

Bench:

Mr. Justice Md. Ruhul Quddus

Civil Revision Number 3025 of 1998

Soleman Talukdar being dead his heirs and
heirssess Md. Amjad Hossain and others
... Petitioners

-Versus-

Md. Ayezuddin Mondal being dead his
heirs and heiresses Mst. Jamela Bewa and
others
... Opposite Parties

Mr. Md. Shahadat Tanveer Amin, Advocate
...for the petitioners

Mr. Rowshan Alam Khan, Advocate
... for the opposite parties

Hearing concluded on 29.01.2025

Judgment delivered on 23.02.2025

This rule was issued on an application under Section 115 (1) of the Code of Civil Procedure calling in question the validity of judgment and decree dated 13.08.1997 passed by the District Judge, Natore in Title Appeal Number 55 of 1996 allowing the same on reversing those dated 18.03.1996 passed by the Subordinate Judge (now Joint District Judge), Second Court, Natore in Other Class Suit Number 43 of 1994 decreeing the suit.

This civil revision has a chequered history. The plaintiff instituted Other Class Suit Number 134 of 1974 (subsequently, renumbered as Other Class Suit Number 56 of 1976) for partition of 4.30 acres of *ejmali* land as described in Schedule-Ka of the plaint

claiming 3.22 acres in his *saham*. His case, in brief, was that the suit land originally belonged to Rafatullah Mondal. He had one son Fazar Ali Mondal and two daughters Buluman and Lilyman, who died before Rafatullah Mondal. Thereafter, he died leaving behind his widow Runduman Bewa and maternal cousin Ukil Uddin, father of the plaintiff and accordingly they inherited the left-out property of Rafatullah to the extent of four annas and twelve annas respectively. During life, plaintiff's father Ukil Uddin allowed Runduman Bewa to manage and control the entire property of Rafatullah, but took some share of the crops according to the will of Runduman Bewa. He however, did not hurt her in any manner. After the death of Ukil Uddin, the plaintiff inherited twelve annas share of the suit land and was in *ejmali* possession thereon with Runduman Bewa. He also used to take the share of crops in the same manner as his father did.

It was also stated in the plaint that during preparation of SA record, the suit land was wrongly recorded in the single name of Runduman Bewa. Before that, Runduman Bewa transferred 3 bighas of land to Pachai and Solaiman Pramanik and RS Khatian Number 191 was recorded in their names. Runduman Bewa also transferred 22 decimals of land to Sabjan and another 38 decimals to Sefat. Accordingly, RS Khatians Number 374 and 208 respectively were published in their names.

However, Runduman Bewa died in 1973 leaving her three nephews, namely, Reazuddin Mondal, Ayezuddin Mondal and Lokai Mondal (defendants 1-3) as her legal heirs. The said defendants

abruptly entered into the house of Runduman Bewa as described in Schedule-Kha of the plaint, misappropriated the share of crops produced in the *ejmali* land and behaved very unreasonably with the plaintiff. He requested the defendants for partition of the land in the month of Jaishtha, 1381 Bangla, which they refused. The cause of action for institution of the suit thus arose.

The defendants contested the suit by filing a joint written statement denying the material allegations of the plaint contending, *inter alia*, that the plaintiff's father Ukil Uddin was not even a relation to the original owner Rafatullah Mondal. Rafatullah died leaving behind his widow Ulu Bewa, one son Geda Mondal and two daughters Fuljan and Deljan, who subsequently died issueless and Ulu Bewa became the owner of the entire property left-out by Rafatullah. Therefore, the question of inheritance by any distant kindred, or that of sharing crop with him would not arise. Rafatullah's widow was Ulu Bewa, not Runduman Bewa. After the death of Ulu Bewa, the defendants being her only heirs and successors, became the owners-in-possession of her entire property.

It was further stated that after the death of Rafatullah, the suit land was put in auction in a rent execution case. Thereafter, Ulu Bewa took settlement of the land from the auction purchaser-landlord in 1349 Bangla. In this way, Ulu Bewa became the independent owner of the suit land. She constructed a dwelling house on the Schedule-Kha land and resided there with the defendants. The

subsequent records of right were correctly recorded in the name of Ulu Bewa.

On the aforesaid pleadings, the trial court framed the issues, namely, (1) was the suit maintainable in its present form? (2) was the suit bad for defect of party? (3) was the suit barred by limitation,? (4) was the suit properly valued? (5) had the plaintiff his alleged share in the suit property? If so, was the plaintiff entitled to get the partition as prayed for? (6) to what other relief, the plaintiff was entitled?

Both the parties went on trial, in course of which, the plaintiff himself deposed as PW 1 supporting the plaint's case and adduced in evidence the registers of death showing the date of Fazer Ali's death on 14.05.1933, which was allegedly registered on 16.05.1933 (vide Exhibit-1), death of Buluman on 25.12.1933 registered on 30.12.1933 (Exhibit-1/A); that of Lilyman on 26.12.1933 registered on 30.12.1933 (Exhibit-1/B) and death of Rafatullah Mondal on 27.06.1941 (vide Exhibit-1/C). A Rent Receipt showing payment of rent against the land of RS Khatian Number 120 by the plaintiff was produced and marked as Exhibit-II D. The plaintiff examined three other witnesses, namely, Hasen Mondal, Del Mohammad Tarafder, and Kayemuddin Sarker who deposed as PWs 2, 3 and 4 respectively. Subsequently, during pendency of Title Appeal Number 178 of 1987, RS Khatian Number 191 was adduced in evidence and marked as Exhibit-2.

On the other hand, defendant number 2 deposed as DW 1 and adduced in evidence a bunch of documents those were marked as

exhibits including Exhibit- A series (*dakhilas*) and Exhibit-B (CS Khatian Number 53 in the name of Rafatullah). The defendants also examined three more local witnesses, namely, Badal Mondal, Nur Mohammad and Moyen Tarafder who deposed as DWs 2, 3 and 4 respectively.

On conclusion of hearing, learned Subordinate Judge, Additional Court, Rajshahi decreed the suit by judgment and decree dated 21.03.1977, challenging which the defendants preferred Title Appeal Number 133 of 1977. Learned District Judge heard the appeal, allowed the same and sent the suit on remand. The judgment and decree as well as the record of this appeal are not available in the lower courts' records, but this fact is evident from the order sheet of the trial court (vide orders dated 21.03.1977 and 31.05.1978).

After the suit came on remand, the plaintiff filed an application for recall of PW 3 which was allowed by order dated 21.08.1978 and PW 3 was re-examined. The defendants also examined two more witnesses, namely, DW 5 Mofizuddin and DW 6 Zahiruddin. After conclusion of hearing, learned Subordinate Judge, Additional Court, Rajshahi decreed the suit again by judgment and decree dated 29.08.1978, challenging which the defendants number 1 and 2, preferred Other Class Appeal Number 121 of 1978 in the Court of District Judge, Rajshahi. Learned Additional District Judge, Rajshahi ultimately heard the appeal, allowed the same by judgment and decree dated 30.04.1982 and sent the suit again on remand for

deciding the plaintiff's title over the suit land by amending the plaint incorporating a prayer for declaration of title.

On remand of the suit for the second time to the Court of Subordinate Judge, Natore, it was renumbered as Other Class Suit Number 275 of 1984 and thereafter, it was transferred to the Court of Munsif, Baraigram and was renumbered as Other Class Suit Number 40 of 1986. Learned Assistant Judge, Baraigram concluded the hearing and dismissed the same by judgment and decree dated 29.07.1987. Being aggrieved, the plaintiff preferred Title Appeal Number 178 of 1987 in the Court of District Judge, Natore. Learned Subordinate Judge, Natore ultimately heard the appeal and allowed the same by judgment and decree dated 18.02.1990 and sent the suit again on remand to the trial court to dispose of the same complying with the direction made in the judgement of the appellate court passed in Other Class Appeal Number 121 of 1978.

Subsequent to the remand for third time to the Court of Assistant Judge, Baraigram, the suit was transferred therefrom to the learned Subordinate Judge, Natore and was renumbered as Other Class Suit Number 14 of 1993. Thereafter, it was again transferred to the Second Court of Subordinate Judge, Natore and was renumbered as Other Class Suit Number 43 of 1994. Learned Subordinate Judge heard the suit and decreed the same by judgment and decree dated 18.03.1996. The defendants preferred Title Appeal Number 55 of 1996 in the Court of District Judge, Natore. Learned District Judge heard the appeal and allowed the same by judgment and decree dated

13.08.1997 and thereby dismissed the suit giving rise to the instant civil revision.

Mr. Md. Shahadat Tanveer Amin, learned Advocate for the plaintiff-petitioner submits that both the courts below concurrently found that one son and two daughters of Rafatullah Mondal died issueless before the death of their father, and that Rafatullah died leaving behind his widow Ulu Bewa and maternal cousin Ukil Uddin, father of the plaintiff. The courts below also found that Ulu Bewa failed to prove her independent title over the suit land by way of *pattan* taken after the death of her husband. The suit land has, therefore, been established as an *ejmali* land left out by its original owner Rafatullah Mondal. According to the Muslim law of succession, Ulu Bewa would inherit four annas and Ukil Uddin would get twelve annas of Rafatullah's left out property. Accordingly, the trial court decreed the suit, but the appellate court dismissed it on an absurd theory of "ouster clause", which is not applicable in a suit for partition.

Mr. Shahadat refers to the evidence on record and submits that PWs 2 and 6 themselves admitted that Rafatullah's son and daughters died beforehand, and on the basis of such admission as well as on other evidences including RS Khatian Number 120 that was correctly published in the name of the plaintiff as well as Ulu Bewa to the extent of 12 and 4 annas respectively, considering which, the trial court arrived at its findings and rightly decreed the suit. In support of his submission on the point of "ouster clause", Mr.

Shahadat refers to the case of *TN Anantha Balaraje Urs vs Smt. Gunamba Nanjaraje Urs*, AIR 2005 (NOC) 430 (Karnataka).

On the other hand, Mr. Rowshan Alam Khan, learned Advocate for the defendant-opposite parties refers to the previous judgment and decree dated 30.04.1982 passed in Other Class Appeal Number 121 of 1978, and submits that the defendants proved their case by adducing so many documentary evidences, but subsequently, those were missing from the records. When the learned Additional District Judge, Rajshahi in the judgment dated 30.04.1982 found the death certificate/register of Rafatullah (Exhibit-1/C) to be fictitious and forged, immediately thereafter, the said exhibit was tampered and the sign of forgery was removed therefrom. It is a settled proposition of law that a tampered document cannot be relied on as an evidence. Since in this case, the defendants' evidences have been removed and plaintiff's evidence which was found to be fictitious and forged by the appellate court and afterward was tempered by tearing that part from the evidence, certainly the presumption would go against the plaintiff. Mr. Rawshan then proceeds to submit that this is not a simple suit for partition, where the co-sharership of the parties is admitted. In this case, the plaintiff was not an admitted co-sharer, but the defendants' predecessor Ulu Bewa was admitted widow of Rafatullah, the original owner. In such a suit, the plaintiff must come with clean hand and prove his co-sharership up to the satisfaction. On critical reading of the evidence, it would be apparent that the plaintiff failed to prove that his father was the maternal

cousin of Rafatullah, and that Rafatullah died after the death of his son and daughters. On a plain reading of the judgments of the courts below including the previous judgments, it would be clear that the death register of Rafatullah (Exhibit-1/C) was a forged document. But the courts below on total misreading of evidence, arrived at the finding that he died afterwards. If the original rent receipts and other documentary evidences of the defendants were not stolen from the record, the defendants' case of further settlement from the Jaminder's *sherista* in the name of Ulu Bewa could have been shown. The defendants' predecessor Ulu Bewa was not supposed to be the custodian of the judgment and decree in the rent suit and disposal order of the rent execution case, but the landlord who had purchased the suit land in auction. Ulu Bewa was a helpless widow and was not that much farsightful to collect all the documents of rent suit in advance. She had the rent receipts of the Jaminder's *sherista* and other documents including the SA record prepared in her name, which she proved accordingly.

I have considered the submissions of the learned advocates, gone through the records and the decision cited. Although the previous judgments of the trial court and that the lower appellate court are no more in force, I have gone through the same to appreciate the anxiety of the opposite parties. Since this is a judgment or reversal, I have also gone through the evidence on record both oral and documentary. It appears that Exhibit-1-1(C) are separate pages of death register showing registration of death of

Fazar Ali, Buluman, Lilynnessa and Rafatullah respectively. On a careful examination of Exhibit-1 series, it would be clear that no registration of death of any other person was noted thereon. In that case, the names of Rafatullah, and his son and daughters were supposed to be registered and noted one after another serially on a single page, but those were recorded on separate pages and the noting started from the middle of the pages keeping space for noting other deaths at the top and bottom. The spelling of the names of the dead persons are also different. It further appears that all the dates of death and that of registrations of the death were written in English. According to the judgment of the Additional District Judge, Rajshahi passed on 30.04.1982 in Other Class Appeal Number 121 of 1978, Rafatullah's death was written as 27.06.1941 and that of the registration of his death was written as 26.10.1934. Learned Judge of the court below, however, read it as Bangla year and considered the register as a valid piece of evidence, which was actually a misreading of evidence. On critical reading and examination of the said death registers, it would be clear that, those were created documents for the purpose of establishing the date of Rafatullah's death subsequent to that of his son and daughters. So, the Exhibit-1 series are disbelieved.

Let me examine whether the date of Rafatullah's death after his son and daughters was otherwise proved. It appears that during trial, the PWs and DWs supported the respective cases of the plaintiff and defendants, but DW 2 Badal Mondal, who was an uncle

of the defendants admitted in cross-examination that Rafat's son and two daughters died before his death. Similarly, DW 6 Zahiruddin, in cross-examination, stated "*Rafatullah had two daughters called Lilyman and Buluman and a son called Fazar Ali out of the wed-lock with Ulu Bewa. All of them had died before the death of Rafat Mondal.*" The defendant's claim that Rafatullah's son and daughters died after him and had inherited a major part of his property was, therefore, disproved on the basis of their own evidence and the plaintiff's case on this point was proved, despite Exhibit-1 series were not credible.

The trial court, in decreeing the suit, considered RS Khatian Number 120 in its judgement, although it was not marked as an exhibit. This khatian is lying in the record and during hearing of the rule, learned advocate for the opposite parties has not challenged its authenticity. So, this court considers RS Khatian Number 120 as an evidence for the purpose of disposal of the present rule. This khatian was prepared in the joint names of Ulu Bewa to the extent of 4 annas and the plaintiff to the extent of 12 annas. A rent receipt was adduced by the plaintiff, and marked as Exhibit-II D. The trial Judge, however, wrongly described it as Exhibit-3 in the original judgment. This rent receipt shows payment of rent by the plaintiff against the land of RS Khatian Number 120.

The parties also debated on the names of Rafatulla's widow, son and daughters for the purpose of falsifying each other's case. The plaintiff called his widow as Runduman Bewa, while the

defendants called her Ulu Bewa. Similarly, the plaintiff called his son Fazar Ali and two daughters Buluman and Lilyman, but the defendants called them as Geda Mondal, Fuljan and Deljan respectively. During trial, the parties did not strict on their identity, or adduce any credible evidence to prove their own contention, or to disprove that of the adversary. The courts below also proceeded holding Runduman Bewa and Ulu Bewa to be the same person and described her as Ulu Bewa in their judgments. It further appears that during life, Ulu Bewa transferred land beyond her alleged share to different persons by registered deed of conveyance, and as many as three RS Khatians were published in the names of those transferees. Of them RS Khatian Number 191 was adduced in evidence **and was marked as Exhibit-2**. To be more particular, it was stated that Ulu Bewa had transferred three bighas of land to Pachai and Solaiman and RS Khatian Number 191 was recorded in their names, and she also transferred 22 decimals of land to Sabjan and another 38 decimals to Sefat. In this way total 1.60 acre of land was transferred to third parties who were not co-sharers of the land. **Exhibit-2** is the RS Khatian Number 191 containing plots number 416, 1001 and 2562 in the name of one Soleman Pramanik. It proves that Ulu Bewa had transferred land beyond her alleged share to third party, and the said transfer was acted upon. The plaintiff did not take any step against the said registered documents within the prescribed time even did not make any prayer in the prayer portion of the plaint.

The plaintiff also stated that his father Ukil Uddin had left the supervision of the entire land upon Ulu Bewa and he did never hurt her in any manner. He also followed the same policy of his father. Thus the land was under absolute control of Ulu Bewa. It further appears that the RS Khatian Number 120 containing 3.01 acres of land was recorded in the name of Ulu Bewa to the extent of four annas and in that of the plaintiff to the extent of twelve annas, and the plaintiff also paid rent against the said twelve annas (vide Exhibit-II D).

From the above facts and circumstances, it can easily be inferred that Ukil Uddin waived his right, title and interest over a portion of the suit land presumably for the welfare of Ulu Bewa, who was apparently a helpless widow. His son Soleman Talukder (deceased plaintiff) also followed the principle of his father, but raised claim over the entire land after the death of Ulu Bewa, presumably because of dispute with defendants number 1-3, who were her distant kindreds. The lower appellate court explained this waiver as “ouster clause”, but committed mistake in dismissing the suit as a whole without considering that the principle of waiver in this case, would not apply in the land (3.01 acres) of RS Khatian Number 120 that was recorded in joint names of the predecessor of the defendants and the plaintiff, who paid rent against the same, raised claim over the same and asserted his title and possession by adducing evidence. This court thus finds that the land of RS Khatian Number 120 was the ejmali property, over which the plaintiff's

father had proportionate right and title to the extent of 12 annas, and the plaintiff was legally entitled to saham to that extent only. The remaining land of Rafatullah was no more ejmali property as the co-sharer of the land and father of the plaintiff had waived his right and title over the same. Once he had waived the right and title on the land, his son (the plaintiff) cannot subsequently, inherit, or claim the same.

The documentary evidences as adduced by the defendants except Exhibit-B is not available in record. Exhibit-B is the CS Khatian of the suit land in the name of Rafatullah Mondal, which is an admitted document. The order sheet shows that when the defendants' evidences were found missing from the record, an inquiry was held (vide order dated 09.02.1987), but the outcome of the inquiry is not available. On an application filed by the defendants, the court passed an order on 06.04.1987 that the missing documents would be deemed to have been lying in record and would be considered in the manner as the learned Judge considered the same in Other Class Appeal Number 121 of 1978. In the said appeal, learned Additional District Judge, Rajshahi considered Exhibit-A series, the *dakhilas* from the ex-landlord and found that Ulu Bewa was the owner-in-possession of the suit land. This finding of the learned Additional District Judge was wrong inasmuch as *dakhilas* (rent receipts) cannot be considered as the sole basis of title and ownership. It also appears from the order sheet (vide order dated 10.02.1977) that the noting of the defendants' exhibits was made by

a different handwriting and it did not bear any endorsement from the trial judge. It raises doubt over the authenticity of the defendants' rent receipts (Exhibit-A series).

Learned Additional District Judge in passing the judgment **in Other Class Appeal Number 121 of 1978** took the view that the plaintiff's father was a distant kindred and the possession of Ulu Bewa could not be considered as his possession in case of such distant kindred. Here, the plaintiff ought to have prayed for declaration of title as well. The suit was, therefore, not maintainable. However, as the defect was technical, learned Judge by judgment and **decree dated 30.04.1982** sent the suit on remand for fresh adjudication on amendment of the prayer. In the subsequent Title Appeal Number 178 of 1987, the appellate court sent the suit again on remand for compliance of the judgement passed by the appellate court in Other Class Appeal Number 121 of 1978. The plaintiff filed an application on 08.12.1986 for incorporating the prayer for declaration of title as well, which was allowed **by order dated 04.01.1987** passed on the face of the application, but the amendment was not incorporated in the original plaint. So, it is apparent that the appellate court in making such observation in the judgment dated 29.07.1987 wrongly proceeded because of non-incorporation of the amendment in the body of the original plaint. The family history of the plaintiff was also brought in record by an application for amendment of plaint dated 29.09.1992, which was allowed by an

order passed on the face of the application. This amendment was also not incorporated in the original plaint.

It has already been discussed that Ulu Bewa controlled and managed the land and admittedly she had transferred 1.60 acres to others. According to the plaintiff, the quantity of transferred land by Ulu Bewa was more than her share. If this fact and the critical part of the oral evidence of the witnesses of both parties are read with RS Khatian Number 120, it would be clear that Ukil Uddin had waived his right as co-sharer in the capacity of distant kindred over the land left out by his cousin Rafatullah Mondal except the land of RS Khatian Number 120.

The right of inheritance under Muslim personal law is established with the predecessor's death, and it continues till partition of the land among the co-sharers, except such right is waived by any particular co-sharer in the manner whatsoever. The principle of 'ouster clause' generally applies in case of claim on property by adverse possession in the background of inaction of the adversary in exercising his right, title and possession thereon. The appellate court thus took a wrong view of 'ouster clause' and missed the point that actually there was waiver on the part of the original co-sharer Ukil Uddin over a part of the land left by Refatullah, and ultimately allowed the appeal as a whole instead of doing it partially, and thereby committed error of law resulting in an error in the decision. He ought to have allowed the appeal in part and decreed the suit in part. I thus find merit in the rule to the extent of RS

Khatian Number 120, which itself shows Ulu Bewa to be the one fourth owner that comes to $75 \frac{1}{4}$ decimals of land and Soleman Talukder as three fourth owner that comes $2.25\frac{3}{4}$ acres out of total *ejmali* land of 3.01 acres.

Accordingly, the rule is made absolute in part and the impugned judgment and decree of the appellate court is modified decreeing the suit in part. The plaintiff will get *saham* of $2.25\frac{3}{4}$ acres of land from RS Khatian Number 120. The parties are directed to get their *saham* separated by mets and bound within 60 days from receipt of this judgment failing which, the plaintiff will be at liberty to get his *saham* separated by appointing an Advocate Commissioner through the Court.

Send down the records.