

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.1759 of 2019

In the matter of:

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

And

Md. Nurul Islam

.... Petitioner

-Versus-

Md. Siddiqur Rahman and others

.... Opposite parties

None appears

.... For the petitioner.

Mr. Abdul Barek Chowdhury, Advocate

.... For the opposite party

No.1.

Heard on 20.02.2025 and 23.02.2025.

Judgment on 24.02.2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and decree dated 04.04.2019 passed by the learned Additional District Judge, Thakurgaon in Title Appeal No.56 of 2009 allowing the appeal and reversing the judgment and decree dated 17.09.2009 passed by the learned Assistant Judge, Ranisankail, Thakurgaon in Other Class Suit No.69 of 2006 decreeing the suit 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 kabla deed dated 05.09.2005 executed by the defendant Nos.1 and 2 to defendant No.3 for 10 decimal land is collusive, unlawful and not binding upon the plaintiff.

It was alleged that Shukur Mahmud was the rightful owner and possessor of $66\frac{3}{4}$ decimal land of Plot No.57 and he transferred 30 decimal land to Jamir Uddin by registered kabla deed dated 10.03.1987 who in his turn transferred the same by two registered kabla deed Nos.8150 and 8153 dated 10.03.1987 to the plaintiff, Khademul and Taijuddin. By amicable partition plaintiff got possession of 10 decimal land from north eastern side adjacent to the canal and erected dwelling huts, planted trees and mutated his name vide Miscellaneous Case No.IX-1/1669-70 and created Khatian No.2394 and Municipal Holding No.781/5 and paid rents to the Government and taxes the municipality. On 05.09.2005 at 10.00 P.M. defendant Nos.1-3 attempted to dispossess the plaintiff from above dwelling huts on the strength of above kabla deed dated 08.09.2005.

Defendant Nos.3 contested the suit by filing a written statement alleging that Shukur Mahmud was owner and possessor of $57\frac{1}{2}$ decimal land and he transferred the same to his two sons defendant Nos.1 and 2 by registered Heba-bil-ewaz Deed No.20135 dated 28.08.1986. By above deed of Heba-bil-ewaz defendant Nos.1 and 2 acquired 88 decimal land

but in fact they were in possession of $66\frac{3}{4}$ decimal land. Defendant Nos.1 and 2 mutated their names for 88 decimal land and they transferred 10 decimal land to defendant No.3 by registered kabla deed dated 05.09.2005. Defendant Nos.1 and 2 possessed above land by erecting dwelling huts and planting trees and paid holding tax and rents. Shukur Mahmud did not have any right, title, interest and possession in above land and JamirUddin did not acquire any title and possession in above land nor the plaintiffs got any title and possession in above land by purchase from above Jamir Uddin.

At trial plaintiff examined five witnesses and documents of the plaintiff were marked as Exhibit Nos.1-9. On the other hand defendants examined three witnesses and documents of the defendants were marked as Exhibit Nos. "Ka" - "Da".

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

Being aggrieved by above judgment and decree of the trial Court defendant Nos.3 as appellant preferred Title Appeal No.56 of 2009 to the District Judge, Thakurgaon which was heard by the learned Additional District Judge who allowed above appeal, set aside the judgment and decree of the trial Court and dismissed the suit.

Being aggrieved by above judgment and decree of the Court of Appeal below above respondent as petitioner moved to this Court with

this petition under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

No one appears on behalf of the petitioner at the time of hearing of this Rule although the matter appeared in the list for hearing on several dates.

Mr. Abdul Barek Chowdhury, learned Advocate for the opposite party No.1 submits that admittedly Shkur Mahmud was the owner and possessor of $66\frac{3}{4}$ decimal land of Plot No.57 and he transferred above land to his two sons defendant Nos.1 and 2 by registered deed of Heba-bil-ewaz dated 28.08.1986 and delivered possession. Defendant Nos.1 and 2 were in possession in above land by erecting dwelling huts, latrine and planting trees and paying holding tax and rents and they transferred above land by registered kabla deed dated 05.09.2005 to the defendant No.3. Defendant No.3 is in possession in above land by paying rents and taxes. Above Shukur Mahmud did not have any subsisting interest in the land of Plot No.57 and Jamir Uddin did not acquire any title or possession in 30 decimal land of above Plot by purchase from Shukur Mahmud by registered kabla deed dated 10.03.1997 nor the plaintiff acquired any valid title and possession in disputed 10 decimal land by purchase from above Jamir Uddin by registered kabla deed dated 10.03.1987. It is true that above Shukur Mahmud registered a Heba-bil-ewaz cancellation deed on 09.01.1990 but a registered instrument cannot be avoided or cancelled by mere

registration of another deed. By consistent and mutually supportive evidence of three witnesses defendant Nos.3 has succeeded to prove his lawful possession in above 10 decimal land. On consideration of above evidence on record the learned Judge of the Court of Appeal below has rightly allowed the appeal, set aside the unlawful judgment and decree of the trial Court and dismissed the suit which calls for no interference.

I have considered the submissions of the learned Advocate for the opposite parties and carefully examined all materials on record.

It is admitted that Shukur Mahmud was the rightful owner and possessor of $66\frac{3}{4}$ decimal land of Plot No.57 and defendant Nos.1 and 2 are his two sons.

Plaintiff as PW1 has in his evidence reiterated all claims and allegations as set out in the plaint and stated that Shukur Mahmud transferred 30 decimal land to Jamir Uddin by registered kabla dated 10.03.1987 who in his turn transferred the same to the plaintiff, Taijuddin and Khademul Islam and by amicable partition plaintiff got possession in disputed 10 decimal land and possessing the same by evicting dwelling house and planting trees. The plaintiff created separate holding number and mutated his name and paying rents and taxes. On 05.09.2005 the defendants attempted to forcibly dispossess the plaintiff from above house disclosing that defendant No.3 purchased above land from defendant Nos.1 and 2 by registered kabla deed dated 09.09.2005. PW1 produced and proved his registered kabla

deed dated 10.03.1987 and kabla deed of his predecessor Jamir Uddin which were marked as Exhibit Nos.3 and 4 respectively. He also produced his Kharis Khatian No.3294, rent receipts and payment of holding tax to the municipality which were marked as Exhibit Nos.8 and 9 series respectively. Above witness denied that Shukur Mahmud transferred 57 decimals land including above 10 decimal to defendant Nos.1 and 2 by registered deed of Heba-bil-ewaz dated 19.03.1986 (Exhibit Nos."Dantanna").

PW2 Mohammad Mainuddin the owner of the house adjacent to the disputed land stated in his evidence that the plaintiff is in possession in above land and defendants never possessed above land. Above witness was extensively cross examined by the defendant but his above evidence remained consistent and free from any contradiction. Above witness was not cross examined on his evidence that he is the owner of the home adjacent to the disputed property. PW5 Khademul is another purchaser of land of the disputed plot from Jamir Uddin and in his evidence he stated that defendants did not have any title or right to sale of the disputed land and he owns the land in the disputed plot. In cross examination he stated that the plaintiff, Taijuddin and he jointly purchased 30 decimal land from Jamir Uddin who purchased the same from Shukur Mahmud. He denied that Shukur Mahmud did not deliver possession of above land to Jamir Uddin.

Defendant No.3 while giving evidence as DW1 stated that Shukur Mahmud was the owner and possessor $57\frac{1}{2}$ decimal land of Plot No.57 and he transferred the same to defendant Nos.1 and 2 his two sons by registered deed of Heba-bil-ewaz dated 28.08.1986 (Exhibit No."Dantanna") and Shukur Mahmud did not have any subsisting interest in above plot. As such Jamir Uddin did not get any title and possession in above plot by purchase from Shukur Mahmud. Defendant Nos.1 and 2 were in possession in above $57\frac{1}{2}$ decimal land by mutating their name for $66\frac{3}{4}$ decimal land and constructing dwelling huts and planting trees and creating Municipal Holding No.782/IB and paying rent to the Government and transferred 10 decimal land to defendant No.3 by registered kabla deed dated 05.09.2005 and defendant No.3 is possessing above land.

As mentioned above plaintiff claims disputed 10 decimal land on the basis of purchase from Jamir Uddin by registered kabla deed dated 10.03.1987 who purchased the same from Shukur Mahmud. On the other hand defendant No.3 claims title and possession in above land by purchase from defendant Nos.1 and 2 by registered kabla deed dated 05.09.2003 who acquitted the same from Shukur Mahmud by registered deed of Heba-bil-ewaz dated 28.08.1986 (Exhibit No."Dantanna").

Plaintiff has claimed that above registered deed of Heba-bil-ewaz between the father and his two sons out of five was never acted upon. It

is not disputed that predecessor of the plaintiff Jamir Uddin was a third person who purchased above land from Shukur Mahmud with valuable consideration.

The Muslim Law of heba or Heba-bil-ewaz does not require registration of the deed but requires that there must be an offer of heba by the owner of the property and acceptance of the same by the person to whom above heba is made, the payment of ewaz and delivery of possession. A Court must be over cautious and very careful in scanning the evidence of a heba or Heba-bil-ewaz made between the members of a family when the donor of the Heba or Heba-bi-ewaz transfers the same property to a third person for valuable consideration. The Court must examine if above Heba-bil-ewaz was in fact acted upon and possession was delivered.

As mentioned above plaintiff is a third party who purchased 30 decimal land jointly with two other persons in 1987. There is no claim of defendant Nos.1-2 against remaining 20 decimal land of two co-purchaser, Kahdemul and Taijuddin. Defendant No.3 claims the 10 decimal land of the plaintiff by purchase from defendant Nos.1 and 2 by registered kabla deed 05.09.2005.

In his written statement defendant No.3 admitted that above deed of Heba-bi-ewaz was for 88 decimal land but in fact Shukur Mahmud had lawful title and possession only in 57 decimal land. It was stated in another Paragraph of above written statement that Shukur Mahmud

had lawful title and possession in $66\frac{2}{3}$ decimal land and defendant Nos.1 and 2 got possession in $66\frac{3}{4}$ decimal land. As such no reliance can be placed on registered deed of Heba-bil-ewaz dated 28.08.1986 which transfers 88 decimal land which was not held, owned and possessed by Shukur Mahmud.

Defendant No.1 Azizur Rahman gave evidence as DW2 but the did not mention anything about acquisition of 88 decimal land from his father Shkur Mahmud by registered deed of Heba-bil-ewaz or possession in $66\frac{2}{3}$ decimal land of above plot by constructing dwelling huts and planting trees or opening municipal holding tax. He merely stated that defendant No.2 and he jointly transferred 10 decimal land to defendant No.3. In cross examination he stated that his father transferred 88 decimal land by registered Heba-bil-ewaz deed dated 28.08.1985 and he denied that his father did not have title and possession in 88 decimal land and above deed of Heba-bil-ewaz was never acted upon.

It turns out from the registered kabla deed dated 05.09.2005 of defendant No.3 that there is no mention of Heba-bil-ewaz deed dated 28.08.1986. DW3 Abdul Aziz stated that defendant No.3 is possessing the disputed land but he did not mention that defendant No.3 was residing in the house of above land. Above witness lastly stated that he

did not know when the defendant came into possession of the disputed land.

It is true that a registered deed be it a kabla deed or a deed of Heba-bil-ewaz cannot be cancelled or avoided by mere execution and registration of another deed of cancellation in the relevant Sub-registry Office. Such a document must be avoided either by cancellation or by declaration by instituting an appropriate suit in a competent Civil Court. But the endeavour of Shukur Mahmud to cancel the register deed of Heba-bil-ewaz dated 28.05.1986 of defendant Nos.1 and 2 by registering a deed of cancellation on 08.09.1990 shows his desperation to avoid above deed of Heba-bil-ewaz. As mentioned above the receipt of ewaz and delivery of possession are indispensable components of a Heba-bil-ewaz. There is in fact not an iota of evidence to show that defendant Nos.1 and 2 paid ewaz to their father and their father delivered possession of the land of above Heba-bil-ewaz.

On the contrary the plaintiff have succeeded to prove his lawful possession in disputed 10 decimal land by constructing dwelling huts and paying rent to the Government and taxes to the municipality.

In above view of the facts and circumstances of the case and evidence on record I hold that the learned Judge of the trial Court on correct appreciation of materials on record rightly decreed the suit but the learned Judge of the Court of Appeal below utterly failed to understand the true meaning of the evidence on record and relevant laws and most illegally allowed the appeal, set aside the lawful

judgment and decree of the trial Court and dismissed the suit which is not tenable in law.

In above view of the materials on record I find substance in this Civil Revisional application under Section 115(1) 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. The impugned judgment and decree dated 04.04.2019 passed by the learned Additional District Judge, Thakurgaon in Title Appeal No.56 of 2009 is set aside and the judgment and decree dated 17.09.2009 passed by the learned Assistant Judge, Ranisankail, Thakurgaon in Other Class Suit No.69 of 2006 is restored.

However, there will be no order as to costs.

Send down the lower Court's records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER