

Present:-***Mr. Justice Mahmudul Hoque*****Civil Revision No.5204 of 2011**

Alam Mian

... Petitioner

-Versus-

Pariskarer Nessa being dead her legal heirs;
1(a) Mosammat Khadeza Begum and others

... Opposite- parties

Mr. K.M. Zaber, Advocate

...For the petitioner

Ms. Nusrat Jahan, Advocate

...For the opposite-party No.2.

Judgment on 10th August, 2025.

In this application under Section 115(1) of the Code of Civil Procedure Rule was issued calling upon the opposite party Nos.1 and 2 to show cause as to why the impugned judgment and decree dated 10.04.2011 passed by the learned Additional District Judge, Brahmanbaria in Title Appeal No.53 of 2005 allowing the same and thereby reversing the judgment and decree dated 28.02.2005 passed by the learned Senior Assistant Judge, Nabinagar, Brahmanbaria in Title Suit No.18 of 2003 dismissing the suit 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 relevant for disposal of this Rule, in short, are that the opposite-party Nos.1 and 2, as plaintiff, filed Title Suit No.18 of 2003 in the Court of Senior Assistant Judge, Nabinagar, Brahmanbaria against the present petitioner along with others, as defendant, for a decree of partition of the suit property, stating that the suit property under C.S. Khatian No.80 belonged to Karim Box and Afsar Uddin in equal share who were full brother. As per record of right after selling some property to others and purchasing some properties by Afsar Uddin, finally Afsar Uddin acquired 156 (1.56 acres) decimals of land as mentioned in the schedule to the plaint under schedules 2 and 3. Afsar Uddin died leaving 2 sons, defendant Nos.1 and 2 and only daughter plaintiff No.1. As per Mohammadan Law of inheritance, the plaintiff No.1 inherited $\frac{1}{5}$ th share of the property left by Afsar Uddin and $\frac{4}{5}$ th share of the property inherited by defendant Nos.1 and 2. The plaintiff No.1 used to possess and enjoy her share of the property with her 2 brothers in ejmali by visiting her father house's from time to time. The plaintiff No.1 by a Registered Deed of Gift No.8586 dated 03.11.2002 gifted 32 sataks of land to her daughter, plaintiff No.2 out

of her $\frac{1}{5}$ th share. The plaintiff No.1 demanded partition of the suit property to defendant Nos.1 and 2 and requested them to get the property amicably partitioned for their convenience of possession and enjoyment. But the defendant Nos.1 and 2 did not pay any heed to the request of the plaintiffs and avoiding partition of the property on this and that plea. The plaintiffs finally on 10.02.2003 demanded partition of the property and requested the defendant Nos.1 and 2, but they refused to partition the property consequently, the plaintiffs have become constrained to file the instant suit for decree of partition.

Defendant Nos.1 and 2 contested the suit by filing written statement denying all the material allegations made in the plaint contending, inter alia, that the property admittedly belonged to their father Afsar Uddin. They claimed that the plaintiff No.1 had been facing serious financial crisis they used to help her time to time and at the time of marriage of plaintiff No.2, the defendants gave financial support for her marriage as well as for maintenance of plaintiff No.1. At the time of marriage of plaintiff No.2, plaintiff No.1 came to the house of the defendant Nos.1 and 2 and said them that she will sell the property of her share. The defendant Nos.1 and 2, since the property is

their ancestral property agreed to purchase $\frac{1}{5}$ th share of the plaintiff No.1 at a consideration of Tk.50,000/-. The plaintiff No.1 upon receipt of Tk.50,000/- from the defendants, executed a Nadabipatra on 18.05.1997 relinquishing her share measuring 34 sataks land in favour of defendant Nos.1 and 2. Consequently, the plaintiff No.1 lost her title and interest in the suit property and she had no title to be transferred to her daughter-plaintiff No.2 in the year 2002. Next to Plot No.140 a road has been constructed, resultantly, property of Plot No.140 became a ditch. The defendants by spending huge amount got the ditch filled in and made the same into bhati land and they constructed boundary wall and erected tinshed house on the said plot and started business of Poultry farm. They claimed that the property is not ejmali property. The plaintiffs have no right, title and possession in the suit property. It is also claimed that deed of gift executed and registered by plaintiff No.1 in favour of her daughter plaintiff No.2 on 03.11.2002 is mere a paper transaction and has not been acted upon as the plaintiff No.1 had no right and title to be transferred in favour of plaintiff No.2. The plaintiff No.2 also acquired no title and possession in the suit property. Plaintiff No.1 earlier filed Title Suit No.41 of

1999 for a decree of partition, knowing ultimate result of the said suit he abandoned the same and filed the instant suit with ulterior motive and for illegal gain, as such, the suit is liable to be dismissed.

The trial court framed 5(five) issues for determination of the dispute between the parties. In course of hearing the plaintiff No.2 deposed in favour of plaint case as P.W.1 and the defendant examined 4(four) witnesses as D.Ws including defendant No.2 as D.W.1. Both the parties submitted some documents in support of their claim which were duly marked as exhibits. The trial court after hearing dismissed the suit by its judgment and decree dated 28.02.2005.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the plaintiff, preferred Title Appeal No.53 of 2005 before the learned District Judge, Brahmanbaria. Eventually, the appeal was transferred to the Court of learned Additional District Judge, 1st Court, Brahmanbaria for hearing and disposal, who after hearing by the impugned judgment and decree dated 10.04.2011 allowed the appeal and set aside the judgment and decree of the trial court and decreed the suit. At this juncture, the petitioner moved this Court by filing this revisional application under Section 115(1) of the

Code of Civil Procedure and obtained the present Rule and order of stay.

Mr. K.M. Zaber, learned Advocate appearing for the petitioner at the very outset submits that there is no dispute that the property in question originally belonged to Afsar Uddin, father of defendant Nos.1 and 2 and plaintiff No.1. It is also fact that the defendant Nos.1 and 2 as sons of Afsar Uddin inherited $\frac{4}{5}$ th share of the property and the plaintiff No.1 inherited $\frac{1}{5}$ th share in the property left by Afsar Uddin. He submits that plaintiff No.1 as sister of defendant Nos.1 and 2 was in financial crisis. Consequently, both the brothers used to help her from time to time by giving financial assistance and giving marriage of her daughter plaintiff No.2. At the time of marriage of her daughter plaintiff No.1 came to them and expressed her willingness to sell the property at a consideration of Tk.50,000/-. The defendant Nos.1 and 2 accepted her proposal and paid Tk.50,000/- to the plaintiff No.1 who after receipt of said consideration money executed a Nadabiparta in favour of defendant Nos.1 and 2 on 18.05.1997. Since then the defendant Nos.1 and 2 as owners of the entire property

left Afsar Uddin have been possessing the same by developing portion of the property, erecting tinshed houses thereon. After a long time of relinquishment of share of the plaintiff No.1 in favour of defendant Nos.1 and 2 she with ulterior motive and collusively executed and registered a Deed of Gift No.8586 dated 03.11.2002 gifting the property to her daughter without partition and delivery of possession.

He argued that by unregistered Nadabipatra or the unregistered sale deed the defendant Nos.1 and 2 acquired title in the property as per Section 54 of the Transfer of Property Act, as consideration of the property has been passed couple with delivery of possession to the defendant Nos.1 and 2. As such, since the property has not been partitioned by metes and bound and relinquished title of the plaintiff No.1 in favour of defendant Nos.1 and 2, present suit for a decree of partition at the instance of the plaintiffs is not maintainable. He submits that the trial court while dismissing the suit rightly held and observed that the plaintiffs could not disprove the Nadabipatra, rather refrained from denying the execution of the said deed by plaintiff No.1 who did not come before the court to deny Nadabipatra. He argued that trial court rightly found that thumb impression contain in

Nadabipatra and on the deed of gift with necked eyes seems to be of the same persons. In the absence of contrary evidence it can be construed that by Nadabipatra executed by the plaintiff No.1 in favour of defendant Nos.1 and 2, the defendants acquired title and possession in the suit property. With the relinquishment of title of plaintiff No.1, the plaintiffs being not co-sharer in the suit property, the present suit is not maintainable in law. But the appellate court without controverting the findings and observations of the trial court most unfortunately found that Nadabipatra creates no title in favour of defendant Nos.1 and 2 and the same has not been proved by obtaining expert opinion and citing attesting witness, deed writer and identifier and as such, committed an error of law in the decision occasioning failure of justice.

Ms. Nusrat Jahan, learned Advocate appearing for the opposite party No.2 submits that admittedly plaintiff No.1 is sister of defendant Nos.1 and 2 who as per law of inheritance is entitled to get $\frac{1}{5}$ th share of the property left by their father. She argued that plaintiff No.1 in her turn gifted her share in favour of her daughter plaintiff No.2 by a registered Deed of Gift No.8586 dated 03.11.2002 measuring 32

sataks and after making gift the plaintiff had 1·5 sataks in her share. She submits that only claim of the defendant Nos.1 and 2 that plaintiff No.1 by a deed of relinquishment dated 18.05.1997 gave up her property in favour of her 2 brothers, defendant Nos.1 and 2 upon receipt of consideration of Tk. 50,000/-, which is unregistered document and the language of the document show that this is a sale deed not Nadabipatra. She submits that any deed of sale exceeding the value of Tk.1,00/- is compulsorily registerable under Section 17 of the Registration Act. Unless a sale deed is registered under Registration Act no title passed to the purchaser, as such, by the unregistered deed dated 18.05.1997 (Exhibit-Ka), the defendants acquired no title in the property of the plaintiff No.1. In support of her submissions she has referred to the case of *Tara Mohan Barman Vs. Ananda Mohan Barman and others* reported in **48 DLR (HC)226**.

Apart from this she submits that the said Nadabipatra has been denied by plaintiff No.2 who is happened to be recipient of gift from her mother. When execution of unregistered deed by plaintiff No.1 is denied it was incumbent upon the defendant Nos.1 and 2 to produce witness before the trial court, such as scribe, Anowar Hossain,

identifier Anowrul Hoque and attesting witness in whose presence the deed was executed by plaintiff No.1 and received consideration money. But the defendant Nos.1 and 2 though examined as many as 4 D.Ws including defendant No.2 none of them could say at what time, in whose presence the plaintiff No.1 put her thumb on the deed. The trial court while dismissing the suit most unfortunately failed to find such fact and without examining the thumb impression by Hand Writing Expert on his own motion held that the thumb impression on both the deeds are of the same person which is beyond provisions of law.

She finally argued that the deed of plaintiff No.2 dated 03.11.2002 is a registered deed of gift nothing contrary came before the trial court that the deed of gift of the plaintiff No.2 is fraudulent or fabricated. In the absence of any contrary evidence a registered deed shall take preference over unregistered deed which has not been proved in accordance with law. Therefore, by the unregistered deed though defendant Nos.1 and 2 claimed title in the property, as per law they acquired no title on the basis of the said deed, as such, the

appellate court rightly allowed the appeal and set aside the judgment and decree of the trial court.

Heard the learned Advocates of both the sides, have gone through the revisional application, plaint, written statement, evidences both oral and documentary available in lower court records and the impugned judgment and decree of both the courts below.

Both the parties unequivocally conceded that the property in question originally belonged to Afsar Uddin who died leaving 2 sons and only daughter-plaintiff No.1. As per law of inheritance, the plaintiff No.1 inherited $\frac{1}{5}$ th share in the property and defendant Nos.1 and 2, $\frac{4}{5}$ th share. The plaintiffs claimed that by a registered Deed of Gift No.8586 dated 03.11.2002, the plaintiff No.1 gifted 32 sataks of land out of her share to her daughter plaintiff No.2.

On the other hand, defendant Nos.1 and 2 claimed that plaintiff No.1 upon receipt of Tk.50,000/- executed a Nadabipatra in favour of defendants giving up his title and interest in the property and as such, the plaintiff No.1 had no title in the property to be transferred in favour of plaintiff No.2. They also claimed that though plaintiff No.1

by a registered deed of gift, gifted undivided property to her daughter, plaintiff No.2, it has not been acted upon with delivery of possession which is one of the important factor of the valid gift. The plaintiffs to prove their case deposed as P.W. and filed C.S. Khatian No.80, deed of gift dated 03.11.2002 (Exhibit-2) and the defendant Nos.1 and 2 filed only document unregistered Nadabipatra as Exhibit-Ka.

The trial court dismissed the suit holding that plaintiff No.1 by unregistered Nadabipatra relinquished her share in favour of her 2 bothers defendant Nos.1 and 2, as such, she has no right, title in the property and the deed of gift in favour of her daughter-plaintiff No.2 has not been acted upon and she did not acquire title in the property, holding that the thumb impressions of both the deeds are of the same persons and a gift of undivided property is invalid under Doctrine of Musha in Mohammadan Law. The appellate court while allowing the appeal held that the trial court failed to appreciate the evidences on record both oral and documentary and held that alleged unregistered Nadabipatra has not been proved in accordance with law by citing deed writer, identifier, attesting witness in whose presence plaintiff No.1 put her thumb impression and received money. Only one

attesting witness examined who could not prove execution of the said Nadabipatra.

Apart from this the appellate court held that an unregistered deed of Nadabipatra or sale is not a document of title unless it is registered under Section 17 of the Registration Act and also held that the trial court committed an error of law by holding that both the thumb impressions of plaintiff No.1 are seems to be of the same person without obtaining opinion of the Hand Writing Expert.

I have gone through both the judgment and decree of the courts below. It appears that the trial court while dismissing the suit wrongly took responsibility on his soldier ignoring provisions of law, in particular, thumb impression, without sending the same to the Hand Writing Expert for opinion. A signature may be looked into by the court for comparison, but thumb impression of a person cannot be judged with necked eyes without obtaining Hand Writing Expert opinion, but the trial court did so. The trial court wrongly observed that undivided property cannot be gifted under Doctrine of Musha, but failed to find that this is not a gift under Mohammadan Law even if the gift made under Mohammadan Law, gift of undivided property is

not void or voidable, but this can be said as irregular not invalid in law. Moreover, this is a gift under the Transfer of Property Act, as such, Doctrine of Musha is not applicable in the present case. Even if the unregistered Nadabipatra construed to be executed by plaintiff No.1 it cannot be considered as valid document of title unless it is registered under the Registration Act. Therefore, the appellate court while allowing the appeal rightly held that the defendant Nos.1 and 2 on the basis of unregistered deed acquired no title denying title of the plaintiff No.1 as one of the heirs of Afsar Uddin. She had every right to gift her property in favour of her daughter plaintiff No.2. In case of making any gift by mother in favour of daughter or son, by husband in favour of wife, father in favour of son physical delivery of possession is not necessary. Where the plaintiff No.1 is admittedly a co-sharer defendant Nos.1 and 2 being full brothers they used to possess the suit property on behalf of sister also and as such, formal delivery of possession is not fatal in the instant case. Therefore, the appellate court in allowing appeal and decreeing the suit committed no illegality or error of law in the decision occasioning failure of justice.

Taking into consideration the above, this Court finds no merit in the Rule as well as in the submissions of the learned Advocate for the petitioner calling for interference by this Court.

In the result, the Rule is discharged, however, without any order as to costs.

The order of stay granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.