Bench:
Mr. Justice Bhishmadev Chakrabortty

Civil Revision No. 939 of 2005

Md. Zahangir Mollah .....petitioner
-Versus-
Md. Azizul Jalal and others
.....opposite parties

Mr. Shasti Sarkar with
Mr. FM Mizanur Rahman, Advocates
..... for the petitioner

Mr. Ahmed Nowshed Jamil with H.M. Borhan, Advocates
..... for opposite party 1

Judgment on 09.05.2024

In this Rule, issued at the instance of plaintiff, defendant opposite party 1 was called upon to show as to why the judgment and decree of the Joint District Judge, Court No.3, Khulna passed on 15.02.2005 in Title Appeal No.337 of 2000 allowing the appeal reversing those of the Senior Assistant Judge, Koyra, Khulna passed on 29.08.2000 in Title Suit No.58 of 1996 decreeing the suit should not be set aside and/or such other or further order or orders passed to this court may seem fit and proper.

Facts relevant for disposal of the Rule, in brief, are that the petitioner as plaintiff instituted the suit stating facts that Madhab Sarder, Jadab Sarder, Bhuban Sarder, Kalicharan Sarder and Kalipada Sarder were the recorded tenants of the land measuring an area of 7.21 acres. They got 1.44 acres each in the suit *khatian*. Madhab sold out his share measuring 1.44 acres to Yer Ali

Mollah, father of the plaintiff through *kabala* dated 17.06.1970 and handed over possession thereof. Naren son of Bhuban also sold out his share measuring 1.43 acres to plaintiff's father on 30.05.1970 through another *kabala*. In this way the plaintiff's father became owner in possession of 2.87 acres in the suit *khatian*. Therefrom, he sold out .66 acres to Moslem and .165 acres to defendant 19. After sale of total .825 acres he had 2.045 acres of land. Yer Ali died leaving behind his 2(two) sons plaintiff 1 and defendant 16, his wife defendant 17 and daughter defendant 18 as heirs and they are in possession of the aforesaid quantum of land. The plaintiff's father was an inhabitant of India. Madhab and Naren purchased his property situated in India and they started residing therein. Subsequently Madhab died there. The defendant disclosed on 12.08.1993 that he obtained a compromise decree in Title Suit No.266 of 1973 and claimed the suit land. Defendant 1 was a minor and his father representing him instituted the aforesaid suit. The *patta* as mentioned in that suit was returned to Madhab the original owner of the land. The father of defendant 1 grabbed the said *patta* and fraudulently obtained the compromise decree against defendants 1-4 and *ex parte* against the rests. The plaintiff was not a party to the suit and no notice was served upon him. Hence, the suit for declaration that the decree passed in the aforesaid suit was collusive and not binding upon the plaintiff.

Defendant 1 contested the suit denying the statements made in the plaint. He admitted that Madhab, Jadab, Bhuban, Kalicharan and Kalipada each got 1.43 acres of land in the suit *khatian*. Madhab from his share settled .99 acres to Banshiram on 19.06.1951 through a registered *patta*. Subsequently, Banshiram sold the same to Abbas Gazi who purchased it in the name of his minor son Azizul Jalal, defendant 1 through a *kabala* dated 21.03.1973. Sufia Khatun, mother of Azizul Jalal as guardian instituted Title Suit No. 266 of 1973 in the Court of the then Munsif, Court No.3, Khulna for declaration of title because record was erroneously prepared in the name of Madhab and others. In the said suit Madhab and Banshiram were made parties. The suit was decreed on compromise on 12.05.1975 with defendants 1-4. During liberation war the original *patta* with other documents were lost. Defendant 1 has been possessing the aforesaid .99 acres of land by mutual partition. The plaintiff has no title and possession in the suit land. The suit for mere declaration that the decree is not binding upon him without any prayer for declaration of title and recovery of possession is not maintainable, and as such it would be dismissed.

On pleadings, the trial Court framed 06(six) issues. During trial the plaintiff examined 3(three) witnesses and produced his documents exhibits-1, 2, 3 series and 4. The defendant also

examined 3(three) witnesses and their documents were exhibits-Ka 1-3 and Kha 1-4. However, the Assistant Judge decreed the suit against which defendant 1 preferred appeal before the District Judge, Khulna. The Joint District Judge, Court No.3, Khulna heard the appeal on transfer and by the judgment and decree under challenge in this revision allowed the appeal and dismissed the suit.

Mr. Shasti Sarker, learned Advocate for the petitioner takes me through the materials on record and submits that Title Suit No.266 of 1973 was filed by a minor represented by his father Abbas Gazi. After filing *solenama* in the suit Abbas Uddin died and his wife, *i.e.,* mother of the minor appeared in the suit and deposed supporting the *solenama* which she cannot. Firstly, she had to accord permission from the Court to be the legal guardian of the minor and thereafter could proceed with the suit. He refers to the provisions of Order 32 Rules 6 and 7 of the Code of Civil Procedure (the Code) and the case of Kalitara Biswas vs. Mrinal Kanti Biswas and others, 39 DLR (AD) 216 to substantiate his submission. He then takes me through the *solenama* exhibit 4(Ga) and submits that without any consideration it cannot be treated as a valid agreement between the parties. The aforesaid suit was decreed in terms of *solenama* between plaintiff and defendants 1-4 of that suit and *ex parte* against the rests including this petitioner.

The requirements of passing an *ex parte* decree as settled in the case of Bangladesh vs. Abdul Wadud and others, 25 DLR (SC) 90 and the case of Md. Abu Zafor Miah vs. Abdul Motaleb and another, 3 BLC 412 have not been fulfilled. He then refers to the case of Hemayet Uddin and others vs. Md. Rustam Ali and others, 4 LM (AD) 228 and submits that this suit praying for declaration that the decree passed in the previous suit is not binding upon the plaintiff is well maintainable because of the fact that the plaintiff proved his title and possession in the suit land. He further submits that although in the *patta* exhibit-Ka it is found the land has been permanently settled to Banshiram but according to the old practice and customs of that area it is out and out a mortgage for a limited period. The specific case of the plaintiff is that the land included in the *patta* was returned to its owner Madhab. Although, the defendant claimed the suit land on the strength of *patta* but he did not produce the original on the fear that the status of it and the fact of its return to Madhab would come out. The *patta* which is the basis of defendant's claim was not acted upon because on its basis no record right was prepared in the name of Banshiram. Since it was not acted upon, therefore, Banshiram cannot transfer the land to defendant 1. Moreover, the certified copy of the *patta* was produced as exhibit-Ka but it was not proved formally as required under section 65 of the Evidence Act. The defendant in evidence

failed to prove that the original document was lost in 1971. He finally refers to the case of Additional Deputy Commissioner Revenue vs. Abdur Rashid, 5 BLC (AD) 6 and Md. Abu Alam Vs. Zarina Begum and others, 59 DLR (AD) 74 and submits that findings of the trial Court were not adverted by the lower appellate Court as per law. The Court of appeal below failed to assess the evidence both oral and documentary and dismissed the suit which is to be interfered with by this Court.

Mr. Ahmed Nowshed Jamil, learned Advocate for opposite party 1 opposes the Rule and submits that in this suit the plaintiff prayed that the decree passed in the previous suit is not binding upon him. In such a suit he is to establish his legal status in the subject matter of the suit and that the defendants denied his such status and that no other relief is required to be sought except the relevant claim. In the instant suit the plaintiff's legal status and defendant's denial of it have been proved. But plaintiff's possession in the suit land has not been proved and as such, he cannot get a decree without prayer for recovery of possession. Mr. Jamil then submits that the deed of the defendant stands on Banshiramn's *patta.* The certified copy of *patta* has been proved as exhibit-Ka without any objection and admitted into evidence. The suit without any declaration against the aforesaid *patta* is also not maintainable. The contents of the *patta* further proves that it is

not a mortgage but out and out a permanent settlement of the land which is to be taken into account overriding the oral evidence to that effect. He refers to the case of Mst. Gulshan vs. Amir Ali, PLD 1977 Karachi 29 and Shreejukta Haladhar Karmakar and others vs. Bangladesh and others, 16 BLD 519 and submits that burden of proof of the fact that defendants 1-4 of the previous suit resided in India at the time of passing decree lies upon the plaintiff which he failed. Mr. Jamil finally refers to the provision of section 114(e) of the Evidence Act and submits that the compromise decree is a judicial record and presumed to be correct unless contrary is proved. Here, the plaintiff challenged the decree of a competent Court without proving the fact that it was obtained by misleading the Court. The appellate Court correctly allowed the appeal and dismissed the suit. The Rule, therefore, having no merit would be discharged.

I have considered the submissions of both the sides at length, perused the judgments of the Courts below and *ratio* of the cases cited by the parties.

It is admitted fact that Madhab and four brothers were the original owners of the land of *khatian* 129 measuring an area of 7.12 acres. It is also admitted that they had equal shares measuring more or less 1.43 acres each. The case of the plaintiff is that Madhab sold out 1.44 acres of land to plaintiff's father through

kabala dated 17.06.1970 exhibit-2 and handed over possession thereof. Naren, son of Bhuban also sold 1.43 acres to him through *kabala* dated 30.05.1970 exhibit-5. Thus plaintiff's father became owner and possessor of total 2.84 acres. Therefrom, he sold out total .825 acres to Salim and defendant 19 through two separate *kabalas* and remained owner in possession of remaining 2.045 acres. After his death the plaintiff being his son became owner of it with his brother, mother and sister. It is his specific case that his father was an Indian national who came to this country and purchased the land from Madhab and Naren and that Madhab and Naren opted to India and purchased the land of plaintiff's father and started residing therein.

The defendant claimed that Madhab through *pattan* exhibit-Ka settled .99 acres on 19.06.1951 to Banshiram who subsequently sold it to defendant 1 through a *kabala* dated 21.03.1973 exhibit-Ka(1). The plaintiff's case is that although it was a registered *pattan* on taking *salami* from Banshiram but it is a mortgage deed as per customs of that area. Banshiram subsequently returned the *patta* and handed over the land to its owner Madhab on taking paid *salami* by endorsing it on the backleaf of the *patta.* The defendant produced certified copy of *patta* exhibit-Ka. Mr. Jamil, learned Advocate for opposite party 1 raised serious objection about the aforesaid claim of the plaintiff.

He relied on the provisions of section 92 of the Evidence Act and submits that where there is documentary evidence on a particular fact, the oral evidence for the same purpose should be left out.

Section 92 of the Evidence Act reads as follows:

> **92. Exclusion of evidence of oral agreement**- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.
>
> *Proviso* (1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such a fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure] of consideration or mistake in fact of law.
>
> *Proviso* (2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.
>
> *Proviso* (3) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.
>
> *Proviso* (4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to

> the law in force for the time being as to the registration of documents.
>
> *Proviso* (5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:
>
> Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.
>
> *Proviso* (6) Any fact may be proved which shows in what manner the language of a document is related to existing facts. *(emphasis supplied)*

The above provisos 2 and 5 of the section speaks that if the existence of any separate agreement either oral or documentary as to any matter on which the document is silent with and which is not inconsistent with his terms may be proved. In considering whether or not this proviso applies the Court shall have regard to the decree of formality of the document and that any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contract of that description may be proved. I find that in this case proviso 2 and 5 of the aforesaid section goes in plaintiff's favour and against the defendants.

The case as made out in the plaint that it was a mortgage deed has been proved by the evidence of PWs 2 and 3. PW 2 Abdul Hamid Sarder stated in his evidence that he was an attesting witness to the *patta* and it was returned to its original owner Madhab on taking paid *salami* giving endorsement at the backleaf of the deed. The appellate Court considered the evidence of PWs 2

and 3 in piecemeal way only which was necessary for allowing the appeal. The evidence of PWs 2 and 3 is to be taken as a whole to extract the truth which the appellate Court did not. The further case of the plaintiff is that the defendant did not produce the original *patta* on the fear that the truth of its return to Madhab taking paid *salami* and giving endorsement on the backleaf of the *patta* would come out is well founded. Here oral evidence of the plaintiffs' is accepted considering the exceptional circumstance related to the existing facts. I hold that on the basis of *patta* exhibit-Ka Banshiram did not accrue any title in the suit land because it was registered in 1951 but the record of right was not prepared in his name on its basis. Moreover, the *patta* is not followed by any *dhakilas* as endorsed in its body. The submission of Mr. Jamil that the plaintiff had to seek relief against the *patta,* therefore, bears no substance.

It is found from the compromise decree dated 12.05.1975 [exhibit-4(Ka)] passed in Title Suit No.266 of 1973 that Sufia Khatun mother of minor plaintiff deposed in his favour although his father signed in the *solenama*. According to the provisions Rules 6 and 7 of Order 32 of the Code a guardian on behalf of the a minor was to appoint first through Court but here minor's father instituted the suit and signed in the *solenama* and subsequently died but the mother deposed supporting *solenama*. In the record I

do not find that she was appointed as legal guardian of the minor through Court. She had to appoint as legal guardian first and then file a fresh *solenama* by putting her signature therein and to depose in its support. It further appears that the *solenama* was filed without swearing affidavit by the parties or without any verification. I failed to understand that how the *solenama* exhibit-4(Ga) for compromise without affidavit or verification of the parties and without ascertaining their identity by the learned Advocates was entertained by the learned Judge. Although, there is no specific provision in the Code of swearing affidavit in filing a *solenama* but Order 6 Rule 15 of the Code shall apply in case of filing application alike. Mr. Jamil refers to the provisions of Rule 2 of Chapter-XIII of CRO, Volume-I and tried to convince me that passing of a compromise decree is a Judicial act and not a ministerial act which may safely be relied upon. I hold that the Court must satisfy itself by taking evidence or on affidavit or otherwise that the agreement is lawful. It must be borne in mind that the learned Judge's satisfaction is to be judicious considering the facts of the application placed before him. Here, considering the nature of the compromise and the application filed by the parties for it, the satisfaction of the learned Judge for its acceptance cannot be considered as judicious. The learned Assistant Judge acted mechanically in passing the compromise

decree. It further appears that this petitioner was defendant 7 in the previous suit decree of which has been challenged here. He was made party to the suit by way of amendment but there is nothing in the record to hold that notice of the suit was served upon him. The onus of proving the fact of service of notice lies upon this defendant 1 under section 103 of the Evidence Act which he did not perform.

The defendant claimed that the plaintiff has no title and possession over the suit land and as such the suit in the present form only praying for declaration that the *ex parte* decree is not binding upon him is not maintainable under section 42 of the Specific Relief Act. I have already discussed that by the strength of two purchase deeds exhibits-2 and 5 the plaintiff's father accrued title over the suit land and that the basis of the claim of the defendant through *pattan* has not been proved by evidence. Therefore, instant suit for declaration only that the *ex parte* decree is not binding upon him is maintainable as well. It further appears that on the basis of *pattan* exhibit-Ka Bahshiram did not pay any rent to the concerned authority. The plaintiff paid rent in respect of the suit land from 1974-1991 through series of rent receipts exhibits 3-3Jha which proves plaintiff's possession in the suit land. Moreover, the evidence of PWs 2 and 3 is corroborative to hold the plaintiff's possession in the suit land. On the other hand,

the evidence of DWs 2 and 3 cannot be believed because in cross-examination they admitted that there are criminal cases between the parties and they are accused and witness in the cases respectively. The reason that they are accused of criminal case or witness of a case cannot be the only ground to disbelieve their evidence but here considering the facts and all other aspects of the case, the trial Court rightly disbelieved their evidence for holding defendant's possession. The possession, therefore, is found in favour of the plaintiff, and as such, no consequential relief is required to be sought in this suit. The suit mere declaration that the *ex parte* compromise decree dated 12.05.1975 is collusive and not binding upon the plaintiff is maintainable. Therefore, the submission of Mr. Jamil on this point bears no substance.

The other facts as stated in the plaint that defendants 1-4 of that suit resided in India at the material time and they did not appear and put their signatures in the *solenama* are also proved by the plaintiff in evidence. The appellate Court sifted evidence of PWs 2 and 3 erroneously in deciding that defendants 1-4 of that suit were in this Country at that time. PWs 2 and 3 both stated that defendants 1-4 left for India in 1970. Although they stated that in 1975 they were in India, but it does not mean that at the time of filing the *solenama* in 1974 they were in Bangladesh. Therefore, this point also goes against opposite party 1.

In view of the discussion made hereinabove, I find substance in the submissions of Mr. Sarkar. Accordingly, the Rule is made absolute. However, there will be no order as to costs. The judgment and decree passed by the Appellate Court is hereby set aside and those of the trial Court decreeing the suit are restored.

Communicate the judgment and send down the lower Court records.

Sumon-B.O.