

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

Present:

**Mr. Justice Md. Moinul Islam Chowdhury
With
Ms. Justice Naima Haider
And
Mr. Justice Md. Rezaul Hasan**

Civil Revision No. 1214 of 2014

IN THE MATTER OF:

An application under section 115(1) of the Code
of Civil Procedure.

(Against Judgment & Decree)

And

IN THE MATTER OF:

Jabur Alam and others

--- Defendant-Appellant-Petitioners.

-versus-

Md. Khorshed Alam and others

--- Plaintiff-Respondent-Opposite Parties.

Mr. Md. Masder Hossain with

Mr. Abdur Rahman and

Mr. Md. Akram Hossen, Advocates

--- For the Defendant-Appellant-Petitioners.

Mr. Uzzal Kumar Bhowmick with

Mr. Md. Nahid Islam Chowdhury, Advocates

--- For the Plaintiff-Opposite Party No. 1.

Heard on: 26.04.2022, 02.08.2022 and

10.11.2022.

Date of Judgment: 10.11.2022.

Md. Moinul Islam Chowdhury, J:

This matter has been sent by the Hon'ble Chief Justice before
this Special Larger Bench constituted by an Order dated 11.01.2022
in order to hear and dispose of the Rule.

At the instance of the present defendant-appellant-petitioners, Mr. Jabur Alam and others, this revisional application has been filed under section 115(1) of the Code of Civil Procedure and the Rule was issued calling upon the opposite party No. 1 to show cause as to why the judgment and decree dated 12.02.2014 passed by the learned District Judge, Khagrachori in the Civil Appeal No. 29 of 2011 dismissing the appeal and thereby affirming the judgment and decree dated 29.09.2011 passed by the learned Joint District Judge, Khagrachori decreeing the suit in the Civil Suit No. 34 of 2010 should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present plaintiff-respondent-opposite party No. 1, Md. Khorshed Alam, filed the Civil Suit No. 31 of 2003 in the court of the Deputy Commissioner (DC) and the Ex-Officio Court of the learned Civil Judge, Khagrachori Parbatta Hill Tracts praying for a declaration that the Oshiyatnama/Willnama Deed executed on 07.02.2001 (registered on 23.4.2003) by the father of the defendant-appellant-petitioners, namely, Dela Miah, regarding the suit land as inoperative, illegal as to the suit land described in the schedule of the plaint which has not created any right in favour of the defendant Nos. 2-4. The plaint further contains that the said Oshiyatnama was not executed as per the conditions of the Muslim Ain and the same was executed in connivance with the defendants. It further contains

that the Miscellaneous Case No. 03/Sadar-2002 by the Upazilla Sadar schedule land called for the cancellation of the decree or order passed in the said case. The prayer of the plaint contains that the said Oshiyatnama dated 07.02.2001 was registered in the Sub-Registry Office concerned to declare illegal among other prayers regarding the suit land situated at Mouza-Bangla Kati and Golabari, Police Station- Khagrachori Sadar, District- Khagrachori Parbatta Hill Tracts which was originally belonged to one Dela Mia who died on 25.10.2009 leaving behind his legal heirs the plaintiff and the defendants in the instant case. The present defendants disclosed to the plaintiff on 25.04.2003 that their father executed an Oshiyatnama on 23.04.2003 regarding the land measuring 03.21 acres of the scheduled property described in the deed situated at the above-mentioned address which they are in possession. The plaint also contains that the plaintiff constructed his own house by expending Tk. 70,000/- (seventy thousand) near to the old parental house.

The said Title Suit No. 31 of 2003 was filed by the plaintiff, Md. Khorshed Alam, against Dela Miah himself and others, stating that the plaintiff is his son who used to look after his parents and his brothers and sisters. He also arranged the marriage of his brothers and sisters. He was in Government Service.

The plaintiff further stated in the plaint that his parents' defendant Nos. 1 and 4 that defendant Nos. 2 and 5 conspired to control his parents who are the defendant Nos. 1 and 4 against the plaintiff and in connivance with the others instigated into a dispute among the parents and his brothers and sisters against the plaintiff. On 07.02.2001 the defendants created an illegal Deed of Oshiatnama as to the land owned by the defendant No. 1, Dela Miah and they arranged to file a mutation case being Mutation Case No. 03 of 2001-2002 in order to grab the land but the said dispute could be resolved by the local guardians. However, the defendants could immorally pressurized their old aged father to create an Oshiatnama Deed in order to grab the land influenced Dela Miah to file the Miscellaneous Case No. 03 of 2001-2002 in the Office of the Deputy Commissioner behind his back for achieving their entitlement and depriving the plaintiff, as such, the said Oshiatnama Deed is void, inoperative and illegal under the Muslim Law and claiming that a Muslim person cannot execute a Willnama (Oshiatnama), over $\frac{1}{3}$ of his entire property, thus, the Oshiatnama Deed became an illegal document. The land measuring 01.22 acres situated at Mouza-Bangla Kati and Golabari, Police Station-Khagrachori Sadar, District- Khagrachori Parbatta Hill Tracts total land measuring 03.21 acres. In the plaint, the cause of action of the

instant case was created when the plaintiff could know on 16.04.2003 when he obtained a certified copy of the deed.

The present petitioners as the defendant Nos. 1, 4 and others contested the suit by filing a written statement denying the claims made in the plaint and contending, *inter alia*, that the suit was not maintainable, barred by limitation and no *locus standi* to file the suit. The written statement further contains that the father of the plaintiff and the defendants registered a Willnama (Oshiatnama) on 23.04.2003 when their father Dela Miah (now deceased) was alive in order to distribute his landed property among his children during his lifetime who are the plaintiff and defendants in the suit land measuring total 03.21 acres situated at Mouza-265-Bangla Kati and 262-Golabari, Police Station- Khagrachori Sadar, District-Khagrachori Parbatta Hill Tracts. The said Dela Miah filed a case being Miscellaneous Case No. 03/Sadar/2002 on 23.08.2001 before the Deputy Commissioner, Khagrachori Hill Tracts for approval as the land situated tribal area. However, the present plaintiff-opposite party No. 1, Md. Khorshed Alam, filed a written objection which was rejected by the Deputy Commissioner, Khagrachori Hill Tracts on 16.04.2003. The creator of the Willnama, the father of the plaintiff and the defendants, registered the said Willnama (Oshiatnama) on 23.04.2003.

The present opposite party No. 1 as the plaintiff, thereafter, filed the Title Suit No. 31 of 2003 before the Deputy Commissioner and Ex-Officio Civil Judge, Khagrachori Parbatta Hill Tracks. The said suit was, thereafter, withdrawn on 11.05.2003 by the present plaintiff-opposite party No. 1 and the said court allowed the withdrawal of the said case on 11.05.2003. The present plaintiff-opposite party No. 1, Md. Khorshed Alam, filed the Title Suit No. 34 of 2010 in the court of the learned District Judge, Khagrachori Parbatta Hill Tracks and the said suit was subsequently heard by the learned Joint District Judge, Khagrachori Parbatta District.

On receipt of the said Title/Civil Suit No. 34 of 2010, the learned Joint District Judge, Khagrachari heard the parties and obtained evidence from the respective parties who came to a conclusion to decree the suit by canceling the Willnama (Oshiatnama) being registered Deed No. 430 dated 23.04.2003. Being aggrieved the present defendant-petitioners as the appellants preferred the Civil Appeal No. 29 of 2011 which was heard by the learned District Judge, Khagrachari Hill District and passed the impugned judgment and decree dated 12.02.2014 by affirming the judgment and decree passed by the learned trial court.

This revisional application has been filed challenging the legality and propriety of the impugned judgment under section

115(1) of the Code of Civil Procedure and the Rule was issued thereupon.

Mr. Md. Masder Hossain, the learned Advocate, appearing along with the learned Advocates, Mr. Abdur Rahman and Mr. Md. Akram Hossen on behalf of the petitioners, submits that the learned appellate court as well as the learned trial court passed the judgment and decree by misreading and non-reading the legal and factual aspects of the case as to bar by limitation and *res-judicata* under the provisions of law. The present plaintiff-opposite party also filed the Civil Suit No. 31 of 2003 for declaration of title and also for declaration that the Willnama (Oshiatnama) arising out from the Miscellaneous Case No. 03/Sadar/2002 was executed by the said Dela Miah is illegal and without any legal basis. Thus, the learned trial court as well as the learned appellate court below committed an error of law resulting in an error occasioning failure of justice by passing the impugned judgment and decree, as such, the same is liable to be *set aside* and the original suit is liable to be dismissed.

The learned Advocate further submits that the plaintiff has no *locus standi* to file the suit and there is no *prima-facie* case in favour of the plaintiff due to knowing the matter at the time of execution and he also filed the Civil Suit No. 31 of 2003 and it has been barred by limitation to file a new suit as per law and the

plaintiff also by suppressing the matter to file the instant suit on 14.02.2010 which can not be sustained in law and the Willnama (Oshiyatnama) executed by the predecessor of the plaintiff and defendants being No. 430 dated 23.04.2003 is not binding upon the plaintiff, thus, the learned trial court as well as the learned appellate court below committed an error of law in not considering the matter but decreed the suit, as such, the Rule is liable to make absolute.

He also submits that the Willnama (Oshiyatnama) is governed by the Muslim Law in which there is no bar to distribute his property among his heirs because in the Willnama (Oshiyatnama) the testator had ownership and he had the right to possess the scheduled property. The testator had ownership and possession of the scheduled property, hence, he could make a Willnama (Oshiyatnama) of the scheduled property beyond $\frac{1}{3}$ of the whole property without obtaining consent of his all heirs and the learned trial court as well as the appellate court below committed an error of law with misunderstanding and by misreading about the Willnama (Oshiyatnama), as such, the same is liable to be *set aside* and the Rule should be made absolute.

The Rule has been opposed by the present plaintiff-opposite party No. 1, Md. Khorshed Alam.

Mr. Uzzal Kumar Bhowmick, the learned Advocate, appearing along with the learned Advocate Mr. Md. Nahid Islam

Chowdhury, submits that the Willnama (Oshiyatnama) Deed No. 340 dated 23.04.2003 was executed by the owner of the suit land for the purpose of distribution of his total land measuring 3.21 acres among his wife, sons and daughters by violating the Muslim Shariah Law beyond the framework of the said Muslim Personal Law but the present petitioners obtained this Rule by misleading the court as per disregarding his discretion for disposing of the shares of the land owned by him, accordingly, the deed was executed as a bequest, as such, the Rule is liable to be discharged.

The learned Advocate also submits that as per the Muslim Law of inheritance, a person cannot execute any Oshiyatnama for more than $\frac{1}{3}$ of the total land because $\frac{1}{3}$ of the property must be kept out of his total land but without obtaining the consent of his legal heirs, the executant of this Oshiyatnama executed for entire property he owned during his lifetime without any permission from the Deputy Commission, Khagrachori Hill Tracts under the provisions and rules existing in the Khagrachari Parbatta Chattagram Hill Tracts, as such, the Rule is liable to be discharged.

He further submits that the Oshiyatnama/Will was executed regarding his property described in the schedule of the plaint measuring 3.21 among his successors during his lifetime but the present plaintiff-opposite party No. 1 challenged the said Oshiyatnama by filing a case earlier in the year of 2003, however,

that suit was withdrawn by the plaintiff himself and this Title Suit No. 34 of 2010 was filed challenging the appropriateness, accuracy, validity, propriety and prosperity of the judgment and order passed by the learned appellate court below declaring the Oshiyatnama dated 23.04.2003 being registration No. 430 as illegal.

I have considered the submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with the annexures, in particular, the impugned judgment and decree passed by the learned appellate court below i.e. the learned District Judge, Khagrachari Hill District on 12.02.2014 by disallowing the appeal and thereby affirming the judgment and decree passed of the learned trial court and also perusing the relevant documents available in the lower courts record, I have considered the Willnama (Oshiyatnama) being No. 430 dated 23.04.2003 which was executed by the father to his successors who were examined by the learned trial court and also by the learned appellate court on the basis of the evidence adduced and produced by the parties in the trial court and came to a concurrent findings declaring the Willnama (Oshiyatnama) as an invalid document, therefore, not operative upon the plaintiff and the defendants because there are no errors of law. However, after examining the terms and conditions for creating the Oshiyatnama

and the purpose for creating that thereof I also consider that the Oshiyatnama is an invalid so far as it relates to the plaintiff-opposite parties and in respect of all necessary respective parties relating portion of land described in the schedules of the said deed in favour of the defendants who are the heirs of the creator/testator of the Oshiyatnama because there was no consent given by the defendants in the deed. Moreover, the plaintiff-opposite party apparently did not consent as to the creation of Oshiyatnama dated 23.04.2003. Everybody and the plaintiff would be allowed to get his part of the share under the provisions of Muslim Law/Shariah Law as per the Mohamedan Shariah Law regarding the heirs of the land. Operation of the judgment would allow the successors of the deceased testator which would be meant by following the description of land entitled to all the respective parties in this case.

Regarding the order passed by another Bench of this court on 05.01.2022 making some queries as to the execution of an Oshiatnama under the provisions of Muslim Law and the verses of Surah (সূরা) of the Holy Quran (পবিত্র কুরআন) for distribution of property. I have examined 3 questions for considering in an Oshiatnama. I consider that such questions are involved in the interpretation of the verses of the section of property by a Muslim owner of the land. This is a court of law and any interpretation or explanation or raising any question as to the settled principles of

Muslim Law as to inheritance as described in Surah Nesa (সূরা নেসা) and also Surah Baqarah (সূরা বাকার). I am not inclined to give any interpretation of the settled verses of the Holy Quran (পবিত্র কুরআন) and any new interpretation or explanation would be involved into a Blasphemy Law. As such, I do not take any decision as to the above questions.

In view of the above, I am not inclined to interfere upon the impugned judgment and decree passed by the learned appellate court below.

I, therefore, consider that the learned appellate court below committed no error of law by dismissing the Civil Appeal No. 29 of 2011 and thereby affirming the judgment and decree dated 29.09.2011 passed by the learned Joint District Judge, Khagrachori Hill District decreeing the Civil Suit No. 34 of 2010, as such, I do not consider that this Rule requires any further consideration.

Accordingly, I do not find merit in this Rule.

In the result, the Rule issued by this court is hereby discharged.

The impugned judgment and decree dated 12.02.2014 passed by the learned District Judge, Khagrachori Hill District in the Civil Appeal No. 29 of 2011 by disallowing the appeal and thereby affirming the judgment and decree dated 29.09.2011 passed by the

learned Joint District Judge, Khagrachori Hill District decreeing the Civil Suit No. 34 of 2010 is hereby upheld.

The interim order of stay and a direction passed by this court at the time of issuance of this Rule to maintain *status quo* in respect of the possession and position of the suit land by the respective parties and subsequently the same was extended from time to time and lastly, it was extended till disposal of the Rule are hereby recalled and vacated.

The concerned section of this Court is hereby directed to send down the lower court records along with a copy of this judgment and order/decision to the learned concerned courts below immediately.

There is no order as to cost.

Naima Haider, J:

I agree.

Md. Rezaul Hasan, J:

I respectfully concur with the judgment and order passed by my learned Brother Mr. Justice Md. Moinul Islam Chowdhury, however, for the reasons stated hereinafter.

The facts of the case need not be repeated.

I have considered the limitation point and I find that the right to sue has accrued in this particular case, after the death of the testator.

Having considered the submissions of both sides, in the light of the facts and circumstances of the case and a binding judgment passed by the Appellate Division, reported in 9 SCOB [2017] AD 40: Most. Rabeya Khatoon Vs Md. Abdur Rakib Sarker, I hold that the trial court's view is legal and the appellate court has rightly concurred with the same.

As regards the question as to “whether the provisions relating to *wasiyya* as envisaged in Sura Nesa has repeated that of Sura Baqarah,” my considered opinion is that, this court is not and cannot be called upon to interpret the Holy Quran. The duty of this Court is confined to the interpretation of statute or law. In spite of that, having perused the relevant verses, I do acknowledge with humility that there is no conflict between these two verses. Verse 180 of Sura Baqarah permits disposal of property, by way of bequest, to the parents and next of kin during the lifetime of its

proprietor, while Verses 11-12 of Sura Nisa are about the inheritance of his property after his death.

Therefore, I find no merit in this Rule and I respectfully agree with my learned brother.

Before parting, I should record here that, (1) the creator does not speak to His creature in a language that is not intelligible to them and (2) His revelations are to be found relevant for the people of all ages, all races and all time.

I find no merit in this Rule.

In the result, the Rule is discharged.

The order of stay granted earlier by this court should stand vacated.

Send down the lower court records and communicate the judgment and order.