IN THE SUPREME COURT OF BANDLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

CIVIL Revision No. 5314 of 1998

Abul Kasem and another
...Petitioners.
-Versus-
Mrs. Ummul Hasnat Mahmud Ahmed being dead his heirs Asfaque Ahmed and another
....Opposite parties.

Mr. Md. Zinnat Ali Advocate with
Mr. Syed Jahangir Alam Advocate
… for petitioner No.1
Mr. A.M. Amin Uddin, Senior Adv. with
Mr. Mokarramus Shaklan Advocate
… for opposite party Nos. 1(a) - 1(d)
Mr. Abdul Wadud Bhuiyan, Senior Advocate
… for added opposite party No.2

Heard on : 11.08.2022, 21.08.2022 and 23.08.2022.
Judgment on : 25.08.2022.

Present:
Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon the opposite party to show cause as to why judgment and decree dated 21.07.1998 (decree signed on 27.7.1998) passed by learned Additional District Judge, 8th Court, Dhaka in Title Appeal No. 18 of 1998 reversing those dated 17.11.1997 (decree signed on 20.11.1997) passed by learned Senior Assistant Judge, 2nd Court, Dhaka in Title Suit No. 238 of 1997 decreeing the suit should not be set aside.

This Rule was earlier heard by a Single Bench of this Court who, vide judgment dated 17.11.2009, made the Rule absolute, against which the heirs of sole defendant-opposite party preferred Civil Appeal No. 190 of 2015 before the Hon'ble Appellate Division and the Appellate Division, after hearing, vide judgment dated 12.02.2020, set aside the judgment passed by the High Court Division and sent back the matter before this Division for hearing and pronouncement of

judgment in accordance with law and thereafter, this matter was fixed for hearing by me on 2.8.2022 at the instance of opposite party Nos. 1(a) to 1(d).

Relevant facts, for the purpose of disposal of this Rule, are that the petitioners as plaintiffs filed suit for declaration that registered sale deed No. 6288 dated 26.10.1964 in favour of the defendant in respect of total 1.33 acre land, as described in schedule 'Ka', 'Kha' and 'Ga' of the plaint, was forged, illegal, inoperative and not binding upon the plaintiffs stating, *inter alia,* that Bazlul Karim was the owner in possession of .45 acre land of C.S plot No. 8, as described in 'Ka' schedule of the plaint, who transferred the same vide registered sale deed being No. 6718 dated 24.07.1962 in favour of Ashraf Ali, Taher Ali, Ishque Ali, Abdul Aziz and Anwar Ali and delivered possession thereof to them. Abdul Mazid, Abdur Noor Mia and Abdul Mannaf Mia were the owners in possession of .30 acre land of C.S plot No. 9 as described in schedule 'Kha' who transferred the same vide registered sale deed No. 5747 dated 13.04.1963 in favour of Ashraf Ali (father of plaintiffs No.1 and brother of plaintiff No.2) and delivered possession thereof to him. Gedu Mia was the owner in possession of .58 acre land of C.S plot No. 224, as described in schedule 'Ga', who transferred the same vide registered sale deed No. 11745 dated 12.08.1963 in favour of said Ashraf Ali and delivered possession thereof to him.

While said Ashraf Ali was owning and possessing 'Ka', 'Kha' and 'Ga' schedule suit land the Government acquired .08 acre land of plot No. 8 and .68 acre land of other plot vide L.A. Case No. 53/1963-64 and compensation award was prepared in his name and the Deputy Collector gave notice to Ashraf Ali on 01.12.1992 requesting him to receive compensation award within 25.02.1993.

Safaruddin died leaving behind five sons including the plaintiff-No. 2, two daughters and one wife. He had no sons namely Abdul Ali and Anwar Ali. Anwar Ali son of Safar Uddin left for India in 1962 and he never came back. It is presumed that he died there unmarried. Ashraf Ali, plaintiff No.2 Abdul Aziz, Taher Ali and Ishaque Ali were possessing 'Ka' schedule land jointly by turning it to a brick field and Ashraf Ali had been possessing the land of schedules 'Kha' and 'Ga' exclusively as brick

field. Ashraf Ali died leaving behind 4 sons including plaintiff No. 1, four daughters and mother, while Taher Ali died leaving behind mother and one son and Ishaque Ali died leaving behind 4 brothers including plaintiff No. 2 and two sisters. Plaintiff No.1, after receiving notice issued from Dhaka Collectorate in the name of his father, went to the L.A Department on 25.2.1993 for receiving award money and for the first time he came to learn that the defendant was trying to withdraw the award money claiming the acquired land by purchase and thereafter, the plaintiffs have learnt about the forged deed on 20.6.1993 after collecting certified copy thereof. The plaintiffs also learnt that the defendant created forged sale deed being No. 6288 dated 26.10.1964 showing herself as vendee and the heirs of the grandfather of plaintiff No.1 and father of plaintiff No.2 as vendors and said deed has cast cloud upon title and possession of the plaintiffs in the suit land. By dint of said forged deed the defendant never went into possession of the suit land. The deed was created by false personification. The suit deed never acted upon.

The defendant [predecessor of opposite party Nos. 1(a)-1(d)]contested the suit by filing written statement denying material averments as made out in the plaint stating that the suit is not maintainable in its present form; that suit is bad for defect of parties and is barred by limitation and under section 42 of the Specific Relief Act; that the plaintiffs have no title to and possession in the suit land and that without praying for a decree of declaration of title to and recovery of khas possession of the suit land the present suit is not maintainable. The positive case of the defendant, in brief, is that Ashraf Ali Bepari, Taher Ali Bepari, Ishaque Ali Bepari @ Ishaque Bepari, Abdul Ali Bepari @ Abdul Bepari and Anwar Ali Bepari @ Ansar Ali all were sons of Safaruddin and were owners in possession of ‘Ka’ schedule suit land by purchase vide two registered sale deeds dated 14.7.1962. Then Ishaque Ali died leaving behind two sisters namely, Jaitunnessa & Mahitunnessa, mother Aymunnessa and four brothers namely, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari as his heirs who inherited his share. Ashraf Ali Bepari alone purchased ‘Kha’ and ‘Ga’ schedule suit land on 13.04.1963 and 12.08.1963 respectively.

While Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari, Anwar Ali Bepari, Aimannessa, Jaitannessa and Mahitannessa were owning and possessing 'Ka' 'Kha' and 'Ga' schedule suit land they jointly sold the same to the defendant vide registered sale deed dated 26.10.1964 being No. 6288 at a consideration of total Tk. 30,000/- out of which Ashraf Ali received Tk. 16,000/- against 'Kha' and 'Ga' schedule suit land and Ashraf Ali and others jointly received Tk. 14,000/- against 'Ka' schedule suit land and handed over possession thereof to her. The defendant has been possessing the suit land on payment of rent after mutating the same and by growing crops therein. The plaintiffs have no right, title, interest and possession in the suit property and as such, the suit is liable to be dismissed.

At the trial, the plaintiffs adduced two witnesses and the defendants examined six witnesses along with documentary evidence to prove their respective claim. The trial Court decreed the suit in favour of the plaintiffs vide judgment and decree dated 17.11.1997 against which the defendant filed Title Appeal No. 18 of 1988 before the learned District Judge, Dhaka which was transferred to learned Additional District Judge, 8th Court Dhaka for disposal who, upon hearing, allowed the appeal vide judgment and decree dated 21.7.1998 and reversed the judgment and decree of lower Court.

Being aggrieved by and dissatisfied with the judgment and decree passed by the appellate Court the plaintiffs as petitioners have preferred this revision under section 115(1) of the Code of Civil Procedure and obtained the Rule, as stated above.

During hearing of the Rule opposite party No.2 was added vide order dated 14.08.2022. The case of added opposite party No. 2 is that he purchased .30 acre land of C.S plot No. 9 (Kha schedule suit land) from Abul Kashem son of late Ashraf Ali Bepari vide registered sale deed being No. 12651 dated 4.12.2014 and he muttaed his name in the revenue office and paying rents thereof. He also supports the case of the plaintiff-petitioners.

Initially, the sole opposite party filed Vokalatnama to contest the Rule and after her death, her heirs are contesting the Rule as opposite party Nos. 1(a) to 1(d) by filing Vokalatnama.

Mr. Md. Zinnat Ali learned Advocate appearing with Mr. Syed Jahangir Alam learned Advocate for petitioner No.1 and Mr. Abdul Wadud Bhuiyan learned Senior Advocate appearing for added opposite party No.2 made similar submissions. They mainly submitted that the Court of appeal misdirected itself in its total approach of the matter and misread and misappropriated the evidence on record; that the appellate Court came to a wrong decision without considering the fact that L.T.I. No. 6212 of Ishaque Miah was shown as an executant in the deed in question and as such, his thumb impression in said deed (Exhibit No. 'Ga') creates a doubt about the genuineness of the deed; that the learned Judge of the appellate Court failed to appreciate the findings of the trial Court to the effect that the suit deed was not property executed and registered; that the appellate Court did not properly consider the statements of the witnesses and misread the evidence adduced by the parties and as such, has come to a wrong decision; that the appellate Court ought to have considered the statement of P.W 2 who clearly supported the case of the plaintiffs; that the appellate Court totally ignored that the Additional Deputy Collector of the Government had sent notice in the name of Ashrf Ali on 01.12.1992 to withdraw compensation money of the acquired suit land including other land within 25.02.1993 and the plaintiffs had received the notice; that the appellate Court erred in holding that the plaintiffs could not prove their assertion that Safaruddin had no son namely, Ansar Ali and Abdul Ali and that another son Anwar Ali left for India in 1962 and never came back; that the trial Court, upon proper appreciation of the evidence and materials on record, came to its findings and decision and decreed the suit but the appellate Court, as the last Court of facts, by misreading and non-consideration of material evidence and without reversing the findings of the trial Court came to wrong findings and decision and illegally reversed the judgment and decree of the trial Court and accordingly, committed an error of law resulting in an error in the decision occasioning failure of justice; that added opposite party No.2 acquired title to .30 acre land out of the suit land from the son of original owner Ashraf Ali and he has been owning

and possessing the same by mutating his name and on payment of rent and as such, his claim may be considered by this Court.

Per contra, Mr. A. M. Amin Uddin, learned Senior Advocate appearing with Mr. Mokarramus Shaklan learned Advocate for opposite party Nos. 1(a) - 1(d) submitted that the trial Court by misreading and non-consideration of the evidence on record came to its findings and decision and decreed the suit without considering that the suit is not maintainable under section 42 of the Specific Relief Act and that the suit is bad for defect of parties and the plaintiffs could not prove their title and possession in the suit land; that the appellate Court, as the last Court of facts, upon proper appreciation of the materials and evidence on record and by sifting evidence independently came to its findings and decision and rightly reversed the findings and decision of the trial Court; that considering the evidence on record the trial Court should have dismissed the suit; that the plaintiffs could not able to disprove execution and registration of the sale deed in question by reliable oral and documentary evidence but the trial Court, upon misconstruing the deed in question, came to erroneous finding that the same was not properly executed and registered; that the appellate Court did not misconstrued or misread the evidence and accordingly, interference is not called for by this Court.

Since, the question arises as to misreading, non-consideration of material evidence affecting the merit of the suit, misconception of law committed by the Courts below, I have scrutinized and gone through the pleadings of the parties, evidence, both oral and documentary and relevant provisions of law to come to a proper conclusion.

Upon the pleadings, trial Court framed following issues:

(a) Is the suit maintainable in its present form ?

(b) Is the suit barred by limitation ?

(c) Is the suit bad for defect of parties ?

(d) Is the suit deed illegal, inoperative and binding upon the plaintiffs ?

(e) Is the plaintiffs entitled to get any relief as prayed for ?

Trial Court, upon consideration of evidence, both oral and documentary, decided all issues in favour of the plaintiffs and decreed the suit. On perusal of the judgment of the trial Court, it appears that the learned Judge did not decide whether plaintiffs have title to the suit land but found possession on basis of oral testimony of PW-1 and PW-2 who stated that the plaintiffs were possessing the suit land by turning it to brick field. No documentary evidence like mutation, rent receipt or trade license was produced on behalf of the plaintiffs. The defendant claimed that after purchase she has been possessing the suit land through bargadars and adduced DW 2 and DW 3 who supported the claim of the defendant. The defendant produced and proved certified copies of mutation Khatians (Exts. Gha series), DCR (Exts. Uma series) and rent receipts (Exhibits- Cha series). The trial Court did not discuss the documentary evidence of the defendants to ascertain possession of the defendant. The trial Court only emphasized upon the genuineness of the deed in question and found that the deed in question (Ext. Ga) was not executed by Ashraf Ali and others. It appears that the appellate Court reversed the findings of facts of the trial Court with reference to evidences of the parties and found that the plaintiff could not prove possession in the suit land. The Court of appeal did not give any finding as to acquisition of title to the suit land by the plaintiffs but after consultation of the deed in question and other evidence held that the plaintiffs could not able to prove that the impugned deed was not executed and registered properly.

It appears that both the Courts below did not decide the issue of maintainability of the suit with reference to settled principle of law. The Court of appeal also did not decide the issue of defect of parties but dismissed the suit as the plaintiffs could not prove their possession in the suit land and could not prove that the impugned deed was not executed and registered properly.

Now question arises whether there is any justification to interfere with the findings and decision of the Court of appeal in revisional jurisdiction of this Court.

The scope of the revisional power under section 115(1) of the Code of Civil Procedure as it stands now may be seen. The jurisdiction of the

High Court Division while hearing a revision petition is purely discretionary and the discretion is to be exercised only when there is an error of law resulting in an error in the decision and by that error failure of justice has been occasioned and interference is called for the ends of justice and not otherwise. Error in the decision of the sub-ordinate Courts do not by itself justify interference in revision unless it is manifested that by the error substantial injustice has been rendered. The decision which is calculated to advance substantial justice though not strictly regular may not be interfered with in revision.

Power of revision is intended to be exercised with a view to sub-serve and not to defeat the ends of justice. The above principles of law, the High Curt Division is required to follow while adjudicating upon a matter in exercise of its revisional jurisdiction under section 115(1) of the Code of Civil Procedure. Here, it must not be overlooked that there is a lot of difference between a revision and appeal. An appeal confers a right on the aggrieved party to complain in the prescribed manner to the higher forum whereas the supervisory or revisional power has for its objects the right and responsibility of the higher forum to keep the sub-ordinate Courts within the bounds of law.

The High Court Division while exercising its revisional jurisdiction is competent to reverse the judgment of the courts below when the same has been made either upon misreading or non-consideration of the material evidence caused failure of justice; or when the same has been passed on the basis of evidence which cannot be considered as legal evidence and had the same been not taken into consideration the judgment would not have been one as has been made; or when the appellate Court in giving a particular finding has committed any error of law resulting in an error in the decision occasioning failure of justice or such finding is found to have resulted from glaring misconception of law; or when the findings arrived at by the appellate Court is contrary to the evidence; or when there appears error of law apparent on the face of the record occasioning failure of justice. It is also of the view of the Apex Court that once the conditions in section 115(1) of the Code of Civil Procedure are satisfied and the High Court's jurisdiction to interfere is established, the proceedings as a whole from start to finish

can be scrutinized and any order necessary for doing justice may be passed. There is no limit to the area in which the revisional power is to be exercised by the High Court Division in the facts and circumstances of each case. [Ref. 11 BLT (AD) 60, 15 BLR (AD) 319, 33 BLD (AD) 93, 22 BLT (AD) 486, 22 BLC (AD) 254].

When a finding of fact is based on consideration of the materials on record, those findings are immune from interference by the revisional Court and the High Court Division has no jurisdiction to sit on appeal over a finding of fact. [Ref: 33 BLD (AD) 93, 70 DLR (AD) 168]. Without reversing the findings of facts concurrently arrived at by the Courts below on the grounds covered by section 115 C.P.C the High Court Division has no jurisdiction to disturb the findings of facts. It cannot superimpose itself as a third Court for fresh appreciation of the evidence on record, this being not the function of a Court of revision [Ref. 3 MLR (AD) 196].

Now, reverting back to the case in hand. In view of the submissions of the learned Advocates for both parties I have to decide, at first, whether the suit is maintainable under the provision of section 42 of the Specific Relief Act and bad for defect of parties.

The plaintiffs filed the suit for simple declaration that the sale deed in question (Ext. Ga) was forged, collusive and not binding upon them. As per plaint, Ashraf Ali (father of plaintiff No.1 and brother of plaintiff No.2), Taher Ali, Ishaque Ali, Abdul Aziz (plaintiff No.2) and Anwar Ali purchased .45 acre land of C.S plot No. 8 (“Ka” schedule of the plaint) vide registered sale deed Nos. 6718 and 6706 dated 14.07.1962 [Exts. 1(ka) & 1= Exts. Kha & Kha (1)] and said Ashraf Ali purchased .30 acre land of C.S plot No. 9 (schedule ‘Kha’) vide registered sale deed No. 5747 dated 13.04.1963 [Ext. 2= Ext. Kha(2)] and Ashraf Ali also purchased .58 acre land of C.S plot No. 224 (schedule ‘Ga’) vide registered sale deed No. 11745 dated 12.08.1963 [Ext. 2(Ka) = Ext. Kha (3)]. The defendant admitted those purchased deeds but claimed that Abdul Aziz (plaintiff No.2) was not co-purchaser of .45 acre land. On perusal of sale deed Nos. 6718 and 6706 dated 14.7.1962 it appears that i said deeds five persons namely Ashraf Ali (father of plaintiff No.1), Taher Ali, Ishaque Ali, Abdul Ali and Anwar Ali are the vendors. The

deed does not contain the name of Abdul Aziz (plaintiff No.2) as vendee which suggests that plaintiff No. 2 could not acquire title to 'Ka' schedule suit land vide sale deeds dated 14.7.1962 because of the fact that oral evidence cannot override documentary evidence.

The plaintiffs also claimed that while Ashraf Ali was owning and possessing his share to the suit land died leaving behind 4 sons including plaintiff No.1, four daughters and mother, while Taher Ali died leaving behind mother and one son and Ishaque Ali died leaving behind 4 brothers including plaintiff No.2 and two sisters. As per plaint, other three sons, four daughters and mother of Ashraf Ali and one son of Taher Ali, other heirs of Ishaque Ali and other purchaser namely Anwar Ali and Abdul Ali were co-sharers in total 1.33 acre suit land. Moreover, as per plaint .08 acre land out of .45 acre suit land was acquired by the Government vide L.A Case No. 53/63-64. In the plaint, the plaintiffs did not state anything as to how they have acquired title over entire 1.33 acre suit land. The plaintiffs did not led any evidence as to how they acquired title from other admitted co-sharers and acquired their title to entire 1.33 acre suit land. Moreover, the plaintiffs did not make other co-sharers including the Government as parties to the suit. So, on the face of the plaint, the suit is bad for defect of parties but the trial Court wrongly held that the suit is not bad for defect of parties by shifting the onus upon the defendant that she could not produce the names of left out persons.

Moreover, plaintiff No.1 claimed title to the suit land without ascertaining his share therein. As per claim of the plaintiffs .08 acre suit land was acquired by the Government and there were other co-sharers in the suit land. In such situation the plaintiffs are not entitled to claim title to the entire suit land. Accordingly, I am of the view that the plaintiffs could not prove title to the suit land but the trial Court without ascertaining the title of the plaintiffs decreed the suit.

Now question arises whether the plaintiffs are entitled to get such a decree of declaration simpliciter that a registered kabala is collusive without establishing their title to the suit land.

In the case of Ratan Chandra Dey and others vs. Jinnator Nahar and others reported in 61 DLR (AD) 116 the appellate Division held as follows:

> "As it appears, the High Court Division discharged the Rule on holding that the plaintiff-petitioners instituted the suit for a mere declaration that the disputed ewaznama deeds in favour of the defendant-respondent No.1 is fraudulent and void whereas the respondent No.1 contested the suit contending that the suit as framed was not maintainable and the petitioners had no title and possession in the land covered by the alleged exchange deeds; in the case of Md. Joshimuddin vs. Md. Ali Ashraf reported in 1991 BLD (AD) 101=42 DLR (AD) 289 it has been held that the plaintiff is not entitled to a simple declaration that the appellant's kabala is false and fraudulent without first establishing his title to the suit land; in the case of Munsur Ali Malik vs. Md. Nurul Hoque Malik reported in 1986 BCR (AD) 58 the High Court Division dismissed the suit on the ground that the defendant in the suit having challenged the possession of the plaintiff, it was incumbent upon the plaintiff to file regular suit for declaration of title and confirmation of possession and the suit is not maintainable for his failure to ask consequential relief, and in the case of Sahara Khatun vs. Anowara Khatun reported in 1 BCR 126 it has been held that before the plaintiff can be given a declaration that a decree or kabala is fraudulent and not binding upon her, it is not enough for her just to make out a *prima facie* case that she has right , title and interest in the suit property but she has to prove that she had the legal character or the right to property she claimed and unless she could prove such legal character or right to property she could not be given any such declaratory relief, and the facts and circumstances of the above reported cases being similar to the facts and circumstances of the present case, the principle laid down therein are applicable in the present case and accordingly the petitioners ought to have filed a suit for declaration of title and partition of the suit land."

This decision of the Appellate Division is squarely applicable considering the facts and circumstances of the present case. The plaintiffs filed the present suit for mere declaration that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them. The plaintiffs filed the suit as the disputed

kabala cast cloud upon title of the plaintiffs to the suit land and on the basis of the deed in question, the defendant claimed title to the suit land. Since, before filing of the suit, a cloud has been cast upon the plaintiffs' title to the suit land and that the defendant denied their title therein by dint of a registered kabala, the plaintiffs should have filed the suit for a decree of declaration of title to the suit land as principal relief along with other consequential relief that impugned registered kabala deed was collusively made and obtained by forgery and not binding upon them, as provided under section 42 of the Specific Relief Act. Accordingly, this suit as framed is not maintainable.

On the other hand, question arises whether the defendant acquired title to the suit land by dint of disputed deed. The defendant admitted the ownership and possession of Ashraf Ali Bepari, Taher Ali Bepari, Ishaque Ali Bepari @ Ishaque Bepari, Abdul Ali Bepari @ Abdul Bepari and Anwar Ali Bepari @ Ansar Ali all are sons of Safaruddin in respect of 'Ka' schedule suit land who purchased the same vide two registered sale deeds dated 14.7.1962. The defendant also stated that Ishaque Ali died leaving behind two sisters namely, Jaitunnessa & Mahitunnessa, mother Aymunnessa and four brothers namely, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari as his heirs who inherited his share. This genealogy has not been denied by the plaintiffs. The defendant also admitted the ownership and possession of Ashraf Ali Bepari in 'Kha' and 'Ga' schedule suit land who purchased the same on 13.04.1963 and 12.08.1963 respectively. The defendant further claimed that while Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari, Anwar Ali Bepari, Aimannessa, Jaitannessa and Mahitannessa were owning and possessing 'Ka' 'Kha' and 'Ga' schedule suit land they jointly transferred the same to the defendant vide registered sale deed dated 26.10.1964 being No. 6288 in favour of the defendant at a consideration of total Tk. 30,000/- out of which Ashraf Ali received Tk. 16,000/- against 'Kha' and 'Ga' schedule suit land and Ashraf Ali and others jointly received Tk. 14,000/- against 'Ka' schedule suit land and handed over possession thereof to her. Surprisingly, neither the vendors of the deed nor their successors except the plaintiffs have challenged the deed dated 26.10.1964 being No. 6288.

The defendant produced the original sale deed dated 26.10.1964 which was marked as Exhibit-Ga. To prove its execution and registration she adduced two attesting witnesses of the deed namely, Md. Abdul Majid (DW-4) and Sayebur Rahman (DW-5) who admitted their signature in the deed as witnesses and identified their signatures. Though the signature of DW-4 was not marked as exhibit but the signature of DW-5 was marked as Exhibit. Ga(1). Syed Mohammad Ali Advocate deposed as DW-6 who stated that he drafted the deed in question and signed the deed as witness No.1. He identified his signature which was marked as exhibit-Ga(2). DWs 4-6 categorically stated that the vendors executed the deed in question in their presence by putting their signatures and thumb impressions and the consideration money was paid by the husband of the defendant to the vendors in their presence. In cross-examination they did not deviate from their assertions, made in examination-in-chief. The trial Court did not discuss the evidence of these DWs but upon consulting the deed in question found that out of seven vendors only four vendors admitted their execution and the names of three vendors namely, Mst. Aymonnessa, Jaitunnessa and Mahitannessa were penned through and also found that 'one Ishaque Mia was shown as identifier in that an L.T.I was put by Ishaque Mia bearing No. 6212 as 'executant' and by referring to the statement of PW-1, the son of the defendant who could not say whether the transferors and the attesting witnesses were present in the S.R office at the time of registration of the deed, disbelieved the execution and registration of the deed. The Court of appeal reversed said finding of the trial Court stating that DW-1 was not supposed to know whether the executants of the suit deed appeared before the concerned S.R personally. The Court of appeal found that seven persons executed the deed out of whom the executrixes namely, Mst. Aymonnessa, Jaitunnessa and Mahitannessa wer identified by Ishaque Mia. It also found that in the back page of the first page of the suit deed Ishaque Mia put his L.T.I bearing No.6212 and he also put his signature beside this L.T.I. The Court of appeal also observed that as identifier of some executants Ishaque Mia put his signature. The Court of appeal also did not discuss the evidence of DWs 4-6 but finally reversed the finding of

the trial Court saying that " *the lower Court illegally arrived at a decision that the suit deed was not executed and registered properly*".

On the face of above conflicting findings of the Courts below I have perused the original sale deed in question (Ext. Ga). On perusal of Exhibit-Ga, it appears that it is drafted in English containing total 14 pages and registered before Sadar Joint Sub-Registrar, Dacca. At the top of first 13 pages and in the heading of 'EXECUTANTS' at last page four vendors namely, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari put their signatures and other three vendors namely Mst. Aymonnessa, Jaitunnessa and Mahitannessa put their L.T.Is and their L.T.Is were took by Ishaque Mia by putting his signatures just beside each LTI. At the last page of the deed under the heading 'WITNESSES' 1. Syed Mohammad Ali Advocate (DW'6) 2. Md. Abdul Majid (DW -4), 3. Sayebur Rahman (DW -5) and 4. Ishaque Mia put their signatures.

In the left side of reverse page of the 1st page of the deed, the Sub-Registrar endorsed that the deed was presented for registration at 11 a.m on 26th day of October 1964 at the Sadar Joint Sub-Registry Office, Dacca by Ashraf Ali Bepari on behalf of the executants, who then signed as presenter and then the Sub-Registrar put his signature and affixed office seal and date 26.10.1964 and thereafter, Ashraf Ali Bepari, Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari put their signatures as executants and thereafter, Ishaque Mia put his signature and four executants affixed four thumb impressions just left to their respective signatures in serial Nos. 6209, 6210, 6211 and 6212. In the right side of that page, the Sub-Registrar made an endorsement '**Execution is admitted**' by 1. Ashraf Ali Bepari, 2. Taher Ali Bepari, 3. Abdul Ali Bepari 4. Anwar Ali Bepari all sons of Safaruddin Bepari and then penned through the names of 5. Mst. Aymonnessa, 6. Jaitunnessa and 7. Mahitannessa by putting his initials against each name and then made endorsement that the executants were identified by Eshaque Miah son of Kadam Ali and at last the Sub-Registrar put his signature and affixed office seal and date 26.10.1964.

Similarly, in the left side of the reverse page to 2nd page of the deed Mst. Aymannessa, Jaitunnessa and Mahitannessa put three thumb

impressions as executrix in serial Nos. 219, 220 and 221 and beside each thumb impression Ishaque Mia put his signature by writing " Ning, bong" and then he put another signature. In Bengali, 'Ning' means who put thumb impression and 'Bong' means who took the thumb impression which suggest that Ishaque Ali took the L.T.Is of three executrixes and he was their identifier. In right portion of that page, the Sub-Registrar made an endorsement stating " *having visited the residence of Aynunnessa wife of……., Jaitunnessa wife of ……Mahitunnessa wife of ……..at 17 Larmani Street, P.S Sutrapur, Dacca I have this day examined the said Aymonnessa, Jaitunnessa and Mahitannessa who have been identified at my satisfaction by Eshaque Miah son of……and the said Aymonnessa, Jaitunnessa and Mahitannessa admitted the execution of this document*" and then put his signature and affixed date as 1st November, 1964. At the reverse page of the last page of the deed the Sub-Registrar endorsed certificate containing the word "**Registered**" and then wrote the words "Book No. 1, Volume No. 107, Page 154 to 164, Being No. 6288 for the year 1964" and then put his signature and affixed office seal and date 23.11.1964.

Registration Act, 1908 provides procedure relating to the registration of documents. As per section 31 of the Registration Act, ordinarily a document shall be presented and registered at the office of the Sub-Registrar provided that on special cause he may attend at the residence of any person desiring to present a document for registration and accept for registration. Section 32 stipulates that except in cases provided in section 89 every document to be registered shall be presented by the executants or his representative while section 34(1) of the Act stated that subject to the provisions contained in Part VI and in sections 41, 43, 69, 75, 77, 88 and 89 no document shall be registered under the Act unless the executant or his agent appears before the registering officer. Proviso to section 34 gives an opportunity to the absente executants who could not appear due to unavoidable circumstances to appear again before the registering officer within four months for registration. Section 34(2) provides that appearances under section 34(1) may be simultaneous or at different time. Section 34(3)

also provides that the registering officer shall thereupon enquire whether or not such document was executed by the persons by whom it purports to have been executed; satisfy himself as to the identity of the persons appearing before him alleging that they have executed the document. Section 35 provides that if all persons executing the document appear personally or by a representative before the registering officer and if he is satisfied that they are the persons they represents themselves to be and if they admit the execution of the document, the registering officer shall register the document as directed under sections 58-61.

Section 52 provides that the signature of every person presenting a document for registration shall be endorsed on every document and every document admitted to registration shall be copied in the book appropriated thereof. Section 58 of the Act, relates to endorsement of the particulars in the document like 'the signature and addition of every person admitting the execution of the document or refusal of the registering officer to endorse the same. Section 59 provides that the registering officer shall affix the date and his signature to all endorsements made under section 52 and 58, relating to the same document and made in his presence on the same day. Section 60(1) of the Act provides that after compliance of provisions under sections 34, 35, 58 and 59 the registering officer shall endorse in the document a certificate containing the word "registered" together with the number and page of the book in which the document has been copied and as per section 60(2), such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Registration Act.

The provisions under sections 31, 32, 34, 52, 58, 59 and 60 read together suggest that the registering officer may accept a document for registration in his office or for special cause, at the residence of the executants on commission (ref: section 31). The document must be presented for registration by the executant or his representative or attorney (ref: section 32). The executants or their representatives must appear before the registering officer within the time allowed for

presentation under sections 23 -26 or if they could not appear in the stipulated time due to urgent necessity or unavoidable accident they must appear before him within four months (ref: section 35). After the document was presented by a proper person to the satisfaction of the registering officer, he would be under a duty to enquire whether or not such document was, in fact, executed by the persons by whom it purports to have been executed and after satisfying himself as to the identity of the persons appearing before him admitting that he had executed the deed, the registering officer shall register the document (ref: section 35) and when all those formalities as required under sections 34, 35, 58 and 59 have been complied with, the registering officer shall endorsed thereon a certificate containing the word "registered" and the said document shall then be admissible for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsement have occurred as therein mentioned (ref: section 60).

Such endorsement of the registering officer i.e "**Registered**" would be strong presumptive evidence of the fact that the document was explained to the executant before registration who admitted his execution and the receipt of consideration and that the whole proceeding and endorsement made therein were regular and in order and the said endorsement could only be rebutted by the plaintiff by adducing strong evidence proving the allegation that fraud was committed upon the Sub-Registrar. (Ref. Haji Kari Abdur Rahman vs. Abdur Rahim Gazi, 35 DLR 132).

Now question arises whether the deed in question was registered in compliance of the provisions under the Registration Act, 1908.

In the instant case, the endorsements of the then concerned Sadar Joint Sub-Registrar, Dacca at the back page of the first page of the deed and the particulars contained therein suggest that on 26.10.1964 at 11 a.m. the deed was presented for registration by Ashraf Ali Bepari, one of the executants and he himself along with Taher Ali Bepari, Abdul Ali Bepari and Anwar Ali Bepari appeared before the Sub-Registrar and admitted their execution and they were identified by Ishaque Mia and they put four signatures as executants and put four L.T.Is (left thumb

impressions) in serial Nos. 6209, 6210, 6211 and 6212 and Ishaque Mia signed as identifier as fifth signatory and the Sub-Registrar, being satisfied that the vendors were the persons they represent themselves to be and admitted their execution, made endorsement to that effect put his signature and affixied seal and date. It appears that due to space constraint the thumb impression of 4th executant namely, Anwar Ali Bepari was put beside the signature of Ishaque Mia. On 26.10.1964, three other female executrix did not appear before the Sub-Registrar and accordingly, he penned through those names by putting his initials.

On the other hand, the endorsement made by the Sub-registrar on 01.11.1964 appeared in back page of the 2nd page and other particulars contained therein clearly suggests that on 1st November, 1964 the Sub-Registrar himself visited the residence of Aymannessa, Jaitunnessa and Mahitannessa at 17 Larmani Street, Sutrapur, Dhaka on commission and the deed was again presented before him for registration. Then he examined the executrixes who were identified by said Ishaque Mia and being satisfied with their identity and acceptance of their execution made an endorsement to that effect. It also appears that Sub-Registrar endorsed the deed twice on 26.10.1964 and 01.11.1964 when the same was placed before him for registration and also affixed the date and his signature and office seal against all endorsements as required under section 59 of the Registration Act. Finally, the registering officer endorsed, at the back page of the last page, a certificate containing the words '**Registered**' together with Book No.1, Volume- No. 107 page No. 154 to 164, in which the document has been copied and also he put his signature and affixed office seal and date 23.11.1964. Accordingly, the deed in question finally registered on 23.11.1964 as per section 60 of the Registration Act.

It appears that the whole proceeding in regards execution and registration of the deed in question and endorsement of the Sub-Registrar therein as provided under sections 31, 32, 34, 35, 52, 58, 59 and 60 of the Registration Act, as stated above, were done in accordance with those provisions of the Act and the document achieved strong presumptive evidence as to its due registration. Accordingly, burden was upon the plaintiffs to rebut such evidence by

adducing strong evidence to prove that the deed in question was a product of forgery. But the plaintiffs failed to discharge the onus.

It appears that the trial Court upon misconstruction of the deed in question and ignorance of law, as discussed above, came to the wrong finding that Ishaque Mia, the identifier, put L.T.I as executant of the deed and disbelieved its execution and registration. The Court of appeal though set aside the finding of the trial Court and found the document to be genuine and gave a finding that Ishaque Mia was identifier of three female executrix but wrongly held that he put his L.T.I in L.T.I. serial No. 6212. The was no reason on the part of the identifier to put L.T.I in the deed in question but the learned Judge argued that such mistake (though there was no question of such mistake) might happened beyond the knowledge of the Sub-Registrar. I have already found that Ishaque Mia was the identifier of all executants and he also took the L.T.Is of three executrix and identified their L.T.Is and he did not put any L.T.I in the deed as executant. It appears that the learned Judge of the appellate Court also misconstrued the deed in question on this point. Such misconstruction on the part of the appellate Court could not invalidate the deed and affect the merit of the case.

Now question arises, whether the defendant acquired title to the suit land.

The defendant denied the plaintiffs' claim of acquisition of .08 acre suit land by the Government. She claimed that she acquired title to the suit land vide the disputed deed dated 26.10.1964 from Ashraf Ali Bepari and six others (Ext. Ga). Except a notice dated 1.12.1992 purported to have issued by L.A. Collectorate, Dhaka vide L.A Case No. 53/63-64 (Ext. 3), the plaintiffs could not produce any paper to show that said land was acquired by the Government and vested in it.

In the case of Abani Mohan Saha vs. Assistant Custodian, reported in 39 DLR (AD) 223 the Apex Court in paragraph 26 held as follows:

> " Certificate for the registration raises a presumption as to the admission of execution by the executant, but such admission cannot be evidence of due execution against third parties. The execution of a document is to be proved in a manner as provided in section 67 of the Evidence Act and when witnesses are available to prove the questioned document the

> court may not take recourse to any presumption under section 60(2) of the Registration Act, as the Registrar's endorsement under that section cannot be treated as a conclusive proof of execution;…".

To prove execution of the deed in question, the defendant adduced two attesting witnesses namely, Md. Abdul Majid (DW-4) and Sayebur Rahman (DW-5) who admitted their signatures as witnesses of the execution of the vendors and identified their signatures in the deed. But the signature of DW-4 was not marked as exhibit. The signature of DW-5 was marked as Exhibit Ga (1). Syed Mohammad Ali Advocate deposed as DW-6 who stated that he drafted the deed in question and signed the deed as witness No.1. He identified his signature which was marked as exhibit-Ga(2). DWs 4-6 categorically stated that the vendors executed the deed in question in their presence by putting their signatures and thumb impressions and the consideration money was paid by the husband of the defendant to the vendors in their presence. In cross-examination they did not deviate from their assertions made in their examination-in-chief. During their testimony DW-4 was 61 years, DW- 5 was 71 years and DW-6 was 79 years old and they were not interested witnesses but old persons. Accordingly, there is no reason to disbelieve their evidence. On the other hand, the case of the plaintiffs was that there was no son of Ashraf Ali namely, Abdul Ali and Anwar Ali and Anwar Ali was unmarried and he went to India in 1962 and he never came back and died there. The trial Court held that the defendant could not prove that Abdul Ali and Anwar Ali were the sons of Ashraf Ali and Anwar did not go to India. The appellate Court, upon evaluating the evidence, reversed the finding of the trial Court holding that it was the duty to prove such assertion by the plaintiffs by adducing relevant papers or by circumstantial evidence but the plaintiffs did not try to do so. This view of the appellate Court also based on proper appreciation of the evidence and materials on record.

Moreover, deed in question dated 26.10.1964 attained 30 years of age at the date when it tendered to evidence on 29.3.1997, original of which was produced from proper custody. As per section 90 of the

Evidence Act, it is to be presumed as genuine document. The plaintiffs could not rebut such presumption by adducing any credible evidence.

In that view of the matter it can be safely concluded that the defendant has able to prove the execution of the deed in question by credible and reliable evidence. Since the execution and registration of the deed in question has proved by evidence the same is a genuine one and by this deed the defendant has acquired title to the suit land. Accordingly, I am of the view that the Court of appeal committed no illegality in reversing the finding of the trial Court that the deed in question was not executed and registered properly.

In regards possession of the parties, though the trial Court found possession of the plaintiff in suit land on the basis of oral testimony of the PW-2 but the appellate Court, as the last Court facts, after considering the oral evidence of P.Ws 2 and 3 (the bargaders of the defendant) and documentary evidence like mutation kahtian, DCR and rent receipts appeared in the name of the defendant found that the defendant could prove possession in the suit land and reversed the finding of the trial Court. It appears from the evidences adduced by the parties in regards possession that the Court of appeal, after due consideration of the evidence and materials on record, took the right view.

Added opposite party No.2 claims title to .30 acre land of C.S plot No. 9 ('Kha' schedule suit land) from Abul Kashem son of late Ashraf Ali Bepari vide registered sale deed being No. 12651 dated 4.12.2014. Since the title of Ashraf Ali Bepari has extinguished by transfer of his entire share in the suit land vide impugned sale deed dated 26.10.1964, his son Abul Kashem did not acquire title to .30 acre land as his heir and he had no saleable interest in the suit land and to transfer the same to added opposite party No.2. Accordingly, added opposite party No.2 could not acquire title to his claimed land.

As a whole, the judgment of the trial Court is founded on mere assumption and presumption of facts and not on proper appreciation of the evidence on record. The learned Judge of the trial Court has embarked upon the loopholes and weaknesses of the defendant's case to establish the case of the plaintiff against the settled principle of law

that the plaintiff must prove his case in order to get a decree in his favour and the weakness of the defendants case is no ground for passing a decree in favour of the plaintiff.

On perusal of the entire evidence adduced by the parties, pleadings, as well as other materials on record, I am of the view that the appellate Court, as the last Court of facts, upon due consideration of evidence came to definite findings and decision that the plaintiff could not prove title and possession in the suit land and accordingly, rightly reversed the findings and decision of the trial Court. Learned Advocate for the petitioner could not show that the judgment of the appellate Court is based on misreading or non-consideration of any evidence which may affect the merit of the case or its findings are resulted from glaring misconception of law and accordingly, I am of the view that the judgment of the appellate Court is a proper judgment of reversal.

In view of the above, I find no merit in this Rule which should be discharged.

In the result, the Rule is discharged however, without any order as to casts.

Sent down the L.C.R, along with a copy of this judgment to the Courts below at once.