

Present:

Mr. Justice Md. Kamrul Hossain Mollah

Civil Revision No.2917 of 2022

IN THE MATTER OF:

An application under Section 115 (1) of the Code of Civil Procedure

- AND -

IN THE MATTER OF:

Md. Shafiun Chowdhury
... Plaintiff-Petitioner

-Versus –

Al Mamun Chowdhury and another
... Defendant-Opposite Parties

Mr. Shakir Uddin Ahmed Bappy, Advocate
....For the petitioner

Md. Mainul Islam, Advocate
...For both the Parties

Heard and Judgment on 17.08.2023

Md. Kamrul Hossain Mollah, J:

On an application by the petitioner, under section 115(1) of the Code of Civil Procedure, this Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 31.05.2022 passed by the learned Joint District Judge, 2nd Court, Netrokona in Other Appeal No.137 of 2021, affirming those dated 25.03.2021, passed by the

learned Senior Assistant Judge, Purbodhola, Netrokona, in Other Class Suit No.232 of 2018, should not be set-aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

At the time of issuance of the Rule this Court directed the parties to maintain Status-quo in respect of possession and position of the suit land.

Facts necessary for disposal of the Rule, in short, are that the present petitioner as plaintiff filed Other Class Suit No.232 of 2018 for declaration that the Gift Deed No.1036 dated 03.02.2000 is false and fabricated and not binding upon the plaintiff in the Court of learned Senior Assistant Judge, Purbodhola, Netrokona against the defendant-respondent-opposite party No.1 stating inter alia that the father of the plaintiff, Meher Ali Chowdhury used to own and possess 1.65 acres of land in Mouza-Kaldoar, Upazilla-Purbodhola, District-Netrokona as described in the schedule of the suit land and during his life time it was rightly recorded in the S.A. Khatian No.389 and S.A. Khatian No.486. Late Meher Ali Chowdhury had two wives and that the plaintiff and his brother Shamsul Arefin Chowdhury were from the first wife and his deceased father and his father's second wife had 4 children, one is the defendant in the instant suit and three daughters. After the death of Meher Ali Chowdhury his children from two families inherited his properties as per law and they partitioned the land amongst themselves through in-house compromise. The plaintiff is in possession of the suit land and accordingly has established a tin shed house and has dug up a pond

therein. However, the defendant to deprive the plaintiff from the suit land executed deed No.1036 dated 03.02.2000 which was never acted upon, when the plaintiff came to know about the existence of the said gift deed, he filed the instant suit for declaration that the said gift deed is illegal, void and not binding upon the plaintiff and hence the case.

The defendant-respondent-opposite party contested the said suit by filing a written objection denying all material facts of the plaint and the case of the defendant, in short, is that the donor is the father of the defendant and the plaintiff is the step brother of the defendant. Upon anticipation after the death of Meher Ali Chowdhury, the plaintiff and his brother may deprive the defendant of his share, Meher Ali Chowdhury executed the said gift deed in full knowledge of all and henceforth the defendant has been possessing the suit land. Defendant further stressed in his written statement that the gift deed has properly executed and it is legally effective and the plaintiff has no title in the suit land and prayed for the suit to be dismissed.

After hearing the parties the learned Senior Assistant Judge, Purbodhola, Netrokona dismissed the Other Class Suit No.232 of 2018 by his judgment and decree dated 25.03.2021.

Being aggrieved and dissatisfied with the judgment and decree dated 25.03.2021 passed by the learned Senior Assistant Judge, Purbodhola, Netrokona in Other Class Suit No.232 of 2018 the petitioner as appellant

filed the Other Appeal No.137 of 2021 before the District Judge, Netrokona and thereafter the case was transfer to the learned Joint District Judge 2nd Court Netrokona and after hearing both the parties the learned Joint District Judge, , Netrokona disallowed the said Appeal and affirmed the judgment and decree dated 25.03.2021 passed by the learned Senior Assistant Judge, Purbodhola, Netrokona in other Class Suit No.232 of 2018 by his judgment and decree dated 31.05.2022.

Being aggrieved by and dissatisfied with the judgment and decree dated 31.05.2022 in Other Appeal No.137 of 2021, passed by the District Judge, 2nd Court, Netrokona the petitioner filed this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of status-quo.

Mr. Shakir Uddin Ahmed Bappy, the learned Advocate for the petitioner submits that the petitioner has been owning and possessing the suit property very smoothly and without any hindrance since then, but the Appellant Court without considering the same rejected the Appeal, which is an error of law resulting in an error in the decision occasioning failure of justice.

He further submits that the deed of gift being No.1036 dated 03.02.2000 is illegal, collusive, void and ineffective and the defendant No.1 had acquired no title or interest by such gift. The petitioner is in possession of the land in question and he has a house and pond therein and

he has been peacefully enjoying possession of the same since the death of his father. Where a deed of gift is challenged the donee under the gift is not exempted from proving the essential ingredients of a gift by a Muslim, namely, offer and acceptance of the gift and delivery of possession of land covered by gift [the case of Anowarul Azim and others Vs. Fatema Khatun and others, reported in 12 BLT (HCD) 255].

He also submits that the opposite party adduced no evidence at all that donor offered or desired to make a gift of the land to defendant No.1 and defendant No.1 accepted the gift and that pursuant to the gift, he delivered the possession to defendant No.1 which he also accepted. If any deed of gift is written one, it must be registered for its validity and there must be three elements to be fulfilled namely declaration by donor, acceptance by the done and consequent delivery of possession which are clearly absent in the purported transaction. Moreover, the deed of gift was not proved by its attesting witnesses and as such, the deed of gift has got no evidentiary value.

The learned Advocate lastly submits that since the deed of gift was not attested by any attesting witness as enjoined under section 123 of the Transfer of Property Act, the said deed is void. The section 123 provides that a gift of immovable property can only be made by a registered instrument signed by or on behalf of the donor and attested by two witnesses. The section 129 has recognized the personal laws of Muslim

relating to gift. This section is an exception to section 123 of the said Act, which requires that a gift of immovable property must be effected by a registered instrument. Such exception has been provided to Muslim of course, not to any other communities such as Hindus, Buddhists, Christians. If the impugned judgment and decree dated 31.05.2022 passed by the learned Joint District Judge, 2nd Court, Netrokona is not set-aside the petitioner will suffer irreparable loss and injury. Accordingly, he prays for making the Rule absolute.

On the other hand, Mr. Md. Mainul Islam, the learned Advocate for the opposite party No.1 submits that the donor is the father of the defendant and the plaintiff is the step brother of the defendant. Upon anticipation after the death of Meher Ali Chowdhury, the plaintiff and his brother may deprive the defendant of his share, Meher Ali Chowdhury executed the said gift deed in full knowledge of all and henceforth the defendant has been possessing the suit land. Defendant further stressed in his written statement that the gift deed has properly executed and it is legally effective and the plaintiff has no title in the suit land. The learned Advocate for the opposite party No.1 further submits that the learned Trial Court considering the evidences of both the parties opined in favour of the defendant opposite party and accordingly the learned lower court dismissed the suit. The learned Advocate for the opposite party lastly submits that the learned Appellate Court considering the evidences on record rightly dismissed the

appeal by his judgment and decree dated 31.05.2022 . Therefore, he prays for discharging the Rule.

I have heard the submissions of the learned Advocates for the parties and perused the revisional application, the impugned judgment and order of the Court's below, the papers and documents as available on the record.

It appears from the record that, the present petitioner as plaintiff filed Other Class Suit No.232 of 2018 for declaration the Gift Deed No.1036 dated 03.02.2000 is false and fabricated and not binding upon the plaintiff in the Court of learned Senior Assistant Judge, Purbodhola, Netrokona against the defendant-respondent-opposite party No.1 stating inter alia that the father of the plaintiff, Meher Ali Chowdhkury used to own and possess 1.65 acres of land in Mouza-Kaldoar, Upazilla-Purbodhola, District-Netrokona as described in the schedule of the suit land and during his life time it was rightly recorded in the S.A. Khatian No.389 and S.A. Khatian No.486. Late Meher Ali Chowdhkury had two wives and the plaintiff and his brother Shamsul Arefin Chowdhury were from the first wife and his deceased father and his father's second wife had 4 children, one is the defendant in the instant suit and three daughters. After the death of Meher Ali Chowdhury his children from two families inherited his properties as per law and they partitioned the land amongst themselves through in-house compromise. The plaintiff is in possession of the suit land and accordingly has established a tin shed house and has dug up a pond therein. The

defendant-opposite party No.1 to deprive the plaintiff from the suit land executed deed No.1036 dated 03.02.2000 which was never acted upon, when the plaintiff came to know about the existence of the said gift deed, he filed the instant suit for declaration the said gift deed is illegal, void and not effective upon the plaintiff. On the other hand, the defendant-respondent-opposite party contested the said suit by filing a written objection denying all material facts of the plaint and the case of the defendant, in short, is that the donor is the father of the defendant and the plaintiff is the step brother of the defendant. Upon anticipation after the death of Meher Ali Chowdhury, the plaintiff and his brother may deprive the defendant of his share, Meher Ali Chowdhury executed the said gift deed in full knowledge of all and henceforth the defendant has been possessing the suit land. Defendant further stressed in his written statement that the gift deed has properly executed and it is legally effective and the plaintiff has no title in the suit land.

Considering the above facts, circumstances and materials on record, it appears that in order to prove this case, the plaintiff-petitioner produced 04(four) witnesses namely Safiun Chowdhury as P.W.1. Abdul Khalek as P.W.2, Abdur Rahim as P.W.3 and Abdul Jabbar as P.W.4 in this Court and the petitioner's submitted deed is marked as exhibit-1. On the other hand, the opposite party produced 4 witnesses namely Al Mamun Chowdhury as D.W.1, Sona Mia as D.W.2, Md. Lal Hossain Sarker as

D.W.3 and Abul Hashem as D.W.4 and they testified in the trial Court. The opposite party did not file any document.

Further, it appears from the record that, the suit land is situated in Kaldoar Mouza. The suit land .15 acre of S.A Dag No.889, .85 acre of S.A. Dag No.893, .20 acre of S.A. Dag No.887 and .45 acre of S.A. Dag No.874 in 1.65 acres of land in the usufruct of Meher Ali Chowdhury in his name S.A. Khatian No.389 was published in a clean manner. Meher Ali Chowdhury had two wives. First wife had two sons namely Shafiun Chowdhury and Shamsul Arefin Chowdhury and 2nd wife had one son namely Al Mamun Chowdhury and three daughters. The plaintiff claimed that after the death of Meher Ali Chowdhury, the heirs are entitled to share in the land inherited from their ancestors. The opposite party executed Deed No.1036/2000 (Exhibit -1) in connivance with Meher Ali Chowdhury. On the other hand, the opposite party No.1 claimed that Meher Ali Chowdhury, the donor of the document is his father. The petitioner is the self-brother of the opposite party No.1. upon anticipation that after the death of Meher Ali Chowdhury, the plaintiff and his brother may deprive the defendant. Meher Ali Chowdhury executed the gift deed with the knowledge of all. At the same time the opposite party No.1 is in possession of the suit land. The plaintiff claimed that he never knew about the suit deed. The plaintiff claimed that on 09.11.2018 the plaintiff came to know about the deed No.1036/2000 after receiving the certified copy of the

deed. In such a case, the onus is on the plaintiff to prove the truth of the claim.

Moreover, Meher Ali Chowdhury was the donor of the complaint deed in the case. Meher Ali Chowdhury's possession of suit land is recognized by the parties. The plaintiff claimed that the gift deed was executed by the defendant connivance with the Meher Ali Chowdhury. Admittedly, the suit land belonged to Meher Ali Chowdhury, Meher Ali Chowdhury has full right to transfer the suit land. The plaintiff did not claim that Meher Ali Chowdhury was not the donor of the gift deed nor the tip (thum impression) of the document was not given by Meher Ali Chowdhury and the deed was not executed by the Meher Ali. The plaintiff blamed the defendant in his plaint for execution of the deed, but failed to provide proper evidence to that effect. In his cross-examination the plaintiff as P.W.1 stated that- “বিবাদী দলিল সম্পাদনের সময় ছোট ছিলেন। বিবাদীর বোন জামাই চক্রান্ত করে দলিল সম্পাদন করেন।”, which is contradictory. Oral testimony alone will not prove the authenticity of a suit deed, especially if it is claimed to be forged or illegal. Although the plaintiff filed the certified copy of suit deed, he did not verify the authenticity of the document by calling the volume of the said document. Since the plaintiff did not calling the volume and the donor Meher Ali Chowdhury died, the plaintiff has to prove the case through sufficient evidence. But it is found that of the witnesses presented by the plaintiff in this case, are not attesting witnesses of suit deed and they are

not related with the suit deed. It is also found that also the plaintiff has not given any evidence in their support of the plaint that suit deed was not executed properly. The plaintiff claims that the suit deed has not been acted upon because the plaintiff is in possession of the suit land but has not been able to produce any documentary evidence in support of the possession. The plaintiffs contended that after the death of their father they received their respective shares of land by amicable partition among the family member's and the plaintiff received the suit land. But the plaintiff could not present any credible evidence in favor of the said amicable partition claimed by the plaintiff. Though plaintiff examine P.W-2, P.W-3 and P.W-4 as witnesses but in their cross-examination they admitted that they were not present at the time of amicable settlement as demanded by the plaintiff. Again, the witnesses presented by the plaintiff could not identify filed the location of the suit plaint land properly and could not give specific evidence in favor of the possession of the plaintiff, so the possession of the plaintiff in the suit land is not proved by the witnesses produce by the plaintiff. On the other hand, the witnesses produced by the defendant-opposite party claim that the defendant is in possession of the suit land and the plaintiff already knew about the suit deed.

In view of the above discussion, it appears that the suit deed has been duly executed and the suit deed is valid and legal one. Considering the plaint written statement evidence produced by both the parties able to

prove their case and therefore the plaintiff cannot get any relief accordingly to prayers.

In the light of the above discussions, it appears before me that the learned Joint District Judge, 2nd Court, Netrokona rightly passed the judgment and decree dated 31.05.2022 in Other Appeal No.137 of 2021 rejecting the appeal and thereby affirming the judgment and decree dated 25.03.2021 passed by the learned Senior Assistant Judge, Purbodhola, Netrokona in Other Class Suit No.232 of 2018 dismissing the suit. The Court below has not committed any error of law resulting in the decision occasioning failure of justice. So, the impugned judgment and decree of the lower Court is not interferable.

Therefore, I find that the learned Joint District Judge, 2nd Court, Netrokona passed the judgment and decree dated 31.05.2022 is maintainable in the eye of law and I do not find any substance to interference into the said judgment and decree.

Accordingly, I do not find any merit in the Rule.

In the Result, the Rule is discharged.

The judgment and decree dated 31.05.2022 passed by the learned Joint District Judge, 2nd Court, Netrokona in Other Appeal No.137 of 2021 disallowing the appeal is hereby upheld and confirmed.

The order of Status-quo granted at the time of issuance of the Rule is hereby recalled and vacated.

Let a copy of this judgment and order be communicated to the concerned Court below at once.

Md. Anamul Hoque Parvej
Bench Officer

