

*Present:-*

*Mr. Justice Mahmudul Hoque*

**Civil Revision No.388 of 2019**

**with**

**Civil Revision No.4970 of 2024**

Shamsunnahar and others

... Petitioners

-Versus-

Nurul Alam and others

...Opposite-parties

Mr. A.B.M. Altaf Hossain, Senior Advocate with

Mr. A.R.M. Kamruzzaman (Kakon) and

Mr. Md. Abul Kasem, Advocates

...For the petitioners

Ms. Syeda Nasrin with

Mr. ABM Imdadul Haque Khan,

Ms. Jannatul Islam Peya,

Ms. Salma Kulsum and

Mr. Forhand Hossain, Advocates

...For the opposite-parties.

**Judgment on 30<sup>th</sup> April, 2025.**

These 02(two) Rules have arisen from same judgment and decree of the appellate court and taken up for joint consideration and disposal by a single judgment, given that these pertains to the same parties and involve common facts and issues of law.

In these 02(two) revisions Rules were issued calling upon the opposite party Nos.1-8 to show cause as to why the impugned judgment and decree dated 30.09.2018 passed by the learned Additional District Judge, 4<sup>th</sup> Court, Chattogram in Other Appeal No.298 of 2012 allowing the appeal, reversing the judgment of the

trial court dismissing the suit and sending back the suit on remand for fresh trial and disallowing Other Appeal No.169 of 2012 and thereby affirming the judgment and decree dated 26.02.2012 passed by the learned Senior Assistant Judge, Rangunia, Chattogram in Partition Suit No.130 of 1996 seizing the unregistered deed dated 08.10.1931 and directing to initiate criminal proceedings against defendant-appellants for using the forged deed in evidence should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The predecessor of Respondent No.1 filed Partition Suit No.130 of 1996 against the predecessor of defendant No.1 and other defendants for partition seeking saham of 34 sataks land described in the schedule to the plaint, claiming that the suit land under R.S. Khatian No.1627 distributed among the co-shares before holding R.S. survey. The land under R.S. Plot No.9577 is an ejmali property. In the disputed R.S. khatian, the plaintiff is a co-sharer with Atar Ali and others. R.S. Plot Nos.5245, 5246, 5248 and 5259, amicably partitioned earlier among the 5(five) sons of

Abdul Ali. In the suit plot, the father of the plaintiff had 5 gondas 1 kara, 1 konto share. The plaintiff is only successor of his father. Abdul Ali also had same portion of land in the suit plot. After his death, his five sons namely Atar Ali, Hedayet Ali, Belayet Ali, Mosharaf Ali and Jarip Ali became owners of the said portion of land. Jarip Ali and Belayet died unmarried. Co-sharer Hamid Ullah was the owner of 1/ 13 1/1. Konto and he died leaving behind his son Nur Ahammad and daughter Karimjan Bibi. Subsequently, Nur Ahammad died leaving behind his sister Karimjan Bibi. After the death of Karimjan Bibi, her only son Tamij Uddin became the owner of the said portion of land as her legal heir. Subsequently, Tamij Uddin sold the said land to the plaintiff vide Deed of Sale No.2470 dated 19.08.1971. The name of Karimjan has not been recorded in the R.S. khatian wrongly.

Imam Uddin was the owner of / 4 11// Konto land out of 16 annas and he died leaving behind 4 sons namely Mobarak Ali, Sona Miah, A. Soban and Gura Miah and 1 daughter named Jamal Khatun as his legal heirs. After the death of Gura Miah, his wife Islam Khatun, 2 sons Nurjoma and A. Samad and daughter Rabia

Khatun inherited him. Subsequently, they sold their property to the plaintiff vide Deed of Sale Nos.5789 and 5797 dated 02.12.1974 the plaintiff purchased  $2\frac{1}{2}$  decimals of land vide Deed of Sale No.1879 dated 23.06.1996 from several persons. Besides, the plaintiff has purchased another land measuring  $1\frac{1}{2}$  decimals vide Deed of Sale No.2566 dated 13.08.1996. The defendant No.2 instituted Other Suit No.78 of 1996 against the Nurul and others which was dismissed and the title of the plaintiff has been established. The legal heirs of Sona Miah sold 1 decimal of land vide Deed of Sale No.570 dated 25.02.1998 to the plaintiff. Thus, the plaintiff has become the owner of total 34 decimals of land. P.S. and B.S. khatians have been published in the name of the plaintiff and he has been possessing  $25\frac{1}{2}$  decimals of land. But the defendants are trying to possess the land beyond their entitlement. Hence, the present suit for a decree of partition.

The defendant Nos. 1-9 and 27-30 contested the suit by filing written statement denying all the material allegations made in the plaint contending *inter alia* that the defendant Nos. 27-30 are the

successor of R.S. recorded owner Ator Ali. Belayet and Jarip Ali died unmarried. Consequently, Ator Ali got the land measuring 3.24 decimals from his said brothers. Ator Ali purchased 20 decimals of land from the R.S. recorded owner Nur Ahammad vide unregistered Deed dated 08.10.1931, but since said Ator Ali was an illiterate person he had no knowledge about registration of the said deed and nobody advised him to register the same. He made 30 feet long mud house along with other structures on the disputed land. Subsequently, Ator Ali died leaving behind one son namely Jagir Hossain alias Jakir Hossain and one daughter namely Habia Khatun. Said Habia Khatun relinquished her share infavour of her brother and all the disputed land was recorded in the name of said Jagir Hossain @ Jakir Hossain in P.S. Khatian No.1659 and B.S. Khatian No.186. Defendant Nos. 27-29 are the successor of said Jagir Hossain and defendant No.30 Jamal Khatun is the daughter of R.S. recorded owner Imam Uddin and they have become the owners of the land in question. Predecessor of the plaintiff was a deed writer and clever person and he was like guardian of the defendants too. The defendants paid all the rents through him.

Karimjan died before brother Nur Ahammad. The case of the plaintiff is false.

The trial court framed 3(three) issues for determination of the dispute. In course of hearing both the parties adduced evidences both oral and documentary which were marked as exhibits. After hearing the trial court dismissed the suit and seized unregistered deed dated 08.10.1931 directing the Chief Judicial Magistrate, Chattogram to initiate criminal proceedings against defendant-appellants for creating forged deed and using the same in evidence.

Being aggrieved by and dissatisfied with the judgment and decree passed in Partition Suit No.130 of 1996 so far as it relates to seizing the unregistered deed dated 08.10.1931 and directing the Chief Judicial Magistrate, Chattogram to initiate criminal proceedings against defendant-appellants, the instant petitioners as appellant preferred Other Appeal No.169 of 2012 and plaintiff in suit preferred Other Appeal No.298 of 2012 before the learned court of District Judge, Chattogram. Both the appeals transferred to the Court of Additional District Judge, 4<sup>th</sup> Court, Chattogram for hearing and disposal who after hearing dismissed Other Appeal

No.169 of 2012 affirming the judgment and decree of the trial court and allowed Other Appeal No.298 of 2012 and sent back the suit on remand to the trial court for fresh trial by the impugned judgment and decree dated 26.02.2012. At this juncture, heirs of the defendant No.27, and defendant Nos.28, 29, and 30, moved this Court by filing these 2(two) revisions and obtained the present Rules and orders of stay.

Mr. A.B.M. Altaf Hossain, learned Senior Advocate with Mr. Md. Abul Kasem, learned Advocate appearing for the petitioners in both the revisions submit that the suit was filed by the plaintiff for a decree of partition of the suit property only in respect of R.S. Plot No.9577, claiming that other properties of their predecessor earlier amicably partitioned except the suit plot. After hearing the trial court found that the suit is barred by defect of parties and hotchpotch and lacking from insufficient genealogy in the plaint. The defendants claimed that one Nur Ahammad by an unregistered sale deed transferred 20 sataks of land in favour of one Ator Ali. The plaintiffs claimed that the deed is forged and fabricated. They purchased the property by a Registered Deed No.2470 dated

19.08.1971. The trial court after hearing found that the suit is not maintainable in its present form and also found that the unregistered sale deed (Exhibit-Da) is forged and fabricated, consequently, directed the office to file a complaint against the defendants before the Chief Judicial Magistrate, Chattogram for using forged document in evidence.

Mr. Altaf candidly submits that the petitioners agreed with the judgment and decree passed by the appellate court in Other Appeal No.298 of 2012 sending the suit on remand for fresh trial, but he argued that when the suit itself was sent back on remand to the trial court for fresh trial affording an opportunity to the plaintiffs to cure defect in the plaint and to adduce evidences if necessary, the appellate court ought to have allowed Other Appeal No.169 of 2012 sending the same on remand for fresh hearing by setting aside the operative portion of the judgment passed by the trial court in respect of unregistered sale deed (Exhibit-Da) for taking opinion sending the same to the Hand Writing Expert. He submits that under Section 73 of the Evidence Act, the court is empowered to compare the hand writing and the signature with the



admitted signature in question, but the safe and best course for the court to obtain opinion from hand writing expert to avoid the practice of comparing the writing or signature as it is risky, unsatisfactory and dangerous procedure. In support of his submissions he has referred to the case of ***Tarak Chandra Majhi Vs. Atahar Ali Howlader and others*** reported in ***13 BLT (AD) 03, Bhashani Mondal Vs. Abdus Sukur and others*** reported in ***64 DLR (AD) 84*** and ***AIR 2011 Supreme Court 1492***.

Ms. Syeda Nasrin, learned Advocate appearing for the opposite-parties in both the revisions submits that the trial court while disposing the suit by way of dismissal found defect in framing the plaint and the statement made therein. Side by side the trial court upon consideration of evidences both oral and documentary though dismissed the suit, but observed that the deed of the year 1931 (Exhibit-Da) is forged and fabricated one which was subsequently created by the defendants showing its execution on 27.02.1931 on an old stamp and used the said forged document in evidence. Consequently, the document was retained and ordered to lodge a complaint to the Chief Judicial Magistrate, Chattogram

against the defendants. On appeal preferred by the plaintiff, the appellate court found that the trial court rightly dismissed the suit and found that unregistered deed of the year 1931 has been forged and fabricated by the defendants. Consequently, allowed Other Appeal No.298 of 2012 and sent the suit to the trial court on remand for proper adjudication by affording opportunity to the plaintiffs to cure the defects found by both the courts below. But nothing wrong found in respect of findings and observations in respect of the unregistered deed of the year 1931 (Exhibit-Da), consequently, dismissed Other Appeal No.169 of 2012 affirming the findings and observation and direction of the trial court. She submits that from the face of unregistered deed of the year 1931(Exhibit-Da) it would be clear that on an old stamp the deed has been written with new ink by a deed writer named Anju Miah.

The trial court as well as the appellate court amongst other characteristics of the deed found that the writing of the alleged deed writer Anju Miah and his signature has been forged by the defendants. Therefore, both the courts below were legally empowered under Section 73 of the Evidence Act to compare the

writing and the signature of alleged deed writer Amju Miah, accordingly, they did so. Therefore, it was not at all necessary for both the courts below to obtain expert opinion by sending the deed to the hand writing expert where on an ordinary looking it appears that the unregistered deed (Exhibit-Da) is forged and fabricated and as such, both the Rules are liable to be discharged.

Heard the learned Advocates of both the sides, have gone through the revisional applications, plaint in suit, written statements, evidences both oral and documentary available in lower court records and the impugned judgment and decrees of both the courts below.

Fact of the case is not required to be stated again. In both the Rules pertinent question involve for decision whether the appellate court by allowing Other Appeal No.298 of 2012 and sending the suit back to the trial court on remand by *setting aside* the judgment and decree of the trial court has committed any error in the decision occasioning failure of justice and whether in dismissing Other Appeal No.169 of 2012 preferred by the present petitioners as defendant-appellants against the findings and observations and

order of the trial court for initiating criminal proceedings against the defendant-petitioners under Section 95(1)(C) of the Code of the Criminal Procedure for using a forged document in the evidence before the Civil Court is lawful and justified.

Learned Advocate for the petitioners conceding the judgment and decree passed by the appellate court allowing the appeal in Other Appeal No.298 of 2012 put strong stress on the Rule issued in Civil Revision No.388 of 2019, submitting that when the judgment and decree of the trial court has been *set aside* by the appellate court in Other Appeal No.298 of 2012 it ought to have allowed Other Appeal No.169 of 2012 and sent back both the matter to the trial court on remand, considering the fact that though Section 73 of the Evidence Act empowered the court to compare the signature and hand writing of any person with the admitted signature or hand writing, it would be wise and practicable for the court to obtain an opinion by sending the same to hand writing expert, but the appellate court utterly failed to appreciate the provisions of law as well as the principle enunciated in our

jurisdiction by the Apex Court in the case of *Tarak Chandra Majhi Vs. Atahar Ali Howlader and others* reported in *13 BLT (AD) 03*.

To appreciate the submission of the learned Advocate for the parties, I have gone through the judgment and decree passed by both the courts below. It appears that the suit is for a decree of partition. In a partition suit the court usually consider whether the plaintiff is a co-sharer in the suit property, all the co-sharers have been made party to the suit, all the properties have been brought into hotchpotch. In the instant suit the trial court found that the suit has not been properly framed by making all the co-sharers party to the suit and bringing all the property in hotchpotch and its lacking clear genealogy and proper description in the plaint, resultantly, dismissed the suit of the plaintiff. The defendant-petitioners contested the suit by filling written statement claiming that their predecessor purchased the property measuring 20 sataks from the suit plot from one Nur Ahammad by an unregistered sale deed of the year 1931.

From documentary evidence, it appears that the plaintiffs claimed saham on the basis of the Deed No.2470 dated 19.08.1971

(Exhibit-2) and the defendants claimed on the basis of unregistered deed dated 08.10.1931 (Exhibit-Da). Both the deeds alleged to have been written by same deed writer named Amju Miah son of Sheikh Ebadullah. In deciding claim and counter claim, the trial court compared hand writing of both the deeds and found that the Deed No.2470 (Exhibit-2) written by deed writer Amju Miah son of Sheikh Ebadullah, but the unregistered sale deed written by one Anju Miah Munshi son of late Ebadullah and both the hand writing are totally different from each other. Moreover, schedule of unregistered deed of the year 1931 has been written with 2(two) different ink apparent on the face of it. After comparing the writing and signature of the writer the trial court came into a finding that the defendants created the unregistered sale deed by forging hand writing and signature of deed writer Amju Miah on an old stamp and for using a forged document in evidence retained the same in court custody and directed to initiate a criminal proceedings before the court of Chief Judicial Magistrate against the defendant-petitioners.

I have gone through the alleged deed dated 08.10.1931 (Exhibit-Da) and Deed No.2470 (Exhibit-2) and find that though writer of both the documents have been shown as same person, but the hand writing and signature of deed writer are totally different from each other. Both the courts below concurrently observed that the deed in question is forged one, but our apex Court in the case of ***Tarak Chandra Majhi Vs. Atahar Ali Howlader and others*** reported in ***13 BLT (AD)*** clearly held that:

*“In case of contentious writing, signature etc. though provision of Section 73 of Evidence Act permits the court to compare the contentious signature with the admitted signature, the safe and best course in our view for the court would be to avoid the practice of comparing the writing or signature etc. and should not stake its judgment on the opinion formed or view taken upon resorting to risky or in other words ‘unsatisfactory and dangerous’ procedure.”*

In view of the principle enunciated by apex Court to be more sure in addition to observations and findings of both the courts below, I think that an opinion from hand writing expert was required to be obtained before initiating a criminal proceedings against the defendant-petitioners, but the fact of the referred case

reported in *13 BLT (AD) 03* is totally different from the instant case.

In that case, there was an admitted signature with which the trial court compared the disputed signature without obtaining opinion from hand writing expert, but in the instant case, there is no admitted writing and signature of Amju Miah. The Deed No.2470 is registered one and written by deed writer Amju Miah son of Sheikh Ebadullah Talukder. The deed of the year 1931 (Exhibit-Da) also appears to be written by one Anju Miah Munshi son of late Ebadullah Talukder. There is no case, either on the part of the plaintiffs or defendants that both the deeds writer Amju Miah and Anju Miah Munshi are different person. Rather, from evidence it has come out that both the deeds written by same person named Amju Miah. The Deed No.2470 (Exhibit-2) is not admitted by defendants. Therefore, the trial court had no other option or alternative to obtain opinion from hand writing expert. Moreover, neither of the parties to the proceedings prayed for sending both the deeds to the hand writing expert for opinion whether the writing in



deed of the year 1931 and the writing in Deed No.2470 are same person.

Apart from this there are other anomalies in the deed of the year 1931, such as, the writing seems to be fresh and execution by thumb impression normally identified by a person just below the thumb impression writing the name of the executant. But in the present deed unusually name of the identifier has been shown above thumb impression and the left margin of the deed is not uniform. Schedule of the deed has been written with different ink and spelling of deed writer's name Anju Miah is different from registered Deed No.2470 (Exhibit-2). The trial court as well as the appellate court concurrently found and observed that Nur Ahammad died issueless leaving sister Karimjan Bibi as appearing from the recital of Deed No.2470. By the unregistered deed validity and genuineness of a registered deed cannot be overridden unless contrary facts or evidence comes before the Court.

Apart from this during pendency of the appeal the trial court filed complaint before the Chief Judicial Magistrate, Chattogram being Complaint Case No.88 of 2012 against the defendant Nos.27-

30 and D.W.4, Md. Jafor Alam, an attesting witness to the deed.

Among the aforesaid 5(five) persons, defendant No.27 died, his heirs have been substituted as defendant-appellant-petitioners.

Criminal Proceeding under Section 195(1)(C) is not tenable against them as they did not use the document in question before the Civil

Court. Defendant No.29, Sajahan Begum and defendant No.30,

Jamal Khatun are village women and house wives, they were not at

all supposed to know about the said deed and they did not file the

same in Court and deposed in support of unregistered deed of the

year 1931 (Exhibit-Da). As such, the trial court as well as the

appellate court ought to have *set aside* the order for initiation of

criminal proceedings against them and because of death of

defendant No.27, Nurul Alam his heirs Petitioner Nos.1-4 are not

liable to be prosecuted in the criminal case. Therefore, order of the

trial court as well as the appellate court for initiation of criminal

proceedings and subsequent, filing of Complaint Case No.88 of

2012 is not tenable against them. P.W.4 Jafor Alam being a witness

is also not liable to be prosecuted as decided in the case of ***Ali Mia***

*and others Vs. The Crown* reported in *9 DLR (1957) 269*.

Therefore, they are hereby absolved from criminal liability.

In view of the above, I find that the Complaint Case No.88 of 2012 can be maintained only against defendant No.28.

Taking into consideration the above, this Court finds merit in the Rule issued in Civil Revision No.388 of 2019 in respect of prosecution against heirs of defendant No.27, defendant No.29 and defendant No.30 calling for interference by this Court and finds no merit in Civil Revision No.4970 of 2024.

In the result, the Rule in Civil Revision No.388 of 2019 is made absolute in part and Rule in Civil Revision No.4970 of 2024 is discharged, however, without any order as to costs.

Judgment and decree of both the courts below are hereby modified so far as it relates to the Petitioner Nos.1-4, 6, 7 and P.W.4-Jafor Alam in Civil Revision No.388 of 2019.

Judgment of the appellate court allowing Other Appeal No.298 of 2012 and sending the suit back to the trial court on remand for fresh trial is maintained.

Orders of ***stay*** granted at the time of issuance of these Rules stand vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.