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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 2631 of 2022

Mst. Sakina Khatun
....Petitioner
-Versus-
The State
….Opposite party

Mr. Suprokash Datta Amit, with
Mr. Sayed Mehefuz Islam, Advocates
….For the petitioner
Ms. Shahida Khatoon, with
Mr. Sovan Mahmud, and
Ms. Khandaker Asma Hamid, AAGs
....For the opposite party

Heard on: 31.10.2024
Judgment on: 11.12.2024

Title Suit No. 75 of 2016 was decreed on 13.02.2020 (decree signed on 16.02.2020) by the learned Senior Assistant Judge, Meherpur Sadar, Meherpur. Title Appeal No. 22 of 2020 was allowed on 26.04.2022 and the suit was dismissed. Thereafter, the sole plaintiff filed the instant revision and obtained Rule on 26.06.2022.

The plaintiff filed the title suit for declaration of title in the land described in 'kha' schedule of the plaint measuring 2 decimals of land which was recorded in S.A. khatian No. 731, S.A. Plot No. 2582 and subsequently recorded in R.S. khatian No. 1, R.S. Plot No. 6702 as

khas land. A home is situated on the suit land. The Government represented by the Deputy Commissioner, Meherpur is the sole defendant.

The averments made in the plaint, in short, is that Monindra Kumar Haldar was the owner of the suit land and other lands. He had left the country for India. Sakina Khatun (sole plaintiff), Sahadat Ali and Momezan Bibi had left India for the then East Pakistan and came to Meherpur. Both sides decided to exchange their respective properties situated in the then East Pakistan and India. They executed separate deeds of power of attorney. At that time there were too many obstacles to execute and register any exchange deed. Nonetheless, Sahadat and others submitted an application before the Deputy Commissioner, Kushtia praying for registration of the property they had obtained by the way of exchange. Accordingly, the Settlement Case No. 226/A/67-68 was initiated. Sahadat and others submitted an application to the Additional Deputy Commissioner (Revenue), Kushtia. He executed the deed No. 9421 dated 10.12.1979 (ext. 5) in favour of Sahadat and others. Thus, Sahadat and others got title and possession in the suit land and other lands. On the same day, Sahadat Ali and Momezan Nesa transferred 8 decimals of land including the suit land to the plaintiff by executing a registered heba deed No. 9432 dated 10.12.1979 (ext. 4). On 02.08.2015, the plaintiff came to know that the suit land was wrongly recorded in the R.S. khatian No. 1 as

khas land in the name of the Government and hence, the suit for declaration of title.

The defendant (Government) contested the suit by filing written statements denying the case of the plaintiff. The case of the defendant is that 2 decimals of land appertaining to C.S. khatian No. 567, C.S. plot No. 2582 was recorded in the name of Zamiruddin and others. S.A. khatian No. 731 was prepared in the name of Monindra Kumar Haldar. During the R.S. survey, the land of the former plot No. 2582 was converted to R.S. plot No. 6702 and the suit land and other lands total 80.8159 acres of land were recorded in R.S. Khatian No. 1 in the name of the Government. The plaintiff has no title or possession in the suit land. The plaintiff has filed the suit by creating fake documents with the intention of grabbing the government property.

The trial Court decreed the suit. The appellate Court below reversed the judgment and decree of the trial Court and dismissed the suit observing, inter alia:

> "The boundaries and location of disputed 0.02 of acre suit land is not specifically mentioned in the 'Kha' schedule. According to order VII rule 3 of Code of Civil Procedure, the boundaries and location as well as the specification of suit land is essential in a suit for declaration of title.
>
> Plaintiff is claiming title on the basis of deed no. 9421 dated 10.12.1979 and stated that the deed was executed by the ADC (Revenue) as the Assistant Custodian, Vested and Non-resident Property. The certified copy of this deed was exhibited by the plaintiff (exhibit-5).

> Plaintiff side did not adduce any document to the trial court below to prove that SA tenant Monindra had executed any deed of power of attorney or, plaintiff's predecessor had submitted any application to the Deputy Commissioner (DC), Kushtia or there was any application for any settlement case to the office of DC, Kushtia or there was any application for registration of exchange property or, there was a settlement case in connection with the suit land. Plaintiff is quite silent on CS record of the suit land and did not take any step to produce the original deed no. 9421 dated 10.12.1979.
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> …
> …
> …
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> Furthermore, plaintiff had exhibited the certified copy of deed no. 9421 (Ext. 5) but did not prove it formally by producing the volume. Defendant-government did not adduce any evidence, oral or documentary, but examined the PWs in cross.
>
> It is fact that plaintiff had neither produced the document of settlement case nor called for the volume for the purpose of formal proof of the certified copy of the deed executed by the ADC Kushtia. Plaintiff did not state anything on CS Khatian. So it is not proved that SA Khatian of the suit land was duly prepared, or Manindra had title and possession over the suit land. In addition there is no specification of location of the suit land".

The learned Advocate appearing for the plaintiff-petitioner submits that the finding of facts of the appellate Court below is based on surmise and conjecture inasmuch as in the written statements the defendant admitted that the suit land and other lands were recorded in S.A. khatian in the name of Monindra Kumar Halder which is also the case of the plaintiff. The learned Advocate further submits that the defendant did not challenge the certified copy of the registered deed No. 9421 dated 10.12.1979 (ext. 5) executed in the Exchange Case

No. 226/A/67-68. Therefore, as per the provisions of the Code of Civil Procedure (CPC) and the Evidence Act, the case of the plaintiff stands proved.

Ms. Shahida Khatoon, learned Assistant Attorney General (AAG) appearing for the defendant-government, on the other hand, submits that the execution of the deed dated 10.12.1979 (ext. 5) is barred by law inasmuch as after 05.09.1965 the government was not permitted by law to initiate any exchange case under the Disturbed Persons (Rehabilitation) Ordinance, 1964. In support of the argument, a memo dated 29.11.1973 issued by the concerned Secretary of the then Ministry of Land Administration and Land Reforms which was forwarded to the Deputy Custodian for information and issuing necessary instructions to all Assistant Custodians, Enemy property (L&B) for guidance, has been produced before me by the learned AAG. The relevant part of the said memo is reproduced below:

"GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH
MINISTRY OF LAND ADMINISTRATION AND LAND REFORMS
SECTION-I(ESTBT)

Memo No.6E-10/73/710(19)L&B Estbt. Dated: 29-11-1973.

To: The Deputy commissioner,.....(all Dist.)

Subject: Exchange of migrant's immovable properties with bona fide Muslim refugees/expellee from India.

The undersigned is directed to invite his attention to this Ministry's Memo Nos. 1578-Genl., dated the 15th November, 1968 admn 1036-Genl, dated 23-12-69 and to say that elaborate instructions for regularization of genuine exchanges of immovable properties made by refugees/expellees from India with those of Hindu migrants from Bangladesh, were issued therein. All such

exchanges made before the 6th September, 1965, were considered for regularization and they were divided into two categories viz. (I) those made before the 10th October, 1964, where the properties had become enemy properties; (ii) and those made between the 10th October, 1964 and the 5th September, 1965, where the properties stood forfeited to Government u/s 6A of the Disturbed Persons (Rehabilitation) Ordinance, 1964.

2. In both the categories the Deputy Commissioners were to receive applications for regularization of exchanges. In the first category of the cases when the Deuty Commissioner was satisfied about the genuineness of the exchange, he would furnish a certificate to that effect and the Asstt. Custodian, Enemy Property (L&B) would on the basis of such certificate of genuineness give effect to the exchange by execution of necessary deed of transfer in favour of the refugee/expellee concerned on behalf of the migrant. In the second category of exchange, if the Deputy Commissioner finds the exchange to be genuine he should formally forfeit the property covered by the exchange if not done already and settle it with the refugee/expellee concerned. In either case no consideration money other than usual annual land revenue should be charged for such transfer or settlement. ...

3. …

4. The position has since been examined carefully and the following instructions are issued:-

Where the Deputy Commissioner finds or it is brought to his notice that there is a bona fide mistake in determining the genuineness and otherwise of an exchange he should exercise his inherent power to correct his own mistake and for that he may entertain an application for review or on his own motion review his earlier orders and correct such mistake and communicate revised orders, if any passed in that behalf to the Asstt. Custodian, Enemy Property (L&B) for taking necessary action in pursuance of such orders.

5. …"

The learned Advocate appearing for the petitioner produces a circular dated 19.06.2005 issued by the government. The learned Advocate submits that by the said circular the government extended the period for regularization of exchanged property till 31.07.2005. The relevant part of the circular is reproduced below:

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
ভূমি মন্ত্রণালয়
শাখা-৬
পরিপত্র

স্মারক-ভূঃমঃ/শা-৬/বিনিময়/১৩৯/২০০২-৪৫৭ তারিখ-১৯/০৬/২০০৫ খ্রিঃ

বিষয়ঃ বিনিময় মামলা নিষ্পত্তি বিষয়ক।

বিনিময় মামলাসমূহ দ্রুত নিষ্পত্তির লক্ষ্যে মহানগর কমিটি নিম্নরূপ কমিটি গঠন করা হলোঃ

১. অতিরিক্তি জেলা প্রশাসক (রাজস্ব) -সভাপতি
২. আর ডি সি -সদস্য সচিব
৩. সংশ্লিষ্ট সহকারী কমিশনার (ভূমি) -সদস্য
৪. সরকার কর্তৃক মনোনীত ২ (দুই) জন সমাজ সেবক -সদস্য

কমিটির কার্যপরিধি নিম্নরূপঃ

ক. কমিটি ব্যাপক প্রচারের মাধ্যমে জনসাধারণের নিকট থেকে বিনিময় নিয়মিতকরণ সংক্রান্ত দরখাস্ত আহ্বান করবেন। কমিটির পক্ষ্যে সদস্য সচিব দরখাস্ত ও প্রয়োজনীয় কাগজপত্রাদি গ্রহণ করবেন। তবে দেওয়ানী আদালতে বিচারাধীন রয়েছে কিংবা মালিকানা নিয়ে বিতর্ক রয়েছে এরূপ বিনিময় সংক্রান্ত কোন আবেদন গ্রহণ করা যাবে না বা এ বিষয়ে কোন প্রকার সিদ্ধান্ত প্রদান করা যাবে না।

খ. বিনিময় সম্পত্তি নিয়মিতকরণের আবেদন আগামী ৩১/০৭/০৫ খ্রিঃ তারিখ পর্যন্ত গ্রহণ করা যাবে।

গ.... ।

ঘ. ... ।

ঙ. ...।

চ. ...।

ছ. ...।

জ. ...।

ঝ. ...।

ঞ. ...।

ট. ...।

(আজাদ রুহুল আমিন)
সচিব
ভূমি মন্ত্রণালয়”

Upon perusal of the circular it appears that the government time to time extended the period for making application to regularize the exchanged property. Moreover, the circular dated 29.11.1973, which is referred to by the learned A.A.G., does not say that after 05.09.1965 no application for regularization can be entertained. It simply states that the properties exchanged between the period from 10.10.1964 to 05.09.1965 would stood forfeited to the Government. It appears from the deed No. 9421 dated 10.12.1979 (ext. 5) that the property in question was exchanged within the period stipulated in the circular dated 29.11.1973.

The deed No. 9421 dated 10.12.1979 (ext. 5) states, inter alia: *“...whereas the Deputy Commissioner Kushtia representing the Govt. of Bangladesh has certified (a copy of the certificate is annexed herewith) that (1) the 1st party is refugee/expellee from India (2) he has transferred his property in India to the 2nd party in exchange at the migrant 2nd party’s property in Bangladesh as described in the schedule below that (3) the 2nd party was the legal owner and in absolute possession of the property described in the schedule below before migrated to India and that (4) the Deputy Commissioner Kushtia after proper enquiry was satisfied that the exchange of properties between the 1st and the 2nd parties was a genuine one and*

whereas the Deputy Commissioner Kushtia in his above mentioned certificate has estimated and reported the valuation of the property of the 2nd party in Bangladesh as described in the property of the 2nd party in Bangladesh as described in the schedule below exchanged with the 1st party to be Tk. 44,000/- (forty four thousand only) Sd/illegible Assistant Custodian, Vested and non-resident Property (Land B) Kushtia Add. Deputy Commissioner (Rev) Kushtia-3-Exchange Case No. 226 (A)/67-68: Now this indenture whitness that. …".

In view of the contents of exhibit-5, the argument advanced on behalf of the government that the exchange case was barred by law has no leg to stand.

The learned AAG submits that the plaintiff did not produce the original deed No. 9421 dated 10.12.1979 (ext. 5) and the certified copy of the same being a secondary evidence is inadmissible in evidence. The appellate Court below also observed that the plaintiff did not prove (ext. 5) formally by producing the volume.

It appears from lower Court records (L.C.R.) that at the time of tendering the certified copy of the deed No. 9421 dated 10.12.1979 in evidence and marking the same as exhibit-5, no objection was taken. If after admission of a document, it is found to be inadmissible or irrelevant, it may be rejected at any stage of the suit under Order XIII, rule 3 of the C.P.C. When a document is marked as exhibit without

objection, the admissibility of the same cannot be challenged at appellate stage or subsequent stage [44 DLR (AD) 162, 12 LM (AD) 138, (2004) 7 SCC 107]. The rationale behind the principle is that objection as to the mode of proof falls within the procedural law. Therefore, such objections could be waived. The rule of fair play envisages that an objection, if taken at the appropriate point of time, would enable the party tendering the secondary evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the secondary evidence to act on an assumption that the opposite party is not serious about the mode of proof [(2004) 7 SCC 107]. In view of the settled position of law, the objection raised by the learned AAG and the appellate Court below regarding admissibility of exhibit-5 in evidence is not sustainable in law and the same is overruled.

The learned AAG submits that the Government in its written statements categorically stated that the plaintiff had filed the case by creating fabricated documents. In this regard, I note that the plaintiff produced the original heba deed No. 9432 dated 10.12.1979 (ext. 4) by which she got the suit land (2 decimals of land) from the donors in whose favour the Assistant Custodian of vested and non-resident property executed the deed No. 9421 dated 10.12.1979 (ext. 5). The government did not take any step during the trial to prove that exhibit

Nos. 4 and 5 were forged documents. The plaintiff proved those documents which are public documents under Section 74 of the Evidence Act, 1872. Therefore, under Section 103 of the Evidence Act the burden lies upon the Government to disprove the exhibit Nos. 4 and 5. The Government did not take any step to disprove those documents.

The appellate Court below observed that the plaintiff did not state anything about the C.S. khatian and as such, it is not proved that S.A. khatian of the suit land was duly prepared, or, Monindra had title and possession in the suit land. Suffice it to say that it is categorically stated in the written statements that Monindra was the S.A. recorded owner of the lands in question. Moreover, it is stated in the deed No. 9421 dated 10.12.1979 (ext. 5) that the Deputy Commissioner, Kushtia after proper enquiry was satisfied that the exchange of properties between the 1st party and the 2nd party was genuine. The plaintiff's case is not based C.S. or S.A. record-of-rights, rather her case is based on exhibit-5 which is admitted by the defendant. Admitted facts need not be proved under Section 58 of the Evidence Act.

The appellate Court observed that there was no specification of location of the suit land. The decree passed by the trial Court specified the respective khatians, plot numbers and boundary and thus, the decree negates the appeal Court's observation.

In view of the foregoing discussions on facts and law, this Court finds merit in the Rule.

In the result, the Rule is made absolute. The judgment and decree passed by the appellate Court below dismissing the suit are set aside and those passed by the trial Court allowing the suit are affirmed.

Send down the L.C.R.

Mazhar, BO