

Bench:

Mr. Justice Md. Ali Reza

Civil Revision No. 153 of 2011

Mafizul Islam .....petitioner

-Versus -

Md. Amin Mia and others

.....opposite-parties

Mr. Md. Abdul Kader Bhuiyan, Advocate

.....for the petitioner

Mr. Abdul Haque with

Mr. Md. Suza Al Faruque, Advocates

.....for opposite parties 1-9

Judgment on 09.01.2023

In the instant revision rule was issued calling upon the opposite party Nos. 1-9 to show cause as to why the judgment and decree dated 18.08.2010 passed by the Joint District Judge, 1<sup>st</sup> Court, Chandpur in Title Appeal No. 04 of 2006 allowing the appeal thereby reversing the judgment and decree dated 26.10.2005 passed by the Senior Assistant Judge (in charge), Hajigonj, Chandpur in Partition Suit No. 50 of 2002 should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

Facts relevant for disposal of the instant rule, in short, is that the predecessor of the present opposite parties 1-6 named Sona Miah and opposite parties 7-9 as

plaintiff filed Partition suit No. 01 of 1989 in the Court of Shahrasti Assistant Judge, Chandpur on 04.01.1989 against the petitioner and defendants-respondents-opposite parties 10-113. The said partition suit was subsequently transferred to the Court of Chandpur Sadar Senior Assistant Judge and renumbered as Title Suit No. 255 of 1992. Thereafter, the same again was transferred to the Court of Additional Assistant Judge, Chandpur and renumbered as Title Suit No. 41 of 1993. The Suit was dismissed on the ground of defect of party and hotchpot by judgment and decree dated 17.02.1994. Then plaintiffs preferred Title Appeal No. 25 of 1994 in the Court of District Judge, Chandpur and the appeal was allowed with an order of remand for fresh trial on 27.02.1997. Then the suit was again registered as Title Suit No. 101 of 1999. The plaintiff amended the plaint and the suit was transferred to the Court of Senior Assistant Judge, Hajigonj for trial and renumbered as Title Suit No. 50 of 2002. Plaintiffs filed the instant suit for partition claiming successive heirs of C.S. recorded tenant Amin Uddin.

The case of the plaintiffs is that Amin Uddin being the owner in possession in 4.15 acres of land of C.S.

khatian No. 27 transferred .30 acres of land on 02.03.1932 to Aslam Munshi who is the predecessor of defendants 4-9 and accordingly the possession was delivered. After death of Amin Uddin his wife Meherjan got .88½ acres, each of the 03(three) daughters got .68 acres and son got 1.36 acres of land. Meherjan and 03(three) daughters by virtue of a registered gift dated 17.02.1941 transferred .42 acres of land in favour of Sona Miah who is the son of Idris. Thereafter mother Meherjan died leaving behind son Idris and 03(three) daughters named Kader Jan, Alek Jan and Dud Banu. Dud Banu thus became owner of total .6520 acres of land and died leaving behind 02(two) sisters and 01(one) brother. She had no child. Idris got .3260 acres and each of the sisters got .1630 acres of land of Dud Banu. Thus Idris became the owner of total  $1.36+.1540+.3260=1.84$  acres of land. He had two wives. Two sons named Jonab Ali and Sona Miah and two daughters named Jamila and Afia were issues of the first wife. Jonab Ali is the predecessor of defendants 31-39. Sona Miah is the predecessor of plaintiffs 1(Ka)-1(Chha). Jamila Khatun is the predecessor of plaintiffs 2-3 and Afia herself is plaintiff No. 4.

Defendant No. 1 Abdul Latif, defendant No. 2 Abdul Ali are 02(two) sons and defendant No. 3 Feroza is the daughter of second wife. Heirs of first wife are Jonab Ali, Sona Miah, Jamila and Afia. The second wife got .23 acres, each of the sons got .2927 acres and each of the daughters got .1463 acres of land. Second wife Ulfatunnesa died leaving behind her heirs defendants 1-3 and they got the land of their mother. Sona Miah got .29 acres as heir of Idris Ali and .42 acres through gift which in total is .71 acres of land. Sona Miah then died leaving behind his heirs plaintiff 1(Ka)-1(Chha). Jamila Khatun got .1463 acres of land and died leaving behind her heirs plaintiffs 2-3. By this way the plaintiffs 1(Ka)-1(Chha) claimed .71 acres, plaintiffs 2-9 claimed .14½ acres and plaintiff No. 4 claimed .14½ acre which in total is 1 acre or 100 decimals of land and for the convenience of possession according to share this suit for partition was filed.

Defendants 1-4 contested the suit by filing a written statement denying all material statements made in the plaint contending, *inter alia*, that the suit would be dismissed for defect of parties. The gift deed dated 17.02.1941 executed by the heirs of Amin Uddin in favour

of Sona Miah is illegal. Amin Uddin sold .30 acres from plot No. 177 to the predecessor of defendants 4-9 named Aslam Munshi. Amin Uddin also gave possession of rest .60 acres to Aslam Munshi by a kot kabala dated 06.10.1934. Thereafter Amin Uddin died without paying off the loan. After his death his heirs defendants 1-2 paid the proportionate loan money to the heirs of Aslam Munshi and got possession in .42 acres of land by dint of a deed of relinquishment dated 16.04.1988. The plaintiffs might be the owner in some portion of land of plot No. 179 in which they are only entitled to get saham.

Defendants 4-6, 8 and 9 also contested the suit by filing a written statement denying all material averments made in the plaint contending, *inter alia*, that the case as made out by defendants 1-2 is correct. They further claimed that they have admittedly acquired .30 acres of land by document dated 02.03.1932 executed by Amin Uddin in favour of their father Aslam Munshi. They also claimed that after payment of the proportionate due by defendants 1-2 in favour of these defendants a deed of relinquishment was executed with respect to .42 acres out of .60 acres and as such they have title in the rest .18

acre of land and accordingly they are entitled to get saham.

Earlier the suit was tried by the Assistant Judge, Hajigonj, Chandpur and during trial plaintiffs examined 03(three) witnesses and defendants examined 02(two) witnesses and both the parties adduced documentary evidence in order to prove their respective cases.

The suit was dismissed on contest on 17.02.1994 on ground of defect of party and hotchpot. Thereafter the plaintiffs preferred Title Appeal No. 25 of 1994 and the appeal was allowed with an order of remand on 27.01.1997. The Suit was sent down on remand by the appellate court for fresh trial. The plaintiffs on 07.02.1999 filed an application for amendment of the plaint to cure the defect of party and hotchpot and included the entire jote in the schedule of the plaint and claimed partition for 1(one) acre of land.

The trial court upon perusal of the pleadings and hearing the parties dismissed the suit by judgment and decree dated 26.10.2005.

As against the same plaintiffs preferred Title Appeal No. 04 of 2006 before the District Judge, Chandpur and

the appeal on transfer was heard by the Joint District Judge, 1<sup>st</sup> Court, Chandpur who was pleased to allow the same by judgment and decree dated 18.08.2010.

Being aggrieved by the judgment passed by the appellate court defendant No. 4 as petitioner came before this Court with this revision and obtained the instant rule.

Learned Advocate Mr. Md. Abdul Kader Bhuiyan, appearing on behalf of the petitioner submits that the impugned judgment passed by the appellate court is not a proper judgment of reversal and the same is liable to be set aside. He submits that the impugned judgment was not made in accordance with law and it is an incomplete judgment because the share of the defendants 4-9 was not discussed. He submits that the appellate court passed this judgment with a wrong finding on kot kabala as the document was not in evidence but oral evidence was led to that effect and the kot kabala document is in the record with the list of firisti. The Court could have considered that document. He further submits that the appellate court was wrong in not giving .30 acres of land to the defendants in that defendants filed document in support of that land and plaintiff also admitted that document. He

further submits that the kot kabala dated 06.10.1934 and the subsequent agreement dated 22.04.1938 derived from that kot kabala although were not exhibited but those can be considered under section 99 of the Code of Civil Procedure. He lastly submits that appellate court could give at least a saham of .30 acres of land in favour of defendants 4-9 since the document is admitted. He finally submits that the judgment passed by the appellate court since being passed upon misreading and non consideration of material evidence the same is liable to be set aside.

On the other hand the learned Advocate Mr. Abdul Haque appeared on behalf of the opposite party and submits that the submissions made by the learned Advocate for the petitioner is not in terms of the rule as prayed and issued by this Court and for such reason the submissions do not deserve consideration. He submits that the kot kabala or the deed of mortgage or any agreement made therefrom or a deed of relinquishment does not confer title to defendants because those are not documents of title. The deed of mortgage is a mere security for repayment of any loan and in the instant case

even the deed of mortgage or in other words kot kabala was not proved in evidence and for such reason the case of the petitioner does not have merit. He again submits that if a mortgagor claims any title on the mortgaged property after elapse of time he has to pray for a decree from a competent court. Learned Advocate also submits that the defendants although filed written statement but they did not file any application for separate saham with a clear description of their claim. He again strongly submits that since the entire decree has been challenged in this revision and no prayer of modification for allotting saham in favour of the defendants has been made out and no rule in such term has been issued their claim is not sustainable. The rule is liable to be discharged because there is nothing left to interfere with the judgment passed by the appellate court.

I have heard the learned Advocates for both sides. I have also gone through the revisional application and judgment passed by the Courts below and perused the materials on records and the relevant law.

It appears that there are as many as 10 plots in C.S. Khatian No. 27 containing 4.18 acres of land. Plaintiff

initially prayed for partition only in .5072 acres of land and the suit having been dismissed by the trial court plaintiff preferred appeal and the appellate court allowed the appeal and sent down the suit on remand to cure the defect of parties and bring all the properties of the khatian in hotchpot and also for fresh trial. Accordingly, plaintiffs amended the plaint and cured the defect of parties and included all the 10 plots of the said khatian in hotchpot. Hotchpot generally denotes the schedule of property of a partition suit described in schedule to the plaint. With regard to hotchpot the general rule is that a partition suit should embrace all the joint property of the parties concerned in that suit. The plaintiff must bring all the joint property between himself and the defendants for complete adjudication of the disputes amongst them. However subsequently the defendants did not raise any objection on defect of parties or on hotchpot. The trial court dismissed the partition suit on the finding that since the subsequent State Acquisition khatian has not been introduced in the suit, it is not possible to pass any decree of partition amongst the co-sharers. But the trial court failed to appreciate that the genealogy and the share of

each of the parties are not denied in the suit except the claim by the defendants through the kot kabala of the year of 1934 which was not proved in evidence by the defendants. This is an old suit of the year of 1989. Initially the suit was dismissed by the trial court and on appeal the same was sent down on remand to the trial court. The defendants claiming a particular case on kot kabala document and an agreement pursuant to that document did not file the same in the trial court or subsequently after remand. They even did not produce those documents in Title Appeal No. 25 of 1994 or in 04 of 2006. It is admitted by the plaintiffs that the predecessor of the plaintiffs named Amin Uddin transferred .30 acres of land from plot No. 177 to the predecessor of the defendants 4-9 named Aslam Munshi by kabala dated 22.02.1932. This kabala of the year of 1932 is exhibit-Ka(1) filed by the defendants. Amin Uddin had interest in 3.88 acres of land after deducting the .30 acres of land from 4.18 acres of land. Amin Uddin died leaving behind son Idris who got 1.36 acres of land by inheritance. His wife Meher Jan got .48½ acres of land and the 03(three) daughters named Kador Jan, Alek Jan and Dud Banu got

.68 acres of land each. Sona Miah is the son of Idris. Mother and 03(three) sisters of Idris transferred .42 acres by registered deed of gift dated 17.02.1941 (exhibit-2) in favour of Sona Miah. After such transfer Meher Jan had interest in .38 acres of land and she died leaving behind son Idris and those 03(three) daughters. After transfer Dud Banu had interest in .57½ acres and she got .0770 acres from her mother. Thus in total she acquired .6520 acres of land from her parents. Dud Banu died unmarried leaving behind brother Idris and 02(two) sisters Kador Jan and Alek Jan. Idris got Dud Banu's share which is .3260 acres and 02(two) sisters got .1630 acres each. Accordingly, Idris acquired 1.36 acres from his father, .1540 acres from his mother and .3260 acres from his sister Dud Banu which in total figure at 1.84 acres of land. Idris had 02(two) wives and his first wife has got 02(two) sons, Janab Ali who is the predecessor of defendants 31-39, son Sona Miah who was plaintiff No. 1 and now predecessor of the plaintiffs 1(ka)-1(Chha) and 02(two) daughters named Jamila who was the predecessor of plaintiffs 2-3 and daughter Afiya who herself is plaintiff No. 4. Thus Sona Miah acquired .2927

acres of land from his father. Idris's second wife has 02(two) sons and 01(one) daughter named Abdul Latif defendant No. 1, Abdul Ali defendant No. 2 and Feroza defendant No. 3 respectively. Thus, the predecessor of plaintiffs 1(ka)-1(Chha) named Sona Miah got .29 acres of land from his father and .42 acres of land by the gift deed dated 17.02.1941 (exhibit-2) which all together amount to .71 acres of land. Jamila Khatun being predecessor of plaintiffs 2 and 3 acquired .14½ acres of land and plaintiff No. 4 also similarly acquired .14½ acres of land. Thus plaintiffs 1(Ka)-1(Chha)-4 acquired 1 acre of land for which they prayed for partition. The contesting defendants claimed that the C.S. tenant Amin Uddin sold out .30 acres of land by registered kabala dated 02.03.1932 (Exhibit-Ka(1)) from plot No. 177 which contained .90 acres of land. This sale is admitted by the plaintiff. The further case of the contesting defendant is that Amin Uddin executed a deed of mortgage with respect to .60 acres of land by registered kot kabala on 06.10.1934. But subsequently Amin Uddin failed to pay the loan and he died. Then defendants 1 and 2 being sons of the second wife of Idris proportionately repaid the loan

and got a deed of relinquishment from defendants 4-9 in respect of .42 acres of plot No. 177. The rest .18 acres remained with defendants 4-9. Thus, the plaintiffs have no title in suit plot No. 177.

The main dispute arose in the instant case is with respect to plot No. 177 which contains .90 acres of land. Admittedly, plaintiffs disowned .30 acres of land because of the earlier sale on 02.03.1932 by late Amin Uddin through (Exhibit-Ka(1)) in favour of the predecessor of defendants 4-9 named Aslam Munshi. Plaintiffs say that the rest .60 acres of land remained with Amin Uddin. Defendants dispute this point of the plaintiff. Defendants say that Amin Uddin executed a kot kabala deed on 06.10.1934 in favour of Aslam Munshi and took loan from him. But he could not repay the loan. Subsequently, pursuant to that kot kabala an agreement was executed by Amin Uddin on 22.05.1938 but even then he also failed to pay off the loan and later on he died. Thus these defendants 4-9 became owner in .60 acres of land. Defendants 4-9 further say that defendants 1 and 2 being heirs of Amin Uddin paid the proportionate value of the land to defendants 4-9 for which they executed a deed of

relinquishment with respect to .42 acres on 16.04.1988 (Exhibit-Ga). Thus according to the claim of defendants 1 and 2 they got .42 acres out of .60 acres of land from plot No. 177 and defendants 4-9 were owners in .18 acres after such transfer by deed of relinquishment. It transpires that all these claims of defendants 1-9 are originated from the kot kabala dated 16.10.1934. Defendants faced couple of rounds in trial and appeal respectively but did not tender and prove the kot kabala dated 06.10.1934 as well as the subsequent agreement dated 22.05.1938. It appears from the record that the deed of relinquishment was exhibited on 07.02.1994 by DW 1 Mofizul Islam who deposed on behalf of defendants 4-9 but surprisingly did not hold forth that mortgage document and agreement in order to establish and prove their claim in the suit. Since the defendants have failed to prove their claim of mortgage they did not acquire any title in the rest .60 acres of land of plot No. 177. It is therefore held that the rest .60 acres remained with Amin Uddin and as such there is no way to refuse the claim of the plaintiffs. The claim of the defendants 1 and 2 that they acquired title by a deed of relinquishment in .42

acres and the claim of defendants 4-9 that they had remaining interest in .18 acres are unfounded. Since the mortgage document was not presented in evidence defendants 1-9 have no case with respect to claim in .60 acres of land in plot No. 177.

Learned Advocate for the petitioner submitted that defendants have a remedy under section 99 of the Code of Civil Procedure because the mortgage document was not exhibited. This submission is wrong in as much as there was no reason and it was impossible for the judge to mark that particular document in evidence which was not even presented before him. Section 99 is not applicable in the present context.

Learned Advocate for the petitioner further submitted that this revisional Court can accept that mortgage document as additional evidence. He also submitted that an order of remand would be proper for proving such document. This submission has also got no value at all. The suit was filed in 1989 and the same faced trial in 02(two) times and appeal also in 02(two) times. Now the defendants cannot say that they would be entitled to get an order of remand as a matter of course to

fill up their lacuna in the case. After getting such opportunity in number of occasions defendants 1-9 did not avail such convenience. Thus the submission made by learned Advocate for the petitioner does not deserve any consideration. The gift document dated 19.02.1941 (Exhibit-2) was filed in original from the proper custody. This document being 30(thirty) years old has got a presumption under the law and mere claim through kot kabala by the defendants without producing the same does not make the gift document doubtful. The deed of relinquishment dated 15.04.1988 (Exhibit-Ga) has got no basis in absence of kot kabala. The appellate Court considering all aspects of this case and upon proper appreciation of evidence rightly decreed the suit in favour of the plaintiffs.

Learned Advocate for the petitioner also submits that the appellate Court could have given at least the saham of .30 acres of land since this case on saham is made out in their written statement. I have considered the submission. The appellate Court would have granted the saham of .30 acres in favour of defendants 4-9 who are claiming the same by the admitted document dated

02.03.1932 (Exhibit-Ka(1)). However defendants 4-9 are granted saham of .30 acres from plot No. 177 subject to the payment of court fee.

In view of the above discussion and findings the judgment and decree of the appellate Court is affirmed in the above modified form, i.e., defendants 4-9 would get .30 acres of land as discussed above.

Accordingly this Rule is disposed of. However, there will be no order as to costs.

The order of stay granted stands vacated.

Send down the lower Courts' record.

Communicate this judgment to the concerned Court.

Md. Ali Reza, J: