

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 3665 of 2012

Advocate S.M. Abdus Salam

..... Petitioner.

-Versus-

Most. Salma Khatun alias China and
others

.....Opposite parties.

Mr. Hassan Shaheed Quamruzzaman, Adv.

.....For the petitioner.

None appears

.....For the Opposite parties.

Heard and judgment on 10th July, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite party No.1 and 2 to show cause as to why the judgment and decree dated 30.07.2012 passed by the Joint District Judge, 2nd Court, Jessore in Title Appeal No. 42 of 2010 affirming those dated 30.03.2010

passed by the Assistant Judge, Sadar, Jessore in Title Suit No. 146 of 2001 decreeing the suit should not be set aside.

Opposite party No.1-2 as plaintiff filed Title Suit No. 146 of 2001 before the Court of Assistant Judge, Jessore against the petitioner and others for partition and for cancellation of judgment and decree dated 24.05.1983 passed in Title Suit No. 609 of 1982 as null and void.

Plaint case in short, inter alia, is that the scheduled property of the plaintiff measuring an area of 2.43 acres, situated at 78 No. Kholadanga Mouza appertaining Plot No. 645 and 646 under S.A. khatian No. 549 and 669 shown to have been recorded in the name of Abdus Salam Sikder in 16 annas share. Abdus Salam Sikder transferred the said land in favour of Saiyed Ali Sikder vide registered kabala deed dated 11.02.1970. Saiyed Ali Sikder died leaving behind only son Rabiul Islam Babu, two daughters the plaintiff No.1 and defendant No.2 and one wife, the plaintiff No.2 as his legal heirs. Saiyed Ali Sikder had 2 wives. After divorcing 1st wife he married plaintiff No.2. Plaintiff No.1 and defendant No.2 are the children of defendant No.2 and defendant No.2 is the children of 1st wife. At the time of death of Saiyed Ali Sikder

plaintiff No.1 and defendant No.1 were minor and defendant No.2 was living in her husband's house. At that time defendant No.3 uncle S.M. Abdus Salam as a guardian between plaintiff No.1 and defendant Nos. 1-2 executed a partition deed dated 12.01.1979 and registered it on 23.01.1979. At the time of execution of the partition deed, the plaintiff No.1 and defendant No.1 were minor and inexperienced in the matter of land and the plaintiff No.2 was mentally deficient. (Some lands are excluded from partition deed) When Saiyed Ali Sikder died in the year 1374 BS while working as a peon in the office of Jessore Collectorate, plaintiff No.2 prayed to waive the husband's pension and defendant No.2 prevented it and said that the plaintiff No.2 would not withdraw the pension unless the entire property received by plaintiff No.2 was handed over to him. If the plaintiff No.2 did not agree to the proposal, but the defendant No.2 denied the plaintiffs ownership by showing the gift deed at the end of August, 1999 stating that the land received by their uncle Abdus Salam obtained through gift. Plaintiffs prayed for certified copy of the plaint and application of the Title Suit No. 609 and Misc. Case No. 9 of 85 stated in the said deed and last on 09.08.2000 came to know about

said decree after obtaining certified copy of the plaint of aforesaid suit and application. No summons or notices served upon the plaintiff or no guardian appointed for serving notice upon the plaintiff No.1. Defendant No.3 by virtue of being an advocate concealed the summons notice of the impugned suit obtained the ex parte decree. According to the said judgment and decree and the Deed No. 12527 dated 20.10.1986 executed by the defendant No.3, no title has arisen at all in favour of the defendant No.1 in the disputed land. According to the plaint of the impugned suit. Saiyed Ali Sikder was never the benamder of defendant No.3 or there was no reason to be a benamder of defendant No.1 and 2. In collusion with each other deliberately filed the suit No.42 of 2000 for cancellation of partition deed dated 23.01.1979, which is still running. Defendant No.3 came to the office of NDC and in a conspiratorial manner disclosed that Anwara Khatoon is the divorced wife of Saiyed Ali Sikder. It was fraudulently created and propagated by the defendant No.3. During his life time Saiyed Ali Sikder never granted divorce to the plaintiff No.2 or disclosed any divorced. Plaintiff Salma alias Chaina Khatun's father name is recorded as Sayed Ali Sikder in suit filed by defendant No.3 and

in the Misc. Case No.1 of 1985 filed by defendant No.1 and in Title Suit NO. 640 of 1985 and Title Suit No. 48 of 2016 and Misc. Case No. 50-54/96 pending before the Court of Assistant Judge, Bagharpara. Moreover plaintiff and defendant No.1 had written their fathers name as Saiyed Ali Sikder in deed of redemption dated 18.07.1990 executed in favour of one Moshiar Rahman and Anwara Khatoon written her husband's name as Late Saiyed Ali Sikder. Defendant Nos. 1/3 created gift deed dated 20.10.1986 to deprive the plaintiff. The suit land yet not divided by meets and bound between the sharers. On 15.12.2000 plaintiff requested to partition the property described in the scheduled but defendant denied. On the death of Saiyed Ali Sikder, father of the defendant No.3 despite having 2 sons Saiyed Ali Sikder and defendant No.3 and 4 daughters filed Title Suit No. 48 of 1996 and was obtained decree without mentioning the share of the daughters in the plaint against which Title Appeal No. 105 of 1998 was preferred challenging the said judgment and decree, which was reversed. Thereafter defendant No.3 being aggrieved filed Civil Revision No. 1300 of 1999 before the Hon'ble High Court Division, where the shares of the plaintiff and his other

brothers were affirmed. Such way defendant No.2 filed Title Suit No. 609 of 1982 and obtained ex parte decree on 24.05.1982. Plaintiff brought this suit seeking to set aside the aforesaid judgment and decree and for praying partition.

Petitioner as defendant No.3 contested the suit by filing written statement, denying the plaint case, alleging, inter alia, that the suit land measuring an area of 2.43 acres recorded under S.A. khatian No. 649 and 669 appertaining plots No. 645 and 669 occupied by Abdus Salam Sikder as the recorded tenant, on payment of rent land of plot No. 645 are cultivable lands and lands of Plot No. 646 are partly cultivated and the rest have houses. Defendant No.3 is in usufructuary possession of said land through Bargader. Defendant No.3 decided to accept the job and in the advice of his elder brother, for the security reason, executed and registered a deed of transfer in the name of his elder brother Saiyed Ali Sikder on 11.02.2070. Although the said deed is written in the form of a kabala deed, it is completely non-exchangeable. According to the said deed his elder brother never occupied the land. The deed of the said land along with other documents are with the defendant No.3 and until he is in

possession of the disputed land though plaintiff No.3. Saiyed Ali Sikder had one wife but being a woman of questionable character granted divorce to her on 28.11.1967 by way of executing registry Talaknama. The identity of the father of the defendant No.1 is not known. After divorce was obtained the same, plaintiff No.2 got married to Arshad Ali Mollah of Gournadi. Then plaintiff No.1 Salma Khatoon alias Chaina Khatoon was born. Defendant No.2 Farida Khatoon is the daughter of one Chabed Ali, plaintiff and defendant No.1, posing as the heir of terrorist forces, executed a deed of partition dated 23.01.89 in respect of disputed land of Saiyed Ali Sikder, the defendant was forced to sign the deed as a witness at gun point. And aggrieved by their such behaviour of plaintiff and defendant Nos.1-2, defendant No.3 filed Title Suit No. 609 of 1982 with a prayer for declaration of title and confirmation of possession of the land on the basis of Benami deed and according to partition deed make defendant No.1 as a party to the suit and his father's name was written as Saiyed Ali Sikder. Summons Notices of the said suit were duly issued to the plaintiffs but they did not appear to the court and accordingly exparte judgment was passed on 24.05.1989. Against the said

exparte judgment and decree, the defendants brought Misc. Case No. 9 of 1985 and deliberately the name Chaina has been mentioned referring to defendant No.1 as a minor. On last 30.01.1986, the said case was rejected at the end on contest. And the petitioner (Sayel) side of the case as well as plaintiff No.1 and defendant Nos. 1-2 at the last stage of hearing applied to withdraw their claim of the suit stating that they have no ownership in suit land. When Saiyed Ali Sikder died while he was an employee of Jessore Collectorate, these plaintiffs filed an application claiming pension mentioning them as heirs. The issue of divorce of Saiyed Ali Sikder with plaintiff No.2 was disclosed in the relevant volume on the face of objection of defendant No.3. When the plaintiff filed Suit No. 30 of 1999 against other defendants in respect of Benami Land of Saiyed Ali Sikder. In the said suit, on 29.10.2023, at the time of giving deposition, plaintiff No.1 China Khatoon alias China stated her age as 32, the birth of plaintiff No.2 is given in the fourth year of divorce. As the heir of Saiyed Ali Sikder, the plaintiff has not acquired any title in the plaintiff's land. On the other hand, since the legal ownership of the said land is still intact and the plaintiff is completely title less of the land in

question. The suit of the plaintiff is liable to be dismissed as the suit is based on a false and fabricated statement.

The Assistant Judge framed the following issues.

- i) Whether the suit is maintainable to its present form or not?
- ii) Whether the suit is barred by limitation?
- iii) Whether there are any title and possession of the plaintiffs?
- iv) Whether the judgment and decree of the impugned Title Suit No. 609 of 1982 is fraudulent, collusive, illegal and voidable or not?

Plaintiff examined 3 witnesses and exhibited number of witnesses, which were exhibited in court as Ext. 1-5 series and defendant examined 3 witnesses and produced documents were marked as Ext. Ka to Chha.

By the judgment and decree dated 30.03.2010, the Assistant Judge dismissed the suit on contest.

Challenging the said judgment and decree, plaintiff preferred Title Appeal No. 42 of 2010 before the Court of District Judge, Jessore, which was heard on transfer by the Joint District Judge, 2nd Court, Jessore, who by the impugned judgment and decree dated 30.07.2012 dismissed the appeal and affirmed the judgment of the trial court.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant rule.

Mr. Hassan Shaheed Quamruzzaman, the learned advocate appearing for the petitioner drawing my attention to the judgment of the court below submits that both the court below concurrently committed error of law in disbelieving the plaintiff case arbitrarily. The impugned judgment is not sustainable in law, which is liable to be set aside.

Although the matter is posted in the list along with the name of the learned advocate appearing for the opposite party but no one is found to oppose the rule.

Heard the learned advocate and perused the lower courts record and the impugned judgment.

This is a suit for partition and further declaration that the judgment and decree dated 24.05.1983 passed in Title Suit No. 609 of 1982 is null and void. According to the plaintiff, suit property measuring 2.43 acres of land was belonged to Saiyed Ali Sikder, who purchased it into his name and his own interest. Defendants claim that the said sale deed dated 11.02.1970 was purchased in the name of Saiyed Ali Sikder, he was a benamder. In fact it was owned and possessed by the defendant No.3. After the death of said Saiyed Ali Sikder, he was survived by one son Rabiul Islam @ Babu and two daughters, who are plaintiff No.1 and defendant No.2 and a widow plaintiff No.2. Saiyed Ali Sikder had two wives. After divorce to his first wife, he married plaintiff No.2 as a second wife, who are plaintiff No.1 and defendant No.1 are the two children of plaintiff No.2 and the defendant No.2 is the son of first wife of Saiyed Ali Sikder. When Saiyed Ali Sikder died plaintiff No.1 and defendant No.1 were minor and defendant No.2 resides in her husbands house. When defendant No.3 S.M. Abdus Salam was the guardian of minor children, who executed deed of partition on 12.01.1979 amongst plaintiff No.1 and defendant No. 1 and 2, which was registered on 23.01.1979. At

that time since the plaintiff No.1 and defendant No.1 were minors had no experience of the ownership of land and since plaintiff No.2 was at that time mentally unstable, there were some lands which were out of the deed of partition. Saiyed Ali Sikder died in the year 1974, when plaintiff No.2 applied for getting the pension wherein defendant No.1 try to resist the same and disclosed that if the owned property is not being transferred to him he will not allow the plaintiff No.2 to withdraw the pension, when she refused to accept the proposal, defendant No.1 disclosed that he obtained the entire property from his uncle Abdus Salam and showed a deed of gift done on the last part of August, 1999. In the said deed the existence of Title Suit No. 609 of 82 and Misc. Case No.9 of 85 were disclosed therein and then the plaintiff getting the certified copy of the said cases on 09.08.2000 became confirmed about the existence of the said suits, although notice of the said suit was not been served upon them and plaintiffs were minor and without appointing a court guardian upon the minors, said exparte decree was obtained by the defendant No.3 exparte. By dint of that decree defendant No.3 neither acquired any title of the suit land nor it was established that Saiyed Ali Sikder was a benamder of

the suit property. Since the property was not properly been partitioned and the decree passed as stated above are on collusive and fraudulent, plaintiff filed the suit.

Defendant No.3 petitioner denied all the claim of the plaintiffs in his written statement and said that since the defendant No.3 is a government servant and in order to save him from restriction of the official problem with the consultation of his elder brother, Saiyed Ali Sikder, he purchased the suit property through registered sale deed dated 11.02.2007 in the name of his elder brother Saiyed Ali Sikder. Plaintiff No.2 although is a wife of Saiyed Ali Sikder but since she was a woman of questionable character, he divorced her on 28.11.1967. Defendant No.1 is a foster children. Plaintiff No.1 after getting talak was married to one Arshad Ali Mollah and plaintiff No. 1 Salma Khatoon @ Chaina Khatoon was born in the wedlock of their marriage and had no right to inherit the property of the suit land. Defendant No.2 is the daughter of one Chabed Ali. Plaintiffs and defendant No.1 by creating pressure through terrorist managed to create a partition deed on 23.01.79 upon taking signature of the defendant on gun point and as such defendant No.3 was compelled to file

Title Suit No. 609 of 1982. Since the defendant did not appear, who obtained the ex parte decree on 24.05.1983 on that suit. Against the said decree defendant filed Misc. Case No. 9 of 1985 but that misc. case was dismissed on contest on 30.01.86. Plaintiffs suit is false and is liable to be dismissed with cost.

By the judgment and decree dated 30.03.2010, the Assistant Judge dismissed the suit on contest as well as it was affirmed by the appellate court by the judgment and decree dated 30.07.2012 in Title Appeal No. 42 of 2010, which is under challenged in the instant rule.

Upon perusal of the judgment of the court below together with considering the Lower Court Records it appears that both the court below concurrently found that defendant No.3 failed to establish the fact that Saiyed Ali Sikder was a benamder in the sale deed dated 11.02.70 but it was found that the said property was legally and validly been purchased by Saiyed Ali Sikder by his own money and own interest and remaining in possession all through. The plaintiffs were found to be minor when the alleged deed of partition as has been claimed by the defendant to have been made on 23.01.79 the decree was obtained in Title Suit No.

609 /82 against defendant, who are minor and no court guardians was appointed to protect the right and interest of the defendants in the said suits. Both the court below further observed that no notice was ever been served upon the defendants in the said suits and subsequently Misc. Case No. 9 of 1985 was filed collusively. In the said concurrent findings of the court below there is nothing to show that those were obtained on misreading or non-reading of the evidences. In the premises the decree as has been passed in favour of the plaintiffs concurrently by the court below contains no illegality.

I thus find no merit in the rule.

In the result, the Rule is discharged and the judgment and decree passed by the court below is hereby affirmed.

Send down the Lower Court Records and communicate the judgment at once.