

District: Habiganj

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 2732 of 2018

In the matter of :

Md. Saiful Islam Khan alias Abul Kalam Khan
... Petitioner

-Versus-

Mst. Rukhia Begum and others
...Opposite parties

Mr. Monishankar Sarkar, Advocate
...For the petitioner

Mr. Md. Jahangir Kabir, Advocate
...For the opposite parties

Heard on:28.01.2025, 04.02.2025

Judgment on: 24.02.2025

Rule was issued on an application under section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1-7 to show cause as to why the judgment and decree dated 05.03.2018 passed by the Additional District Judge, Habiganj in Title Appeal No. 143 of 1994, reversing those of dated 24.10.1994 passed by the Senior Assistant Judge(in charge), Nabiganj,

Habiganj in Title Suit No. 01 of 1992 dismissing the suit should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The predecessor of the opposite party Nos. 1-7, Abdul Kayum Khan as plaintiff filed Title Suit No. 01 of 1992 before the Assistant Judge, Nabiganj, Habiganj for setting aside the ex-parte judgment and decree dated 12.01.1989 passed in Title Suit No. 24 of 1987 as being collusive, fraudulent, illegal and for further declaration that the deed of gift dated 25.01.1987 alleged to have been executed by Abdul Matin Khan in favour of the defendant No.1 is forged, collusive, antedated, in-operative and not binding upon the heirs of Abdul Matin Khan.

Case of the plaint briefly are that the scheduled land was originally belonged to Abdul Matin Khan who used to reside in London; while said Abdul Matin Khan was suffering from cancer, he returned to his home from London on 20.01.1986 along with his wife and thereafter, on 31.01.1986 he died. At the time of death, he had 1(one) wife, defendant No. 2; one daughter,

defendant Nos. 4, and 5(five) sons, the plaintiff and defendant Nos. 1, 3, 5 and 6. The local tahsilder in the month of November, 1991 disclosed to the plaintiff that the defendant No. 1 mutated his name in respect of the scheduled property and on going through the mutation record, the plaintiff came to know regarding the ex-parte judgment and decree of Title Suit No. 24 of 1987 and he also came to know that in the said suit the defendant No. 1 (of present suit) claimed that their father Abdul Matin Khan executed an unregistered deed of gift in his favour on 25.01.1986 in respect of the scheduled property. The further case of the plaintiff is that Abdul Matin Khan never executed any deed of gift in favour of defendant No. 1 and the said deed of gift was collusive and forged one; the defendant No. 1 in collusion with others created the same. Challenging the said ex-parte judgment and the authenticity of the deed of gift dated 25.01.1986, the plaintiff filed the suit.

On the other hand, the defendant No. 1 contested the suit by filing a written statement denying all the material averments of plaint contending, inter-alia that Abdul Matin Khan, the

predecessor of the plaintiff and defendants, amongst others sent some of his sons, plaintiff and defendant Nos. 3, 5 and 6 to Saudi Arabia and London for their betterment and upon working in abroad they have acquired a huge wealth and property in home and in abroad. The defendant No. 1 used to look after his father's property in Bangladesh and also looked after his father, Abdul Matin Khan after his returning to home with illness. Considering service of defendant No.1 and his present financial situation comparing with his brothers together with his future welfare, Abdul Matin Khan executed a deed of gift on 25.01.1986 in favour of him in respect of the suit land and delivered possession thereof. Abdul Matin Khan died on 31.01.1986 and as such, he could not cause to register the said deed of gift. Thereafter, the present defendant No. 1 as plaintiff filed Title Suit No. 24 of 1987 before the Court of Sadar Munsif, Habiganj in order to get the deed register, wherein the present plaintiff was impleaded as defendant No. 2 and summons of the said suit was duly served upon the defendants. The defendant No. 1 is in possession of the

suit property and while he has in enjoyment, he permitted to defendant Nos.2 and 3 to run their business in the suit premises. The plaintiff and other defendants are quite aware of the fact of the deed of gift as well as the decree of Title Suit No. 24 of 1987 and as such, the suit is liable to be dismissed. The defendant Nos. 2 and 3 also filed a written statement but did not examine any witness in support of their case.

During trial, the plaintiff examined 5(five) witnesses and adduced documentary evidences as exhibits and defendants examined 6(six) witnesses and produced some documentary evidences.

On conclusion of hearing, learned Senior Assistant Judge, Nabiganj, Habiganj by his judgment and decree dated 24.10.1994 dismissed the suit.

Having been aggrieved by the aforesaid judgment and decree, the heirs of plaintiff filed Title Appeal No. 143 of 1994 before the District Judge, Habiganj. On transfer, the said appeal was heard by the Additional District Judge, Habiganj and by his

judgment and decree dated 05.03.2018 allowed the appeal reversing the judgment and decree of learned Senior Assistant Judge, Nabiganj, Habiganj passed in Title Suit No. 01 of 1992.

Mr. Monishankar Sarkar, learned Advocate for the petitioner submits that the appellate Court below committed error of law in reversing the judgment and decree of the trial Court failing to consider that the summons of Title Suit No. 24 of 1987 were duly served upon the defendants and the said service of summons has been proved before the Court by examining D.Ws. 4 and 5. Moreover, father of the plaintiff and defendants after returning from London used to stay in the house of defendant No. 1 and the defendant No. 1 looked after him and it is specific case of the defendant No. 1 that this defendant used to look after all the properties of their father, Abdul Matin Khan situated in Bangladesh. The other sons of Abdul Matin Khan are well off, residing in abroad and were sent by their father. Considering the above, Abdul Matin Khan gifted .5 decimals of land along with the shop situated therein to the defendant No. 1 on 25.01.1986 and

the said fact of gift has been adequately proved by the D.Ws 2 and 3, despite the Court of appeal below without having any material, what so ever, arbitrarily disbelieved the fact of execution of the deed of gift and thereby reversed the judgment and decree of the trial Court.

On the other hand, Mr. Md. Jahangir Kabir, learned Senior Advocate appearing for the opposite parties submits that the ex-parte judgment and decree dated 12.01.1989 of Title Suit No. 24 of 1987 was passed behind the back of the plaintiff-opposite parties and the summons of the said suit was not properly served upon the defendants of that suit. The trial Court without having any material in hand illegally found that the defendants of Title Suit No. 24 of 1987 were leaving in same mess, although the defendant No. 1 of the present suit categorically admitted that plaintiff and other defendants were resided in abroad at the time of institution as well as decreeing of the suit. He further submits that the unregistered deed of gift dated 25.01.1986 is a collusive, forged and antedated document and the plaintiff of Title Suit No.

24 of 1987 could not prove the said deed by adducing adequate evidences; the Court of appeal below justly and legally passed it's judgment reversing the judgment and decree of the trial Court.

Heard learned Advocate of the petitioner as well as the opposite parties, perused the revisional application, the counter affidavit and the lower Courts' record.

From the record, it appears that earlier the present defendant No. 1 as plaintiff filed Title Suit No. 24 of 1987 before the Court of Sadar Munsif, Habiganj impleading the wife, sons and daughter of Abdul Matin Khan for a declaration that the deed of gift dated 25.01.1986 executed by the predecessor of plaintiff and defendants, Abdul Matin Khan is a legal and valid deed and which has been acted upon accordingly. The said suit was decreed ex-parte by the judgment and order dated 12.01.1989.

Challenging the said ex-parte decree as well as the authenticity of the deed of gift dated 25.01.1986, the present suit has been filed.

The trial Court upon assessing the evidences on record, in particular, the evidences of D.Ws. 4 and 5 found that the summons of Title Suit No. 24 of 1987 were served upon defendant Nos. 1 and 3 of that suit in person; but in deciding the issue of service of summons upon other defendants found contrary to the evidences on record to the effect that the other defendants, i.e. defendant Nos. 2, 4-6 were leaving in same mess alongwith defendant Nos.1 and 3 and as such, service of notices upon defendant Nos.1 and 3 on behalf of them are sufficient to treat it as proper service upon all the defendants. Although the specific case of the present defendant No. 1 is that the plaintiff (defendant No. 2 of Title Suit No. 24 of 1987) was residing in Saudi Arabia and other defendants were residing in London expending their father's money. Thus, the findings of the trial Court, as to the service of summons of Title Suit No. 24 of 1987 is not tenable in law; and in this regard, the finding of the appellate Court may be taken into consideration to the effect that summons had not been served upon all the defendants and thus, it was ordered to set aside the ex-parte

judgment and decree dated 12.01.1989 of Title Suit No. 24 of 1987; but so far it relates to the declaration that the deed of gift dated 25.01.1986 is concerned, the finding of the Court of appeal below suffers from some infirmity, such as, on examination of 'Exhibit-4', 'Memorandum of Understanding' dated 02.01.1989 executed by the heirs of Abdul Matin Khan, it made a hypothesis without having any reliable evidence and contrary to the recital of the document itself (Exhibit-'4'), wrongly held that the defendant No. 1 did not express and thereby suppressed the fact of execution of the deed of gift at the time of settlement; although from the 'Exhibit-4' it transpires that the settlement was took place for the commitment of heirs of Abdul Matin Khan that they shall not sale or transfer their father's property in any manner; partition and other settlement of the property of Abdul Matin Khan was not an issue in the said settlement. Thus, from the aforesaid settlement it cannot be assumed or held that (as has been assumed by the appellate Court) the defendant No.1 suppressed the fact of execution of the deed of gift in question, thus, wherefrom no

inference can be allowed to be drawn that he concealed the fact with bad intention.

Apart from that the signature of Abdul Matin Khan appeared in the deed of gift was caused to examine by hand writing expert at the instance of plaintiff-opposite party, but on 10.10.2016 (finding of the appellate Court) learned Advocate of the plaintiff-appellant apprised the Court that they will not proceed with their prayer of examination of the signature by hand writing expert. Accordingly, authenticity of the signature of Abdul Matin Khan having not been adjudicated. On the other hand, according to the case of defendant No. 1 regarding the existence of the deed of gift and it's execution appears to have prima-facie case on consideration of the facts and circumstances as well as the evidences on record.

In the premise above, this Court is of the opinion that evidently the summons of Title Suit No. 24 of 1987 having not been served properly upon all the defendants in accordance with the provision of law. Thus, the ex-parte judgment and decree

dated 12.01.1989 is hereby set aside and the Title Suit No. 24 of 1987 is hereby sent to the trial Court (the Court concerned having jurisdiction to hear) for hearing and dispose of it on merit after issuing summons and notices afresh upon both the parties and both the parties are at liberty to adduce their evidences in support of their cases and the findings made in the judgment and decree of the Additional District Judge, Habiganj dated 05.03.2018 in Title Appeal No. 143 of 1994 and the judgment and decree dated 24.10.1994 passed in Title Suit No. 01 of 1992 shall have no bearing upon the Judge concerned and he will decide the suit independently and as expeditiously as possible.

With the aforesaid observation, the present Rule is disposed of without any order as to cost.

Send down the lower Courts' record.

Communicate the judgment and order at once.