

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 415 of 2011

Mst. Rahima Khatun and another

..... petitioners

-Versus-

Minor Md. Saddam Hossain and others

..... opposite parties

Mr. Ahmed Nowshed Jamil with

Mr. HM Borhan, Advocates

..... for the petitioners

No one appears for the opposite parties

Judgment on 12.05.2024

This rule at the instance of the defendants was issued calling upon the plaintiff-opposite parties to show cause as to why the judgment and decree of the Additional District Judge, Court No. 1, Khulna passed on 28.10.2010 in Title Appeal No. 36 of 2009 allowing the appeal reversing the judgment and decree of the Assistant Judge Koira, Khulna passed on 21.08.2008 in Title Suit No. 103 of 2005 dismissing the suit should not be set aside.

The plaintiffs brought the suit stating, *inter alia*, that lands measuring 10.99 acres appertaining SA Khatian 13 originally belonged to Golabdi Sana. During his possession and enjoyment he gifted 10.00 acres therefrom to his 4 sons namely 1. Abu Taleb Sana 2. Abul Hossain Sana 3. Motaleb Sana and 4. Aziz Sana. During their possession in equal shares Abu Taleb Sana gifted .66 acres to Azgar Sana and Karim Sana through deed of gift dated 22.09.1987. He

further sold .33 acres to Nur Islam and gifted .32 acres to Mst. Asiron Bibi through another deed of gift dated 19.04.2004. Abu Taleb Sana took Taka 30,000.00 from plaintiffs' father for his treatment and repay debts. Abu Taleb Sana further transferred .575 acres to the plaintiffs through a deed of gift dated 19.04.2004. The plaintiffs were minors and as such their father received and possessed the land on their behalf. He remained in possession by erecting houses thereon and other land by cultivation. After the death of her first wife Abu Taleb Sana got married to his sister-in-law Rahima Khatun. Defendant 2, son of the second wife Rahima instituted Title Suit No. 16 of 2005 which was decreed on compromise. Defendant 2 very secretly executed and registered a *heba-bil-ewaz* to defendant 1 on 29.03.2004 showing payment of dower money to her. Abu Taleb Sana divorced defendant 1 and subsequently she was given in marriage to one Md. Abul Gazi son of Monu Gazi of village-Meger Aith of police station Koira. Defendant 1 after the death of her second husband used to reside in the house of Sheikh of Paikgachha police station. At the time of execution and registration of the *heba-bil-ewaz* deed defendant 1 was not the valid wife of Abu Taleb Sana and as such granddaughter of Abu Taleb Sana namely Rahima Khatun instituted the suit representing plaintiffs 1 and 2 praying for deceleration that *heba-bil-ewaz* dated 29.03.2004 of 'kha' schedule in respect of 'ka' schedule

land described in the schedule to the plaint is fraudulent, collusive, illegal, inoperative and not binding upon the plaintiffs.

Defendants 1 and 2 (ga) contested the suit by filing written statement denying the assertion made in the plaint. They admitted the facts of ownership of 2.5 acres land of Abu Taleb Sana by way of gift from his father Golabdi Sana. They further contended that Abu Taleb Sana by a *heba-bil-ewaz* dated 29.03.2004 transferred .80 acres of land to his second wife defendant 1 showing payment of dower money. After handing over possession to defendant 1 he became titleless in the suit khatian. Although the defendants admitted other transfers of Abu Taleb Sana but denied execution and registration of the deed of gift dated 19.04.2004 claiming it forged, fraudulent, collusive, illegal and inoperative. During his old age, Abu Taleb used to reside in the house of Abdul Karim, son of his second wife Rahima and died there. Plaintiffs' father gifted some lands to the plaintiffs and to his wife, daughter and sisters. He transferred more land he was not entitled to and as such Title Suit No. 16 of 2005 was filed which was decreed on compromise. The defendants paid rent of the suit land to the concerned authority. Through the *heba-bil-ewaz* deed defendant 1 acquired right, title and possession over the suit land. Therefore, the instant suit praying for declaration that the *heba-bil-ewaz* is not binding upon the plaintiffs without any prayer for declaration of title

in the suit land is not maintainable. The suit, therefore, would be dismissed.

To adjudicate the matter in dispute between the parties, the trial Court framed 6 issues. In the trial, the plaintiffs examined 3 witnesses while the defendants examined 1. The documents produced by the plaintiffs were exhibits- 1, 2 and 3 and that of the defendants were exhibits- 'ka' and 'kha'. However, the Assistant Judge dismissed the suit deciding all the material issues in favour of the defendants. Against which the plaintiffs preferred appeal before the District Judge, Khulna. The Additional District Judge, Court No. 1, Khulna heard the appeal on transfer and allowed it by setting aside the judgment and decree passed by the trial Court which prompted the defendants to approach this Court with the revisional application upon which this rule has been issued.

Mr. HM Borhan, learned Advocate for the petitioners taking me through the judgments passed by the Courts below submits that although the plaintiffs asserted in the plaint that Abu Taleb Sana divorce defendant 1 and she took Md. Abdul Gazi of village Meger Aith of police station Koira her husband but it was not proved. Only the *kabinnana* to that effect where the address of the alleged husband is found different cannot be considered that she was married for the second time. He then submits that the plaintiffs claimed that they got the suit land through a registered deed of gift dated 19.04.2004

exhibit-2 but it was not proved by oral evidence of witnesses. The evidence of the plaintiffs' witnesses on the deed of gift is contradictory. He further submits that the *heba-bil-ewaz* dated 29.03.2004 executed and registered by Abu Taleb Sana showing transfer of land to defendant 1 has been proved by evidence of PWs 2 and 3. In their evidence they admitted the above transfer through *heba-bil-ewaz* and handing over possession thereof. Exhibit-'kha', a rent receipt through which defendant 1 paid rent in respect of suit land proves defendants possession in the suit land. Since the title and possession of the defendants have been proved by oral and documentary evidence this suit praying for declaration that the *heba-bil-ewaz* is not binding upon them without any prayer for declaration of title in the suit land and seeking consequential relief for possession is not maintainable. The trial Court correctly assessed the evidence of the witnesses and decided the issues in favour of the defendants. The Court of appeal below without adverting the findings of the trial Court allowed the appeal and decreed the suit on some findings beyond the materials on record which is required to be interfered with in this revision. The rule, therefore, should be made absolute.

No one appears on behalf of the opposite parties 1-3 although the matter has been appearing in the daily cause list for a couple of days with the name of Mr. Dewan Makhdum, learned Advocate for the above opposite parties. I heard the submissions of learned

Advocate for the petitioners on 18.03.2024 and fixed date to 19.03.2024 for delivery of judgment. On that day Mr. Makhdum appeared and prayed for adjournment. On his prayer the matter was withdrawn from delivery of judgment and posted in the list for hearing. Subsequently, it appeared in the list for hearing on 08.05.2024 but he did not appear and it was adjourned on that day for ends of justice. Finally, it appeared in the cause list today, but Mr. Makhdum is found absent on repeated calls. His conduct is unwarranted amounts to professional misconduct and utter disregard to this Court.

I have considered the submissions of Mr. Borhan, learned Advocate for the petitioners, perused the judgments passed by the Courts below and other materials on record.

It is admitted fact that land measuring 10.99 acres of SA khatian 13 of Shreerampur mouza originally belonged to Golabdi Sana. It is also admitted that he gifted 10.00 acres therefrom to his 4 sons and Abu Taleb Sana being one of them got 2.50 acres in his share. The plaintiffs claimed that Abu Taleb Sana totally transferred 1.885 acres to different persons by *kabalas*. He transferred .575 acres to the plaintiffs though registered gift dated 19.04.2004 exhibit-2. The plaintiffs further claimed that although the deed of gift executed and registered but Abu Taleb Sana took loan of Taka 30,000.00 from plaintiffs' father and the gift was for adjustment of the aforesaid loan.

On the strength of the aforesaid deed plaintiffs' father took over possession of the land and started living therein by erecting house and remaining part by cultivation. The defendants denied the execution and registration of the aforesaid gift. In support of the gift exhibit-2 the plaintiffs examined witnesses. On assessment of evidence of 3 witnesses of the plaintiffs it appears that they deposed contradictorily as to the payment of consideration money. In exhibit-2 the consideration money was shown at Taka 19,500.00. PW 1 in evidence stated that he paid Taka 30,000.00 at a time while PW 2 stated that his maternal uncle paid Taka 10,000.00 in the registry office but PW3 stated that the payment was made in 3 equal installments. The trial Court correctly assessed the evidence of the above witnesses and found that the plaintiffs failed to prove the deed of gift exhibit-2 on payment of consideration money. The Court of appeal below without discussing any evidence to that effect reversed the findings of the trial Court and found that the deed of gift was valid. If the plaintiffs succeed in proving their basis of title over the suit land through exhibit-2 in that case only they are entitled to get a decree as prayed for which they failed. The disputed *heba-bil-ewaz* deed dated 23.09.2004 was produced by the defendants as exhibit-'Ka'. It is a registered document executed by Abu Taleb Sana to defendant 1 for .80 acres of land. The defendants produced a rent receipt exhibit-'kha' showing payment of rent for the land transferred

through exhibit-‘ka’. The rent receipt proves possession of the defendants in the suit land. The plaintiffs did not file any document to show their possession in the suit land. Although PW 1 in his evidence stated that he possesses the suit land but PW 2 and 3 supported possession of defendant 1 stating that she resides over the suit land in the house of his son defendant 1 (ga) and that she used to look after Abu Taleb Sana at his old age. For the sake of argument if the fact that defendant 1 took second husband as claimed by the plaintiffs is admitted, it cannot be a ground of her disqualification to get dower from Abut Taleb Sana. Dower money can be paid at any time even after lapse of many years of divorce. In the evidence of PW 2 and 3, I find that exhibit-‘ka’ the *heba-bil-ewaz* was dully executed and registered and possession of the land through it has been handed over to defendant 1. The finding of the lower appellate Court to that effect is not based on evidence on record and as such cannot be accepted. It is further found that as per the admission of plaintiffs’ witnesses the defendants are in possession in the suit land through exhibit-‘ka’. Although the plaintiffs claimed title and possession over the suit land but those are not proved in evidence. Therefore, the instant suit praying for declaration that the *heba-bil-ewaz* dated 29.04.2004 exhibit-‘ka’ is not binding upon the plaintiffs without declaration of title and recovery of possession is not maintainable. The Court of appeal below misdirected and misconstrued in its approach of the

matter and thereby committed error of law resulting in an error such decision occasioning failure of justice and as such I am inclined to interfere with it.

This rule, therefore, merits consideration and accordingly it is made absolute. However, there will no orders as to costs. The judgment and decree passed by the lower appellate Court is hereby set aside and those of the trial Court are restored. The order of *status quo* stands vacated.

Communicate the judgment and send down the lower Court records.