

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Murad-A-Mowla Sohel

First Appeal No.43 of 2013

Md. Khalilur Rahman appellant

-Versus-

Md. Aslamuddin and others respondents

Mr. Tapash Kumar Biswas with Mr. A.Z.M. Morshed Al-Mamun and Mr. Quazi Ferdousul Hasan, Advocates for the appellant

Mr. Jahangir Alam, Advocate for respondent 1

Judgment on 20.11.2025

Bhishmadev Chakrabortty, J:

The plaintiff has preferred this appeal challenging the judgment and decree of the Joint District Judge, Court 2, Dhaka passed on 23.10.2012 in Title Suit 345 of 2012 rejecting the plaint under Order 7 Rule 11 read with section 151 of the Code of Civil Procedure (the Code).

Facts relevant for disposal of the appeal, in brief, are that one Md. Shajahan Ali Khan purchased the suit land measuring .07 acres from its original owner through a registered *kabala* dated 08.01.1981. He mutated his name, paid rent to the government and during his possession and enjoyment handed over its possession to the plaintiff on 21.06.2001 through an oral gift. In support of the aforesaid oral gift Shajahan Ali Khan sworn an affidavit on 05.07.2001 before the Notary Public of Bangladesh which was counter signed by the learned Magistrate. Hazi Asraf Ali Khan, father of Shajahan Ali Khan brought

up the plaintiff as his own son and the plaintiff lived with him in the same house who was his cousin. The plaintiff and Shajahan Ali Khan had some joint business and the former used to look after the business of both. On getting oral gift the plaintiff mutated his name and paid rent in respect of the suit land. He took connection of WASA and electricity line and paid bills. At the well behavior of the plaintiff Shajahan Ali Khan gifted the property to him. Defendant 4, Shyamol Kanti Saha manager of the farm, cousin Firoz Talukder and Anisur Rahman Mallick put their signatures in the affidavit. Some properties of Shajahan Ali Khan were mortgaged to the bank and bank instituted money suit against him. To protect the property of Shajahan Ali Khan and to repay the debts of bank the plaintiff, defendant 4 and others sat together and agreed that all the properties of Shajahan Ali Khan would be sold out and defendant 4 would get 60% of the sale proceed and plaintiff 4 would get 40% therefrom. The plaintiff came to learn that defendants 4-6 entered into an agreement for sale of the suit land with defendant 3 on 06.09.2010. Defendant 3 and their men threatened as plaintiff of dispossession. He then instituted Title Suit 410 of 2010 in the Court of Assistant Judge on 14.09.2010 praying for permanent injunction against defendants 3-7. In the said suit the plaintiff filed an application praying for temporary injunction against the defendants upon which show cause notices were issued but in the meantime defendant 3 hung a signboard in the suit land in their

names. Ultimately, defendants 3-7 showing political power dispossessed the plaintiff from the suit land on 18.12.2010. The plaintiff filed an application in the previous suit for amendment of the plaint which was rejected against which he preferred revision. Subsequently, he came to learn that during pending of the aforesaid suit defendant 4-7 sold out the suit land to defendant 3 through a registered *kabala* dated 27.02.2011 and defendant 3 sold the same to defendant 1 through another *kabala* dated 01.03.2012. The plaintiff then withdrew Title Suit 410 of 2010 as well as the revision and instituted this suit showing cause of action the date of dispossession, the date of transfer by defendants 4-7 to defendant 3 and the subsequent sale by defendant 3 to defendant 1 praying for declaration of title and recovery of possession with further prayer that that the registered *kabalas* dated 27.02.2011 and 01.03.2012 are not binding upon him.

Defendants 1-6 had filed written statement denying the statements made in the plaint. In the written statement they contended that Shajahan Ali Khan purchased the suit land from the gradual heirs of recorded tenants through a *kabala* dated 08.01.1981. He mutated his name and paid rent including all utility bills in respect of the suit land. He erected a *sami pucca* office room and tinshed godown in the suit land and city survey *khatian* was prepared in his name. Shajahan Ali Khan took loan from Agrani Bank Narayangonj Branch in the

name of his business farm General Trading Corporation but failed to repay the amount due to business loss. Consequently, the bank instituted a suit against him and others and obtained a decree in 2006. Defendants 4-7, heirs of Shajahan Ali Khan were added as parties in the Execution Case 09 of 2007 after his death. The aforesaid defendants 4-7 paid all the due to the bank and the bank consequently returned the deed of Shajahan Ali Khan to them. Thereafter, defendants 4-7 sold the suit land to defendant 3 through a *kabala* dated 27.02.2011 and defendant 3 subsequently sold it to defendant 1 through another *kabala* dated 01.03.2012. All the original documents and rent receipts are lying with defendant 1. Before transferring the land defendants 4-7 mutated their names and paid holding tax and other utility bills in their names. The plaintiff is not the cousin of late Shajahan Ali Khan. Therefore, there could be no reason of making gift of the property to the plaintiff while the wife and sons of Shajahan Ali Khan were alive. The oral gift is false and the affidavit sworn in support of it was created by the plaintiff only to grab the property. The plaintiff was never in possession of the suit land. The witnesses of so called affidavit never put their signatures on it. The mutation in the name of the plaintiff was cancelled on the prayer of these defendants. The documents in the name of the plaintiff are all forged. Defendant 1 after purchase of the land took loan from National Bank Limited, Rokeya Swarani Branch by mortgaging the land. The plaintiff did not

withdraw Civil Revision 45 of 2011 but instituted the instant suit on false statements. The defendants by expert tested soil of the suit premises to contract a building therein. In the premises above, the suit would be liable to be dismissed.

During pending of the aforesaid suit defendants 1 and 2 filed an application under Order 7 Rule 11 read with section 151 of the Code for rejecting the plaint stating more or less similar facts as stated in the written statement. In the application they simply stated that Shajahan Ali Khan died on 09.09.2001 leaving behind defendants 4-7 as heirs. In the Artha Rin suit which was decreed against the predecessor of defendants 4-7, they appeared and paid due of the bank and the bank being satisfied returned the registered deed of their predecessor Shajahan Ali Khan to them. After that defendants 4-7 sold the suit land to defendant 3 in 2011 and defendant 3 sold the same to defendant 1 in 2012 through registered *kabalas*. Defendant 1 is now in absolute possession of the suit land. There could be no reason of making oral gift followed by an affidavit in the name of the plaintiff. The signatures put in the alleged affidavit are forged, collusive and created only to grab the suit property. Since there is no cause of action of filing the aforesaid suit and the facts that the plaintiff earlier instituted the suit against the defendants, the plaint of this suit would be rejected under Order 7 Rule 11 of the Code. The plaintiff filed written objection against the said application for

rejection of the plaint stating the facts as stated in the plaint. However, the Joint District Judge by the judgment and decree under challenge in this appeal allowed the said application and rejected the plaint.

Mr. Tapash Kumar Biswas, learned Advocate for the appellant taking us through the materials on record simply submits that to reject a plaint under Order 7 Rule 11 of the Code, a Court has very limited scope. The plaint of a suit can be rejected only on the grounds prescribed in Order 7 Rule 11 (a) (d). On mere reading of the plaint, if it is found that it do not disclose any cause of action, in that case the plaint may be rejected. The same also may be rejected if it is found to be barred by certain law. Here the Joint District Judge rejected the plaint on the ground of non discloser of cause of action in the plaint and on the ground of *res judicata*. In the plaint, the plaintiff specifically stated the cause of action of filing the suit in paragraph 12 of the plaint. Moreover, the suit which was filed by the present plaintiff against defendants 3 and others being Title Suit 410 of 2010 was withdrawn and subsequently this suit has been filed with the aforesaid prayers. The Court below has gone wrong in fact and law and rejected the plaint on the ground which ought to have adjudicated in the suit by taking evidence of the parties. He refers to the case of Md. Mahbubul Haque vs. Md. A Kader Munshi, 52 DLR (AD) 49 and submits that question of *res judicata* is mixed questions of fact and law which needs thorough investigation on taking adequate evidence

to arrive at a correct decision on framing issues by the trial Court. In view of the above position of fact and settled principle of law by our apex Court in numerous cases, the impugned judgment is required to be interfered with by this Court in appeal. The appeal, therefore, would be allowed.

Mr. Jahangir Alam, learned Advocate for respondent 1, on the other hand opposes the appeal and supports the judgment and decree passed by the trial Court rejecting the plaint. He takes us through the materials on record and submits that the plaintiff claimed the suit land by oral gift from Shajahan Ali Khan followed by an affidavit in support of it. If for the sake of argument the suit is proceeded with trial and evidence of witnesses are taken, the ultimate result of the suit would be a big zero because there is no value of oral gift in the eye of law. He further submits that the oral gift is false and in necked eye the affidavit in support of it is found to be created and only to grab the suit property. None of the witnesses put their signatures in the affidavit. The plaintiff did not state in the written statement that he has paid the dues of Shajahan Ali Khan to the bank for which Artha Rin suit was filed against him and others. Moreover, as per written statement and documents laying with the record these defendants 4-7 paid the decreetal amount of the bank and bank returned the documents of late Shajahan Ali Khan to them. The plaintiff was never in the possession of the suit land and all the documents in respect of

the suit land are in the name of Shajahan Ali Khan and in the name of his heirs and subsequently the purchaser defendant 1. He refers to the case of Md. Sazzaduzzaman Siraj (Joy) vs. Mosammat Jannatul Ferdous (Fensi) and others, 25 BLT (HCD) 149 and relying on the *ratio* laid therein submits that the plaintiff claimed the land on the basis of an oral gift but he has no *locus standi* to file the suit claiming so. The trial Court correctly rejected the plaint at the initial stage of the suit because a plaint can be rejected under section 151 of the Code, if it is found that the continuation of the proceeding would be useless and wastage of time and money of both the parties and it would never see the light. The Court below entering into every four corners of the case rejected the plaint which may not be interfered with by this Court in the appeal. The appeal, therefore, having no merit would be dismissed.

We have considered the submissions of both the sides, gone through the material on record and *ratio* of the cases cited by the parties. It is admitted by the parties that Shajahan Ali Khan was the original owner of the suit land measuring .07 acres which he purchased through a registered *kabala* dated 08.01.1981. In the plaint, the plaintiff claimed that he is the cousin of Shajahan Ali Khan and performed joint business with him. Ashraf Ali Khan, father of Shajahan Ali Khan brought up him like his son. He used to reside with Shajahan Ali Khan in the same house jointly. Shajahan Ali Khan

gifted the suit property to him orally on 21.06.2001 in presence of the witnesses and delivered possession thereof. He further claimed that in support of the oral gift Shajahan Ali Khan made a declaration of affidavit on 05.07.2001 which was signed by defendant 4 and his other relatives. In the last part of 2001 Shajahan Ali Khan died. It is found that as per plaint the aforesaid oral gift was made on 21.06.2001 and the affidavit was sworn on 05.07.2001, *i.e.*, the oral gift was made before amendment of section 17 of the Registration Act, 1908 came into force. The aforesaid amendment came into force on 1st July, 2005. Through which clause (aa) in section 17(i)(Aa) has been inserted and registration of declaration of heba has been made compulsory. Therefore, at the relevant time on 21.06.2001 the oral gift was valid. Whether the oral gift was at all made or the affidavit was sworn by Shajahan Ali Khan and signed by others as witnesses are to be decided in the trial of the suit. In the case of Md. Sazzaduzzaman Siraj (Joy) vs. Mosammat Jannatul Ferdous (Fensi) and others, 25 BLT (HCD) 149 as referred to by Mr. Alam a bench of this Division dismissed the appeal and affirmed the judgment and decree passed by the trial Court rejecting the plaint. But there the plaintiff claimed title in the suit land on the basis of a oral gift made in year 2013. We do fully agree with the *ratio* laid in the aforesaid case because the oral gift in that case was made after amendment of section 17(1) came into force in 2005. After the amendment in 2005 no oral gift is permissible

without registration of the declaration. The registration is mandatory. So plaint of this suit cannot be rejected only on the ground that the plaintiff claimed the land by oral gift.

It is found in the statements made in the plaint that the plaintiff earlier instituted Title Suit 410 of 2010 praying for permanent injunction against defendants 3 and others. But during pending of the suit and show cause notice against the defendants as to why temporary injunction as prayed for shall not be granted, the defendants on 18.12.2010 dispossessed the plaintiff from the suit land. He, thereafter, withdrew the earlier suit and instituted this suit praying for declaration of title and recovery of possession. In paragraph 12 of the plaint, the plaintiff further stated the cause of action on 18.12.2010, 27.02.2011 and 01.03.2012. The first date is the date of dispossession, the next two dates are deed of registered *kabalas* by defendants 4-7 to defendant 3 and defendant 3 to defendant 1 respectively. So cause of action has been disclosed in the plaint which are to be decided in the trial of the suit by examining witnesses. It is found that the earlier suit was for permanent injunction which has been withdrawn by the plaintiff and thereafter the present suit for declaration of title and recovery of possession and with other prayers has been filed. The previous Title Suit 410 of 2010 was not finally adjudicated. Therefore, the present suit cannot be said to be barred by the principle of *res judicata* because the matter in issue of the previous suit is not

identical with the present one and the parties thereto are not same. Whether defendants 4-7 repay the decreetal amount of Artha Rin suit as alleged by them in the written statement as well as in the application under Order 7 Rule 11 of the Code is the subject matter of the present suit which is required to be determined on taking evidence of the parties. At this stage without taking evidence it is difficult to make any comment about the judgment passed in the Artha Rin suit or who paid the dues of the bank. We cannot pass any remark on the documents submitted by the defendant in support of their claim as to the certificate issued by the bank and the documents of late Shajahan Ali Khan now in possession of defendant 1 as alleged.

The Joint District Judge has totally gone wrong in fact and law and rejected the plaint of the suit on the ground of nondisclosure of cause of action and on the principle of *res judicata*. We, therefore, find substance in the submission of Mr. Biswas, learned Advocate for the appellant.

In the premises above, we find merit in this appeal. Accordingly, the appeal is allowed. The judgment and decree passed by the Joint District Judge in the aforesaid suit rejecting the plaint is hereby set aside. No order as to costs.

However, the Joint District Judge is directed to dispose of the suit expeditiously, preferably within 06(six) months from the date of

receipt of this judgment and order. The Joint District Judge will be at liberty to frame issue as to the maintainability of the suit.

Civil Rule No. 201(F) of 2013 is hereby disposed of and interim order passed therein, if any, stands vacated.

Communicate this judgment and send down the lower Court records.

Murad-A-Mowla Sohel, J.

I agree.