

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 707 of 2020

Rafiqul Islam being dead his heirs and
successor Most. Monwara Begum and
others

.....Petitioners.

-Versus-

Nurul Islam being dead No.1 his heirs
and successor Most. Rokeya Khatun and
others

.....Opposite parties.

Mr. Md. Humayun Kabir, Advocate

.....For the petitioners.

Mr. Md. Abdur Rouf Akanda, Advocate

..... For the opposite parties.

Heard and judgment on 4th April, 2023.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to
show cause as to why the judgment and decree dated 23.01.2010
passed by the Joint District Judge, 1st Court, Rangpur in Other

Class Appeal No. 84 of 2015 reversing those dated 18.11.2014 passed by the Assistant Judge, Taraganj Court, Rangpur in Other Class Suit No. 703 of 2008 decreeing the suit should not be set aside.

Petitioner as plaintiff filed the above suit against the defendant for declaration that the deed No. 5525 of 1977 dated 29.06.1977 is false, fabricated and inoperative and not binding upon the plaintiff.

Plaint case in short, inter alia, is that the lands appertaining to schedule 'ka' was owned by Miazain Uddin, Monir Uddin, Abbas Ali and Abdul Kader. Abdur Kader while owning and possessing his share transferred 6.75 acres of land to his sons, who are plaintiffs and defendants in the suit. Accordingly both of them are owning and possessing the suit land. Thereafter it was mutated into their names and accordingly plaintiffs are paying rents to the government. During the present survey field recording was prepared in the name of the plaintiffs accordingly. Challenging the said record, defendant Nurul Islam, while filed Misc. Case No. 39/85, 9/86-87, 1624/81-82 for cancellation, all the Misc. Case were rejected and the recording was found on correct. Defendants

also initiated a suit being Other Class Suit No. 94 of 1993 in cancellation of heba-bil-ewaj deed No. 5212 dated 2.4.1968, which was also been dismissed. Thereafter defendant Nurul Islam also initiated a criminal proceeding under section 144 of the Code of Criminal Procedure in M.R. Case No. 3 of 2008 on 05.03.2008 when plaintiffs first time came to know about the existence of the impugned deed being No. 5525 dated 29.06.1977. After the execution of heba-bil-ewaj deed No. 5212 dated 2.4.68 their predecessor Abdul Kader Mondal since did not have any title over the suit land, the impugned deed dated 5525 dated 29.6.77 is forged and collusive deed, their father died on 2.7.1977 since the deed was false, concocted, not acted upon as well as not binding upon the plaintiff, they filed the suit.

Defendant contested the suit by filing written statement denying the plaint case, alleging, inter alia, that Abdul Kader Mondal, the predecessor of the plaintiffs and defendants while owning and possessing of the suit land intended to make a gift in favour of his sons who are his heirs, accordingly going to sub-registry office at Mithapukur, he transferred 12.92 acres of land in favour of his six sons, who are plaintiffs in the suit vide registered

deed No. 5524 and transferred the suit land measuring 6.20½ acres of land in favour of the defendant Nurul Islam Mondal vide deed of heba-bil-ewaj No. 5525 and thereafter he died on 10.07.1977. The present field survey was recorded in the name of the defendant. The plaintiffs fraudulently created their deed being No. 5212 dated 2.4.68 by false personification. After the death of their father Abdul Kader Mondal, in fact plaintiff Md. Shah Alam Mondal and Md. Shamsul Alam Mondal were not born on the date of execution the deed No. 5212 dated 2.4.68, they born on 25.05.1971 and 21.09.1974 respectively. Since the said deed was not acted upon and is forged and concocted one, plaintiffs have no right title over the suit land, suit is liable to be dismissed with cost.

By the judgment and decree dated 18.11.2014 the Assistant Judge decreed the suit on contest.

Challenging the said decree defendant preferred Other Class Appeal No. 84 of 2015 before the Court of District Judge, Rangpur, which was heard on transfer by the Joint District Judge, 1st Court, Rangpur. Who by the impugned judgment and decree

reversed the judgment of the trial court and upon allowing the appeal dismissed the suit.

Challenging the said judgment and decree petitioner obtained the instant rule.

Mr. Md. Humayun Kabir, the learned advocate appearing for the petitioner drawing my attention to the impugned judgment submits that appellate court totally failed to understand the nature and character of the suit and illegally shifted the burden of proof of the case upon the plaintiff in the suit for cancellation of deed of heba-bil-ewaj, which has alleged to be illegally done by the defendant. The learned advocate further submits that the trial court upon proper discussion of the evidences on record clearly found that the deed in question as been owned by the defendant is not been proved to have obtained validly and legally from the executant. The suit was filed well within time and as such he decreed the suit in favour of the plaintiff. On the other hand appellate court without proper reversing the judgment of the trial court most arbitrarily held that suit was barred by limitation and plaintiffs failed to prove his title over the suit land and as such he dismissed the suit upon allowing the appeal illegally.

Mr. Abdur Rouf Akando, the learned advocate on the other hand, appearing for the opposite party opposes the rule and submits that appellate court being the last court of fact has correctly assess the fact of this case and the fact that the suit was hopelessly barred by limitation and plaintiff failed to establish his title over the suit land and accordingly dismissed the suit rightly.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

This is a suit for declaration that the deed being No. 5525 dated 29.6.77 is forged, concocted, illegal, not acted upon as well as not binding upon the plaintiffs. Plaintiffs contention is that suit property was owned and possessed by the predecessor of both the parties. One Abdul Kader Mondal their father transferred the said land in favour of his children, who are plaintiffs and defendants in the suit by way of a registered deed of heba-bil-ewaj being No. 5212 dated 2.4.68 accordingly they are in possession after mutating their names and paying rents to the government. Their father Abdul Kader Mondal never transferred the property to his only one son Nurul Islam Mondal, who is the defendant by way of impugned deed No.5525 dated 29.06.1977. When it was alleged to

be executed the said deed, property was not been owned and possessed by the said Abdul Kader Mondal, it has already been transferred in favour of his successor children, who are plaintiff and defendant in the suit. Taking the advantage of creating the said deed, plaintiff earlier initiated suit being Other Class Suit No. 94/93 for cancellation of the said deed dated 2.64.68 but it was dismissed. Thereafter as and when defendant Nurul Islam Mondal initiated a criminal proceeding under section 144 of the Code of Criminal Procedure against the plaintiff, first time came to know about the existence of the impugned deed. Thereafter they initiated this suit for cancellation of the deed. On the other hand defendant contention is that Abdur Kader Mondal never transferred the suit land to his heirs through deed No. 5212 dated 2.4.68, it was a forged and collusive deed and was created after the death of Abdul Kader Mondal. In fact, Abdul Kader Mondal intend to transfer his property in favour of his children and accordingly by way of two registered deed of heba-bil-ewaj, he transferred 11.92 acres of land in favour of his six sons, who are the plaintiff in the suit through deed No. 5524 and 6.20½ acres of

land, to his son Nurul Islam Mondal, who is the defendant in the suit by deed No. 5525 both dated 29.6.1977.

In view of the fact the main question in the suit is that the date of deed No. 5525 as being obtained by the defendant from his father on the suit land is correct and properly been executed or not. Both the plaintiffs and defendants are the heirs of late Abdul Kader Mondal. Plaintiffs claim that their father transferred 6.20½ acres of land to his successor vide deed of heba-bil-ewaj No. 5212 dated 2.4.1968 whereby both of them are owning and possessing the suit land. Defendant claim that property was not been transferred by that deed rather it was transferred in favour of the defendant. Since the defendants is holding the deed in question and claim that it was legally been done by his father Abdul Kader Mondal, obviously in the suit, onus lies upon the defendant to prove the existence and legality of that deed. In the suit, defendant Nurul Islam alone adduced in court as D.W.1 and one Md. Mofizul Hoque adduced as D.W.2, who proved the possession of the suit land. Defendants did neither placed the original deed in question before the court nor take any initiative to prove the execution and formation of the said deed by placing any witness

of the deed, rather while deposing in court he admits that the said deed was lost from his custody and he never lodged any General Diary for missing of the said deed. Taking into consideration of all these scenario of this case, trial court come to a findings that the deed being No. 5525 was not been proved to be legally and validly executed by the donner, rather it may be held that it was forged and collusive deed.

Regarding the time of limitation, taking into consideration of the fact of this case, trial court found that suit was filed well within time since as and when plaintiffs came to know the existence of the said deed from a criminal proceedings being M.R. Case No. 3 of 2008, he filed the instant suit well within time. The appellate court totally upon misreading of the evidence has come to a findings that from the earlier suit being No. 94/93, plaintiffs were aware about the existence of the documents and as such suit is barred by limitation. But in fact, the said suit was initiated by the defendant Nurul Islam Mondal against the plaintiffs, which was dismissed for default on 29.10.1996 (Ext.1). Nowhere in the four corner of the defendants evidence or from the written statements it could be gathered that plaintiffs were very much

aware about the existence of the impugned deed earlier than their date of knowledge as been claimed by their plaint in the suit. The findings of the appellate court on the point of limitation is absolutely presumptive and not sustainable in law.

The appellate court has totally failed to understand the nature and character of the suit. This is not a suit for simple declaration of title, where plaintiff is required to prove his title rather this is a suit for declaration in the garb of cancellation of deed of heba-bil-ewaj being No. 5525 dated 29.06.1977 wherein defendant is required to prove that the document was legally and validly been executed by the donor in favour of the donee, which the defendants has totally failed as been observed above as well as been held by the trial court. The appellate court totally failed to understand this feature of this case and shifted the onus upon the plaintiff most arbitrarily and held that the plaintiffs deed No. 5212 is a forged one. This findings is apparently illegal and not sustainable in law in as much as there is no such issue, framed by any of the court below.

Regard being had to the above law, fact and circumstances of this case, I am constrained to hold the view that the judgment

and decree passed by the appellate court is not sustainable in law, which is liable to be set aside.

I thus find merit in this rule.

In the result, the rule is made absolute and the impugned judgment and decree passed by the appellate court is hereby set aside and the judgment passed by the trial court is hereby up held.

The order of stay granted earlier is hereby recalled and vacated.

Send down the L.C.R along with the judgment to the courts below at once.