

Bench:

Mr. Justice Bhishmadev Chakrabortty

Civil Revision No. 1573 of 2012

Md. Abdul Jabbar and another

.....petitioners

-Versus-

Fatema Khatun and others.

.....opposite parties

Mr. SK. Sharifuddin, Advocate

..... for the petitioners

Mr. Ali Imam Khaled Rahim with

Mr. Indrajit Kumar Moulick, Advocates

..... for opposite parties 1-10

Judgment on 10.06.2024

The Rule was issued calling upon the plaintiff-opposite parties to show cause as to why the judgment and decree of the District Judge, Jhenaidah passed on 08.03.2012 in Title Appeal No.97 of 2011 allowing the appeal reversing the judgment and decree of the Senior Assistant Judge, Sadar, Jhenaidah passed on 30.06.2011 in Title Suit No.200 of 2004 dismissing the suit should not be set aside and/or such other or further order or orders passed to this court may seem fit and proper.

The plaint case, in brief, is that the land described in schedule 2 of the plaint covered by the deed of *kabalas* dated 18.06.2003, 23.05.2004, 21.07.2004 and 04.08.2004 originally belonged to Khorshed Ali Sheikh. During his possession and enjoyment he erected a house in plot 208 for plaintiff 3, his daughter. Plaintiff 3 has been residing therein. Plaintiffs 6-9 also erected a house in the compact block comprising of plots 91, 88,

192 and 189. After Kharshed Ali's death plaintiffs 6-9 have been residing therein. During life time Khorshed used to enjoy the said land with other lands on payment of rent to the concerned. Before his death he suffered for 5-6 months from old age diseases. He died on 27.09.2004 leaving behind plaintiffs 1-10 and defendant 2 as heirs. The plaintiffs have been maintaining possession in the suit land covered by the disputed documents within the knowledge of all concerned. Defendant 1 suddenly claimed the suit land on 30.09.2004 by virtue of the *kabalas* described in schedule 1 to the plaint. The plaintiffs got astonished and asked defendant 1 to show the documents. He then supplied them the photostat copies of those deeds. On perusal of the photo copies of the deeds the plaintiffs came to learn that those shown to have been executed and registered by Khorshed but he did never do it. Plaintiffs then arranged a *salish* in presence of the local elites but defendant 1 did not appear in the sitting. It was discussed in the *salish* that Khorshed was a *jotder* and he had financial ability and there could be no reason for him to sell the land. Before his death he told some persons that he did not transfer any land except .05 acres to each of his daughters. Plaintiffs procured certified copies of the disputed *kabalas* dated 10.10.2004 and came to learn that the land belonged to predecessor of the plaintiffs 3-8 also been included in the deeds. The thumb impressions put in the alleged deeds are forged. Defendant 1 has no possession in the land. He earlier

forged a cheque. The plaintiffs could not find some documents of Khorshed after his death and they suspected that defendant 1 had stolen those. Taking advantage of Khorshed's son-in-law he created the documents by false personation. The land of the documents appertains plots 188, 192, 194 and 195 and they are in possession of a compact block of plots 1170, 1172 and 1173 of Pabahati Mouza. Hence, the suit for declaration that the disputed *kabalas* are forged, collusive, inoperative, illegal, without any consideration and not binding upon the plaintiffs.

Defendants 1 and 2 contested the suit by filing written statement denying the statements made in the plaint. They further contended that Khorshed Ali had 2 (two) wives. He had 6 (six) daughters of his first wife. Plaintiff 10 is his second wife. Defendant 2 is the daughter of plaintiff 10. Khorshed loved defendant 2, his youngest daughter very much. Having been pleased with the behavior of defendant 1 he gave defendant 2 marriage with him 4 years ago. Khorshed was shocked at the early death of his only son Ekabbor. At that time defendant 1 looked after him. Khorshed used to treat him as his son and loved him very much. He used to manage the family affairs of Khorshed and also looked after his cases pending in various Courts. Khorshed gifted land to all of his daughters including the second wife measuring .05 acres each by separate registered deeds from different plots. In need of money he wanted to sell a part of his

land at his old age and defendant 1 paying consideration money purchased land through *kabalas* described in the schedule to the plaint and took possession thereof. After filing of the suit the plaintiffs compelled defendant 1 to go into the office of Truck Samity on 26.11.2004 and on threat of death took his signatures on some blank stamp papers. He then filed a criminal case against them which is still pending. The deeds in question were executed and registered by Khorshed. The suit has been filed on false statement which is liable to be dismissed.

On pleadings the trial Court framed 5 issues. During trial the plaintiffs examined 3 (three) witnesses and their documents were exhibits-1-5 series. On the other hand, the contesting defendants examined 6 (six) witnesses and produced their documents exhibits-‘Ka’-‘Gha’ series and ‘Ka (1)’-‘Ka (3)’ series. However, the Assistant Judge dismissed the suit deciding all the material issues against the plaintiffs. Against which the plaintiffs preferred appeal before the District Judge, Jhenaidah who allowed the appeal set aside the judgment of the trial Court and decreed the suit which prompted the defendants to approach this Court with this revision and the Rule was issued.

Mr. SK. Sharifuddin, learned Advocate for the petitioners taking me through the judgments passed by the Courts below submits that the appellate Court did not follow the provisions of

Order 41 Rule 31 of the Code of Civil Procedure (the Code) in writing the judgment. The Court of appeal made general observation other than the material points affecting the merit of the case. It did not reverse the findings and decision passed by the trial Court on cogent reasoning. He then submits that admittedly defendant 1 is a co-sharer in the suit land left by Khorshed. The land comprises of several *khatians* of different *mouza* and, therefore, the present suit praying only for declaration against the *kabalas* without any prayer for partition of the total land is not maintainable. The finding of possession of the lower appellate Court where the parties are in joint possession in the *khatians* and plots is totally wrong. In deciding the matter the appellate Court mainly relied on evidence of the defendants but the defects of defence case does not mean that the plaintiff's case has been proved. Mr. Sharifuddin finally submits that admittedly Khorshed executed and registered deeds of gift to his 6 (six) daughters and wife who are the plaintiffs in this suit. They although alleged forgery in preparing the deeds but did not take any step to compare the thumb impressions of Khorshed put therein with his admitted LTIs on the deeds of gift. The trial Court although gave specific finding and reasoning on this particular issue but the Court of appeal overlooked it. In this case, the plaintiffs hopelessly failed to prove that defendant 1 committed any forgery in execution and registration of the *kabalas*. The trial Court

correctly assessed the evidence of witnesses and dismissed the suit. The Court of appeal committed error of law resulting in an error in such decision occasioning failure of justice in allowing the appeal which is to be interfered with by this Court in revision, he concludes.

Mr. Ali Imam Khaled Rahim, learned Advocate appearing with Mr. Indrajit Kumar Moulick for opposite parties 1-10 on the other hand opposes the Rule and supports the judgment passed by the appellate Court. Referring to the evidence of DWs 2, 3 and 4 he submits that DW 2 is the deed writer and DWs 3 and 4 are the attesting witnesses to the deed but from their evidence it is found that they were not at all acquainted with Khorshed. Admittedly Khorshed was 111/112 years of age at the time of execution and registration of the alleged *kabalas* but the age of DWs 3 and 4 appears to be 46 and 37 respectively and any kind of intimacy between them is against the principle of common course of natural events and human conduct. He then refers to the evidence of DW 2 the deed writer and submits that actually he wrote three deeds executed by Khorshed through which the land has been transferred to defendant 1. It is found from his evidence that he wrote another deed by which Khorshed gifted .05 acres of land to defendant 2. The trial Court erroneously found that all the previous deeds of gift by Khorshed to his 6 (six) daughters were written by DW2. If the evidence of DWs 3 and 4 is assessed together it would be

found that they made false statement on oath and, therefore, the execution and registration of the *kabalas* in their presence cannot be believed. He refers to the provisions of section 114 of the Evidence Act and submits that if the evidence of witnesses is considered all together, it may safely be presumed that in the common course natural events and human conduct and public and private business Khorshed did not execute and register *kabalas* in favour of defendant 1 Abdul Jabbar. In the attending facts and circumstances, it can be held that defendant 1 on false personation executed and registered *kabalas* only to grab the property taking the advantage of Khorshed's old age ailment. He then refers to the case of Haidernessa and another vs. Monowara Begum and others, 16 BLD (AD) 281 and submits that the Court of appeal below being the last Court of fact appreciated the evidence of witnesses and this Division has a little to do any inference with the final Court of fact. There is no misreading and non consideration of the evidence of witnesses and other materials on record for which the judgment passed by the appellate Court may be interfered with. Mr. Rahim finally submits that due to inadvantage and lack of proper advice of the learned Advocate, the plaintiffs failed to file any application in the Court below to send the LTIs of Khorshed put in the disputed deeds to compare with his admitted LTIs put in the deeds of gift. To resolve the dispute between the parties and proper adjudication of the suit this Court may send the case on

remand to either of the Courts below giving a chance to the plaintiffs to take step to that effect. However, considering all aspects of the case, this Rule having no merit would be discharged.

I have considered the submissions of both the sides, gone through the judgments passed by the Courts below and other materials on record. It is admitted fact that the land described in schedule 2 to the plaint covered by the deeds in schedule 1 belonged to Khorshed Sheikh. It is also admitted fact that the plaintiffs being daughters and wife and defendant 2 another daughter are his legal heirs. In the suit the plaintiffs sought declaration that the *kabalas* described in schedule 1 to the plaint are collusive, inoperative, illegal without any consideration, not binding upon them and did not affect the title of the plaintiffs. In the plaint the allegation has been brought that defendant 1 Jabbar took some documents of Khorshed without his knowledge and has created the deeds by false personation. Actually Khorshed did never execute and register those *kabalas* by putting his thumb impressions. The onus of proving the aforesaid facts lies upon the plaintiffs under section 101 of the Evidence Act. It is to be proved by them as per the provisions of section 102 of the Evidence Act that in execution and registration of the *kabalas* defendant 1 committed fraud and forgery. The plaintiffs although examined 3 (three) witnesses to prove the case but failed to bring out anything

that Jabbar had stolen the documents of Khorshed or with those he created the *kabalas* under challenge. The other case of the plaintiffs is that a *salish* was held with Jabbar just after few days of Khorshed's death. But it is found that defendant 1 was not present in the *salish* and it ended fruitless and as such the aforesaid fact in no way help them.

The appellate Court most erroneously relied on the case of defendants shifting onus of proof upon them. By now it is settled principle that there may be thousands of defects in the defence case but those cannot be taken into account to decree the plaintiff's suit. Admittedly Khorshed gifted .05 acres of land to each of his daughters through registered deeds. The above fact has been admitted by plaintiffs' witnesses in evidence but they did not dare to submit those documents in the Court to compare the LIT's put therein with the thumb impressions of disputed *kabalas* under challenge. Having specific findings of trial Court to that effect the plaintiffs did not take any step to that effect in the appeal, even here in this revision. Mr. Rahim, learned Advocate for the opposite parties however made alternative prayer to send the case on remand to either of the Courts below for ends of justice to take steps by the plaintiffs to that effect. But I hold that a case should not be sent on remand to fill up lacuna of either of the parties [Reliance placed on *Aticullah and others vs. Jafala Begum and others*, 54 DLR (AD) 74].

The Court of appeal below in deciding that Khorshed did not execute and register the *kabalas* relied on the evidence of DWs 2, 3 and 4. DWs 3 and 4 are the attesting witnesses and DW 2 is the deed writer. It came out from evidence of DW 2 that except the 3 deeds out of 4, he wrote another deed of gift executed and registered by Khorshed. He was cross-examined by the plaintiffs but nothing came out adverse that he was not acquainted with Khorshed or he (Khorshed) did not go to him on those dates to execute and register the *kabalas*. The findings of the appellate Court regarding dissimilarity of the ages of DWs 2, 3 and 4 with the age of deceased Khorshed in no way effects the merit of this case. A man of 100 years of age may be look like 70/80 years considering his physical structure and health condition. It came out in the evidence that Khorshed was short in height. It is difficult to understand the age of a short man from his outlook and, therefore, the finding and decision of the lower appellate Court mainly relying on the age of late Khorshed and of PWs 2 and 3 appears to me perverse and cannot be sustained. It further appears that defendant 2 being a daughter of Khorshed is a co-sharer of total land left by him including the suit land. Therefore, the instant suit only praying for declaration that the deeds in question are collusive, inoperative, illegal not binding upon the plaintiffs without any prayer for partition of whole land left by Khorshed is not maintainable.

Under the facts and circumstances, I find that the Court of appeal in allowing the appeal did not at all follow the provisions of Order 41 Rule 31 of the Code and thereby committed error of law resulting in an error in such decision occasioning failure of justice which is required to be interfered with by me.

Therefore, I find merit in this Rule. Accordingly, the Rule is made absolute. No order as to costs. The judgment and decree passed by the lower appellate Court is hereby set aside and those of the trial Court are restored.

The order of *status quo* stands vacated.

Communicate the judgment and send down the lower Courts' record.