

*Present:-*

*Mr. Justice Mahmudul Hoque*

**Civil Revision No. 3647 of 1996**

Nur Ahmed and others

... Petitioners

-Versus-

Abdur Rahman being dead his legal heirs:

1(a) Mallica Begum and others

...Opposite-Parties

Mr. Mohammad Al-Amin, Advocate

...For the Petitioners

Ms. Quamrun Nessa, Advocate

...For the Opposite-Party Nos. 2-5.

**Judgment on 31<sup>st</sup> October, 2024.**

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite party Nos.1-6 to show cause as to why the impugned judgment and decree dated 21.05.1996 passed by the learned Subordinate Judge (now Joint District Judge) and Commercial Court and Artha Rin Adalat, Chattogram in Other Appeal No. 419 of 1994 disallowing the appeal and thereby affirming the judgment and decree dated 27.08.1994 passed by the learned Assistant Judge, Chandanaish, Chattogram in Title Suit No. 59 of 1985 decreeing the suit should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The opposite party Nos. 1-6, as plaintiffs,

instituted Title Suit No. 59 of 1985 in the Court of Assistant Judge, Chandanaish, Chattogram against the present petitioners, as defendants, for a declaration of Mourashi Taluka and Raiyati Taluka khas Dakali right to the extent of 10 annas 10 gondas 1 kara and one kranti share in suit schedule 1-3 lands and for confirmation of possession in suit schedule 1(ka), 2(ka) and 3(ka) lands and for permanent injunction restraining the defendants from entering into the suit land and also for a decree of khas possession if the plaintiffs are dispossessed by the defendants during pendency of the suit.

The case of the plaintiffs in short are that the lands in suit schedules 1, 2 and 3 belonged to three brothers namely Meahjan, Ebadullah and Hamidur Rahman alias Nur Ahmed, accordingly, C.S. khatians stand recorded in their names. C.S. Khatian No. 1 wrongly recorded in the name of Ali Ahmed instead of his father Meahjan who is son of Akbar Ali by his first wife and Ebadullah and Hamidur Rahan are the sons of Akbar Ali by second wife. Meahjan died leaving son Ali Ahmed and wife Alekjan, Ebadullah died issueless leaving brother Hamidur Rahman. Hamidur Rahman died leaving sons Amir Hamza, Nurul Hoque, Sirajul Hoque and wife Omda Khatun. Omeda Khatun died leaving aforesaid three sons. Though R. S. khatian recorded in the name of the heirs of Meahjan and Hamidur Rahman but Ali Ahmed managed to record more share in his name during R.S. operation. Ali Ahmed died

leaving mother Alekjan and daughter Rashida Khatun and cousins (paternal uncle's son) Amir Hamza, Sirajul Hoque and Nurul Hoque. Alekjan orally gifted her share to Rashida Khatun. Among the sons of Hamidur Rahma, Amir Hamza died earlier. Sirajul Hoque died leaving the plaintiffs as his heirs, Amir Hamza died leaving plaintiff Nos. 1-6. Share of the defendant No. 8 sold to plaintiff Nos. 1-3 on 23.07.1975. Abdul Gani, the minor son of Nurul Hoque died leaving the plaintiff Nos. 1-5. The plaintiffs as owners are in possession of schedules 1, 2 and 3 lands. The defendants denied title of the plaintiffs and threatened the plaintiffs with dispossession, hence the present suit.

The defendant Nos. 1-5, 6-7 and 17 contested the suit by filing separate written statements denying material allegations made in the plaint and contended inter alia, that the suit is not maintainable in its present form. The defendant Nos. 3-4 and 5 filed additional written statement. Summary of the case as made out by the defendants in their written statements in short are that the suit properties originally belonged to Akbar Ali who died leaving three sons, Meahjan by first wife who died leaving son Ali Ahmed and wife Alekjan, Hamidur Rahman and Ebadullah by second wife. Ebadullah died leaving brother Hamidur Rahman. Hamidur Rahman was entitled to  $\frac{2}{3rd}$  share in the suit land. Hamidur Rahman died before R. S. operation and his sons Amir Hamza, Nurul Hoque

and Sirajul Hoque were minors at the time of his death. Taking advantage of their minority, Ali Ahmed recorded more share in his name in R.S. khatian. Sirajul Hoque left for Burma leaving his share of land in favour of his brother Nurul Hoque. Amir Hamza never claimed the share of Sirajul Hoque. Amir Hamza died leaving the plaintiffs as his heirs. Nurul Hoque's son Abdul Gani died leaving defendant Nos. 6-7. The defendants are the owners of the land of Nurul Hoque as heirs and they got the share of Sirajul Hoque amicably. The statement made in the plaint regarding the death of Sirajul Hoque in the year 1976 is false. The present suit is not maintainable and the plaintiffs are to file a suit for partition and recovery of khas possession.

It is further stated in the additional written statement that Ali Ahmed in addition to his share also purchased 1 kani 15 gondas from Hamidur Rahman vide kabala dated 17.10.1917 and R.S. khatian recorded in his name correctly. Ali Ahmed died leaving only daughter Rashida Khatun, wife Begum Khatun, mother Alekjan Khatun and sister Sonai. Sonai died leaving mother Alekjan and Rashida. Begum Khatun died leaving daughter Rashida. Alekjan gifted her share of land to Rashida and the same is admitted in the plaint. Rashida died leaving the defendants and husband Khoazer Rahman. Khoazer Rahman died leaving the defendant Nos. 3-5. R.S, P.S and B.S record accordingly stand recorded in their names and the plaintiffs never raised any objection

about title and possession of the defendants, as such, the suit is liable to be dismissed.

The trial court framed 8(eight) issues for determination of the dispute. In course of hearing the plaintiffs examined 2(two) witnesses as P.Ws and the defendants examined single witness as D.W.1 in support of their claim and have submitted documents which were duly marked as exhibits. The trial court by its judgment and decree dated 27.08.1994 decreed the suit.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the defendants preferred Other Appeal No. 419 of 1994 before the learned District Judge, Chattogram. Eventually, the appeal was heard and disposed of by the learned Subordinate Judge (now Joint Distract Judge), 2<sup>nd</sup> Commercial and Artha Rin Adalat, Chattogram on transfer who upon hearing by the impugned judgment and decree dated 21.05.1996 disallowed the appeal affirming the judgment and decree of the trial court. At this juncture, the petitioners moved this Court by filing this revisional application under Section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of stay.

Mr. Mohammad Al-Amin, learned Advocate appearing for the petitioners submits that admittedly suit property originally belonged to 3(three) brothers namely, Meahjan, Ebadullah and Hamidur Rahman alias Nur Ahmed. Accordingly, C.S. khatian

stand recorded in their names, but C.S. Khatian No. 1 wrongly recorded in the name of Ali Ahmed instead of Meahjan. Among the 3(three) brothers, Meahjan was son of Ali Akbar by his first wife and Ebadullah and Hamidur Rahman by his second wife. According to plaintiffs, Meahjan died leaving son Ali Ahmed and wife Alekjan. In the instant case share of Meahjan is concerned. The plaintiffs claimed that Ali Ahmed during his life time taking advantage of minority of Ebadullah and Hamidur Rahman managed to get the khatian recorded in his name beyond his entitlement depriving Ebadulah and Hamidur Rahman. It is also claimed that Ali Ahmed died leaving mother Alekjan and daughter Rashida Khatuna and paternal uncle's sons Amir Hamza, Sirajul Hoque and Nurul Hoque. But the defendants claimed that Ali Ahmed died leaving daughter Rashida Khatun, mother Alekjan, wife Begum Khatun and sister Sonai. Because of having daughter, wife, mother and sister, property left by Ali Ahmed did not devolve upon his nephews through step brother. He submits that the property left by Ali Ahmed was inherited by Rashida Khatun, Begum Khatun, Alekjan and Sonai.

He argued that apart from this Ali Ahmed purchased 1 kani 15 gondas land from Hamidur Rahman by a registered sale deed dated 17.10.1917. Therefore, all the khatians so have been recorded in the name of Ali Ahmed stands correct, but both the courts below for the reason best known to them did not consider the deed of

more than 100 years and leaving the said deed, unfortunately, found title of the plaintiffs in the suit land and decreed the same in their favour. He submits that the plaintiffs at the first instance filed Partition Suit No. 92 of 1976 praying for partition of the suit property. After long time they have withdrawn the suit on the ground of formal defect and filed the instant suit in the year 1979 praying for declaration of title, confirmation of possession and injunction, whereas, admittedly, the plaintiffs and the defendants are co-sharers in the common plots, as such, the instant suit is not maintainable without a suit for partition. Both the courts below failed to appreciate the facts and law in this regard. He finally argued that had the court below considered the deed dated 17.10.1917 executed by Hamidur Rahman in favour of Ali Ahmed the suit would not have been decreed in favour of the plaintiff, without a suit for partition. In this situation he prays for sending the suit to the appellate court on remand to consider the deed in question.

Ms. Quamrun Nessa, learned Advocate appearing for the opposite party Nos. 2-5 at the very outset submits that, by filing additional written statement the defendants claimed that their predecessor Ali Ahmed purchased 1 kani 15 gondas land from Hamidur Rahman on 17.10.1917, but the defense side could not prove the same by filing the said deed before the trial court and by adducing any evidence and getting the same marked as exhibit,

therefore, a document beyond evidence cannot be considered by the Court. Moreover, the defendants when preferred appeal they filed an application for additional evidence, but they did not take proper step to get the sale deed exhibited in due process of law. She submits that when the defendants utterly failed to get their document exhibited before the trial court as well as before the appellate court, both the courts had no scope to consider the document without any proof, as such, both the courts below concurrently found title of the plaintiffs as well as possession in the suit property. She finally submits that concurrent findings of both the courts below cannot be disturbed in revision unless it can show misreading of evidences and misinterpretation of law, but in the instant case nothing could prove that the trial court as well as the appellate court failed to consider any evidence which occasioned failure of justice and as such, the courts below rightly decreed the suit as well as dismissed the appeal. She submits that for filling up the lacuna a suit cannot be sent back to the court below on remand.

Heard the learned Advocates of both the parties, have gone through the revisional application, plaint in suit, written statement, evidences both oral and documentary available in lower court records and the impugned judgment and decree of both the courts below.



Both the parties admitted that the property in question originally belonged to 3(three) brothers namely, Meahjan, Ebadullah and Hamidur Rahman alias Nur Ahmed. C.S. khatian stand recorded in their names, but in C.S. khatian in respect of schedule 1 property name of Ali Ahmed showing son of Ali Akbar has been wrongly recorded instead of Meahjan, but other 2(two) schedules correctly recorded in their names. Among the 3(three) brothers Meahjan was son of Ali Akbar by his first wife, Ebadullah and Hamidur Rahman by his second wife. The plaintiffs claimed that as per law of inheritance 3(three) brothers inherited the property equally  $\frac{1}{3\text{rd}}$  each. The plaintiffs claimed that Meahjan died leaving only son Ali Ahmed and wife Alekjan. Ebadullah died issueless consequently, his share devolved upon his full brother Hamidur Rahman. Therefore, Hamidur Rahman acquired  $\frac{2}{3\text{rd}}$  share in the property. Hamidur Rahman died leaving 3(three) sons Amir Hamza, Nurul Hoque, Sirajul Hoque and wife Omda Khatun. On the death of Omda Khatun her share devolved upon 3(three) sons. Ali Ahmed died leaving mother Alekjan and daughter Rashida Khatun, the defendant No. 1 and nephews by step brother Hamidur Rahman named Amir Hamza, Nurul Hoque, Sirajul Hoque. Alekjan died leaving granddaughter defendant No. 1 Rashida Khatun who got her share by oral gift.

Among 3(three) sons of Hamidur Rahman, Amir Hamza died first, Nurul Hoque died leaving 2<sup>nd</sup> wife defendant No. 8, Razia Khatun, son Abdul Gani, 2(two) daughters defendant Nos. 6-7. Abdul Gani died minor, consequently, his share devolved upon the plaintiffs. Defendant No. 8, Razia Khatun, 2<sup>nd</sup> wife of Nurul Hoque transferred her share to the plaintiff Nos. 1-3 by a registered deed dated 23.07.1975. In R.S. record name of Ali Ahmed and 3(three) sons of Hamidur Rahman stand recorded, but taking advantage of minority of sons of Hamidur Rahman, Ali Ahmed got his name recorded more than his share, as such, R. S. record was wrongly prepared. Though, share of Ali Ahmed was shown in the khatian in excess of his share, but the plaintiffs have been possessing the suit land as per their entitlement. Among 3(three) sons of Hamidur Rahman, Sirajul Hoque relinquished his share in favour of plaintiffs and left this country for Burma and permanently residing there who admitted the same by filing written statement and deposing before the court on oath on 10.02.1983. Main contention of the plaintiffs is that they acquired a portion of the property left by Ali Ahmed in absence of male heirs as nephews by step brother and they also did not admit that Hamidur Rahman at any point of time transferred any property in favour of Ali Ahmed.

The defendants claimed that admittedly, Meahjan got  $\frac{1}{3}$ rd share in the suit property. Meahjan died leaving son Ali Ahmed and

wife Alekjan. Thereafter, Ali Ahmed died leaving daughter Rashida Khatun, the defendant No. 1, wife Begum Khatun, mother Alekjan and sister Sonai who inherited the property left by Ali Ahmed. In addition Ali Ahmed also purchased 1 kani 15 gondas land from Hamidur Rahman by a registered sale deed dated 17.10.1917 which was stated by defendants by filing additional written statement and deposing before the trial court as D.W.2, but the trial court did not mark the sale deed as exhibit. Though, in the judgment the appellate court observed that the defendants by filing additional written statement claimed that Ali Ahmed purchased 1 kani 15 gondas of land from Hamidur Rahman by the said deed, but did not consider the same as it was not properly proved by evidence. The appellate court also while refusing to accept the sale deed dated 17.10.1917 observed as follows:

“দেখা যা-চ্ছ যে বিবাদীপক্ষ মূল জবা-ব বিগত ১৭/১০/১৯১৭ইং তারি-খর কবলা সম্প-র্ক কিছুই ব-ল নাই। মূল মামলা দুতরফা সূত্রে ডিসমিস হইয়া আপীল শুনানীঅন্তে রিমাণ্ডে যায়। তৎপর মূল মোকদ্দমা এক তরফা ডিক্রি হয় এবং উক্ত একতরফা ডিক্রির বিরুদ্ধে মিছ আপীল হইয়া উহা মঞ্জুর হয় কিন্তু এতদিনের বিগত ১৭/১০/১৯১৭ইং তাং এর দলি-লর কথা বিবাদীপক্ষ উ-ল্লখ ক-র নাই। বিবাদীপক্ষ সর্বপ্রথম ২৬/০৭/১৯৯৪ইং তারিখ অতিরিক্ত জবাব দাখিলের মাধ্যমে উক্ত ১৯১৭ইং স-নর দলিল এর কথা উ-ল্লখ ক-রন। দেখা যা-চ্ছ যে বিবাদীপক্ষ ১৪/০৮/১৯৯৪ইং তারিখ যুক্তিতর্ক শুনানীর জন্য ধার্য তারিখ ১৯১৭ইং স-নর দলিলটিসহ বিবাদীপক্ষের কাগজপত্র ফিরিস্তিসহ দাখিল করিয়া উহা

নথীভুক্ত রাখার জন্য আবেদন করিয়াছে। পর্যালোচনায় দেখা যা-চ্ছ যে, উক্ত তারিখ যুক্তিতর্ক শুনানী না হইয়া ডি, ডব্লিউ-‘৩’ মফজল আহমদ এর জবানবন্দী জেরা গ্রহণ করা হয়। কিন্তু বিবাদীপক্ষ ঐ তারিখ উক্ত কবলাটিকে প্রদর্শনী হিসা-ব চিহ্নিত ক-র নাই কি, ডি, ডব্লিউ-‘৩’ এর জবানবন্দীতে উক্ত কবলাটি সম্প-র্ক একটি কথাও জিজ্ঞাসা করা হয় নাই। তাহলে মাননীয় আপীল আদালত কর্তৃক মামলা রিমা-ন্ড প্রেরন করার কারন কি? বিজ্ঞ নিম্ন আদালতের সকল ক্রটি-বিচ্যুতিসহ পক্ষগন-ক প্রাসংগিক কাগজপত্র দাখিলসহ প্রাসংগিক সাক্ষ্য প্রদা-নর সু-যোগ প্রদানের নিমিত্তে মোকদ্দমা রিমাণ্ডে প্রেরন করা হয়। কিন্তু বিবাদী- আপীল্যান্ট পক্ষ বিজ্ঞ নিম্ন আদালতে যুক্তিতর্ক শুনানীর পূর্বে উক্ত দলিলটি দাখিল করিয়াও এবং ডি, ডব্লিউ-‘৩’ এর জবানবন্দী গ্রহন করিয়াও উক্ত দলিলটি প্রদর্শনী হিসা-ব চিহ্নিত করা বা উহা জবানবন্দী-ত গ্রহন করার বিষয়-এ এ-কবা-র নীরব রহিয়া-ছন। বর্তমা-ন আপীল শুনানীকা-ল দেঃ কাঃ ৪১ আ-দশ ২৭ রু-লর বিধান মতে একটি দরখাস্ত দাখিলক্রমে উহাকে প্রদর্শনী হিসা-ব চিহ্নিত করার জন্য আবেদন করিয়াছেন কিন্তু উক্ত কবলাটি-ক বাদীপক্ষ তাহা-দর বিগত ০৬/০৮/১৯৯৪ইং তারিখের আপত্তিতে ফেরবী, যোগসাজসী এবং উহা দি-নর আলো দেখে নাই বলা সত্ত্বে উক্ত দলিলটিকে আইনের বিধান মতে সাক্ষী দ্বারা অত্র আদালতে ও প্রদর্শন করার চেষ্টা করে নাই। তাছাড়া উক্ত দলিলটি প্রদর্শনী হিসাবে চিহ্নিত করার জন্য আদাল-তর সুইচ্ছায় পুনরায় মোকদ্দমা রিমাণ্ডে প্রেরন করার কোন আবশ্যিকতা নাই। শুধুমাত্র মুখের কথায় বিবাদীপক্ষের উক্ত কবলাটি গ্রহন যোগ্য হই-ত পা-রনা। যেখা-ন উক্ত কবলাটির বিরুদ্ধে বাদীপক্ষের চ্যালেঞ্জ রহিয়া-ছ এবং যেখা-ন কবলাটি-ক প্রদর্শনী হিসা-ব চিহ্নিত করার জন্য পর্যাপ্ত সুযোগ দেওয়া হইয়াছিল। তাছাড়া উক্ত দলিলটি লেখা সুস্পষ্ট রহিয়াছে কিন্তু সিলগুলি নাই যাহা

থেকে দলিল-লর যথার্থ সম্পর্ক য-থষ্ট স-ন্দহ থাকার  
অবকাশ রহিয়া-ছ।”

The appellate court rightly found that at the back side of the deed as well as on the front side seal of the concerned Registry Office are illegible, but nothing has come on the part of the plaintiffs as respondents that the deed filed by the defendant-appellant is forged one and there is no existence of the deed in the Registry Office. Moreover, the defendants also obtained a true copy of the said deed from Registry Office on 26.06.1996, it means, that the deed in question is in existence.

Apart from this the Deed No. 3500 dated 17.10.1917 executed by Hamidur Rahman in favour of Ali Ahmed has been filed by the defendants in original. As per Section 90 of the Evidence Act a document of 30 years old not required to be formally proved unless the execution of the deed is challenged by the executant of the deed. In the instant case, the plaintiffs as heirs of Hamidur Rahman are not the executants of the deed. In the absence of any contrary evidence both the courts below ought to have considered the deed in evidence and the defendants also had opportunity to get the deed proved in accordance with law by filing application and adducing further evidence, but the petitioners failed to do the same.

In this situation, I find that the matter in dispute has not been properly adjudicated upon by both the courts below, though the dispute between the parties has been lingering from 1979 till today. Since both the courts below as well as the defendants failed to take proper step for proving and marking the deed dated 17.10.1917 and consider the same in their impugned judgment and decree, I think that justice will be met if the appeal is sent back to the appellate court on remand for fresh hearing affording sufficient opportunity to the parties to get their pleadings suitably amended and to led evidence if so advised and to pass judgment afresh considering the deed dated 17.10.1917.

In view of the above observations, I find merit in the Rule as well as in the submissions of the learned Advocate for the petitioners.

In the result, the Rule is made absolute, however, without any order as to costs.

The judgment and decree dated 21.05.1996 passed by the appellate court in Other Appeal No. 419 of 1994 is hereby *set aside* and the appeal is sent back to the appellate court on remand for fresh hearing.

The appellate court is hereby directed to hear the appeal afresh and pass a judgment in the light of the observations made hereinabove within a shortest possible time giving top most priority

preferably within 06(six) months from the date of receipt of this judgment and order.

The order of stay granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.

*Helal/ABO*