

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

Present:

Mr. Justice S M Kuddus Zaman

And

Ms. Justice Tamanna Rahman Khalidi

FIRST APPEAL No.49 of 2021

Mohammad Jinna Miah and another

....Appellants

-Versus-

Mosarrof Hossen and others

... Respondents

Mr. Md. Golam Faruque Bhuiyan, Advocate

... For the appellants.

Mr. Md. Mostafa, Senior Advocate with

Mr. Mohammad Masud Parvez, Advocate

Mr. Mohammad Shah Alam, Advocate

... For the respondent Nos.1-2 and 4-5.

Heard on 10.08.2026 and Judgment on 11.08.2026.

S M Kuddus Zaman, J:

This First Appeal is directed against the judgment and decree dated 28.09.2020 passed by the learned Joint District Judge, Additional Court, Cumilla in Title Suit No.132 of 2019 decreeing the suit.

Facts in short are that the respondents as plaintiffs instituted above suit for declaration of title for 39 decimal land and for further declaration that registered deed of heba dated 29.10.2013 executed by defendant No.2 to defendant No.1 and registered kabla deeds dated

07.12.2014 and 15.09.2014 are unlawful, ineffective and not binding upon the plaintiffs alleging that above 39 decimal land belonged to Asia Khatun who died leaving two sons namely plaintiff No.1 Mosharaf and defendant No.2 and three daughters plaintiff No.2-4 as heirs. Plaintiffs inherited above land of Asia Khatun and are in possession in the same through their constituted attorney Kabir Hossain. Defendant No.2 on false claim of oral gift from Asia Khatun unlawfully mutated his name for above land. The plaintiffs have cancelled above mutation of defendant No.2 and got their names mutated for above land. On 20.11.2014 defendant No.1 claimed title in above land.

Defendant Nos.1-3 contested above suit by filing separate written statements alleging that above 39 decimal land belonged to Asia Khatun who transferred the same to his son defendant No.2 by oral gift on 01.06.2006 who got his name mutated and transferred 37 decimal to his wife defendant No.1 by registered deed of gift dated 09.10.2013 who in her turn transferred 27 decimal land to defendant No.3 by two registered kabla deeds dated 23.12.2012 and 07.12.2014.

It was stated by defendant Nos.1 and 2 that Asia Khatun owned and possessed 49 decimal land and she transferred the same to defendant No.2 by oral gift on 01.06.2006 and subsequently sworn an affidavit before the Notary Public. Defendant No.2 mutated his name for above land and transferred 37 decimal land to his wife defendant No.1 by registered deed of gift dated 09.10.2013 who transferred 27

decimal to defendant No.3 by two registered kabla deed dated 23.12.2012 and 07.12.2014 and above defendant is in possession in above land.

At trial plaintiffs examined three witnesses and defendants examined two. Documents of the plaintiffs were marked as Exhibit Nos.1-12 and those of the defendants were marked as Exhibit Nos. "Ka" to "Neo".

The learned Joint District Judge decreed above suit.

Being aggrieved by and dissatisfied with above judgment and decree of the trial Court defendant No.3 as appellant moved to this Court and preferred this First Appeal.

Mr. Md. Golam Faruque Bhuiyan, learned Advocate for the appellants submits that defendant No.3 is a bonafide purchaser for value of 27 decimal land by two registered kabla deeds dated 23.12.2012 and 07.12.2014 from defendant No.1 who got above land from her husband defendant No.2 by a registered deed of gift on 09.10.2013. Defendant No.1 acquired above land from her mother Asia Khatun by oral gift and on the basis of above oral gift he got possession and mutated his name for above land and defendant No.3 is possessing above land. Plaintiffs do not have any possession in above 27 decimal land but the learned Joint District Judge totally failed to appreciate the evidence as to possession of above land and most illegally decreed above suit. Since the plaintiffs could not prove their possession in above

land above suit was hit by Section 42 of the Specific Relief Act, 1877 and liable to be dismissed.

On the other hand Mr. Md. Mostafa, learned Senior Advocate for respondent Nos.1-2 and 4-5 submits that admittedly above 49 decimal land belonged to Asia Khatun who died leaving two sons plaintiff No.1 and defendant No.2 and three daughters plaintiff Nos.3-5 as heirs. As such defendant No.2 inherited only 10 decimal land of Asia Khatun but most unlawfully he transferred 37 decimal land to defendant No.1 by registered deed of heba dated 09.10.2013 who in her turn transferred 27 decimal land to defendant No.3 although she had no title and possession in above land. Plaintiffs are possessing above land as heirs of Asia Khatun and they have got their names mutated for above land after cancellation of mutation of defendant No.2 and the learned Joint District Judge on correct appreciation of above facts and circumstances of the case and evidence on record rightly decreed above suit which calls for no interference.

We have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It is admitted that Asia Khatun was lawful owner and possessor of 49 decimal land who died leaving two sons, plaintiff No.1 and defendant No.2 and three daughters, plaintiff Nos.3-5 as heirs. Plaintiffs claimed title and possession in 39 decimal land as heirs of Asia Khatun. In a suit under Section 42 of the Specific Relief Act, 1877 the plaintiff is

required to prove valid title as well as possession in the disputed land. In spite of having lawful title if the plaintiffs fail to prove possession in disputed land the suit for declaration of title shall be hit by Section 42 of the Specific Relief Act, 1877 and liable to be dismissed.

It turns out from plaint that on behalf of five plaintiffs the suit was filed by their constituted attorney Md. Kabir Hossain. At Paragraph No.5 of the plaint it has been stated that the plaintiffs are in possession in above 39 decimal land by their constituted attorney Kabir Hossain. Above Kabir Hossain did not give evidence as a plaintiff witness in this suit in support of above claims as set out in the plaint.

Abul Kashem gave evidence as PW1 for all the plaintiffs on the basis of a deed of power of attorney. Above deed of power of attorney of PW1 Kashem was marked as Exhibit No.12 which shows that above deed was executed by plaintiff No.1 alone and other plaintiffs did not authorize him to give evidence on their behalf. Above suit was filed by the constituted attorney of the plaintiffs Kabir Hossain not by PW1 Abul Kashem. No plaintiff has given evidence in above suit. As such it remains not proved that all plaintiffs jointly filed above suit.

As to the possession of above land PW1 stated that the plaintiffs jointly possessed above land. PW2 Kamal Miah stated in his evidence that disputed land is possessed by Mosharaf, Plaintiff No.1 through Jakir Hossain. Above Jakir Hossain did not give evidence in support of above claim of PW2 Kamal Miah. PW3 Shahid Miah stated that the

plaintiffs possessed above land by giving pattan to Jakir Hossain. In cross examination he stated that defendant No.2 transferred above land to Mohsin and Ferdous. Above evidence of PW1 Kashem, PW2 Kamal and PW3 Shahid contradicts the claim as set out in the plaint that plaintiffs possess above land by their attorney Kabir Hossain. As such of PWs 1, 2 and 3 could not prove possession in above land.

Section 17(1)aa of the Registration Act, 1908 provides for compulsory registration of a declaration of hiba and the transfer of disputed land by Asia Khatun by oral gift on 01.06.2006 was unlawful which did not cheat away title or right for defendant NO.2 in above land in June 2006. As such defendant No.2 did not acquire lawful title in above 49 decimal land of Asia Khatun on the basis of oral gift from her mother. Defendant No.1 transferred 27 decimal land to defendant No.3 by two registered kabla deed dated 23.12.2012 and 07.12.2014. Defendant No.2 and his wife defendant No.1 had lawful title only in 10 decimal land of Asia Khatun and her transferee defendant No.3 got valid title only in that 10 decimal land.

The son and daughters of Asia Khatun be at liberty to file a suit for partition for 49 decimal land, if so advised. But as mentioned above this suit was not filed by the son and daughters of Asia Khatun nor anyone of them gave evidence in Court.

In above view of the facts and circumstances of the case and evidence on record we hold that the learned Joint District Judge

committed serious illegality in decreeing above suit which is not tenable in law and this First Appeal deserves to be allowed.

In the result, this First Appeal is allowed.

The impugned judgment and decree dated 28.09.2020 passed by the learned Joint District Judge, Additional Court, Cumilla in Title Suit No.132 of 2019 is set aside and above suit is dismissed on contest against defendant Nos.1-3 and ex-parte against the rest without cost.

However, there will be no order as to cost.

Send down the lower Court's record immediately.

Tamanna Rahman Khalidi, J:

I agree.

MD. MASUDUR RAHMAN
BENCH OFFICER