 failed to discharge such onus. The term “pardanashin lady” has appeared in different statutes of our country as against different contexts. However, the said term has not been specifically defined by any provisions of law. Therefore, we are to examine the legal decision as well as legal dictionaries to understand the effective purport of the said term. According to **K J AIYAR**,

Judicial Dictionary, 17th Edition, Shakil Ahmed Khan, LexisNexis, Vol. 2, “a ‘*pardanashin lady*’, in its legal meaning, is a women of the rank who lives in seclusion, shut in the zenana, having no communication except from behind the *pardah* or screen with any male person, save a few near relations. A ‘*pardanashin*’ woman need not necessarily be a woman of rank. If on account of the rules and customs of society, she has to keep herself within the zenana and to lead a life of seclusion without any contact with the outside world, she is a *pardanashin* women.” [Jubeda Khatun v. Sulaiman Khan, (1986)-1 Gau LR 147, pp 153,154 (K Lahiri CJ and T C Das J)]”. It appears from this definition that a ‘*pardanashin lady*’ in our sub-continental social context has to be a lady who lives a secluded life, who deals with the external world from behind her *parda* or screen with any male person except a few male relations. Now, the question is whether the lady in our case, namely late Jahanara Begum, was a *pardanashin lady* as understood by such legal definition.

4.2 She deposed herself as P.W. 1 that she used to do a job under the family planning department of the government and used to earn Tk. 8000/- per month. As against this, her husband, as P.W. 2, deposed that she was a conscious

lady. There is no evidence on record suggesting that she used to become unconscious while she was suffering from cancer disease. If we examine the above given definition of pardanashin lady, it appears that she was not that pardanashin lady as understood by our legal world. Since she was employed under the family planning department, she was naturally an educated woman and used to deal with a lot of people. She used to earn money through her such service. Therefore, she did not live a secluded life behind parda. Apart from saying that she was a pardanashin lady in the pleading, it was not the case of the original plaintiff, late Jahanara Begum, in her pleading in the original plaint that she used to live a secluded life and that she used to talk to people from behind parda or screen or that except some few family relatives, she was not in a position to deal with other people. Therefore, we have no option but to hold that she was in fact not that pardanashin lady as has been suggested by the learned advocate for the appellants.

4.3 Now, the question of fiduciary relationship as suggested by the learned advocate for the appellants. To address this issue we have examined the deposition of the said

Jahanara Begum, who deposed as P.W. 01. In her cross-examination, she admitted that defendant No. 01 and her husband had a love marriage and during such marriage, the husband of defendant No. 01 was student and that they married without the consent of the parents of her son-in-law and that the defendant No. 01 used to live in her house after such marriage. Therefore, it appears from her own deposition that the defendant No. 01 was residing under the parental guidance of her mother, Jahanara Begum (P.W. 01).

4.4 Now, it has been suggested by the learned advocate for the appellants that since she became sick, a fiduciary relationship developed in between them as because she became dependant on defendant No. 01 on account of her treatment. However, this suggestion of learned advocate for the appellants does not have any basis in the depositions of either P.W. 01 or P.W. 2. Rather, we find the opposite picture in that the said defendant No. 01 was residing under the parental support of P.W. 01 and P.W. 02. Therefore, the situation of fiduciary relationship did not arise at all and as such Section 111 of the Evidence Act, 1872 does not have any manner of the application.

4.5 In this regard, we have examined the decision in **Siddique Ahmed's case, 33 DLR (AD)-01** as cited by the learned advocate for the appellants. The question of independent advice of the donor of a transfer deed becomes relevant when the transferee stands in the fiduciary relation with the lady who transferred the said property. In the said case, the transferor, Sujan Bibi, was claimed to be a pardanashin lady and that she was old and illiterate. A single bench of the High Court Division therein held that she took her decision independently and on her own volition and this finding of the High Court Division was affirmed by the Appellate Division. While discussing different cases decided on the issue of 'pardanashin lady' in our sub-continent, the observation of our Appellate Division in the said case as regards pardanashin lady and its impact on a transfer deed is relevant to be quoted here:

“23. On a review of the authorities cited above it is manifest that this special rule of onus has been devised to give protection to certain categories of women in Indian sub-continent who suffer from some social disabilities because of purdah system. Pardanashin women are excluded from social inter-course except with very near relations and communion outside the narrow family circle is bared to them. It applies to all pardanashin women literate or illiterate. The criteria is whether she is pardanashin or not.”

It is, of course, a question of fact. Next, we get that the protection granted to the pardanashin ladies has been extended to ignorant and illiterate women, though not strictly speaking paradanashin.

24. If in a case of a transfer by a pardanashin lady a dispute arises as to its validity, the onus is always on the party who seeks to hold the transferor to the terms of the deed to satisfy the Court on evidence that she substantially understood the disposition and she executed the deed with full understanding of what she was doing and of the nature and effect of the transaction. It is to be observed that independent advice by itself is not an essential burden to be discharged, unless there are some special circumstances calling for its application, in that the donee or the transferee stood in a position of active confidence or had fiduciary relationship with the pardanashin lady. It is only in such cases, the donee or transferee will carry the additional burden or to prove that the lady had independent and disinterested advice from persons other than the recipient of the document”.

(Underlines supplied)

4.6 As stated above, since the lady in our case, namely late Jahanara Begum, was not such ‘pardanashin lady’ as defined by our legal world, it cannot be said that the onus to prove that she executed the said deed on her own volition, or with independent advice, shifted to defendant No. 01. On the other hand, although there is a suggestion from the

learned advocate of the appellants that there was a fiduciary relationship between the said Jahanara Begum and defendant No. 01, this suggestion does not have any basis in the pleading of the original plaintiff herself in that she did not state that she was dependant on defendant No. 01. Rather, her depositions suggest that the defendant No. 01 was dependant on her since her marriage and used to live in her house under her parental guidance. Not only that, the case of the late Jahanara Begum, as original plaintiff in the pleading, is not of a fiduciary relationship, but an allegation that defendant No. 01 stole some documents, deeds from her cupboard when she was out of the house in Dhaka for her treatment and that defendant No. 01 created the said deed using the said stolen documents and deeds. Therefore, the case of the original plaintiff is not of fiduciary relationship, but of stealing by defendant No. 01. Had it been a true fact that the defendant No. 01 in fact stole the said documents from her mother's cupboard, the question arises as to why the mother did not lodge any General Diary with any Police Station. In this regard, it was suggested by learned advocate for the appellants that since defendant No. 01 was her daughter, she did not lodge any G.D. Even then, the question arises why didn't she involve

other family members or what step did she take to recover the said stolen deeds and papers.

- 4.7 There is another aspect in this case, which has been rightly pointed out by the Court below in the impugned judgment. According to the plaintiffs, defendant No. 01 secretly and fraudulently created the said heba deed (Exhibit Ka) in her favour at a time when Jahanara Begum was suffering from cancer disease and that defendant No. 01, for the first time, disclosed on 20.03.2014 about the said heba deed dated 11.04.2013. As against this, the Court below has rightly held that had the said heba deed been created secretly and fraudulently when Jahanara Begum was suffering from cancer, the defendant No. 01 would have reasonably waited for the death of her mother to disclose about the said heba deed. We find another evidence in this regard. P.W. 2, the husband of Jahanara Begum and substituted plaintiff No. 01, in his cross-examination admitted that the ticket issued in respect of the said heba deed by the registry office was still in his position. Therefore, the question arises had the said heba deed not been executed independently within the knowledge of P.W. 02, how the

ticket in respect of that heba deed was still lying with the possession of P.W. 02.

4.8 On the other hand, if the ticket, as referred by him in his cross-examination, is taken to be a ticket in respect of original baya deed, the question automatically arises as to how the said ticket was still with him when it was the case of the plaintiffs that the entire documents and deeds were stolen by D.W. 01. As against these evidences making the case of the plaintiffs very weak and unreliable, it appears that the original heba deed was produced by defendant No. 01 through her deposition as D.W. 01 and the same was exhibited as Exhibit-Ka. We have ourselves examined the original copy of the said heba deed as lying with the lower Court records. It appears from the said heba deed dated 11.04.2013 (Exhibit-Ka) that in fact Jahanara Begum put her signature as well as thump impression on the said heba deed. Although, it is the case of the plaintiffs in the pleading that some thumb impressions were taken only when she became unconscious, there is no case in the pleading of the plaintiff that the signature on the said heba deed was forged-signature and not the signature of Jahanara Begum. Therefore, the question arises if she became unconscious,

how could she put her signature, namely write her almost full name on the said heba deed on every page of the same.

4.9 Not only that, she put her signature on the cartridge paper and her own photograph in a very careful way which suggests that she signed it on her own volition when she was fully conscious. A thumb impression may be taken from an individual during his unconsciousness, but a signature cannot be taken from an unconscious human being. Therefore, since every page of the said Exhibit-Ka has been signed by the said Jahanara Begum and it is not the case of the plaintiffs that such signatures are false signatures, we have no option but to hold that the case of the plaintiffs in fact have no base to stand as regards fraudulent obtaining of the said heba deed during Jahanara Begum's unconsciousness. It further appears from the said heba deed that the said heba deed was prepared by one Md. Elias Hossain, who himself deposed before the Court as D.W.-2. He deposed in categorical terms that Jahanara Begum signed the said document in his presence and in presence of the concerned sub-registrar and that the

affidavit as annexed to the said heba deed was also signed by the said Jahanara Begum.

4.10 It is true that none of the family members of Jahanara Begum has been shown as witness in the said deed. There could be hundred reasons for that. Had this question been put to D.W. 01 or the P.W. 02, we could have got the reasons as to why the family members of Jahanara Begum were not shown as witnesses. Therefore, only because none of the family members of Jahanara Begum has not been shown as witness in the said registered deed, which has presumptive value under the law, the same cannot be thrown away, particularly when preponderance of other evidences clearly indicates that she executed the said deed with her conscious mind by using her independent decision.

4.11 In view of above discussions of law and facts as well as evidences on record, we are of the view that the Court below has rightly dismissed the suit filed by the plaintiffs seeking declaration that the said heba deed is fraudulent or void. Accordingly, we do not find any ground to interfere into the impugned judgment and decree.

4.12 In the result, the appeal is dismissed. The impugned judgment and decree dated 23.09.2018 in Title Suit No. 50 of 2014 passed by the First Court of Joint District Judge, Patuakhali are hereby affirmed.

Send down the lower Court records.

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(Sheikh Hassan Arif, J)

I agree.

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(Ahmed Sohel, J)