

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Murad-A-Mowla Sohel

First Appeal No.96 of 2001

Jyotish Chandra Dey being dead his heirs:

1(a) Ava Rani Dey and others appellants

-Versus-

Sontosh Kumar Ghose and others respondents

with

Civil Rule No.653(F) of 2002

Jyotish Chandra Dey being dead his heirs:

1(a) Ava Rani Dey and others petitioners

-Versus-

Sontosh Kumar Ghose and others

..... opposite parties

Mr. Md. Faruk Ahmed, Advocate

..... for the appellant

(In appeal and petitioner in the Rule)

Ms. Anjuman Ara Begum, Advocate

..... for respondent 4

(In appeal and opposite party 4 in the Rule)

Mr. Abdul Kader Bhuiyan, Advocate

..... for respondent 7

(In appeal and opposite party 7 in the Rule)

Judgment on 03.09.2025

Bhishmadev Chakrabortty, J:

Since the civil Rule has arisen out of the aforementioned appeal and parties thereto are same, both have been heard together and are being disposed of by this judgment.

This appeal at the instance of plaintiff is directed against the judgment and decree of the then Additional Subordinate Judge, Narayanganj passed on 16.10.2000 in Title Suit 260 of 1992 dismissing the suit for partition with further prayer that the perpetual

lease deed dated 04.03.1953 is collusive, fraudulent and not binding upon the plaintiff.

The plaint case, in brief, is that the lands of CS *Khatian* 33 plot 509 measuring .24 acres and 8 annas of plot 510 measuring .25 acres as described in the schedule to the plaint originally belonged to Gobinda Chandra Dutta and Bipin Chandra Dey in equal share and accordingly CS *Khatian* was prepared in their names. Gobinda Chandra Dutta died issueless. During his lifetime he had brought up Shantosh Kumar Ghose, his nephew as his son and accordingly he got the share of Gobinda Chandra and SA record was prepared in his name according to his share. During his possession and enjoyment in the share, he left for India and started living therein permanently. Bipin Chandra Dey who had 8 *annas* share as recorded in CS *Khatian* died leaving behind his wife Soudamini issueless who acquired life estate in the suit land according to share. Bipin had another brother named Bango Chandra Dey. Soudamini died in the suit premises in 1954 leaving behind Jogendra Chandra Dey son of Bango Chandra. Bipin Chandra and Bango Chandra were full brother and their father was Ram Narasingha Dey. According to the provisions of dayabhaga system of hindu law Soudamini acquired life estate in the suit land. After her death the ownership of the suit land reverted to Bango Chandra and consequently his son Jogendra Chandra as heir. Jogendra Chandra was an employee of Kumudini Welfare Trust who died on

27.02.1957 leaving behind his only son Jyotish Chandra Dey, the plaintiff as heir. The plaintiff has been possessing the suit land by implanting tress and rearing fishes from the pond with his co-sharers. Accordingly, RS *Khatian* 797 plots 1147, 1148 and 1150 has been prepared in his name showing 8 *annas* share. Subsequently, the plaintiff by amendment of plaint incorporated the fact that Sharat Kamini Nag was the wife of Durga Charan Nag who used to reside in the hermitage and both of them died leaving behind a huge number of disciples. Since the hermitage is being managed by the Secretary of Puja Committee and as such he is made defendant 4 in the suit. SA *Khatian* 26 corresponding to CS *Khatian* 33 prepared in the name of Sharat Kamini Nag in 8 *annas* share is erroneous. In RS *Khatian* 8 *annas* share of the aforesaid 2 CS plots have been recorded in the name of the plaintiff and remaining 8 *annas* in the name of co-sharer as vested property. The plaintiff possesses the suit land in *ejmali*. The defendants refused to partition the suit land on repeated requests. Defendant 7 filed additional written statement on 26.05.1998 and disclosed that Soudamini, wife of Bipin after her husband's death transferred his 8 *annas* share from the aforesaid two plots to Sharat Kamini Nag through a perpetual registered lease deed dated 04.03.1953 and handed over possession thereof with two tin shed houses. The plaintiff then amended the plaint and disowned the execution and registration of such perpetual lease by Soudamini

stating that the lease deed is created only to grab the plaintiff's property. Soudamini had no legal necessity to transfer the suit land. She died in the hermitage situated near the suit plots. She did never went to Gaya or Kashi or tirthadham. The plaintiff further claimed that the *ekrarnama* dated 03.03.1967 through which defendant 7 claims lands including the suit land on receipt of the same from the disciples of Sadhu Nag Mahashaya is also created to grab the debottar property and the property of the plaintiff. Therefore, in the suit the plaintiff prayed for partition in the suit land claiming *saham* of .245 acres with further prayer that the perpetual lease deed shown to have been made by Soudamini to Sharat Kamini is illegal, inoperative, forged, fraudulent and not binding upon him.

Defendants 2 and 3, the vested property authority in their written statement stated that the suit land was recorded in SA *Khatian* in the name of Sharat Kamini Nag wife of Durga Charan Nag and another. In 1965 they left for India and the property has been declared as vested property. The government acquired it to establish a TB hospital and now defendant 7, the Diabetic Association has been possessing the suit land. The suit, therefore, would be dismissed.

Defendant 4, the hermitage authority contested the suit by filing written statement. In the written statement they contended that Gobinda Chandra Dutta and Bipin Chandra Dey, the CS recorded tenants devoted the suit land in the name of hermitage of Sadhu Nag

Mahashaya. Monindra Ghose died leaving behind his son Santosh Kumar Ghose who also devoted his part to the hermitage of Sadhu Nag Mahashaya. The name of Sadhu Nag Mahashaya was Durga Charan Nag. He was a famous saint of this subcontinent. Gobinda Chandra, Bipin Chandra and Santosh Kumar were the disciples of Sadhu Nag. Defendant 4 denied that Bango Chandra was the brother of Bipin Chandra. Soudamini, wife of Bipin used to stay in the hermitage of Sadhu Nag Mahashaya and died there. After the death of Sadhu Nag and Sharat Kamani they were cremated in the hermitage premises and their disciples built a cloister on their cremation ashes. In order to grab the property the plaintiff imported the name of Bango Chandra as brother of Bipin and claiming him as son of Jogendra Chandra, son of Bango Chandra instituted the suit on false statement. This defendant further contended that the *ekrarnama* dated 03.03.1967 through which defendant 7 claims the suit property with other lands of the hermitage is false and created. No such *ekrarnama* was executed at the wish of Sharat Kamini Nag and his husband Sadhu Nag or their Sebayets. The property of Sadhu Nag Mahashaya was declared as debottar property and the men of hindu community gather in the premises in every year to observe the religious rituals. The debottar property can be transferred only by its Sebayet for the welfare of it. It further contended that the government has no title and

interest in the suit land. The RS record prepared in the name of the plaintiff is erroneous and the suit would be dismissed.

Defendant 7, Secretary of Bangladesh Diabetic Association, Narayaganj filed written statement and contested the suit. In the written statement he stated that the suit land belonged to Sharat Kamini Nag. Santosh Kumar had no title and possession over the suit land. He was not owner of 8 *annas* share and SA *Khatian* was prepared erroneously. Sharat Kamini Nag and her husband died in the hermitage premises. They were cremated therein and their disciples constructed a cloister on their cremated ashes. Defendant 1 is not the owner of any part the suit land. He has no title and interest therein. Defendant 6 and other defendants did never possess the suit land. The documents of defendant 6 are collusive, fraudulent, inoperative and void. Durga Charan Nag was a saint and died in the hermitage premises and as per his wish Sebayets Balai Ghose, Krishnadhan Banik and Shantimoy Ghose who used to look after the hermitage, cloister and his property after his death executed an *ekrarnama* on 03.03.1967 and handed over total 2.94 acres of land with the suit land to the then East Pakistan Tuberculosis Association to use it for charitable purposes. S. Ahmed, the then SDO and CSP put his signatures in the *ekrarnama*. The land of CS *Khatians* 30, 33 and 101 measuring an area of total 2.94 acres has been gifted through the aforesaid *ekrarnama* and this defendant has been using and possessing

the same. There is a hospital and a clinic on the gifted land. The SA record prepared in the name of Sharat Kamini and others and RS *Khatian* in the name of the plaintiff and others are wrong. The subsequent deeds by a 3rd party in respect of a part of the suit land are also collusive. At the permission of Bangladesh Tuberculosis Association this defendant for public interest established Bangladesh Diabetic Association, Narayanganj and a school therein for the girls. This defendant has been using and possessing the gifted land including the suit land for more than 25 years since they got it through *ekrarnama* in 1967. The suit, therefore, would be dismissed.

Defendant 6 filed written statement and claimed 8 annas share of plot 509 measuring .12 acres by way of gradual purchase from Santosh Kumar Ghose. He stated that the purchaser instituted Title Suit No.92 of 1986 and obtained a decree that the suit land is not vested property.

The trial Court on pleadings framed the following issues to adjudicate the matter in dispute-

1. Who is the real owner of the suit land according to CS *parcha*?
2. According to Hindu Law was Soudamini the real owner of the suit land?
3. Has Soudamini every right to sell 8 annas share of Bipin Chandra Dey?

4. Is the land transferred through the deed dated 04.03.1953?

In the trial, the plaintiff examined 6 witnesses and produced their documents exhibits-1-3. On the other hand, defendant 4 examined 1 witness DW 1 but produced no document and defendant 7 examined 3 witnesses DWs 2-4 and produced their documents exhibits-‘Ka’ and ‘Kha.’ The other defendants did not examine any witness. However, the Joint District Judge dismissed the suit deciding all the material issues in favour of the defendants, giving rise to this appeal by the plaintiff.

Mr. Md. Faruk Ahammed, learned Advocate for the appellants taking us through the materials on record submits that since Bipin had no issue, therefore, after his death wife Soudamini got life estate in her husband’s property and after her death the suit land reverted to the plaintiff’s predecessor Bango Chandra a brother of Bipin and grandfather of the plaintiff. The plaintiff is in possession in the suit land measuring .12 acres of CS plot 509 and .125 acres of CS plot 510. He has been possessing the land by implanting tress in the land and rearing fishes from the pond. No lease deed was executed by Soudamini to Sharat Kamini as alleged. He then pointed us to the perpetual lease deed and submits that even the deed is admitted as true it is found to be an agreement for rent of two houses which were situated in the suit land. On its basis the tenant had to pay yearly rent to the landlord only. After Soudamini’s death it has lost its force and

the property reverted to the predecessor of the plaintiff. He then submits that defendant 4, the Secretary of the hermitage who used to look after the property left by Sadhu Nag Mahashaya, did never claim that Soudamini transferred the suit property to Sharat Kamini through exhibit-‘Ka’. He then refers to exhibit-‘Kha’, the *ekrarnama* dated 03.03.1967 allegedly executed by the Sebayets of the hermitage to Tuberculosis Association and submits that this is an unregistered *ekrarnama*. The first party of the *ekrarnama* were not the Sebayets of the debottar property and were not entitled to transfer the suit land and others to the second party. He submits that no witness was brought to the Court to prove the *ekrarnama*. Since defendant 7 failed to prove the *ekrarnama*, therefore, no right and title over the suit land he accrued through it. Moreover, the recent RS record has been prepared in the name of the plaintiff showing his share which was not challenged by the defendants to any authority. He refers to the case of Zafela Begum and others vs. Atikulla and others, 16 BLC (AD) 46 and submits that since the claim of the plaintiff over the suit land was not denied by the defendants specifically, it would be deemed to have been admitted by that defendants. The admission, therefore, itself being a proof, no other proof is necessary. He then refers to the case of Lakshmi Bazar Shahi Masjid Committee and another vs. St. Francis Xavier’s Girls High School, 51 DLR 557 and submits that the identity of the land has not been challenged by the defendants, therefore, the

question of holding local investigation for relaying the property does not arise at all. The findings of the trial Court that the plaintiff could have appointed an Advocate Commissioner for local investigation to identify the suit land is totally wrong, perverse and beyond the materials on record. He then refers to the case of Probir Kumar Rakshit vs. Abdus Sabur and others, 14 MLR (AD) 10 and submits that since the plaintiff has been enjoying the property with co-sharers, the possession of a co-sharer in a joint property is the possession of the plaintiff. Therefore, the present suit only for partition without declaration of title and recovery of possession is maintainable. He then refers to the case of Wazed Ali Sheikh being dead his heir 1(a) Mst. Bulbulzan alias Jahan and others vs. Mst. Hazera Khatoon and others, 14 MLR (AD) 355 and submits that transfer by an unauthorized person is not a transfer in the eye of law. In the present case the alleged Sebayets cannot transfer the property to the Tuberculosis Association by the *ekrarnama* because it is a debottar property which cannot be transferred without the interest of the deity or hermitage. In this context he refers to the case of Chunnu Mia vs. Manindra Lal Roy, 39 DLR (AD) 42 and relied on the principle laid therein. He then refers to the case of Md. Showkat Ali Howlader and others vs. Nur Box Howlader and others 6 ADC 603 and submits that presumption of preparation of RS *khatian* in the name of the plaintiff is correct unless it is rebutted. In this case, the defendants failed to

rebut such presumption. He then refers a part of the judgment of the trial Court and submits that the decision taken by the learned Judge is contrary to his findings. At one stage the learned Judge found that defendant 4 failed to prove the case but found the issues in favour of defendants 2, 3 and 7. The impugned judgment, therefore, being perverse and beyond the materials on record cannot be sustained in law and would be set aside.

Ms. Anjuman Ara Begum, learned Advocate for respondent 4 submits that in the written statement this defendant did not claim that Sharat Kamini Nag took permanent lease of the suit land from Soudamini. The authority of the hermitage of Sadhunag Mahashaya did never execute and register any *ekrarnama* to defendant 7. The hermitage and cloister as debottar property has been being managed by a committee. Till now there is a cloister of Sadhunag and his disciples perform their religious rituals in the premises. The hermitage and cloister is situated in different part and the religious rituals are being performed there but not in plots 509 and 510. Defendant 7 has no right, title and interest in the suit property. The hermitage authority did never transfer any property including the suit property to defendant 7. His claim is based on false document. Ms. Begum confines her argument that hermitage authority has been possessing its part while the plaintiff is possessing his part but the possession of defendant 7 in other plots are illegal and without valid documents.

Mr. Abdul Kader Bhuiyan, learned Advocate for respondent 7, the Diabetic Association, Naragyaganj on the other hand opposes the appeal and supports the judgment passed by the trial Court. He submits that exhibit-‘Ka’ is the document of permanent lease executed and registered by Soudamini, wife of Bipin to Sharat Kamini wife of Sadhu Nag Mahashaya. The aforesaid lease deed has been proved by calling for the volume. The Sebayets of the hermitage of Sadhu Nag executed the *ekrarnama* dated 03.03.1967 by putting their signatures as first party through which the suit land with other lands were gifted to the Tuberculosis Association for charitable purpose. After getting the land from the hermitage authority they established a TB hospital therein and subsequently taking permission from the authority they have also established a diabetic hospital and a school in the premises. Although there are some contradictions in the findings of the trial Court but the ultimate decision of dismissing the suit is found correct. The suit in the present form for partition simpliciter without any prayer of declaration of title is not maintainable. It is further found that the plaintiff is not in possession of the suit land, therefore, the suit without consequential relief of recovery of possession is not maintainable. In the premises above, the judgment passed by the trial Court would be affirmed.

We have considered the submissions of all the sides, gone through the materials on record and *ratio* of the cases cited by the

appellants. Admittedly CS *Khatian* 33 in respect of .24 acres of plot 509 and .25 acres out of .50 acres of plot 510 was prepared in the names of Gobinda Chandra and Bipin Chandra in equal share. Gobinda died issueless keeping his nephew (sister's son) Santosh Kumar to inherit his share because he had brought up him like his son. Bipin also had died issueless leaving his wife Soudamini. The plaintiff claimed that Bipin had another brother named Bango Chandra. Soudamini had life estate in the property left by her deceased husband Bipin. She did not dispose of the suit property. After her death the property reverted to Bango Chandra, brother of Bipin and grandfather of the plaintiff. The plaintiff specifically stated in the plaint that Bango Chandra was the brother of Bipin and Jogendra, father of the plaintiff was his son. Jogendra after the death of Bipin and Soudamini inherited 8 annas share of the property of CS *Khatian* 33 plots 509 and 510. In the written statement defendant 4 denied the fact that Bipin had any brother named Bango Chandra and that Jogendra was his son. But while PW1 Jyotish Chandra deposed in the Court supporting the aforesaid genealogy, none of the defendants raised any objection as to the identity of Jyotish that he was not the grandson of Bango Chandra or that Bango was not Bipin's brother. The death certificate of Jogendra exhibit-3 proves that Bango was his father which has been proved by PW6. Therefore, the plaintiff has been able to prove that Bipin had a brother named Bango Chandra and that

Jogendra was his son and the plaintiff is the son of Jogendra. The law of succession of dayabhaga system provides that if the share of Bipin in the suit plot was not disposed of by Soudamini for her legal necessity, surely plaintiff Jyotish as grandson of Bango will inherit the share.

It appears that defendant 7, the Diabetic Association brought a case that Soudamini settled the share of Bipin permanently to Sharat Kamini Nag in the year 1953 through a perpetual lease deed. The permanent lease deed dated 04.03.1953 has been produced in evidence as exhibit-‘Ka’ as well as exhibit-2. We have perused the deed and gone through the evidence of PW5, a peon of Sub-Registry office who brought the volume to the Court and exhibited the document. In cross-examination by the plaintiff it came out that the volume he brought in the Court was not binding. The number of lease deed is 2085 which was written in pages 251-254 of the volume. But the deed bearing number 2139 which is after serial number of 45 deeds was written in pages 261 and 264 of the volume. The aforesaid fact that 40 deeds were written in 6 pages of the volume creates a serious doubt about the execution and registration of the aforesaid lease deed by Soudamini. It further appears in exhibit-‘Ka’ and evidence of PW5 that the deed was presented for registration on 04.03.1953 but it contains a signature of the Sub-Registrar dated 02.03.1953 which cannot be. Since defendant 4, the hermitage/cloister

authority did not admit that Sharat Kamini, wife of Shadhu Nag Mahasaya took permanent settlement of the suit land of plots 509 and 510 from Soudamini which was subsequently shown to have transferred to defendant 7 through *ekrarnama* exhibit-‘Kha’, we hold that defendant 4’s predecessor Sharat Kamini accrued no right, title and interest in the suit land on the basis of that perpetual lease deed exhibit-‘Ka’ alleged to have executed by Soudamini. Therefore, by the subsequent unregistered *ekrarnama* from the disciples of Sadhu Nag, defendant 7 Diabetic Association, Narayanganj got no right and title in CS suit plots 509 and 510.

We have gone through exhibit-‘Kha’ the *ekrarnama* alleged to have been executed by the Sebayets of the debottar property. It is found that the *ekrarnama* is unregistered. Through it 2.94 acres of land of CS Khatians 30, 33 and 101 shown to have been transferred to the then Tuberculosis Association which includes the suit land measuring .245 acres of plots 509 and 510 of CS Khatian 33. Although, defendant 7 claimed that Sebayets of the hermitage executed the said *ekrarnama* but it is found that the disciples of the saint Sadhun Nag Mahashaya transferred the debottar property which they cannot. It can be transferred by the Sebayet(s) only for the interest of the deity or hermitage. Here, nothing has been mentioned in the deed. We do not find anything in evidence that the executants first party were the Sebayets of the hermitage or debottar property.

Defendant 4 representative of the hermitage also disowned the execution of the *ekrarnama* by the Sebayets. Defendant 7 did not examine any witness to prove the *ekrarnama*. For the sake of argument even it is admitted that the hermitage authority handed over the suit land with other property to the Tuberculosis Association through the *ekrarnama* on charitable purpose but a condition in the deed is found that Tuberculosis Association shall always use it for charitable purpose for which the land was acquired. It is found that the land was acquired for the necessity of providing treatment of tuberculosis patients. Therefore, Diabetic Association, Narayanganj has no authority to use the land other than the purpose for which it was alleged to have been donated or acquired. It is found that now Diabetic Association, Narayanganj defendant 7 has been using the land for other purposes which is contrary to the deed and as such defendant 7 is found nobody to the property so gifted.

On scanning the oral evidence of witnesses of both the parties it is found that defendant 4, the hermitage authority has been enjoying and possessing the lands where it is situated and in every year the disciples of Sadhu Nag Mahashaya perform their religious festivals and rituals in the premises but not on the lands of plots 509 and 510 which are the suit plots. They perform puja and other religious festivals in the land of plots 498 and 507 which are the lands of CS *Khatians* 30 and 101 not the suit plots and *khatian*. It is found in the

evidence of both the parties that there is a Diabetic hospital, a school, the hermitage and a cloister in the land included in the *ekrarnama* but the hospital and the school are situated in plot 508 and Nagbari is in plots 507 and 498 which are not the suit plots. Therefore, the aforesaid possession of defendants 4 and 7 do not affect the right and possession of the plaintiff in the suit land.

This is a suit for partition with another prayer. The possession of a co-sharer in any part of the suit property is the possession of other co-sharer. Apart from it the plaintiff through evidence of PWs 1, 2 and 3 proved that he has been possessing a part of the suit land of CS plots 509 and 510 by implanting trees and there is a hut therein which is now abandoned. According to the plaint case and oral evidence, the plaintiff's predecessor resided in the hut which is situated in plot 509 before riot of 1965 but now the plaintiff does not reside therein but he is in possession in a part of it by implanting trees. None of the defendants claimed that they have practical possession in suit plots 509 and 510. Therefore, the suit in the present form for partition only without declaration of title and recovery of possession is well maintainable. [reliance placed on 14 MLR (AD)10 and 1 ADC 124].

The issues framed by the trial Court is found not perfect to dispose a suit for partition. The findings of the trial Court is contrary to its decision because the trial Court found that defendant 4 failed to prove its case, but in the ordering part of the judgment learned Judge

held that the case of defendants 2, 3 and 7 have been proved. Defendants 2 and 3 did not examine any witness to prove their case that a part of the property is abandoned property. If defendant 4 fails to prove its case then how defendant 7 can prove his case because it claimed of getting the suit land from the hermitage (defendant 4) who does not claim that Sharat Kamini got the suit land measuring .245 acres of two plots from Soudamini through permanent lease. It is further found that RS *Khatian* has been prepared in the name of the plaintiff according to his share. The preparation of the aforesaid *khatian* in plaintiff's name was not challenged by the defendants in any forum and as such it stands. In the case of Md. Showkat Ali Howlader and others vs. Nur Box Howlader and others, 6 ADC 603 it has been held that RS record has presumptive value and prove possession of the record holder unless it is rebutted. The defendants failed to rebut the presumption of preparation RS *Khatian* in the name of the plaintiff as per his share.

The findings of the trial Court that the plaintiff could have relayed the suit land to identify it by appointing an Advocate Commissioner is found wrong and perverse because the suit land is well identified in the plaint as part of CS plots 509 and 510 and total land of the aforesaid two plots have been included in the suit and it has been proved in evidence. The defendants did not challenge the identity of the suit land, therefore, the question of holding local

investigation does not arise at all. The *ratio* of the case reported in 51 DLR 557 as referred to by the learned Advocate for the appellants shall apply here.

In the aforesaid premises, the trial Court ought to have decreed the suit. Therefore, we find merit in this appeal. Consequently, the appeal is allowed. No order as to costs. The judgment and decree passed by the trial Court is hereby set aside and the suit be decreed as prayed for. The trial Court shall proceed with the preparation of final decree in accordance with law.

The Rule issued in Civil Rule No.653(F) of 2002 is accordingly disposed of. The order of *status quo* stands vacated.

Communicate this judgment and send down the lower Court records.

Murad-A-Mowla Sohel, J.

I agree.