

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No.3118 of 2019

Md. Altaf Hossain Mollapetitioner

-Versus-

Md. Hasen Ali Khandakar and others

.....opposite parties

Mr. ABM Motiur Rahman, Advocate

..... for the petitioner

No one appears for the opposite parties

Judgment on 29.06.2025

At the instance of the defendant this Rule was issued calling upon opposite parties 1 to 9(j) to show cause as to why the judgment and decree of the Joint District Judge, Court 2, Gazipur passed on 02.04.2012 in Other Class Appeal 19 of 2010 allowing the appeal reversing the judgment and decree of the Assistant Judge, Court 1, Gazipur passed on 30.11.2009 in Title Suit 3004 of 2008 dismissing the suit should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

The plaint case, in brief, is that the suit land originally belonged to Piar Ali. He entered into an agreement with Abed Ali and Akkas Ali on 26.08.1967 for its sale at a consideration of Taka 3,500/-. They paid Taka 3,000/- as earnest money and the owner handed over its possession to them. But after execution of the *bainapatra* Piar Ali died leaving behind 2 sons Omar Ali and Nayeb Ali, 2 wives Jayton Nessa and Kashimon Nessa and 1

daughter Raimon Nessa. The abovesaid heirs refused to execute and register the sale deed and consequently they instituted Title Suit 78 of 1968 in the Court of the then Second Munsif, Dhaka for specific performance of contract. The suit was decreed *ex parte* and in Execution Case 03 of 1972 the Court registered the deed to Abed Ali and Akkas Ali and thus they had become owner of 1.18 acres. During possession and enjoyment they sold out .28 acres from plot 428 to plaintiff 1 through a registered *kabala* dated 16.03.1976. Abed Ali sold out .38 acres from plot 381 to plaintiff 2 through another registered *kabala* dated 11.03.1976 and handed over possession thereof. Akkas Ali sold out total $(.28+10)= .38$ acres from plot 381 to plaintiff 3 through 2 registered *kabalas* dated 14.02.1978. In this way the plaintiffs became owner and possessor of total 1.04 acres of land of plots 428 and 381 and started possessing the same within the knowledge of all. Plaintiff 1 also mutated his name in respect of .28 acres of plot 428 with other lands. But defendant 1 filed a miscellaneous case in the office of Assistant Commissioner of Land, Sadar, Gazipur (AC Land) for cancellation of mutation in the name of plaintiff 1 for .1225 of plot 381 and .0520 acres of plot 428 in total .175 acres on the strength of purchase from Raimon Nessa through *kabala* dated 30.04.1967. Plaintiffs collected certified copies of the deeds and came to learn that defendant 1 created a collusive deed showing

Raimon Nessa as owner of the said land through a *heba-bil-ewaz* dated 31.10.1966 from her father. The AC Land cancelled the mutation of plaintiff 1 and mutated the name of defendant 1 expressing that the parties may take shelter of civil Court for redressing their grievances. Hence the suit for declaration of title in respect of the suit land as described in the schedule to the plaint with further prayer that the registered *heba-bil-ewaz* deed in the name of Raymon Nessa dated 31.10.1966 and *kabala* dated 13.04.1967 in the name of the defendant 1 are collusive, fraudulent, without any consideration, inoperative and not binding upon the plaintiffs with further prayer that the RS *khatian* prepared in defendant's name is erroneous.

Defendant 1 filed written statement and contested the suit denying the statements made in the plaint. He contended there that the suit land with other lands were owned, held and possessed by recorded tenant Piar Uddin. During his possession and enjoyment, he transferred .0525 acres out of .28 acres of plot 428 and .1225 acres out of .76 acres of plot 381 in total .175 acres to his daughter Raymon Nessa through a *heba-bil-ewaz* registered on 31.10.1966 with specific boundary of land. The defendant purchased the aforesaid land from Raimon Nessa through a registered *kabala* dated 13.04.1967 and got possession thereon. After the death of Piar Uddin, the plaintiffs created the antedated *bainapatra* in his

name and instituted the suit against his heirs and got an inoperative *ex parte* decree. Plaintiff 1 was a *borgader* defendant's father and after his death he (plaintiff) refused to pay the share of crops of the suit land to defendant 1 for which the defendant filed a *salashi* case to the Chairman of Gizapir Pourashava. He then filed a miscellaneous case for cancelling the mutation in the name of plaintiff 1. The AC Land by his order dated 22.11.2000 cancelled the mutation of plaintiff 1 and mutated his (defendant's) name and accepted rent from him. The plaintiffs knew from 1968 that RS record has been prepared in the name defendant 1 who purchased the land from Raymon Nessa but they instituted the suit in 2008 which is absolutely barred by limitation. It was further contended that the suit was bad for defect of parties and principles of *estoppel*, *waiver* and *acquiescence*.

In the trial, the plaintiffs examined 5 witnesses and their documents were exhibits 1-5 while the defendant examined 2 and his documents were exhibits Ka-Cha. The suit was dismissed first time by the Assistant Judge against which the plaintiffs preferred appeal before the District Judge, Gazipur. The appeal was allowed and the case was sent on remand to the trial Court for trial afresh.

After remand the Assistant Judge reframed 5 issues to adjudicate the matter in dispute but he again dismissed the suit against which the plaintiffs preferred appeal before the District

Judge, Gazipur. The Joint District Judge, Court 1, Gazipur heard the appeal on transfer and by its judgment and decree under challenge allowed the appeal and set aside the judgment and decree passed by the trial Court.

Mr. ABM Motiur Rahman, learned Advocate for the petitioner taking me through the materials on record submits that the plaintiffs by producing documents and oral evidence failed to prove their title and possession in the suit land. He submits that plaintiff 1 claimed suit land from plot 428 by purchase while plaintiffs 2 and 3 claimed land from plot 381 through purchase. But plaintiff 1 led evidence in support of all of them without having any authorization. In view of the above position and as per the provisions of Order 1 Rule 12 of the Code of Civil Procedure, evidence of PW1 is not sufficient to prove the claim of all plaintiffs over the suit land. He adds that defendant 1 purchased the suit land by a registered *kabala* dated 13.04.1967 but the *bainapatra* upon which the plaintiffs' predecessor got decree in the suit land was executed on 26.08.1967 and the deed was registered through Court on 09.05.1972. The deed of the defendant was executed and registered prior to the plaintiffs' deed. He then refers to the case of Nur Mohammad vs. Serajul Islam and others, 64 DLR 491 and Abdus Samad Khan and another vs. Wazedali Fakir and others, 44 DLR 495 and relied on the

principle laid therein that earlier *kabalas* of the defendant will take precedence over the subsequent *kabalas* of the plaintiffs. In this case the plaintiffs have not acquired any right, title and interest in the suit land through purchase because the land was already sold to the defendant. Mr. Rahman further submits that RS record in respect of the suit land has been prepared before the Court registered the deed but they did not take any step against the said wrong record of rights. He then refers to the provisions of Order 7 Rule 1(e) of the Code and submits that the plaint do not disclose any cause of action in filing the suit, therefore, it could have been rejected on that score only. The trial Court on elaborate discussion found that the suit was bad for defect of parties, barred by limitation and also found that the plaintiffs failed to prove their title and possession in the suit land and accordingly dismissed the suit. But the Court of appeal below misdirected and misconstrued in its approach of the matter and allowed the appeal holding that the *heba-bil-ewaz* in the name of Raymon Nessa and the *kabala* of defendant 1 was created on the basis of erroneous RS record of right prepared in defendant 1's name. The judgment and decree passed by the Court of appeal below suffers from misreading of the evidence and non-consideration of materials on record. Moreover, in allowing the appeal the Court did not advert the finding of the trial Court and thus violated the mandatory

provisions of law of Order 41 Rule 31 of the Code. Therefore, the Rule would be made absolute and the judgment and decree passed by the appellate Court be set aside.

No one appears for the opposite parties. Although the record book shows that the notices have been duly served upon them and the case is ready for hearing.

I have considered the submissions of the learned Advocate for the petitioner, gone through the materials on record and *ratio* of the cases cited. The plaintiffs claimed the suit land from Abed Ali and Akkas Ali through purchase. They claimed that Abed Ali and Akkas Ali instituted a suit for specific performance of contract against the heirs of original owner Piar Ali. They got an *ex parte* decree in the suit in 1969 and got the deed registered through Court on 09.05.1972. But the fact remains that the *bainapatra* was unregistered alleged to have been executed by Piar Ali and after his death the suit was filed against his heirs. Defendant 1 claimed that Piar Ali through a registered *heba-bil-ewaz* dated 30.10.1966 exhibit-Ga transferred the suit land measuring .175 acres of two plots to his daughter Raymon Nessa. It is a registered *heba-bil-ewaz* which has been produced in the Court and exhibited without any objection. It is found from exhibit-‘Ga’ that Raymon Nessa accrued title and possession on .0525 acres out of .28 acres of plot 428 and .1225 acres out of .76

acres of plot 381 *i.e.*, in total .175 acres of suit land. She sold it to defendant 1 on 13.04.1967 through a registered *kabala* exhibit- 'Kha'. The aforesaid two deeds (exhibits- 'Ga' and 'Kha') are earlier than that of Piar Ali's so called agreement for sale dated 26.08.1967 with the vendors of the plaintiffs and the deed registered through Court on 09.05.1972 to them. After purchase RS *khatians* 261 and 260 have been prepared in defendant's name. It is found that Abed Ali and Akkas Ali got an *ex parte* decree in Title Suit 78 of 1968 for specific performance of contract on 28.04.1969 exhibit-14 series and the Court through Execution Case 03 of 1972 registered the deed on 09.05.1972 in their names. The plaintiffs subsequently purchased the suit land from Abed Ali and Akkas Ali in 1976 and 1978 exhibits- 4, 11, 12 13 respectively. But it appears that Piar Ali's daughter Raymon Nessa having title and possession sold the suit land measuring .175 acres from 2 plots to defendant 1 much earlier *i.e.*, on 13.04.1967. According to the provisions of section 48 of the Transfer of Property Act and *ratio* of the cases cited by Mr. Rahman reported in 44 DLR 495 and 64 DLR 491, the plaintiffs have got no right and title in the suit land because the *kabala* in name of defendant 1 has been executed and registered prior to the *kabalas* of the plaintiffs. Moreover, admittedly RS *khatian* has

been prepared in the name of defendant 1 finding his possession in the suit land and he paid up to date rent to the concerned authority.

It is further found that plaintiffs 1, 2 and 3 claimed title in the suit land by separate *kabalas* but only PW1 was examined as witness without taking any written authority from other 2 plaintiffs. The land of plaintiffs 1, 2 and 3 are from different plots and different *kabalas* and as such plaintiff 1 cannot prove the case of other plaintiffs without having any authorization letter from them as per the provisions of Order 1 Rule 12(i)(ii) of the Code. Moreover, the plaint do not disclose any cause of action which is required under Order 7 Rule 1(e) of the Code. It is not in the plaint when the plaintiffs came to learn about the wrong record of rights prepared in the name of defendant 1. Therefore, I find that the suit is also barred under Order 7 Rule 1(e) of the Code for non-disclosure of the cause of action. The trial Court assessed the evidence of the parties both oral and documentary, considered the provisions of law and decided all the material issues against the plaintiffs and consequently dismissed the suit. But the Court of appeal below without adverting those findings of the trial Court allowed the appeal in a different way holding that the defendant created antedated *heba-bil-ewaz* in the name of Raymon Nessa and the *kabala* in his name which is beyond the oral and documentary evidence on record. The Court of appeal of the

subordinate Judiciary misdirected and misconstrued in its approach of the matter and without complying the mandatory provisions of law of Order 41 Rule 31 of the Code allowed the appeal which is required to be interfered with by this Court.

Therefore, I find merit in this Rule and accordingly it is made absolute. No order as to costs. The judgment and decree passed by the appellate Court is hereby set aside and those of the trial Court are restored.

Communicate the judgment and send down the lower Court records.

(Sumon-B.O.)