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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 2667 of 1999
with
Civil Revision No. 2668 of 1999

In the matter of:

Mojibal Haque

Petitioner in both Civil Revisions

-Versus-

Jannatul Ferdous Begum and others

Opposite parties in both Civil Revisions

Mr. Sk. Md. Morshed, Senior Advocate, with
Mr. Niaz Murshed,
Mr. Aysha Morshed, and
Mr. Md. Rashidul Alam Sagar, Advocates

...For the petitioner

Mr. Md. Mubarak Hossain, Advocate

... For the opposite party Nos. 1-6

Heard on: 30.10.2024, 07.01.2025 and 14.01.2026
Judgment on: 15.01.2026

The petitioner has filed the instant two revisional applications under Section 115 of the Code of Civil Procedure challenging the judgment and decree dated 16.05.1999 (decree signed on 23.05.1999) passed by the learned Sub-ordinate Judge and Artha Rin Adalat, Noakhali in Title Appeal No. 182 of 1991 which was heard

analogously with Title Appeal No. 183 of 1991 and disposed of by a single judgment allowing the appeals and setting aside the judgment and decree dated 21.9.1991 (decree signed on 25.09.1991) passed by the learned Senior Assistant Judge, Sadar, Noakhali in Title Suit No. 381 of 1987 which was heard analogously with Title Suit No. 387 of 1987 and disposed of by a single judgment dismissing the suits.

The subject matter of Title Suit No. 381 of 1987 is the registered kabala executed on 08.12.1982 and the subject matter of Title Suit No. 387 of 1987 is the registered kabala executed on 09.12.1982. Both kabalas were registered on 23.12.1982 at Sadar Sub-Registry Office, Noakhali. Sayedal Haque was the executant of the kabalas.

The opposite party Nos. 1-6 as plaintiff filed the suits against the petitioner and opposite party Nos. 7-17 praying for declaration that the kabalas are fraudulent, forged, illegal, without consideration and not binding upon the plaintiffs.

The plaintiffs' case is that the original owner of the suit land was Mohammad Younus who died leaving behind two daughters, namely, Julekha Khatun and Maleka Khatun. Julekha Khatun died leaving two sons, namely, Sayedal Haque and Mojibal Haque (defendant No. 2 - petitioner) and one daughter. Sayedal Haque enjoyed his share with title and possession. Sayedal Haque,

predecessor of plaintiffs, was suffering from cancer disease and was bed-ridden at Sadar Hospital Noakhali since 12.12.1982. After 10/12 days when his condition deteriorated, he was advised to get admission at Chittagong Medical College Hospital. But without admitting him at Chittagong Medical College Hospital, his son and daughters took him back to his house on 23.12.1982 and he died on the same date.

Further case of the plaintiffs is that the defendant No. 1 Abdul Motaleb is the husband of defendant No. 3 Jahanara Begum (opposite party No. 8). The defendant No. 1, at the instance of other defendants, had been trying to grab the suit properties. On 10.04.1987, when the plaintiffs were trying to catch fish at the suit pond, the defendants resisted them and disclosed that the defendant No. 2 Mojibal Haque (petitioner) and defendant No. 1 purchased the suit properties. After obtaining certified copy, the plaintiffs came to know about the execution and registration of the impugned kabalas which were executed and registered when their predecessor Sayedal Haque was bed-ridden at Sadar Hospital, Noakhali. He was unable to execute and register those and he never sold the suit properties and never executed and registered the impugned kabalas.

The defendant No. 2 Mojibal Haque (petitioner) contested both suits by filing written statement and additional written statement denying the statements and allegations made in the plaint. His case is that Sayedal Haque was his full brother. Both of them were co-sharers

in the ejmali property but without serving any notice upon him, Sayedal Haque sold the suit properties to the defendant No. 1. The defendant No. 2 Mojibal Haque filed Pre-emption Miscellaneous Case No. 176 of 1984 in the Court of Senior Assistant Judge, Sadar, Noakhali and got decree [final order] in the case on 28.02.1985. He got possession of the suit land through Court on 17.05.1985. Sayedal Haque did not die on 23.12.1982. He died on 24.12.1982. In order to bear the cost of his treatment he sold the suit property.

The trial Court heard both suits analogously and dismissed those. The trial Court observed:

> "নালিশা দাগে বাদীপক্ষের দখল বা বেদখলের বিষয় অস্পষ্ট রহিয়া গেল। যাহা কোন পক্ষ কমিশন করা হইলেই ইহা স্পষ্টভাবে প্রমাণিত হইতো। বাদীপক্ষের যদি দখল থাকিয়াই থাকে তাহলে বাটোয়ারা মোকদ্দমা ব্যতিত অত্র মোকদ্দমাায় বাদীপক্ষ এই প্রশ্নে কোন প্রতিকার পাওয়ার অধিকারী নয়।
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> অপরদিকে বাদীপক্ষের আর্জি বিবাদীর বর্ণিত প্রিয়েমশান মোকদ্দমার ব্যাপারেও সম্পূর্ণ নীরব। বাদীপক্ষ মৃত ছাইদুল হক কর্তৃক ১নং বিবাদী বরাবর সম্পাদিত যে দুইটি দলিলকে জাল জালিয়াতি দাবি করিয়াছে বাদীপক্ষ উক্ত দলিল উহাতে ছায়েদুল হক যে টিপ সই দেয় নাই তাহা প্রমাণের কোন ব্যবস্থা করে নাই। বাদীপক্ষের উচিত ছিল ছায়েদুল হকের নালিশা দলিলের টিপ অপর কোন টিপের সহিত মিল আছে কিনা তাহা প্রমাণের জন্য নালিশা দলিল দুইটি hand writing expert এর নিকট প্রেরণ করা। এবং এইটুকু প্রমাণের দায়িত্ব বাদীপক্ষের উপর। কারণ, নালিশা দলিলের দ্বারা বাদীগণেরই ক্ষতি হইবে যেহেতু তাহারা (বাদীগণ) মৃত ছায়েদুল হকের ওয়ারিশ। এইক্ষেত্রে আমরা দেখিতে পাই যে, বাদীপক্ষ তাদের করণীয় ও আবশ্যকীয় প্রমাণের দায়িত্ব তাহারা পালন করে নাই। এই সম্পর্কে 39 DLR page-46 এ উল্লিখিত মহামান্য সুপ্রীম কোর্টের প্রদত্ত রুলিং প্রবিধানযোগ্য। উক্ত রুলিংয়ে উল্লেখ আছে যে, Possession have been delivered through Court to the

defendant and the plaintiffs have failed to prove their possession therein and as such, the present suit by the plaintiff for declaration without prayer for recovery of khas possession is not maintainable.

অত্র মোকদ্দমার ক্ষেত্রেও আমরা দেখিতে পাই যে, বাদীপক্ষ নালিশা দুইটি কবলাকে শুধু জাল ঘোষণায় প্রার্থনা করিয়াছে। কিন্তু নালিশা ভূমিতে বাদীগণের দখল বাদীপক্ষের সাক্ষীগণ কর্তৃক স্পষ্টভাবে প্রমাণিত হয় নাই। অপরদিকে প্রতিদ্বন্দ্বিতাকারী ২নং বিবাদী ১নং বিবাদীর নালিশা দলিলমূলে খরিদের বিরুদ্ধে অগ্রক্রয়ের মোকদ্দমা করিয়া ডিক্রি পায় এবং উক্ত ডিক্রিমূলে [চূড়ান্ত আদেশ] ২নং বিবাদী আদালতযোগে দখল পায় বলে ২নং বিবাদী দাবি করিতেছে। এই কথার প্রমাণ হিসেবে ২নং বিবাদী তাহার দাবীকৃত প্রিয়েম্পশান মোকদ্দমার রায় ও ডিক্রি এবং আদালতযোগে নালিশা ভূমিতে দখল পাওয়ার সমর্থনে দখলী পরোয়ানা দাখিল করিয়াছে। উক্ত পরোয়ানা পর্যালোচনায় দেখা যায় যে, ২নং বিবাদী প্রিয়েমশান মোকদ্দমামূলে নালিশা ভূমিতে দখল লাভ করিয়াছে। বিবাদীপক্ষের সাক্ষীগণ কর্তৃক নালিশা ভূমিতে বিবাদীর দখল থাকার কথা উল্লেখ করা হইয়াছে। এক্ষেত্রে বাদীপক্ষের খাস দখলের প্রার্থনা ব্যতিত অত্র ঘোষণার প্রার্থনা চলিতে পারে না।”

The appellate Court allowed the appeal. The appeal Court observed:

“He [Sayedal Haque] had been got admitted in the Noakhali General Hospital on 12.12.2002 and he had been released on 23.12.1982. It is surprising and unbelievable that a patient.... in a critical condition.... would have rushed to the sub-registry office for giving approval of registration of both the suit deeds in such a critical condition..... His death on the date of release from the hospital leads us to presume that.... he was incapable of going to the sub-registry office for registration of both the suit deeds. Another peculiar aspect of both the suit deeds is that though alleged executant Sayedul Haque used to put his signature in case of execution and

registration of any deed but both the suit deeds are purported to have been executed and registered by putting his LTIs.

The petitioner of pre-emption proceedings got ex parte decree [final order] showing his brother (opposite party No. 2) as alive and service of summons upon the death person and also got delivery of possession in the case land on the basis of paper transaction. Non-appearance of opposite party No. 1 Abdul Motaleb in the pre-emption proceeding is also indication of secret machination in between petitioner Mojibal Haque and opposite party No. 1 Abdul Motaleb. Therefore, in a legal proceedings - where admitted deceased heirs of Syedul Haque were not parties to, is not binding upon the latter. A decree which is obtained by exercising fraud upon the Court which is apparent on the face of the record is void and need not be sought to be declared void or sought any declaratory relief as observed by the learned Court below.

Where suit deeds are impeached as forged, fraudulent and collusive anti-dated and created by false personification, question of possession of subject matters of suit deeds are incidental, not essential."

Mr. Sk. Md. Morshed, learned Senior Advocate appearing for the defendant-respondent-petitioner submits that without praying for declaration of title in the suit land and also without seeking partition, the instant suit for declaration that the kabalas in question are forged, fraudulent and not binding upon the plaintiffs are not maintainable. Mr. Morshed refers to the cases of ***Ratan Chandra Dey and ors. vs.***

Jinnator Nahar and ors., 64 DLR (AD) 116 and ***Momtaz Begum and ors. vs. Md. Masud Khan***, 52 DLR (AD) 46.

Mr. Morshed next submits that admittedly the kabalas in question were registered kabalas. The due registration of kabalas is itself some evidence of execution, but the plaintiffs did not take any proper steps to disprove the kabalas by examining the attesting witness or the identifier or of the LTI of the executant by an expert. Mr. Morshed relies upon the case of ***Abani Mohan Sana vs. Assistant Custodian (SDO) Vested Property, Chandpur and ors.***, 39 DLR (AD) 223 in support of his argument.

Mr. Morshed finally submits that the final order passed in the pre-emption case based on the kabalas in question, and the subsequent delivery of possession by the Court in the said pre-emption case have not been challenged by the plaintiff. Therefore, the instant suit is not maintainable.

Per contra, Mr. Md. Mubarak Hossain, learned Advocate appearing for the plaintiff-opposite parties submits that fraud vitiates everything. The appellate Court below rightly found that the *ex parte* final order passed in the pre-emption case was obtained by practising fraud upon the Court and as such, no issue was required to be framed on this point and the plaintiffs were not required to challenge the pre-

emption case. Mr. Mubarak Hossain refers to the case of ***Government of Bangladesh vs. Md. Abdul Mannan and ors.***, 71 DLR (AD) 338.

The plaintiffs are successors-in-interest of the deceased Sayedal Haque. They sought declaration that two kabalas purported to have been executed by Sayedal Haque are forged, fraudulent and not binging upon them. Mojibal Haque, full brother of Sayedal Haque, in his written statement disclosed that he, as pre-emptor, had filed the pre-emption case, the subject matter of which was the kabalas in question. Mojibal Haque succeeded in the pre-emption case and obtained possession of the land through Court. The plaintiffs did not amend the plaint and refrained from challenging the validity of the proceedings of the pre-emption case. The appellate Court below *suo moto* raised the issue as to the validity of the pre-emption case and held that Mojibal Haque obtained the *ex parte* final order passed in the pre-emption case by practising fraud and no declaration is required to be prayed for in this regard.

In ***Government of Bangladesh vs. Md. Abdul Mannan***, 71 DLR (AD) 338, which has relied upon by Mr. Mubarak Hossain for the plaintiffs, the writ-petitioner filed a case before the Court of Settlement for delisting the property from the list of abandoned properties. His case was that earlier he and his brother filed Title Suit No. 15 of 1972 for specific performance of contract and obtained an *ex parte* decree. Thereafter, they obtained the deed of sale through

Court. The Government filed Title Suit No. 17 of 1976 challenging the said *ex parte* decree. The plaint was rejected for not paying deficit court-fee. The Court of Settlement called for the records of Title Suit No. 15 of 1972 and was of the opinion that the *ex parte* decree was obtained by practising fraud upon the Court and as such, the decree did not prove the writ-petitioner's claim over the property. Court of Settlement dismissed the case which was affirmed by the Appellate Division.

Mr. Mubarak Hossain submits that in the instant case the appellate Court below rightly found that the *ex parte* decree [final order] passed in the pre-emption case was obtained by practising fraud upon the Court which was apparent on the face of the records and as such, as per the decision given in the above-mentioned reported case, the plaintiffs were not obliged to challenge the pre-emption case.

The cardinal principle of the burden of proof as contained in Section 101 of the Evidence Act, 1872 is that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The case of the petitioner in the reported case was based on the *ex parte* decree. In the instant case, the plaintiffs did not challenge the

pre-emption case which was brought on record by the defence by producing the certified copies of the orders. The plaintiffs did not raise any objection against the same by amending the plaint. On this aspect, the reported case is clearly distinguishable on facts from those of the instant case.

The trial Court observed that the plaintiffs did not take sufficient steps in accordance with law to disprove the kabalas. The appellate Court below, on the other hand, observed that since it was highly improbable for Sayedal Haque, who was on a deathbed, to go to the sub-registry office to register the kabalas on the day on which he died. Moreover, the Courts below differed on question of possession. I do not want to dwell upon on those issues. The reason will be unfolded shortly. I am of the view that the plaintiffs' suit fails for not challenging the pre-emption case for the reason that even if, for the sake of argument, the kabalas are declared as not binding upon the plaintiffs, the final order passed in the pre-emption case by a competent Court based on those kabalas and delivery of possession through Court shall remain valid. This would give rise to a peculiar situation and the plaintiffs' title in the suit land shall remain clouded. Section 18 of the Limitation Act, 1908 states, *inter alia*, that the time limited for instituting a suit against the person guilty of fraud shall be computed from the time when the fraud first became known to the person injuriously affected thereby. It appears to me that due to ill

advice of the conducting lawyer(s) the plaintiffs, who are simple village people, could not take proper steps in the suits. A litigant should not suffer for the fault of his lawyer.

In view of the foregoing discussions, the Rule is made absolute. The judgment and decree passed by the appellate Court below are set aside. The trial Court judgment and decree are affirmed. The plaintiffs are at liberty, if so advised, to challenge the pre-emption case and delivery of possession through Court and also to pray for other appropriate reliefs within a period of 01(one) year from the date of receipt of this judgment. The law of limitation shall not apply within that period.

Send down the L.C.R.

Arif, ABO