

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,

Chief Justice

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

CIVIL REVIEW PETITION NOS.183-184 OF 2018 WITH CIVIL PETITION FOR LEAVE TO APPEAL NOS.949 OF 2019 & 1997 OF 2018.

(From the judgment and order dated 06.06.2016 passed by the Appellate Division in Civil Petition for Leave to Appeal Nos.336-337 of 2013 and judgment and order dated 23.11.2011 and 31.01.2018 passed by the High Court Division in Civil Revision Nos.1977 of 2009 and 1144 of 2017 respectively.)

Deputy Commissioner, Brahmanbaria : Petitioner.
(In C.R.P.Nos.183-184/18 & C.P.No.949/2019)

Md. Ershad Miah and others : Petitioners
(C.P.No.1997 of 2018)

=Versus=

Chand Miah, being dead and his heirs of Respondents.
(a)Most. Hosne Ara Begum and others : (In all the cases)

For the Petitioner : Mr. A.M. Aminuddin, Attorney General instructed
(In C.P.No.949/2019) by Mr. Haridas Paul, Advocate-on-Record.

For the Petitioner : Mr. A.M. Aminuddin, Attorney General instructed
(In C.R.P.Nos.183-184/2018) by Ms. Shirin Afroz, Advocate-on-Record.

For the Petitioner : Ms. Nahid Sultana, Advocate-on-Record.
(In C.P.No.1997/2018)

For the Respondents : Mr. Shahidul Islam, Advocate instructed by Mr.
(In C.P.No.949/2019) Zainul Abedin, Advocate-on-Record.

For the Respondents : Not represented.
(In C.R.P.Nos.183-184/2018)

For the Respondents : Mr. Shahidul Islam, Advocate instructed by Mr.
(In C.P.No.1997/2018) Zainul Abedin, Advocate-on-Record.

Date of hearing and judgment : 04.11.2021.

J U D G M E N T

Hasan Foez Siddique, J: Delay in filing Civil Petition for Leave to Appeal No.949 of 2019 is condoned.

Civil Review Petition Nos.183 and 184 of 2018 and C.P.Nos.949 of 2019 and 1997 of 2018 have been heard together and they are disposed of by this common judgment and order since facts and point of law involved in all these matters are identical.

Civil Review Petition No.183 of 2018 has been filed against the orders dated 06.06.2016 and 21.11.2016 passed by this Division in Civil Petition for Leave to Appeal No.336 of 2013 dismissing the petition for default and rejecting the application for restoration respectively.

Civil Review Petition No.184 of 2018 has been filed against the orders dated 06.06.2016 and 21.11.2016 passed by this Division in Civil Petition for Leave to Appeal No.337 of 2013 dismissing the petition for default and rejecting the application for restoration respectively.

Civil Petition for Leave to Appeal No.949 of 2019 is directed against the order dated 23.11.2011 passed by the High Court Division in Civil Revision No.1977 of 2009 making the Rule absolute.

Civil Petition for Leave to Appeal No.1997 of 2018 has been filed against the judgment and order dated 31.01.2018 passed by the High Court Division in Civil Revision No.1144 of 2017 making the Rule absolute.

One Md. Chand Mia, predecessor-in-interest of the respondent Nos.1-7 as plaintiff, instituted Title Suit No.59 of 1994 impleading (1)Dhirendra Mohon Roy Chowdhury, (2)Narendra Mohon Roy Chowdhury, (3) Matongini Mohon Roy Chowdhury and (4) Afsar Uddin as principal defendants and Deputy Commissioner, Brahmonbaria as proforma defendant No.6 and others for declaration of title in respect of the land measuring an area of .08 acre of settlement plot No.2462 and Khatian

No.77 and recovery of possession in respect of $.01\frac{1}{3}$ rd acre of land as described in the schedule 'Kha' and .03 acre of land as described in schedule 'Ga' to the plaint. The plaintiff's case, in short, was that the principal defendant Nos.1 to 4 transferred the suit land to him by executing and registering deed of exchange No.1029 dated 09.02.1994 and delivered possession. On 20.10.1994, the defendant Nos.1-4 threatened the plaintiff to dispossess him from the suit land. Thus, the cause of action of the suit arose.

The trial Court decreed the suit exparte. The defendant No.6, Deputy Commissioner of Brahmonbaria instituted Miscellaneous Case No.17 of 2004 for setting aside the said ex-parte decree under the provision of Order IX Rule 13 of the Code of Civil Procedure. The plaintiff contested the said Miscellaneous Case by filing written objection.

The trial Court by a judgment and order dated 09.07.2005 allowed the said Miscellaneous Case upon setting aside the exparte decree and restored the suit to its original file and number holding that, “এই মামলায় আমরা দেখিয়াছি যে, প্রার্থীর প্রতি সমন নোটিশ জারীর বিষয়টি প্রমানিত হয় নাই। এই মামলাটি তামাদি বারিত তাহাও প্রমানিত হয় নাই। আর যদি তামাদি বারিত হয় ও তর্কিত রায় ও ডিক্রীটি যেহেতু প্রতারণা মূলক ও যোগাযোগী এবং আদালতকে ভ্রমে পতিত করিয়া মিথ্যার আশ্রয়ে ভুল বুঝাইয়া হাছিল করা হইয়াছে। তখন ইহা আইনতঃ বহাল থাকিতে পারেনা।”

The plaintiff Md. Chand Mia filed Civil Revision No.34 of 2005 in the Court of District Judge, Brahmanbaria against the said judgment and order. Said revision was heard by the learned Additional District Judge, First Court, Brahmonbaria who by a judgment and order dated 16.01.2009 dismissed the same. The plaintiff then filed Civil Revision No.1977 of

2009 in the High Court Division and obtained leave and Rule. The High Court Division, by the impugned judgment and order dated 23.11.2011, made the said Rule absolute upon setting aside the judgment and order of the Courts below.

Defendant No.7 Jamal Ahmed also filed Miscellaneous Case No.8 of 2004 under Order IX Rule 13 of the Code of Civil Procedure which was allowed. Plaintiff Chand Mia filed Civil Revision No.35 of 2005 which was also dismissed. Then the plaintiff filed Civil Revision No.1837 of 2009 in the High Court Division. The High Court Division heard both the Rules together and disposed of those Rules by a common judgment and order making both the Rules absolute. Against the aforesaid judgment and orders of the High Court Division, one Jamal Ahmed filed Civil Petition for Leave to Appeal Nos.336 and 337 of 2013 which were dismissed for default on 06.06.2016. Restoration applications were also rejected on 21.11.2016. Against the judgment and order dated 06.06.2016 and 21.11.2016 passed in Civil Petition Nos.336 and 337 of 2013, the Government filed Civil Review Petition Nos.183 and 184 of 2018 in this Division.

Meanwhile, the plaintiff filed Title Execution Case No.01 of 1999 in the trial Court for executing the decree. One Ershad Mia and others instituted Title Suit No.133 of 2012 in the Court of Assistant Judge, Nabinagar claiming their ejmali right in the suit land and for setting aside the decree passed in Title Suit No.59 of 1994. They prayed for staying further proceeding of Title Execution Case No.1 of 1999. The trial Court rejected the said prayer. Against which, they filed Civil Revision No.24 of 2016 and the learned District Judge, Brahmonbaria stayed the further proceeding of said execution case. Against which, the heirs of Chand Mia

filed civil revisional application under section 115(4) of the Code of Civil Procedure in the High Court Division and obtained Rule. The High Court Division, by a judgment and order dated 31.01.2018, made the said Rule absolute. Against which, Ershad Mia and others filed Civil Petition for Leave to Appeal No.1997 of 2018.

Mr. A.M. Aminuddin, learned Attorney General appearing for the petitioners in Civil Petition for Leave to Appeal No.949 of 2019 and Civil Review Petition Nos.183 and 184 of 2018 submits that the trial Court as well as First Revisional Court upon proper appreciation of the materials on record held that the notice of the suit was not duly served upon the defendant No.6, Deputy Commissioner, Brahmonbaria. He submits that notice was served or not is essentially a question of fact, the High Court Division in second revision erroneously disturbed the said finding of fact which is liable to be set aside. He submits that the S.A. record of right of the suit land was prepared in the name of the Government and, admittedly, the plaintiff is not in possession in respect of 'Kha' and 'Ga' scheduled land out of the suit land as described in the schedule 'Ka' to the plaint and that the Government has been possessing the suit land and a Government office was constructed long ago in the suit land but the plaintiff impleading the government as pro-forma defendant, fraudulently managed to get ex-parte decree, the trial Court rightly set aside the said ex-parte decree.

Mr. Shahidul Islam, learned Advocate appearing for the respondent Nos.1-7 in Civil Petition for Leave to Appeal No.949 of 2019, submits that once Government appeared in the suit but finally it did not contest the same, consequently, the suit was decreed ex-parte, the High Court Division

upon proper appreciation on the materials on record set aside the judgment and order of the Courts below.

From the order-sheet of Title Suit No.59 of 1994, it appears that there is no endorsement in the same that notice upon the pro-forma defendant No.6, Deputy Commissioner, Brahmonbaria was duly served. It further appears from the Order No.17 dated 29.11.1995 that there was an endorsement that defendant Nos.4 and 6 had filed hajira. Both the trial Court and First Revisional Court upon appreciation of the materials on record held that notice upon the Government was not at all served and that the plaintiff obtained ex-parte decree by practising fraud upon the Court. Since the service of notice upon the defendant No.6 has not been proved and court of facts upon appreciation of the materials on record held so, we are of the view that the High Court Division is in second revision erroneously disturbed the findings of facts. A decree obtained by practising fraud is non-existent and can not be allowed to stand. Chief Justice Edward Coke of England about three centuries ago observed that, "fraud-avoids all judicial acts, ecclesiastical or temporal".

Accordingly, we find substance in Civil Petition No.949 of 2019, Civil Review Petition Nos.183 and 184 of 2018. Since exparte decree obtained by Chand Mia is liable to be set aside, the Civil Petition for Leave to Appeal No.1997 of 2018 is also liable to be dismissed as the same has become infructuous.

Thus, Civil Petition for Leave to Appeal No.949 of 2019 and Civil Review Petition Nos.183 and 184 of 2018 are disposed of. The judgment and order dated 06.06.2016 passed by this Division in Civil Petition for

Leave to Appeal No.336 of 2013 and 337 of 2013 are hereby reviewed and set aside. The judgment and order passed by the High Court Division dated 23.11.2011 in Civil Revision No.1837 of 2009 and 1977 of 2009 are also hereby set aside. The suit is restored to its original file and number. The trial Court is directed to proceed with Title Suit No.59 of 1994 in accordance with law. Civil Petition No.1997 of 2018 is dismissed as the same has become infructuous.

C.J.

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The 4th November, 2021.
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