

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No.2065 of 2023

Mossammaunt Momotaz Begum and others.

.....Petitioners.

-Versus-

Md. Badol Hossain Dewan and others.

.....Opposite parties.

Mr. Md. Alamgir Mostafizur Rahman, Adv.

.....For the petitioners.

Mr. Md. Rafiqul Hossain Miah, Adv.

.....For the Opposite parties.

Heard and Judgment on 18.03.2024.

A.K.M.Asaduzzaman,J.

This Rule was issued calling upon the opposite party nos. 1-13 to show cause as to why the judgment and decree dated 23.03.2023 passed by the Additional District Judge, 2nd Court, Munshigonj in Title Appeal No. 230 of 2015 affirming those dated 29.10.2015 passed by the Assistant Judge, Gazaria, Munshigonj in Title Suit No. 96 of 2009 (Civil Suit No. 96 of 2009) decreed the suit should not be set aside.

Opposite party nos. 1-13 as plaintiffs filed the suit for rectification of deed against petitioner before the Court of Assistant Judge, Gazaria, Munshigonj.

Plaint case in short inter alia, is that suit land was of CS khatian No. 232, SA khatian No. 272, plot No. 392 and RS Khatian No. 89, Plot No. 725 Mouja- Bhatchor, P.S-Gazaria, Dist. Munshiganj, measuring .25 decimals originally belonged to Salladi. Salladi died leaving behind 01 son Md. Ali, 03 daughters namely, Salma, Taraban and Arobjan and wife Saju Bibi. Saju Bibi gifted 1/3 of her portion to Arobjan by the deed no. 3644 dated 30.10.1939. Md. Ali and Salma died leaving behind 02 sisters namely Taraban and Arobjan and mother Saju Bibi. Saju Bibi died leaving behind 02 daughters namely Taraban and Arobjan. Arobjan got 25 decimal in the suit plot through the partition deed no. 232 dated 16.01.1942. Partition deed was executed between Taraban and Arobjan. Taraban got in other plots. Khatian No. 75 in the place of khatian no. 232 and plot no. 442 in the place of 392 in serial no. 8 were wrongly recorded in that partition deed no. 232. S.A and R.S records were correctly prepared. Arobjan Bibi gifted 16 decimal land out of the suit 25 decimal to her son Abul Hosen by the deed no. 3452 dated

25.09.1978. Arobian died leaving behind 9 decimals land in the suit land and 5 sons namely, Abul Hosen, Abdul, Abul Hasem, A. Malek and A. Khaelk and 03 daughters namely, Kharirun Nesa, Omortaz, Fatema Begum. They made an amicable settlement. Abul Hosen, Abdul Khalek and A. Malek got that 9 decimal of suit plot No. 392. Each of them got 3 decimal out of that 9 decimal in the suit plot. Thus, Abul Hosen got 16 decimal by gift and 3 decimal by amicable settlement. Abul Hosen got 21 decimal land in the suit plot, mutated in his name by the mutation case. 372/07-08 dated 16.08.2007. Abul Hosen transferred 16.5 decimal lands out of 19 decimals in the suit plot to the plaintiff nos. 2-10 by deeds. Plaintiffs were in possession of the suit land, making their house therein for more than 50 years. There were graves in the suit lands. Suit plot was a joint property. It had not been partitioned by metes and bounds. On 10.07.2009, the plaintiffs sought for partition. But the defendant side denied partitioning the suit land on the ground that the suit plot was not in the deed. On that the plaintiffs knew about the wrong recording in the deed. Hence the suit.

Petitioner as defendant contested the suit by filing written statements denying the plaint case, alleging inter alia that suit land

measuring 25 decimal originally belonged to Salladi. Salladi died leaving behind 02 daughters namely, Taraban and Arobian. Taraban became owner in possession of 12.5 decimal lands in the suit plot by inheritance. Her name was not recorded regarding the suit land measuring 12.5 decimal in SA khatian. That did not affect her possession. Taraban died leaving behind 01 daughter Jinnotjan. Jinnotjan became owner in possession of 12.5 decimal lands left by Taraban. Jinnotjan sold and transferred that 12.5 decimal to Abdul Malek by the deed No. 215 dated 01.02.1996. Abdul Malek died leaving behind 02 sons namely Ripon Mia and Liton Mia, 01 daughter Nazma Begum and wife Momtaz Begum. They were the defendant Nos. 1-4. They were owner in possession of the suit land measuring 12.5 decimal by cultivating various seasonal crops therein. Names of predecessors of the plaintiffs were not recorded regarding the suit land in RS khatian. It did not affect their possession. Defendant No. 3 filed a case under section 145 of the Code of Criminal Procedure against the plaintiffs regarding the suit land. Both of the parties were ordered to keep peace in that case. Plaintiff's claim is baseless and suit is liable to be dismissed.

Trial Court framed the following issues-

- 1) Whether the alleged mistake of the suit deed occurred due to mutual mistake of the parties?
- 2) Whether the plaintiffs are entitle to get prayed relief?

By the judgment and decree dated 29.10.2015, trial court decreed the suit in favour of the plaintiffs.

Challenging the said judgment and decree, defendant preferred Title Appeal No. 230 of 2015 before the Court of District Judge, Munshigonj, which was heard on transfer by the Additional District Judge, 2nd Court, Munshigonj, who by the impugned judgment and decree dated 23.03.2023 dismissed the appeal and affirmed the judgment of the trial court.

Challenging the said judgment and decree defendant-petitioner obtained the instant rule.

Mr. Md. Alamgir Mostafizur Rahman, the learned advocate appearing for the petitioners drawing my attention to the plaint of this suit together with the judgment of the courts below submits that in a suit for rectification under section 31 of the Specific Relief Act, the essential elements are required to be establishment to prove, whether the deed was sought to be rectified was made

through fraud or mutual mistakes of parties, failing which plaintiff will not get any decree under section 31 of the Specific Relief Act. In support of his contention, he cited a decision in the case of Most. Shamsunnahar and others Vs. Abdul Mannan and others reported in 16 MLR(AD)2011 page 374.

In the instant suit, neither the plaintiff has disclosed the same fact in the plaint nor the Judge of the Court below have arisen in any way in the concurrent judgment that the deed was done mistakenly by way of fraud and as such the impugned judgment of the court below is not sustainable in law, which are liable to be set aside. He thus prays for making the rule absolute

Mr. Md. Rafiqul Hossain, the learned advocate appearing for the opposite parties drawing my attention to the judgment of the trial court submits that trial court found that the plaintiff got title in the suit land as well as possession in the suit property and defendants could not have any title and possession in the suit property and as such the court below concurrently passed a decree in favour of the plaintiff. Since in the judgment, there is no misreading or non reading of the evidence, rule may be discharged.

Heard the learned Advocate of both the sides and perused the impugned judgment and the L.C. Records.

This is a suit for rectification of deed, which was admittedly a partition deed registered on 16.01.1942 between Arobjan and Tarabjan, the admitted owner of the suit land. Plaintiffs claimed the suit property through Arobjan on the other hand defendant claimed the property through Tarabjan. Plaintiffs claimed that Arobjan got 25 decimals of land in the suit plot being no. 232 and Arobjan got in other plots vide partition deed dated 16.01.1942, khatian no. 75 in the place of khatian no. 232 and plot no. 442 in the place of plot no. 392 in serial no. was mistakenly recorded in partition deed no. 232 but the amount in boundary in the suit land was correctly written and S.A. and R.S. khatian have correctly been recorded in the name of the plaintiff's predecessor. On the other hand, defendants claimed that plaintiff's claimed are not correct. Defendant is the owner and possessor of 12.5 decimals of land in the suit plot.

From going through the plaint, it appears that in paragraph-10, plaintiff has claimed that-

‘এখানে উল্লেখ্য যে, ১৯৭২ ইং সালে আরবজান বিবির ঘড় আগুনে পুড়ে যায় । তখন তার দলিলপত্র ও অন্যান্য গুরুত্বপূর্ণ কাগজপত্র পুড়িয়া যায় । তাই বাদীপক্ষ অতি প্রয়োজনীয় কিছু দলিলপত্র বিগত ২৫.০১.২০০৭ ইং তারিখে জেলা সাব-রেজিষ্ট্রি অফিস, ঢাকা হইতে উত্তোলন করিয়া রাখেন । উক্ত দলিল উত্তোলন করিলে ও বাদীপক্ষ উক্ত বন্টননামা দলিলে অনেকগুলো দাগ থাকায় উক্ত দাগটি ভুল হওয়ার বিষয়ে এই বাদীপক্ষগণ জ্ঞাত ছিলনা । ফলে উক্ত ১০.০৭.২০০৯ ইং তারিখে শালিশ বৈঠকে বিবাদী পক্ষ নালিশী ২৩২ নং রেজি:কৃত বন্টন নামা দলিলে নালিশী সি,এস ৩৩২ নং খতিয়ান সি, এস ৩৯২ নং দাগটি নাই বিধায় দাবী করিলে বাদীপক্ষ তাহাদের বিগত ২৫.০১.২০০৭ ইং তারিখে উঠানো ২৩২ নং রেজি:কৃত বন্টন নামা দলিলটি তপছিল পর্যালোচনা করিয়া উক্ত দলিলে নালিশী দাগের পরিবর্তে ভুল খতিয়ান ও দাগ নং উল্লেখ্য করা হয় মর্মে সর্ব প্রথম জানিতে পারে । ফলে উক্ত ভুল বিষয়ে সর্ব প্রথম অবগত হওয়ায় উক্ত দলিলটি নালিশী দাগ ও খতিয়ান সংশোধন করা প্রয়োজন হওয়ায় বাদী পক্ষ অত্র দলিল সংশোধনের মোকাদ্দমা দায়ের করিতে বাধ্য হইল ।’

Upon going through the plaint it appears that although plaintiff claimed that by way of different mood of transfer property now been owned and possessed by the plaintiff but since it was not been separated properly a salish was held on

10.07.2009, wherein it was firstly known to everybody that the partition deed registered on 16.01.1942 contains some mistakes, which need to be corrected and as such this suit was filed under section 31 of the Specific Relief Act for correction of the said deed dated 16.01.1942. But no where it has been claimed that there was any fraud or any mutual mistake between the parties in the partition deed. Upon analysis the provision as laid down under section 31 of the Specific Relief Act our Appellate Division in a case named Most. Shamsunnahar and others Vs. Abdul Mannan and others reported in 16 MLR(AD)2011 page 374 observed and held that –

‘To establish a case of rectification of any instrument, it is required to prove that there has been either fraud or common mistake. The plaintiff does not claim that 05 decimals of land have been mentioned in the deed due to common mistake or through inadvertence,. In case of the rectification of a deed, the Court will amend the language of the instrument for the purpose of making it accord with the true intention of the parties, having ascertained what that intention was. In most cases of

rectification, the proximate origin of mistake lies in the carelessness or want of skill of the draftsman, but if, one of the parties to conceal some fact does not wish to disclose that has caused the instrument to be so framed as to defeat the intention known to himself, the cases of this kind are likely to be on the verge of fraud. Therefore, in case of rectification of an instrument it must be proved that it was through a mutual mistake of the parties that the instrument in question did not truly express the intention of the parties and the Court is required to see that there has been mistake in framing the instrument and also ascertain the real intention of the parties executing it. If these two elements are satisfied, it is in the discretion of Court to grant rectification. ’

Upon perusal of the plaint as well as decision mentioned above, the submission made by the petitioner find some substance. Court below concurrently found that plaintiffs got the title and possession in the suit property but in a suit for rectification it bears no sense since it is not a suit for declaration of title simplicitor. In the suit for rectification under section 31 of the Specific Relief Act

main essence to decide whether the deed in question, there is any fraud or any mutual mistake in the parties or not as been decided by our Apex Court, which is totally been absent in the plaint as well as judgment passed by the court below, thus giving decree in favour of the plaintiffs wrongly.

In that view of the matter, I find merits in this rule. Impugned judgment and decree passed by the court below appears to be passed without applying their judicial mind and not in accordance with law, which are liable to be set aside. Accordingly the rule is made absolute without any order as to costs. The judgment and decree passed by the Court below are hereby set aside.

Let the order of stay granted earlier by this court is hereby recalled and vacated.

Send down the L.C.Records and communicate the judgment to the court below at once.