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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 369 of 1998

In the matter of:

Jasim Uddin and others

Plaintiff-respondent-petitioners

-Versus-

Mohammed Ullah being dead his legal heirs Md. Abu Taher and others

Defendant-appellant-opposite parties

Mr. Khair Ezaz Maswood, Senior Advocate

...For the petitioners

Mr. Md. Shafique Ullah, Advocate

... For the opposite party No. 1

Heard on: 22.10.2024, 03.12.2024, 14.01.2025, 15.01.2025, 16.01.2025, 20.01.2025 and 02.02.2025
Judgment on: 17.02.2025

Learned Sub-ordinate Judge, Lakshmipur decreed the Title Suit No. 306 of 1982, vide judgment and decree dated 22.07.1990 (decree signed on 09.08.1990). Learned Additional District Judge, Lakshmipur allowed the Title Appeal No. 34 of 1990, vide judgment and decree dated 29.10.1997. Challenging the same, the plaintiff filed the instant revision and obtained the Rule.

Opposite Party Nos. 1(b), 1(e) and 1(j) to 1(m), who are successors in interest of defendant No. 4, contested the Rule by filing a counter affidavit.

Defendant Nos. 4, 7 and 10 filed separate written statements in the suit. Defendant No. 4 preferred the title appeal only. The instant Rule is contested between the plaintiff and the defendant No. 4.

One Goura Hari Debanath (since deceased) filed the suit on 20.12.1982 through his attorney Abdul Barik for declaration of title in 25.47 acres of land (suit land) appertaining to Diara Khatian No. 148 of Mouza Char Ubati under police station and district Lakshmipur praying for declaration of title in the suit land on the ground that the diara khatian No. 148 was wrongly published in the names of the defendants along with Goura Hari Debanath. Goura Hari Debanath executed the deed of general power of attorney on 11.09.1980 and registered the same on 12.09.1980 giving wide power of transfer and overall management of the suit land to his attorney Abdul Barik.

The plaint case after amendment, in brief, is that Goura Hari Debanath took settlement of 25.50 acres of land out of which the suit land is 25.47 acres from Talukdar Saidul Hoq Patwary by a registered kabuliyat dated 20.02.1943 (ext. 2-Ka) and got possession therein. Goura Hari Debanath was an aged man who had been suffering from old age ailments. He used to live far away from the suit land. The

diara khatian of the suit land was erroneously published in the names of the defendants along with Goura Hari Debanath. The defendants had no title and interest in the suit land. At the time of conducting the diara survey, Goura Hari Debanath used to possess the suit land through his bargadars. He was informed of the wrong recording in the diara khatian on 20.04.1980 after obtaining the certified copy of the khatian. Out of 25.47 acres, Goura Hari Debanath sold through his attorney Abdul Barik a total of 25.40 acres of land to the added co-plaintiff Nos. 2-12 by two separate kabalas dated 04.11.1982 before filing of the suit and by one kabala dated 19.10.1983 after filing of the suit.

During pendency of the suit in the trial Court, the original plaintiff Goura Hari Debanath died and he was substituted by his son, present opposite party No. 11 namely Pulin Chandra Debanath, vide order dated 07.02.1985. Plaintiff Nos. 2-12, being transferees from Goura Hari Debanath, were impleaded as co-plaintiffs in the suit, vide order dated 07.02.1985. Thereafter, plaintiff No. 2 Sobura Khatun died and she was substituted amongst others by her husband Abdul Barik, who was the attorney of Goura Hari Debanath. The plaintiff Nos. 2-12 owned and possessed 25.40 acres of land and the remaining 0.07 acre of land remained with opposite party No. 11.

The case of the defendant No. 4 (present opposite party No. 1) is that Goura Hari Debanath was the owner of the suit land, but Abdul

Barik was not appointed as attorney by him. His specific case is that the general power of attorney was forged, fraudulent and not acted upon. His further case is that he was a bargadar of a portion of the suit land owned by Goura Hari Debanath and that he orally purchased a portion of the suit land in 1369 B.S. from Goura Hari Debanath and at his instance, a portion of the suit land was recorded in the remark column of the diara khatian in his name. His further case is that Goura Hari Debanath died leaving behind 2 sons, namely Nikhil Chandra Debanath and Pulin Behari Debanath (present opposite party No. 11). The defendant No. 4 purchased 6.935 acres of land out of the suit land, vide a kabala dated 25.09.1988 from Nikhil Chandra Debanath. Both Nikhil Chandra Debanath and Pulin Behari Debanath sold the suit lands to other persons and that defendant No. 4 had structures on the land.

The case of the defendant Nos. 7 and 10 is that Saidul Hoq Patwary, from whom Goura Hari Debanath took settlement of the suit land, had no title or possession in the same. Their case is that Faiz Baksh was the owner of eight annas of the superior taluk of the suit land in the benami of Saidul Hoq Patwary. Rokeyar Nesa was the owner of the remaining eight annas of the superior taluk in the benami of Ershad Mia. The defendant Nos. 7 and 10 took settlement of portions of the suit land from the undertenants of Faiz Baksh. Defendant Nos. 7 and 10 claimed title and possession over portions of

the suit land and they denied any sort of title or possession of the plaintiffs in the suit land.

During the trial, the plaintiff and the defendant Nos. 4, 7 and 10 adduced oral and documentary evidence. The trial Court decreed the suit which was reversed by the appellate Court below solely on the ground that the power of attorney (ext. 1) was not proved and thus, was not admissible in evidence and as such, the suit was not maintainable. The appellate Court below did not go into the merit of the case.

Mr. Khair Ezaz Maswood, the learned Senior Advocate appearing for the plaintiff-petitioners, submits that the original registered power of attorney was tendered in evidence by the plaintiff and the same was marked as exhibit-1 without any objection. Mr. Maswood further submits that P.W.1, who tendered the power of attorney in evidence, was not cross-examined as to the genuineness of the said power of attorney. Mr. Maswood next submits that the defendant No. 4 in his written statement and in examination-in-chief as D.W.1 challenged the authenticity of the power of attorney but he did not take any steps to prove that the same was forged. Mr. Maswood refers to Section 2 of the Powers of Attorney Act, 1882, Section 103 of the Evidence Act and the case reported in 55 DLR (AD) 39. Mr. Muhammad Shafique Ullah, the learned Advocate appearing for the defendant No. 4, on the other hand, submits that the

appellate Court below rightly doubted the genuineness of the power of attorney.

The reasons given by the appellate Court below for its conclusion that the power of attorney (ext. 1) was not proved are as follows:

> "গৌর হরি দেবনাথের আমমোক্তার হিসাবে আবদুল বারিক এই মোকদ্দমা দায়ের করেছে। ৪ নং বিবাদী নালিশী সম্পত্তিতে গৌর হরি দেবনাথের স্বত্ব স্বীকার করে। তবে সে সাথে গৌর হরি দেবনাথের আমমোক্তার আবদুল বারিক এই কথা অস্বীকার করে। ৭ ও ১০ নং বিবাদী নালিশী সম্পত্তিতে গৌর হরি দেব নাথের স্বত্ব অর্জনের বিষয় পুরোপুরিভাবে অস্বীকার করে। এই অবস্থায় গৌর হরি দেব নাথ এই মোকদ্দমায় অত্যন্ত গুরুত্বপূর্ণ স্বাক্ষী। উক্ত গৌর হরি দেবনাথ বর্তমানে পরলোকে। তার দেয় আমমোক্তারনামাটি সন্দেহাতীতভাবে অত্র আদালতে প্রমাণ করার দায়িত্ব ছিল আবদুল বারিকের। .....আমমোক্তারনামার লিখক ছিল মোঃ নুর নবী মিয়া। আমমোক্তারনামা সম্পাদনের সময় গৌর হরি দেবনাথকে সনাক্ত করেছিল বজলুর রহমান, স্বাক্ষী ছিল কুঞ্জ লাল ভৌমিক, নাছিল আহাম্মদ, মুসলেহ উদ্দিন মিয়া ও ফজলুর রহমান। এরা কেউই আমমোক্তারনামা সম্পাদনের বিষয়ে আদালতে সাক্ষ্য দিনে আসে নাই। ফলে সাক্ষ্য আইনের বিধান মোতাবেক আমমোক্তারনামা (প্রদর্শনী-১) প্রমাণিত হয় নাই।"

The provisions as to the burden of proof is founded on the rule "*ei incumbit probatio qui dicit, non qui negat*" meaning "the burden of proof lies upon him who affirms not who denies." The combined effect of the provisions of law contained in Sections 101 and 102 of the Evidence Act, 1872 is that a person who asserts a particular fact has to prove the same. The Court has to examine as to whether the person upon whom the burden of proof lies has been able to discharge the burden. In this case, the plaintiff tendered the original registered

power of attorney as documentary evidence which is a primary evidence within the meaning of Section 62 of the Evidence Act. The power of attorney was not authenticated by a notary public or by the officials mentioned in Section 85 of the Evidence Act. It was duly registered before the concerned Sub-registrar under the provision of the Registration Act. Therefore, it is a valid document (***Monindra Mohon Kar vs. Randhir Dutt***, 1987 BLD 275=38 DLR 240). In ***Shishir Kanti Pal and others vs. Nur Muhammad and others***, 55 DLR (AD) 39, the Apex Court held that a registered document carries the presumption of correctness of the endorsement made therein and that one who disputes the said presumption is required under the law to dislodge the correctness of the endorsement made in the registered document. Mr. Maswood appearing for the plaintiffs refers to Section 2 of the Powers-of-Attorney Act, 1882 (since repealed by the Powers-of-Attorney Act, 2012). The Act, 1882 applies to the instant case. Section 2 of the Act, 1882 runs as follows:

> "2. The donee of a power-of-attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

> This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force."

In view of the ratio laid down in ***Shishir Kanti Pal***, 55 DLR (AD) 39, the appellate Court below was wrong in shifting the burden of proof as to the genuineness of the power of attorney on the plaintiff. The plaintiff proved the document in accordance with law. Therefore, the burden shifted on the defendant as per provision of the Section 103 of the Evidence Act to prove that the same was not genuine. Nothing has been brought on record from the defendants' side to show that the power of attorney in question (ext. 1) was not duly registered. Therefore, the power of attorney (ext.1) stands proved.

The issue regarding the admissibility of the original registered power of attorney (ext. 1) in evidence can be looked into from another perspective. The power of attorney was marked as exhibit without objection. When a document is marked as exhibit without objection, the admissibility of the same cannot be challenged at the appellate stage or subsequent stage [44 DLR (AD) 162, 12 LM (AD) 138, (2004) 7 SCC 107].

Another issue, which was not raised before the Courts below but involves a question of law, has been raised in the instant Rule. Admittedly, Goura Hari Debanath, who executed the power of

attorney in favour of Abdul Barik, died during pendency of the suit. Therefore, question arises as to whether after the death of Goura Hari Debanath the attorney can prosecute the suit. Section 201 of the Contract Act, 1872 states, *inter alia*, that the power of attorney is terminated upon death of the principal. However, Section 209 of the Contract Act states: "When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him."

Mr. Shafique Ullah, learned Advocate appearing for the defendant No. 4 points out that before filing of the suit, the attorney Abdul Barik transferred portion of the suit land in favour of his wife, minor sons, daughters and others who were not made parties in the suit at the time of filing of the same. The learned Advocate further points out that after filing of the suit, the attorney transferred further lands out of the suit land. Therefore, the attorney had no authority to file the suit on behalf of the principal for the entire portion of the suit land. In this regard, I note that the suit was filed for declaration of title simpliciter. Even after transfer of the portion of the suit land by the attorney the title of the same remained clouded. Moreover, after the transfer (before and after filing of the suit) 7 decimals of land were left with the principal Goura Hari Debanath which was represented by the attorney and after death of Goura Hari Debanath by his substituted

heir Pulin Chandra Debanath. Considering these facts, I hold that the attorney Abdul Barik had authority to file the suit.

Mr. Shafique Ullah, learned Advocate for defendant No. 4 submits that admittedly the diara khatian was prepared in the names of defendant No. 4, Goura Hari Debanath and others. However, no consequential relief was prayed for correction of the diara khatian. In support of the argument, the learned Advocate refers to some case laws which have no manner of application to the case in hand. Mr. Maswood, appearing for the plaintiff refers to Section 54 of the State Acquisition and Tenancy Act, 1950 and submits that no such declaration for correction of the record of rights by way of consequential relief is required to be prayed for. Under Section 54, the Revenue Officer shall make such alterations in the record of rights as may be necessary to give effect to any final order or decree of a civil Court or High Court passed in any suit or proceeding declaring title to and/or possession of, any land. In ***Abdul Moin vs. Bangladesh and others***, 53 DLR 506, it was held that since the question of title and possession have been settled by the highest Court of the Country the Additional Deputy Commissioner (Revenue) had, in fact, no option in law but to mutate the name of the petitioner by correcting the record of rights. In view of the provisions contained in Section 54 of the State Acquisition and Tenancy Act and the case of ***Abdul Moin***, 53 DLR 506, I find substance in the submission of Mr. Maswood that the

instant suit for declaration of title simpliciter without prayer for correction of the record of rights is maintainable.

Mr. Shafique Ullah submits that P.W.1 stated in deposition that the plaintiff Goura Hari Debanath lost the rent receipts during the flood in 1970 at Barisal where he used to reside. However, defendant No. 4 produced the rent receipts (ext. Ga, Ga-1 and Ga-2) in the name of Goura Hari Debanath. The learned Advocate submits that this fact proves that Goura Hari Debanath orally sold the suit land to the defendant No. 4 who had paid rent of the land in the name of Goura Hari Debanath and kept the rent receipts in his custody. In reply, Mr. Maswood appearing for the plaintiff rightly submits that oral sale of land is not a sale in the eye of law. The learned Advocate further submits that the defendant No. 4 admitted the title of Goura Hari Debanath who is the plaintiff's vendor. In his written statements, he claimed that he had orally purchased some lands from Goura Hari Debanath. He further stated that 13 persons including himself purchased 13.73 acres of land from Nikhil, allegedly a son of Goura Hari on 29.9.1988. In his examination-in-chief, he stated that he made the oral purchase from Goura Hari in 1970. But in cross-examination, he stated that he had purchased in Magh, 1369 B.S. *i.e.* 1963 A.D. Mr. Maswoods points out that it was not proved that Nikhil, the alleged vendor of the defendants' kabala dated 29.9.1988, was the son of Goura Hari Debanath. In examination-in-chief the defendant No. 4 as

D.W.1 stated that he has got his homestead in the suit land. But in cross-examination he stated that his homestead is situated in the village-Jakshin, which is at a distance of 10 miles from the suit land. Mr. Maswood rightly submits that the defendant failed to prove the defence case.

Mr. Shafique Ullah submits that the suit suffered from defect of parties. In this regard, Mr. Maswood appearing for the plaintiff submits that there had been no issue of defect of party before the trial court and the appellate court below. Under Order 1, rule 13 of the Code of Civil Procedure (CPC), the defendant-opposite party is barred from raising this plea at the revisional stage. Moreover, as per Order 1 rule 9 of the C.P.C. no suit will be defeated for non-joinder or misjoinder of parties. Mr. Maswood further submits that Abdul Barik as the attorney of Goura Hari Debanath transferred 9.60+9.60 = 19.20 acres of land to different persons by 2 kabala both dated 04.11.1982, that is, before the filing of the suit on 20.12.1982. He transferred additional 6.20 acres of land by another kabala dated 19.10.1983 to some other persons. Total transfers stood at 25.40 acres. Only 25.47-25.40 = .07 acre of land was left with the principal Goura Hari Debanath. All the transferees by the above deeds were added as co-plaintiffs by order No. 39 dated 07.02.1985. After the death of the added plaintiff No. 2 Sobura, Abdul Barik being the husband of the deceased, was substituted. The purchasers through the aforesaid two

kabala dated 04.11.1982 (before filling of the suit) were supposed to be made co-plaintiffs along with the principal Goura Hari Debanath on the filing of the suit on 20.12.1982. But they were not so made. This irregularity was cured by their subsequent addition as co-plaintiff on 07.02.1985. Goura Hari Debanath died during pendency of the suit and his son Pulin Chandra Debanath was substituted on 7.2.1985. Hence, after the death of the principal Goura Hari Debanath the suit was continued by other co-plaintiffs along with his substituted heir Pulin Chandra Debanath. Mr. Maswood rightly submits that the initial defect regarding non-joinder of parties was cured subsequently.

In respect of possession of the suit land, the trial Court relied upon the oral evidence as well as rent receipts (ext. 5 series) tendered in evidence by the P.W. 1 and held that the plaintiffs are in possession of the suit land. Mr. Shafique Ullah refers to D.W.12 who was the Advocate commissioner. In this regard, I note that the Advocate commissiner's report was not tendered in evidence. Moreover, he admitted in cross-examination that he was not a survey knowing Advocate. Therefore, the evidence of D.W.12 cannot be considered on question of possession. The appellate Court below did not give any findings on possession. On perusal of the materials on record, I hold that the plaintiffs were in possession of the suit land.

I have already noted that the appellate Court below did not discuss the merit of the cases of the respective parties. It allowed the

appeal on a technical ground that the power of attorney (ext. 1) was not proved. The finding was wrong. The trial Court decreed the suit on merit which has been assailed by the learned Advocate for the contesting defendant. The foregoing discussions on facts and law establish that the trial Court rightly decreed the suit and the appellate Court below wrongly dismissed the same. Hence, I find merit in the Rule.

In the result, the Rule is made absolute. The judgment and decree passed in Title Appeal No. 34 of 1990 are set aside and those passed in Title Suit No. 306 of 1980 are restored.

Send down the L.C.R.

Arif, ABO