

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

Present:

Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 2859 OF 2010

Sree Pronob Kumar Ghosh and another
----- Decree Holder-Petitioners

=Versus=

Sree Proshanta Kumar Ghosh
----- Decree Holder-Opposite Party

No one appears

----- For the Petitioners

Mr. Dewan Makhdum, Advocate

----- For the Opposite Party No. 13

Heard on: 23.07.2017

Judgment on: 30.07.2017

At the instance of the present decree-holder-petitioners, Sree Pronob Kumar Ghosh and another, this Rule has been issued calling upon the opposite party No. 1 to show cause as to why the judgment and order No. 17 dated 31.05.2010, passed by the Senior Assistant Judge, and S.C.C. Judge Natore in S.C.C. Execution Case No. 02 of 2009 should not be set aside.

The relevant facts for disposal of the this Rule, inter-alia, are that one Sree Snaholata alias Ghosh filed the S.C.C. No. 02 of 1991 in the court of Small Causes Court, Natore for eviction of the tenants who are the present opposite parties from the land describe in the application of the case. After hearing the parties the learned trial court dismissed the suit by his judgment dated 08.09.1998. Being aggrieved the revisional

application filed by the said Snaholata was made absolute by the High Court Division. The Civil Petition in the Appellate Division of the Supreme Court of Bangladesh was dismissed filed by the present opposite parties. Accordingly, the S.C.C. Suit No. 02 of 1991 was put for execution by filing the Execution Case No. 02 of 09.

During the pendency of the execution case in the executing court, the present petitioners filed an application under Order 1 Rule 10 of the Code of Civil Procedure as they were not made parties in the execution case, even though, they were the decree holders. After hearing the parties the learned executing court rejected the said application for addition of party by the order No. 16 dated 31.05.2010. This revisional application has been filed challenging the said order under Section 25 of the Small Causes Court Act and the Rule was issued thereupon.

This matter has been appearing in the list for a long period of time but no one appears to support the Rule when the matter is taken for hearing.

However, the petitioners have taken ground in the revisional application that the petitioners came to know about the fraud practiced in the execution case initiated by the opposite party No.1 as the petitioners filed a suit for cancellation or modification of power of a attorney vide Suit No. 262 of 2009 before the Court of Senior Assistant Judge, Nature and the suit is now pending and the notice duly served upon the opposite party No. 1. That knowing the filing of the Suit No. 262 of 2009. The

opposite party No. 1 submitted the Execution Case No. 02 of 2009 for his own interest without the interest of the petitioners (own brothers).

The petitioners have also taken ground the learned court below committed an error of law resulting an error in the decision occasioning a failure of justice in failing to consider that the execution case No. 1 of 2009 only running in the name of Sree Proshanta Kumar Ghose but that the Execution Case was conducting by Md. Ruhul Amin from back and behind and subsequently he will be owner and possessor of the suit property in future and the petitioners shall be deprived from their legal interest.

Despite the fact no one appears to oppose the Rule by the opposite party Nos. 1-12 but the Rule has been oppose by the added opposite party No. 13 who filed a counter affidavit today at the time of passing this judgment and order.

Mr. Dewan Makhdum, the learned Advocate appearing for the added opposite party No. 13, submits that under the provisions of Sections 7 and 11 of the power of attorney Act, Sections 8 and 52 of the Transfer of Property Act along with the Order 21 Rule 10 and 16 and the Section 146 of the Code of Civil Procedure, entitled and guaranteed the lawful right of the opposite added party No. 13 over the suit property who had already been substantiated as to that and this court be pleased to dispose of this Rule by directing the lower court as to proceed with the execution Case No. 02 of 2009 for the added opposite party No. 13 who is duly empowered with the provisions of the above mentioned laws.

Considering the above submissions and also considering the revisional application filed under Section 25 of the Small Causes Court Act, 1887 along with annexures therein, it appears to me that the predecessor of the present petitioners and the opposite party No. 1 Snaholata Ghosh was the original owner of the case land after the long course of litigations. She executed or deed to her 3(three) sons by the gift deed No. 9651 dated 24.09.2000. Snaholata filed a suit being S.C.C. Suit No.02 of 1991 for eviction the present opposite party Nos. 2-12 who were the tenants on the suit land. The present petitioners namely Pronob Kumar Gohosh and Prokash Kumar Gohosh thereafter executed a power of attorney in favour of the present opposite party No. 1, Proshanta Kumar Ghose on 23.03.2005. The present opposite party No. 1, sold some property to the present added opposite party No. 13 on 08.01.2008 and also transferred other land but the present petitioners claimed that the present opposite party No. 1 (petitioner's elder brother) practiced fraud by inserting some clouses which was not executed by them.

The petitioners also claimed that they have challenged the legality of the power of attorney dated 23.03.2005 by filing the Case No. 262 of 2009 which is for cancellation or modification of the power of attorney which is still pending. Therefore the execution case filed by Proshanta Kumar Ghosh, the present opposite party No. 1 alone is not sustainable under law without impleading all the necessary parties who are decree holders. The present petitioners executed a power of attorney as the principal therefore any judgment and decree passed in favour of the

attorney is also a decree against the principal and the executor of the power of attorney because of their joint ownership by ownership of the land through the gift dated 24.09.2000.

The present added opposite party No. 13 raised a question that Proshanta as the attorney has already transferred the entire land owned by 3(three) brothers therefore the present petitioners are not necessary party to be added in the Execution Case No. 02 of 2009. In this regard, I have examine the impugned judgment and order but I am not benefited from any further documents as the lower courts records was not called for. I am also not benefited to look at the power of attorney or the deed of gift or any statement by Proshanta. However, if an attorney is a decree holder then the principal must be the decree holders as the joint owners of the land as such the present petitioners are necessary and relevant parties in the execution case as the joint decree holders in the S.C.C. Suit No. 02 of 1991 but the learned trial court unlawfully denied to allow the application for addition of party as there are some allegations from practicing fraud in the power of attorney in order to get undue benefit and to deprive the present petitioners from their entitlement upon the case land measuring 2.16 decimals.

The executing court should have considered the allegation of fraud by inserting new clauses in order to take financial advantage by the present opposite party No. 1, Proshanta and any transfer by practicing fraud to change the terms of the power of attorney would certainly made

any subsequent transfer illegal therefore the executing court should have been more careful before passing the impugned order.

I, therefore, consider that the learned trial court committed an error of law by rejecting the application for addition of party by its order dated 31.05.2010. I am, therefore, inclined to interfere into the judgment and order.

Accordingly, I find merit in the Rule.

In the result, the Rule is made absolute.

The learned Senior Assistant Judge, Natore is hereby directed to include and add the present petitioners as the decree holders in the Execution Case No. 02 of 2009 pending in the trial court and to conclude the hearing by providing any other remedy available to the present petitioners.

The interim order of stay granted at the time of issuance of the Rule upon further proceeding of the S.C.C. Execution Case No. 02 of 2009 is hereby recalled and vacated.

The Section is directed to communicate this judgment and order to the concern court immediately.