Present:

Mr. Justice Sheikh Abdul Awal
And
Mr. Justice Md. Mansur Alam

First Appeal No. 130 of 2005

In the matter of:
Memorandum of appeal from original decree
-and-
In the matter of:
Md. Hasen Ali Matbar and others
Defendants Nos.1-6 & 8 appellants
Versus
Md. Mohsin Ali and others
Plaintiffs-Respondents

Mr. Md. Khalilur Rahman, Advocate
for the appellants Nos.2-7

Mr.Md. Eunus with
Mr.Mohammed Shazzad Ali Chowdhury, Advocates
for the respondent No. 1

Heard on: 27.10.24, 03.11.24, 10.11.24 & 18.10.2024
Judgment on: 21.11.2024

Md.Mansur Alam, J

This appeal is directed against the judgment and decree dated 28.03.2005 (decree signed on 04.04.2005) passed by the learned Joint District Judge, Arbitration Court, Dhaka in Title Suit No. 83 of 2004 decreeing the suit.

The facts, relevant for disposal of this appeal, in brief are that the plaintiff-respondent filed the Suit No. 83 of 2004 for the following reliefs:

a) a decree for declaration of right, title and joint possession over the suit land;

b) also for a declaration that the impugned wasiatnama deed is illegal, not acted upon and not binding upon the plaintiff-respondents.

The plaintiff-respondent filed this suit impleading the defendant-appellant Nos.1-8 alleging that his father died leaving behind his four sons namely Hasan, Mohsin(plaintiff), Akbar, Azgor and Roushon. Three daughters namely, Jamila, Aleba, Afia and wife Earun. These heirs had been possessing the suit land jointly. These defendant-appellants on 07.10.1998 claimed the suit land measuring .37 decimal disclosing that Amiruddin transferred the same to these defendant-appellants by way of the alleged wasiatnama deed. Thereafter plaintiff-respondent got the certified copy of the wasiatnama deed on 26.10.1998 and came to know the details of the deed. Father of the plaintiff-respondents did not execute the alleged wasiatnama deed and the suit land was never transferred to these defendant-appellants. This plaintiff-respondent jointly have been possessing the suit land measuring .37 decimal. The father of the plaintiff was never paralyzed or suffered from arthritis. He was also able to put his signature. He was found to do salish darbar in his locality. The defendant-appellants created this wasiatnama deed by way of forge practice. The plaintiff-respondent thus prayed for declaration of right, title and joint possession over the suit land since his right and title was clouded

by the alleged deed. Also the plaintiff-appellant prayed for further declaration to the effect that the alleged wasiatnama deed is illegal, not acted upon and the same is not binding upon the plaintiff-respondents.

Defendant-appellant Nos.1-8 entered appearance in the suit by filing written statement denying all the materials allegation made in the plaint, contending, inter-alia, that there is no cause of action for filling the suit and the suit is barred by limitation. Plaintiff filed the case on false averments and as such, the suit is liable to be dismissed.

Defendant-appellant stated in short is that the plaintiff Hossain Ali became unfavorable of his father Amiruddin because of his disorderly conduct. The father of the plaintiff-respondent Amiruddin transferred the suit land to the defendants-appellant orally and handed over the possession to the defendant as well, when Amiruddin came to know that plaintiff-respondent sold some of his (Amiruddin) fathers land to the others. Thereafter for avoiding legal barrier Amiruddin executed the alleged wasiatnama deed in favour of the defendant-appellant. Now the defendant-appellant have been possessing the suit land.

Upon consideration of the pleadings of the parties, learned Joint District Judge framed the following issues:-

1. whether the suit is maintainable in its present form and manner ?
2. whether the suit is barred by limitation ?

3. whether the suit suffers from defect of parties ?
4. whether the plaintiffs has right, title and joint possession over the suit land ?
5. whether the wasiatnama deed No.2 dated 18.01.1990 registered in Sub-registrar office, Dhaka is illegal, not acted upon and not binding upon the plaintiff ?
6. whether the plaintiff is entitled to get a decree, as prayed for ?

At the trial of the plaintiff examined two witnesses and the defendant side examined 5 witnesses. The defendant-appellant also produced some documents to prove their case. Those are taken as exhibited by the trial Court.

The learned trial Judge upon hearing the parties and on considering the evidence and materials on record by his judgment dated 28.03.2005 decreed the suit mainly on the ground that the plaintiff-respondent by adducing evidence became able to prove his right, title and joint possession over the suit land and also held that the alleged wasiatnama deed is illegal, not acted upon and not binding upon the plaintiff-respondent.

Being aggrieved and dissatisfied by the impugned judgment and decree dated 28.03.2005 passed by the learned Joint District Judge, Arbitration Court, Dhaka in Title Suit No. 83 of 2004, the defendant-appellant preferred this First Appeal.

Mr.Md. Khalilur Rahman the learned Advocate appearing for the defendant-appellants in the course of argument takes us

through the impugned judgment, plaint of the suit, written statements, deposition of the witnesses and other materials on record and then submits that the trial Court below without applying its judicial mind into the facts of the case and law bearing on the subject most illegally decreed the suit on the finding that the plaintiff-respondent have been able to prove his right, title and joint possession over the suit land. The learned Advocate further submits that the trial Court erroneously held the view that the impugned 'wasiatnama' is illegal, not acted upon and not binding upon the plaintiff-respondent. The learned Advocate in this context submits that the trial Court did not appreciate the evidences adduced by the defendants before the Court, the impugned deed though is a registered deed but it may not be rescined merely on basis of oral evidence of the plaintiff-respondent, defendant-appellant proved well that the father of both the plaintiff-respondent and that of the defendant-appellant Amiruddin was paralyzed and was suffering from arthritis, hence he could not sign of his own hand on the impugned deed, that the defendant-appellant submits that a medical certificate Exhibited as 'Ga' where it transpires that Amiruddin was suffering from cardio vascular accident with right sided hemiplegia with high blood pressure, that the learned trial Court did not consider the aspect that the relationship between Amiruddin and the plaintiff-respondent was not ever well, which caused execute the wasiatnama deed leaving plaintiff Hossain Ali aside.

The learned Advocate for the defendant-appellant further submits that under the provision of Muslim Law an wasiatnama in favour of the future heir/heirs if objected to by any heir shall not be binding upon him, an wasiatnama shall not be invalid or void in the eye of law, the trial Court failed to consider that one transferee of wasiatnama is a granddaughter namely Rojina Begum of late Amiruddin Matbar. This Rojina will get her portion of land cited in wasiatnama. Learned Advocate appearing for the defendant-appellant lastly submits that the plaintiff-respondent Mohsin Ali did not consent to that wasiatnama and the alleged deed might not be binding upon him, one transferee of the alleged wasiatnama is granddaughter of Amiruddin. So, she would not be left out of/ her share she is entitled, in this background the wasiatnama as a whole shall not be invalid or void in the eye of law. The learned Advocate for the defendant-appellant referred a case reported in 73 DLR(AD) at page 28 that a legal heirs would not be in any way deprived by rescinding the wasiatnama. But the legal heirs Rojina would get her portion if the alleged wasiatnama exists. As we found that the impugned wasiatnama is not executed by its transferor and the defendant-appellant is failed to prove its execution beyond any doubt. So, the defendant-appellant will not be entitled to get any relief in connection with the share of the legal heirs of Rojina. This legal heirs Rojina and other heirs of late Amiruddin have sufficient relief to inherit the property of Amiruddin as a co-sharer. So, on consideration of the above the

cited decision is not applicable in this appeal. The learned Advocate for the appellant lastly prays for allowing this appeal.

On the other hand, the learned Advocate appearing for the plaintiff-respondent submits that predecessor of the plaintiff and of defendants, Amiruddin was physically and mentally a fit person and did not execute the impugned deed, the thumb impression on the document does not belong to Mr. Amiruddin, the defendant-appellant failed to produce any supporting evidence or documents to substantiate the claim of Amiruddin Matbor's illness, the defendant-appellant also failed to prove that the relationship between Amiruddin and Mohsin Ali was very ill, the defendant-appellant also failed to show that Amiruddin had been admitted into or received treatment at any recognized hospital in the country, the defendant-appellant claimed that Amiruddin executed the alleged deed using his thumb impression on account of his illness but the deed itself indicates that he was physically present at the sub-registry office and acknowledged himself as being in sound physically and mentally. The learned Advocate for the respondent lastly submits that learned trial Court rightly concluded that the impugned wasiatnama deed dated 18.01.1990 is forged, illegal and not binding upon the plaintiff-respondent. The learned trial Court thus decreed the suit in accordance with the provisions of law and on appreciating well the evidence both oral and documentary. The learned Advocate for the respondent lastly prays for dismissing this appeal.

Having heard the learned Advocates from both the sides and having gone through the materials on record including the impugned judgment of the trial Court. The only question that calls for our consideration in this appeal is whether trial Court below was justified in arriving at the findings that the defendant-appellant have been able to prove their wasiatnama to have been executed duly by its transferor Amiruddin, whether the alleged wasiatnama is liable to be set aside. Similarly the other question that calls for our consideration is whether learned trial Court rightly concluded that the impugned wasiatnama deed dated 18.01.1990 is forged, illegal and not binding upon the plaintiff-respondent and whether learned trial Court rightly declared that plaintiff has right title and joint possession over the suit land.

Now, let us scrutinize the evidences adduced by both the parties.

Plaintiff-respondent examined 2 witnesses namely plaintiff Mohsin Ali as Pw1 and Abdus Sattar as Pw2.

The P.W.1 Mohsin Ali stated that Amiruddin Matbor was never paralyzed patient, he used to adjudicate in his locality, he can put his signature, he has been possessing the suit land with others. In his cross examination his testimony could not be shaken by the defendant-appellant. The P.W.2 Md. Abdus Sattar corroborated the evidence of Pw1 Mohsin Ali with regards to the claim of Amiruddin by the defendant-appellant. The Pw2 supported the version of the plaintiff-respondent’s case that the

plaintiff-respondent has been possessing the suit land with other party and the relationship of Amiruddin with plaintiff Mohsin Ali was good. To cross by the defendant-appellant he reaffirmed that he met Amiruddin 5 days prior to his death at his rice machine. Both the witnesses on behalf of the plaintiff-respondent denied the suggestions of the defendant-appellant that Amiruddin could not put his signature or he executed the impugned deed by using his thumb impression or the plaintiff-respondent has no right title and possession over the suit land or defendant nos.1-6 had been possessing the suit land.

On the contrary defendant-respondent examined 5 witnesses namely, Ali Azgor Matobbar as Dw1, Earun Bibi as Dw2, Abul Hossain as Dw3, Dr. Md. Mosharraf Hossain as Dw4, Mominul Islam as Dw 5 and exhibited the impugned wasiatnama as Exhibit-'ka', un-registered family partition deed as Exhibit-Ga. Dw1 Ali Ajgor Matbor stated that relationship between Hossain Ali (Pw-1) and Amiruddin was very ill, Hossain Ali is a very chaotic person. He used to beat his father. His father Amiruddin expressed his desire to gift out the suit land to these defendant-appellant, his father executed the impugned wasiatnama by using his thumb impression on account of the paralyzed condition on his right hand. These appellant have been possessing the suit land and plaintiff-respondent has no possession over the same. To cross he admitted that he did not bring any allegation to the local U.P. Chairman or lodge any G.D. alleging that the plaintiff used to beat his father

Amiruddin. Also he admitted that he has not mentioned to whom the plaintiff sold his fathers' property, he did not submit rent receipt of the shop though he claimed that he himself rented the shop, he did not submit any tax receipt for the same, he admitted that it is not written down in the affidavit that his father was sick and paralyzed, it is written in the affidavit that his father executed the impugned deed by putting his signature before the sub-registrar; Pw2 Earun Bibi stated that plaintiff and defendant are her son, daughter and granddaughter, her husband died 12 years before, he was sick prior to his death, his right hand was paralyzed, the relationship between Mohsin and his father was not good, she knows nothing the reason why their relationship was not good, defendant-appellant have been possessing the suit land, Mohsin has no possession over the same. To cross Dw2 admitted that she used to live in her fathers' house for long 15 years prior to the death of her husband, she came back to her husbands' house after the death of her husband, she had no relation with her husband for long 15 years, she has no knowledge about the activity of her husband in this period. Also she admits that she did not see her husband being paralyzed. She could not say how much land there are in each plot. Also she admits that the shops had been there during the lifetime of her husband. Dw.3 stated that his father in law Amiruddin died 12 years ago, he was sick and had been suffering from paralysis, plaintiff has sold his fathers' property and hence their relationship became hostile. To cross he stated that he

alongwith his wife were not present at the time of execution and registration of the alleged deed, his father in law set up the shops. He denied the suggestions that the plaintiff and defendant jointly possess the land. The Dw4 deposed that he gave treatment to Amiruddin, he had been suffering from cardic vascular accident with right sided hemiplegia, his right hand was paralyzed. He admitted to his cross that he did not bring any registrar to prove that he gave treatment to Amiruddin from 1986-1989. Dw5 Monirul Islam stated that he measured the suit land. He identified a map exhibited as kha. He admitted in his cross-examination that he did his work at the instance of Ajgor and Hashem Ali. He prepared that map sitting at their house, he prepared that map as he was told that they were 5 brothers and one sister, he is not a government surveyor. Nobody put signature on the map in his presence etc.

On careful perusal of the evidences and materials on record, we find that the plaintiff-respondent brought the original Title Suit No. 83 of 2004, for a prayer of declaration of title over the suit land and for a further declaration that impugned wasiatnama is illegal and not binding upon the plaintiff. It is admitted by both the parties that the suit land was belonged to Amiruddin, father of plaintiff-respondent and of defendant-appellant. The defendant-appellant claims that the suit land measuring .37 decimal has been transferred to them by way of impugned wasiatnama. So the defendant-appellant is to prove their claim. But on close perusal it appears that there was no any cogent ground to transfer the same to

the defendant-appellant. The defendant-appellant though raises that the relationship between Amiruddin and plaintiff Hossain Ali was ill, but they could not adduce any tangible/substantive documentary evidence in this aspect. So, the contention of the defendant-appellant to the effect that Amiruddin transferred the suit land by way of impugned wasiatnama on account of his bitter relationship with Hossain Ali is not at all proved.

The next contention of the defendant-appellant is that Amiruddin Matbor willingly and knowingly executed the impugned wasiatnama to the defendant-appellant. But on appreciation of the evidences of the defendant-appellant it appears that they failed to substantiate the claim of Amiruddin Matbor's illness. The defendant-appellant though attempted to characterized Amiruddin as a paralyzed patient, but they were unable to establish this claim from a legal stand point. The defendant-appellant to prove this contention, presented Dw4 who issued a certificate and identified himself as a doctor, but Dw4 failed to produce any registrar or documentation before the Court to show that Mr. Amiruddin Matbor had been admitted to or received treatment at any recognized hospital in the country. So, the defendant-appellant became unable to prove that Amiruddin Matbor was sick or had been suffering from paralyzed at the time of execution of the impugned deed.

The further contention of the defendant-appellant is that since Amiruddin Matbor was a sick and paralyzed individual, so he

was unable to put sign and therefore used a thumb impression on the impugned deed. But the deed itself indicates that Amiruddin Matbor physically present at the sub-registry office and acknowledged himself as being in sound physical and mental condition. So, this directly contradicts the defendants' case and caste serious doubt on their claims. Furthermore it is assumed for the sake of argument that Amiruddin Matbor was paralyzed, the deed should have been executed in commission. So, the learned trial Court on appreciation of the evidences rightly observed that the impugned wasiatnama is not credible and hence learned Court declared the same as illegal, not acted upon and not binding upon the plaintiff-respondent.

The learned Advocate appearing for the defendant-appellant argued that there is a transferee namely Rojina Begum, granddaughter of late Amiruddin is entitled to get her share in wasiatnama. He further submits that plaintiff Mohsin Ali did not consent to the execution of wasiatnama. So, in this background, under the provision of Mustim Law the impugned wasiatnama might not be binding upon him to the extent of his portion, but in no way, granddaughter Rojina Begum be deprived of her share. In this background learned Advocate for the appellant argues that the alleged wasiatnama, therefore be sustained for the interest of Rojina Begum. He further argues that learned trial Court on misconception of the provision of Muslim Law found that a

Muslim cannot transfer more than $\frac{1}{3}$ of his total property by way of wasiatnama and the defendant-appellant have not taken any steps to seek probate for the deed before any competent Court. Learned Advocate for the defendant-appellants argues in this context that for the reason of transferring more than $\frac{1}{3}$ of the total property, the wasiatnama will not be illegal and probate for the Muslim is not necessary. Learned Advocate refers the relevant section of Muslim Law regarding this contention. But these questions will come up only where the execution of the impugned deed is proved. But from the above evidences and from the observation of the learned trial Court, the defendant-appellant have been failed to prove the execution of the impugned wasiatnama. So the subsequent matter, for example, the right of grand daughter of late Amiruddin, or the right of the consented party to the impugned deed or the consequences of the person who is not party to the impugned deed are not required to be determined here.

From the evidence as discussed above it appears that the plaintiff-respondent has been able to prove his joint possession over the suit land, plaintiff as pw1 deposed that his father Amiruddin set up the alleged shops and they all together possess the shop jointly. Pw2 corroborated the testimony of pw1. Dw1 admits that his father also wrote the shop to the plaintiffs. He also admits that he did not submits any rent receipt or tax receipt to prove his possession over the suit land. Plaintiff-respondent and

pw2 categorically stated that the plaintiff-respondent jointly possess the suit land with the defendants-appellant. So plaintiff-respondent have been able to prove his joint possession over the suit land which learned trial Court rightly observed in his judgment.

On meticulously perusal of the entire evidence both oral and documentary, it appears that learned trial Court rightly observed that plaintiff-respondent has been able to prove his right title and joint possession over the suit land by adducing sufficient evidences. The plaintiff-respondents right, title and joint possession has not been hampered by producing the impugned wasiatnama as the defendant-appellant has failed to prove its execution beyond any doubt. Therefore, we are constrained to hold that the impugned judgment of the trial Court below is not liable to be interference. The learned trial judge correctly and properly evaluate the evidence on record as to right, title and joint possession of the plaintiffs-respondent in the suit land and rightly concluded that the defendant-appellant by adducing evidence could not prove the execution of the impugned wasiatnama.

In view of our discussion made in the forgoing paragraph by now it is clear that the instant appeal must be failed.

In the result, the appeal is dismissed.

The impugned judgment and decree dated 28.03.2005 passed by the learned Joint District Judge, Arbitration Court,

Dhaka in Title Suit No. 83 of 2004 decreeing the suit is hereby affirmed.

Send down the lower Courts record with a copy of this Judgment to the Courts below at once.

Sheikh Abdul Awal, J

I agree

Hasan/A.B.O