

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

Present:
Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.5250 OF 2023

In the matter of:

An application under Section 115(1) of the Code of Civil
Procedure.

And

Rahima Khatun and another

.... Petitioners

-Versus-

Abdus Salam Fakir and others

.... Opposite parties

None appears

.... For the petitioners.

Mr. Md. Aktaruzzaman, Advocate

.... For the opposite party No.1.

Heard on 07.11.2024 and Judgment on 10.11.2024.

This Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and order dated 26.07.2023 passed by the learned Additional District Judge, Additional Court, Barishal in Miscellaneous Appeal No.40 of 2018 allowed the appeal reversing the judgment and order dated 02.08.2018 passed by the learned Senior Assistant Judge (In-charge), Uzipur, Barishal in Pre-emption Case No.59 of 2000 discharging the case of the plaintiff should

not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that the petitioner as petitioner filed above case for pre-emption of 29.5 decimal land under Section 96 of the State Acquisition and Tenancy Act sold by opposite party Nos.3-4 to opposite party Nos.1-2 by two registered kabala deed Nos.3187 and 3194 on 11.10.2000.

It has been alleged that the petitioner is a co-sharer by inheritance and opposite party Nos.1 and 2 are strangers in above holding. Opposite party Nos.3-4 transferred above land secretly without serving any notice upon the petitioner. On 12.11.2000 the petitioner came to know about above transfer of the disputed land and filed this case for pre-emption.

Opposite party Nos.1 and 2 contested the case by filing a joint written objection alleging that opposite party No.3 is a daughter of opposite party Nos.3 and 4 and opposite party No.2 is her husband. Opposite party No.2 is a landless peasant and he had no dwelling house to live. Opposite party Nos.3 and 4 decided to transfer disputed land to their daughter and her husband opposite party Nos.1 and 2 by gift. The petitioner is the full brother of opposite party No.4 and uncle of opposite party No.1 and he was given the responsibility to prepare a deed for gift and arrange its registration. The petitioner fraudulently in collusion with the scribe of above deeds designated above two

documents as sale deeds instead of gift deeds. In fact opposite party Nos.1 and 2 did not have any financial capacity to purchase above land nor they paid any consideration money. Petitioner was an attesting witness to kabala deed No.3187 but he used the name Khalil Fakir.

At trial petitioner examined 3 witnesses and his documents were marked as Exhibit Nos.1-3 series and opposite party Nos.1-2 examined 4 witness and their documents were marked as Exhibit No.'Ka' _ 'Kha' series.

On consideration of facts and circumstances of the case and evidence on record the learned Assistant Judge dismissed the suit.

Being aggrieved by above judgment and order of the trial Court above petitioner preferred Miscellaneous Appeal No.40 of 2008 to the District Judge, Barishal which was heard by the learned Joint District Judge, Additional Court who allowed the appeal, set aside the judgment and order of the trial Court and allowed above case.

Being aggrieved by and dissatisfied with above judgment and order of the Court of Appeal below above respondents as petitioners moved to this Court and obtained this Rule.

No one appears on behalf of the petitioner when the Rule was taken up for hearing although this matter appeared in the list for hearing on several dates.

Mr. Md. Aktaruzzaman, learned Advocate for opposite party Nos.1 submits that two impugned registered deeds effecting the sale of

29.5 decimal land by the opposite party Nos.3 and 4 to opposite party Nos.1 and 2 have been designated as kabala deeds. The opposite party could not prove by legal evidence that those documents were in fact deed of gifts. Undisputedly petitioner is a co-sharer by inheritance and opposite party Nos.1 and 2 are strangers in above holding. Above case was filed within the statutory period of limitation. The petitioner was an attesting witness of the impugned kabala deed No.3187 but that does not constitute waiver and acquiescence and debar the petitioner from seeking pre-emption.

On consideration of above materials on record the learned Judge of the Court of Appeal below rightly set aside the flawed judgment and order of the trial Court and granted pre-emption which calls for no interference.

I have considered the submissions of the learned Advocate for the opposite party and carefully examined all materials on record.

It is admitted that Opposite party No.1 is the daughter of opposite party Nos.3 and 4 and opposite party No.2 is the husband of opposite party No.1 and the petitioner is the brother of opposite party No.4.

Opposite party Nos.1 and 2 has alleged in their written objection and in the evidence of PW1 Raima that her husband was a poor and landless peasant and they did not have any dwelling house. As such her parents opposite party Nos.3 and 4 decided to transfer disputed 29.5 decimal land to them by a deed of gift and assigned the petitioner

to make necessary document. But instead of making a deed of gift the petitioner fraudulently in collusion with the scribe prepared impugned two sale deeds. But in fact opposite party Nos.1 and 2 had no money to pay as consideration of above kabala deeds nor they paid any.

Above claims of opposite party Nos.1-2 were not specifically denied by the petitioner either in the plaint or in his evidence as PW1.

It is not disputed that opposite party Nos.1 and 2 were landless peasants and after getting the disputed land they have constructed a dwelling house and living there along with the members of their family.

In above kabala deed Khalil Fakir was an attesting witness and it is the case of the opposite party that khalil Fakir was in fact the true name of the petitioner. The petitioner has filed this case identifying himself as Abdul Salam Fakir. He denied that Khalil Fakir was his name but in cross examination PW1 Salam Fakir has admitted that in 1997 he participated in the Union Parishad Election as Khalil Fakir. It is proved from above admission that the petitioner was an attesting witness to impugned registered kabala deed No.3187. Since both the kabala deeds were prepared, executed and registered on the same day and in one session and in the same Sub-registry Office it may be presume he was fully aware and gave consent and actively participated in the making of above two kabala deeds.

It has been claimed that opposite party Nos.3-4 in fact gifted above land to their poor daughter without any money and above deeds were fraudulently prepared as kabala deeds by the petitioner. As such the petitioner was required to prove by legal evidence that the impugned deeds were in fact sale deeds and money was consideration of above two deeds. But in his evidence as PW1 the petitioner did not mention that impugned two deeds dated 11.10.2000 were in fact sale deeds. He merely stated that opposite party Nos.3 and 4 secretly executed two deeds on 11.10.2000.

On consideration of above facts and circumstances of the case and evidence on record I hold that the learned Assistant Judge on a detailed and correct analysis of evidence on record rightly held that above case was barred by the principle of waiver of acquiescence and rightly dismissed the case but the learned Judge of the Court of Appeal below failed to appreciate above materials on record correctly and without reversing above evidence based findings of the trial Court most illegally allowed the appeal, set aside the lawful judgment of the trial Court and granted pre-emption which is not tenable in law.

As such I find substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment and order dated 26.07.2023 passed by the learned Additional District Judge, Additional Court, Barishal in Miscellaneous Appeal No.40 of 2018 is set aside and the judgment and order dated 02.08.2018 passed by the learned Senior Assistant Judge (In-charge), Uzirpur, Barishal in Pre-emption Case No.59 of 2000 is restored.

However, there is no order as to costs.

Send down the lower Courts records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER