IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISI0N
(CIVIL REVISIONAL JURISDICTION)

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 3026 OF 2013

Taslima Khatun and others
--- Plaintiffs-Appellants -Petitioners
=Versus=
Hrejan Nessa and others
--- Defendants-Respondents-Opposite Parties

Mr. Syed Alam Tipu, Advocate
--- For the Petitioner
Mr. S.M. Ariful Islam, Advocate
--- For the Opposite Party Nos.1 and 2

Judgment on: 21.05.2018 and 22.05.2018

At the instance of the present plaintiffs-appellants-petitioners, Taslima Khatun and others, this Rule has been issued in the following terms:

এই ম-র্ম ১ ও ২ নং অপরপক্ষ-দর প্রতি কারণ দর্শা-না পূর্বক রুল জারী করা হইল, কেন চুয়াডাঙ্গার অতিরিক্ত জেলা জজ, ২য় আদাল-তর দেওয়ানী ৩৬/২০১২ নং আপী-ল প্রচারিত ০৭-০৫-২০১৩ খ্রিঃ তারিখের তর্কিত রায় এবং ডিক্রি (০৯-০৫-২০১৩ খ্রিঃ তারি-খ স্বাক্ষরিত) রদ ও রহিত করা হইবে না, যে রায় ও ডিক্রি মূলে আলমডাঙ্গার বিজ্ঞ সিনিয়র সহকারী জজ আদালতের অন্য শ্রেনীর ৪৪/২০০৩ নং মোকদ্দমায় প্রচারিত ১৭-০৪-২০১২খ্রিঃ তারিখের যায় ও ডিক্রিকে (ডিক্র স্বাক্ষ-রর তারিখ ২৩-০৪-২০১২)সুদৃঢ়করণ ম-র্ম আপীলটি নামঞ্জুর হইয়াছে এবং দখাস্তকারী আদাল-তর বি-বচনায় আর যে সকল প্রতিকার পাই-ত পা-রন তাহার ও আ-দশ কেন দেওয়া হই-ব না।

The relevant facts for disposal of the present Rule, *inter-alia,* are that the present petitioners as the plaintiffs filed the Other Suit No. 44 of

2003 in the court of the learned Senior Assistant Judge, Alomdanga, Chuadanga for a declaration of title and also for a direction to execute a deed of gift by the defendant. The case in the plaint is that in R.S. record of right was in the name of one Bahar Ali as the original owner and possessor who transferred the land by way of a heba deed dated 24.12.1979 for the land measuring 5.07 acres. The said Anser Ali intended to transfer the land in favour of his 8 daughters and one wife who are the present plaintiffs-petitioners for the land measuring 3.85 acres of land out of his total land measuring 5.07 acres by way of an oral declaration as heba-bil-awaj and the possession was handed over thereof. On 02.01.2003 the said Anser Ali went to the Sub-registrar's office and purchased a non-judicial stamp in order to execute a heba deed in writing. As per his instruction the deed was written and he executed the deed by putting his left thumb impression upon the said deed. However, the registrar office was officially closed until 05.01.2003 for the purpose of registration of any deed. The father of the present plaintiffs-petitioners died early in the morning on 05.01.2003. Therefore, the deed could not be registered. The said Anser Ali died leaving behind the preset petitioners as the legal heirs as well as 2 sisters who are the present opposite party Nos. 1 and 2. The present defendants-opposite parties claimed entitlement more than they were entitled to as the heirs of the said Anser Ali, thus, the suit was file for the Specific Performance Contract.

The suit was contested by the present opposite parties as the defendants denying the statements made in the plaint and also

contending that Anser Ali made no oral gift to the present plaintiffs-petitioners and there was no execution of deed in favour of them on 05.01.2003. It is further contended that Anser Ali died leaving behind the present petitioners and opposite parties as the legal heirs, therefore, the petitioners are only entitle to get portion of land by way of inheritance as per the Sharia Law. Accordingly, the defendants-opposite parties got 80 decimals of land out of the land measuring 3.85 acres.

After hearing the parties, the learned trial court dismissed the suit by his judgment and decree dated 17.04.2012.Being aggrieved the present petitioners as the appellants preferred the Title Appeal No. 36 of 2012 in the court of learned District Judge, Chuadanga which was heard by the learned Additional District Judge, Court No. 2, Chuadanga on transfer who by his judgment and decree dated 07.05.2013affirmed the judgment of the learned trial court. This revisional application has been filed challenging the legality of the said impugned judgment and the present Rule was issued thereupon.

Mr. Md. Sayed Alom Tipu, the learned Advocate appearing the present petitioners submits that the father of the plaintiffs transferred the suit land 05.01.2003 in favour of plaintiffs by way of deed of gift and the delivery of possession was duly given to them and it was nicely established through evidence on record. However, the courts below without considering the materials and evidence on record dismissed the suit filed by the plaintiffs and as such they committed error of law resulting in an error in the decision occasioning failure of justice and those are liable to be set aside.

The learned Advocate further submits that the present plaintiffs-petitioners filed the suit claiming entitlement upon the suit land pursuant to the heba deed exhibit-1 and also exhibits -2-2(1), 3-3(গ) which are the CID reports as the hand writing expert and by way of depositions of the PWs in order to prove their own case in addition to the factual aspects that Anser Ali had originally owned land measuring 5.07 acres and the deed dated 05.01.2003 was for the land of 3.85 acres. Therefore, the defendants would automatically succeed as the sisters of the said Anser Ali from remaining measurement of land but the learned courts below after misreading and non consideration of the evidence came to the wrongful conclusion against the present petitioners which are liable to be set aside and the Rule should be made absolute.

The Rule has been opposed by the present opposite parties.

Mr. S. M. Ariful Islam, the learned Advocate appearing for the opposite parties submits that the documents produced by the present petitioners dated 05.01.2003 was an invalid document as it was never executed by Anser Ali and no registration of the deed could be shown by the petitioners, therefore, the defendants- opposite parties are entitled to get proportionate land as per Sharia Law as successors out of land measuring 3.85 acres. The learned courts below concurrently found in favour of the present opposite parties by declaring the deed dated 05.01.2003 was illegal, as such, the Rule should be discharged.

The learned Advocate also submits that the plaint contains a prayer to register a deed by the court after decreeing the suit for Specific Performance of Contract which is not permissible within the frame work

of law but the present petitioners obtain this present Rule by misleading the court which is liable to be discharged.

Considering the above submissions made by the learned Advocates and also considering the revisional application filed under Section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular the impugned judgment and decree passed by the appellate courts below and also perusing the materials in the lower court records, it appears to me that the present petitioners, as the plaintiffs filed the suit for a declaration of entitlement upon the suit land measuring 3.85 pursuant to a heba deed claimed to have executed by the father / husband of the present petitioners by making the sisters of the said Anser Ali as the defendants. The petitioners claimed that their father/ husband executed a heba deed on 05.01.2003 in order to transfer the suit land and actually handed over possession of the suit land in accordance to the said heba deed. However, the deed could not be registered as the said Anser Ali died early in the morning on 05.01.2003. On the other hand, the present opposite parties claimed that no deed was executed by the said Anser Ali (brother of the defendants- opposite parties), therefore, the opposite parties are entitle to 80 decimals of land pursuant to the sharia law of inheritance.

In view of the above conflicting factual and legal aspects, this court has to take a decision whether the document claimed to have executed by Anser Ali before his death in favour of the present plaintiffs-petitioners is a valid document or not. In order to answer the above question, I have carefully examined the exhibits and depositions

adduced and produced by the parties. In particular exhibit-1 which is a deed of gift or heba deed executed by Anser Ali by putting his left thumb impression which was identified by Refazzel in order to transfer the suit land in favour of the present plaintiffs-petitioners who are his daughters and wife for the land measuring 3.85 acres. In this regard, the vital question is whether these document has transferred the entitlement in favour of the petitioners or not. Under Sharia Law a gift of land is known as heba-bil awaj which was not required to be registered prior to the amendment of the Registration Act on 07.12.2004 by the Act No. XVI of 1908 when all the documents relating to land were made mandatory provisions for registration. Accordingly, prior to the amendment of the Registration Act, 1908 a registration was not mandatory for executing a heba deed in favour of legal heirs if the deed was acted upon or sought any remedy prior to the amendment of the Registration Act, thereafter, other requirements of the new law need not be complied with.

In the instant case, the said Anser Ali (now dead) executed a heba deed in favour of his wife/daughters in order to transfer his land measuring 3.85 acres out of his total land measuring 5.07 acres. I consider that the said deceased Anser Ali had voluntarily and without any influence executed the heba deed being exhibit-1 in favour of his wife and 8 daughters by putting his left thumb impression upon the deed immediate before his death. In the trial court the plaintiffs- petitioners produced the hand writing expert as exhibits-2-2(1) and 3-3(গ) to show that the expert could find the genuineness of the left thumb impression

of the said deceased Anser Ali upon exhibit-1, eventhough, there were some remarks as to the place of left thumb impression upon the said deed. In view of the above, I consider that the learned trial court and the appellate court below misread and failed to take into consideration about the above evidence produced by the present petitioners in the courts below, therefore, they misconstrued the evidence produced in the instant case.

Now I am, inclined to consider the judgment and decree passed by the learned courts below. The learned trial court came to a wrong conclusion to dismiss the suit on the basis of the following findings:

> "The term *'contract'* is defined in the Contract Act, 1872. Section 2(h) of the Act has defined *'contract'* as follows: "*An agreement enforceable by law is a contract."* As per provision of section 10 of the Act, a contract must have a *'lawful consideration.'* But a gift does not contain any *'consideration.'* So a gift is not a *'contract'* at any stage of its constitution. A contract may be legally enforced as per provisions of chapter II of the Specific Relief Act, 1877. But there is no law in Bangladesh by dint of which a gift can be specifically performed. None can be compelled to execute and register a gift deed. So the impugned deed of gift is not legally enforceable. The suit lacks in legal infirmity."

The learned appellate court concurrently found wrongly, therefore, came to a unlawful conclusion to affirm the judgment of the trial court on the basis of the following an unlawful findings:

> "স্বীকৃতম-ত দলিলদাতা আনছার আলীর মৃত্যুর তারি-খই অর্থাৎ ৫/১/২০০৩ তারিখ অরেজিষ্ট্রিকৃত দানপত্র দলিলটি (প্রদঃ ১) লিখিত দেখা যায়। দলিল লেখক পি, ডাব্লিউ-২ হি-স-ব জবানবন্দি-ত প্রদান কর-লও দলি-ল তিনি সঠিক জায়গায় স্বাক্ষর করেন নাই ম-র্ম দেখা যায়। দলি-লর ১ম পাতায় খুব ছোট ক-র ৮ জন গ্রহীতার নাম লেখা হয়।স্বাভাবিকভা-ব দেখা যায় যে, গ্রহীতা বাদদে বাকী লেখাগুলো পূর্বে লিখে পরবর্তীতে ঐ

> ক্রেতাগ-নর নাম লেখা হয়। দলি-লর ১ম পাতায় অপর পৃষ্ঠায় সনাক্তকারী হিসেবে পি, ডব্লিউ- ২ এর স্বাক্ষর থাক-লও দাতার -কান টিপ স্বাক্ষর নাই।এই বিষ-য় আর বিস্তারিত আ-লাচনা না ক-র সুনিশ্চভা-ব বলা যায় যে, পি, ডব্লিউ-২ অন্যান্য বাদী সহ লেখ-কর যোগা-যাগী-ত এই অকার্যকারী দলিলটি সৃষ্টি ক-র রা-খ। বাদীপক্ষ এই দলিলটি আ-দৌও প্রমান কর-ত সক্ষম হন নাই। অর্থাৎ বাদীপক্ষ নালিশী জমি দান পত্র মূলে প্রাপ্তি তথা ঐ জমি-ত তা-দর স্বত্ব দখল প্রমান কর-ত সক্ষম হন নাই।”

In view of the discussions and also after perusal of the judgments and decrees passed by the learned trial court and appellate court, I consider that both the courts failed to take into consideration of all relevant documents exhibited in the present suit in particular exhibit-1 and other exhibits produced by the present petitioners in order to prove their own case as to entitlement of land measuring 3.85 acres pursuant to the heba deed dated 05.01.2003executed by Anser Ali immediate before his sudden death in favour of the present petitioners. The courts have also failed to consider that the said Anser Ali (now deceased) originally owned 5.07 acres but the heba deed contains only 3.85 the remaining land measuring 1.22 could already have been succeeded by the present defendant opposite parties as the sisters of the said Anser Ali. Accordingly, the learned appellate court below committed an error of law by affirming the judgment of the learned trial court. I am, therefore, inclined to interfere into the judgment and decree passed by the appellate court below.

Accordingly, I find merit in the Rule.

In the result, the Rule is made absolute.

The learned Senior Assistant Judge, Alamdanga, District-Chuadanga in hereby directed to execute a register deed as prayed in the

plaint within 3(three) months from the date of receipt of this judgment and order.

The interim order of direction to maintain status-quo by the parties upon the suit land is hereby recalled and vacated.

The Section is directed to communicate this judgment and order to the court concern and the Section is also directed to send down the lower courts records immediately.