

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 2216 of 2022

Ali Ahmed @ Ali Mia being dead his
legal heirs Md. Tazul Islam

..... Petitioner.

-Versus-

Tayab Ali alias Abed Ali being dead his
legal heirs 1 (a) Mst. Taslima Begum
being dead her legal heirs and others

.....Opposite parties.

Mr. Shibli Nomani, Advocate

.....For the petitioner.

Mr. Rafi Ahmed, Advocate with

Mr. Iftekhar Rahman, Advocate

.....For the Opposite parties

Heard and judgment on 4th June, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to
show cause as to why the judgment and decree dated 22.06.2017

passed by the Additional District Judge, 2nd Court, Dhaka in Title Appeal No. 136 of 2004 affirming those dated 31.3.2004 passed by the Joint District Judge, 2nd Court, Dhaka in Title Suit No. 330 of 2000 dismissing the suit should not be set aside.

Petitioner as plaintiff filed Title Suit No. 330 of 2000 before the Court of Joint District Judge, 2nd Court, Dhaka for declaration of title in respect of the suit land against the opposite parties.

Plaint case in short, inter alia, is that the suit land originally belonged to Sheikh Buddu and accordingly C.S. khatian was published in his name correctly, who died leaving behind only son Ludhu, who gave usufructuary mortgage to Sheikh Mokbul by taking Tk.100/- and deed was executed and registered on 16.08.24 with condition that in the month of Bhadra he would pay the said money and would get back the suit land. During Rin Salishi Ain Sheikh Ludhu got the suit land back and took over possession thereof. Before S.A. operation Sheikh Ludhu and Mokbul died and taking this opportunity, the defendant Nos. 1-8 and predecessor of defendant Nos. 9-15 recorded their names in S.A. khatian. The said mortgage deed does not attract section 95 and 95A of the State Acquisition and Tenancy Act, 1950 and R.S.

khatian also been recorded wrongly in the names of the defendants against that wrong recording the plaintiff filed the said suit for declaration that S.A. and R.S. khatian are wrong.

Defendant No.1 contested the suit by filing written statement denying the plaint case alleging, inter alia, that the suit land is originally belonged to Sheikh Budhu, who died leaving behind his son Sheikh Ludhu, who gave mortgage the suit land to Mokbul Bepari with a consideration of money of Tk. 100/- on the condition that within one year he would pay the money. Sheikh Budhu failed to repay the loan, so Mokbul Bepari has been enjoying and possessing the suit land by paying rent to the government. Thereafter Mokbul Bepari died leaving behind three sons and S.A. khatian has been recorded in their names. They also executed a Partition Deed dated 18.04.1980 and the defendant No.1 got the suit land. S.A. khatian was recorded in the name of defendant No.1 and other 2 brothers. Defendant No.1 had been possessing and enjoying the suit land from the year 1924 through their predecessor. The plaintiff with a view to grabbing the suit land filed this false suit, as such the suit is liable to be dismissed with costs.

By the judgment and decree dated 31.03.2004, the Joint District Judge dismissed the suit.

Challenging the said judgment and decree, plaintiff preferred Title Appeal No. 136 of 2004 before the Court of District Judge, Dhaka, which was heard on transfer by the Additional District Judge, 2nd Court, Dhaka, who by the impugned judgment and decree dated 22.06.2017 dismissed the appeal and affirmed the judgment of the trial court.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant rule.

Mr. Shibli Nomani, the learned advocate appearing for the petitioner drawing my attention to the transaction as well as relevant provision of law submits that the instant deed of mortgage was given on 16.08.1924. The provision as laid down under the Transfer of Property Act will apply in the instant case instead of the provision as laid down under State Acquisition & Tenancy Act. He further submits that since the plaintiff got back the property by the order of Rin Salishi Board and they are in possession and their possession has been affirmed by the Revenue

court in a mutation proceedings. Petitioner since got back his property after expiry of the period of mortgage and the recording of S.A. and R.S. khatian was wrong, he is entitled to get a decree as prayed for but the court below failed to understand all these aspect of this case and dismissed the suit most illegally.

Mr. Rafi Ahmed, the learned advocate appearing for the opposite party, on the other hand drawing my attention in a case of Abdul Khaleque -Vs. Abdul Khaleque reported in 1BLC(AD)90 submits that suit property admittedly was given mortgage only for one year. The period has already been expired long before and as such provision as laid down under section 95A of the S.A. & T. Act will have no application in the transaction, which is past and closed. The learned advocate further submits that even if it has been taken as a mortgage by the Transfer of Property Act, for redemption of the property to mortgage, as per section 148 of the Limitation Act plaintiff is required to file suit within 60 years but the instant suit has not been filed thereunder accordingly is barred under law. He further submits that since after the expiry of the period of mortgage, defendant got the title over the suit land and remaining in possession and correctly been recorded in S.A. and

R.S. khatian and government has taken rent from him, thereby plaintiff failed to prove that the property was ever been returned back to the mortgagor by any order of Rin Salishi Board and as such dismissed the suit rightly. Since the impugned judgment contains no miss-reading or non-reading of the evidences and the judgment passed by the court below contains no illegality, he thus prays the rule may be discharged.

Heard the learned advocate and perused the lower courts record and the impugned judgment.

This is a suit for title and further declaration that recording of S.A. and R.S. khatian were wrong in the name of the defendant. In the plaint plaintiff admits that plaintiffs predecessor mortgage the property at Tk. 100/- to the Sheikh Mokbul, who is the father of the defendant by way of registered deed of mortgage deed No. 3982 dated 16.08.1924 with stipulation that if the money is paid within one year he will returned back the property. It is further stated in the plaint that during the Regime of British period when the provision of Rin Salishi Board was promulgated by Sher-e-bangla A.K. Fazlul Hoque, the mortgagor get back the property from the Rin Salishi Board and thereafter remaining in possession

but thereafter defendants fraudulently beyond the knowledge of the plaintiffs in collusion with the surveyor recorded their names in the S.A and R.S. khatian. It is further stated in the plaint that after the promulgation of P.O. No.88/1972 all the mortgage become abolished and turned into a usufructuary mortgage and plaintiff acquired the title over the suit property. In that view of the matter, when plaintiff has got valid title over the suit land and the defendants mutation case as been recording in the name of the defendant not been set aside by the Revenue court, plaintiff was compelled to file this suit. Defendant objected the said suit by saying that property was validly been mortgaged in their favour by the predecessor of the plaintiff and thereafter since the plaintiffs did not return the money obtained, he never get back the property. Defendants acquired valid title over the suit property and the transaction become past and closed transaction, which would be reflected on the recording of the S.A. and R.S. khatian into their name as well as been conferred by the government on accepting rent from him.

During trial both the party adduced evidences in order to establish their case.

Considering the evidences both the court below found that plaintiff could not succeed to prove their contention that property was ever been returned back to the mortgagor plaintiff by the Rin Salishi Board. Moreover the possession of the plaintiff was not been affirmed by way of any document in as much as S.A. and R.S. khatian were prepared in the name of the defendant and the rent was accepted by the government as been possessor of the suit property. The said judgment is challenged in the instant rule.

Now in this rule main question would be whether transaction by way of registered sale deed dated 16.08.1924 is a mortgage deed and the provision as been enacted by way of P.O. No. 88 of 1972 on introduction of new provision under section 95A of the S.A. & T. Act for treating all the mortgage as usufructuary mortgage for 7 years or the transaction is a past and closed transaction.

Plaintiffs petitioner lawyer try to submits that the transaction as been made through deed dated 16.08.1924 is a mortgage of the Transfer of Property Act, which was made long before the provision as laid down under section 95A of the State Acquisition and Tenancy Act came into force. The submission

obviously go against his case. If the transaction is not been governed by the S.A. & T. Act and is a mortgage under the Transfer of Property Act, as per section 148 of the Limitation Act, time limitation was framed for 60 years to redeem his mortgage but the instant suit is not been filed within 60 years accordingly it can be held that the suit is barred by limitation. In the case only one question can be left out for consideration that whether the transaction is a usufructuary mortgage as been declared under section 95A of the S.A. & T. Act and the provision as laid down under section 95 of the said Act is applied or not, and all the transaction is a past and closed transaction where this provision of section 95 and 95A of the S.A. & T. Act will not apply.

Point has already been settled earlier before by the Appellate Division in the case of Abdul Khaleque .Vs. Abdul Khaleque reported in 1 BLC(AD)90. In the said decision their lordships upon referring a decision reported in 33 DLR (AD) 233 has held that:

“10. In 33 DLR (AD) 233 this Division decided as follows:

Our conclusions, therefore, are that the President's Order Nos. 88 and 136 of 1972 and No. 24 of 1973 are all valid legislation for effecting necessary amendments in the East Bengal State Acquisition and Tenancy Act and those laws cannot be attacked on the ground of ultra vires; (2) any transfer of a holding or part thereof by a raiyat either by way of out and out sale with an agreement to reconvey or where the transferor receives from the transferee any consideration and transferee acquires the right to possess and enjoy the usufruct, shall notwithstanding anything contained in the document relating to the transfer, be deemed to be a complete usufructuary mortgage for a period of maximum 7 years and the provisions of section 95(4) and (5) shall apply to such transfers; (3) and such transfers are not to be understood in the light of the Transfer of Property Act because those are to be understood in the light of the enactment in question: (4) those transactions which are subsisting on the date of promulgation of

President's Order No. 88 of 1972 are hit by section 95A including the transaction entered into by way of an out and out sale with an agreement to reconvey, made whether before or after the promulgation of President's Order No. 88 of 1972: and (5) as for the transactions which are not alive before the promulgation of President's Order No. 88 of 1972 they are concluded by the transactions past and closed.

11. Reading the provisions of section 95A and our decision above it cannot be denied that the transactions in the present case (by way of an out and out sale with an agreement to reconvey) shall be deemed to be a complete usufructuary mortgage and it must be said that the High Court Division was wrong in holding that the transaction "cannot be treated as a mortgage transaction in the light of the above decision". But then the question will still be that to attract the application of section 95A the

transaction must be a subsisting one on the date of promulgation of President's Order No. 88 of 1972 (3-8-72) and the transactions which are not alive on that date are to be treated as transactions past and closed. This is precisely what has been laid down in clauses (4) and (5) of paragraph 11 of the judgment quoted above.

12. In the instant case, the parties agreed by the transaction in question that the period of mortgage will be for 4 years beginning from 24-6-1967. So, the transaction cannot be said to be alive and subsisting on the date of promulgation of President's Order No. 88 of 1972, i.e. on 3-8-1972. It was a transaction past and closed. Mr. TH Khan wanted us to interpret section 95A as laying down that notwithstanding anything contained in the document relating to the transfer the same should be deemed to be a complete usufructuary mortgage for a period of 7 years and, in that view of the matter, he submits that the transaction was subsisting on 3-8-1972. We find it

plainly difficult to accept his submission. The import of the provision of section 95A is, that whatever may be the period mentioned in the document the mortgage will be deemed to be for a period "not exceeding seven years." The intention of the law is to limit the period of mortgage to 7 years. In this connection reference may be made to section 95(1) which also stipulates that the period of complete usufructuary mortgage, which (alone) a raiyat is permitted to enter into, shall not exceed seven years which prior to the amendment in 1969 was fifteen years. This does not mean that the parties cannot or could not make a transaction for less than seven years and that in such a case also, section 95A contemplates mortgage for seven years. Admittedly, the mortgage in the present case was for 4 years and the period having already expired long before 3.8.72, section 95A will have no application to the transaction which was past and closed."

In view of the decision referred to above the transaction, which has been already been closed as well as not been in existence, on 03.08.1972, when the President's Order No. 88 of 1972 was promulgated is to be held that it is a past and closed transaction, wherein the provision as laid down under section 95 or 95A of the S.A. & T. Act would not apply. In the instant case transaction was made on 16.08.1924, which was not been alive on 03.08.1972 accordingly it would be held that transaction is a past and closed transaction and question of redemption either by way of section 95 or 95A of the S.A. & T. Act would not attract in the instant case and the plaintiffs will not get his title over the suit property. Moreover plaintiffs failed to establish his case that his predecessor got back the property by way of the order from Rin Salishi Board rather recording of S.A. and R.S. khatian and the rent receipt as has been given by the government to the defendant upon receiving rent from him apparently shows that the property was never been redeemed in favour of the plaintiff and the title or any possession over the suit land was ever been there in favour of the plaintiff.

Considering all these aspect of this case I am of the view that court below committed no illegality in dismissing the suit.

I thus find no merit in the rule.

In the result, the Rule is discharged and the judgment and decree passed by the court below is hereby affirmed.

Send down the Lower Court Records and communicate the judgment at once.