# IN THE SUPREME COURT OF BANGLADESH
## APPELLATE DIVISION

**PRESENT:**

**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Borhanuddin**
**Ms. Justice Krishna Debnath**

**CIVIL APPEAL NO.76 OF 2008**
**(From the judgment and order dated 08.05.2006 passed by the High Court Division in Civil Revision No.2495 of 1990)**

**Bhadu Pramanik, son of Late Badal Pramanik being dead his legal heirs are-1.Md. Paran Ali Pramanik and others : ...... Appellants**

**=VERSUS=**

**Md. Abbas Ali Pramanik : ...... Respondent**

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|---|---|
| **For the appellants** | **:Mr. Golam Robbani, Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record** |
| **For the Respondent** | **:Not represented** |
| **Date of hearing** | **:The 30th August, 2022** |
| **Judgment on** | **:The 30th August, 2022** |

## J U D G M E N T

**MD. NURUZZAMAN, J:**

**This Civil Appeal, by leave, has arisen out of the judgment and order dated 08.05.2006**

passed by the High Court Division in Civil Revision No.2495 of 1990 making the Rule absolute and thereby setting aside the judgment and decree dated 15.05.1990 passed by the learned Additional District Judge, Noagoan in Title Appeal No.28 of 1987 affirming those of dated 24.01.1987 passed by the learned Munsif (now Assistant Judge), Manda, Noagoan in Other Class Suit No.899 of 1987 dismissing the suit.

Facts leading, to filing of this civil appeal, in short, are that the respondent herein as plaintiff filed the Other Class Suit No.899 of 1984 seeking declaration that he is the exclusive owner in possession of the suit land on the averments that Samir Gaine was the owner in possession of the suit land and he

**died leaving behind two sons, namely, Jomir, Sobir and a daughter, Suborna Bewa, and later on Jomir died leaving behind his brother Sobir and sister Suborna and then Sobir died leaving one unmarried daughter Sorodini and sister Suborna and then Sorodini also died unmarried and thus, Suborna became the owner of the suit property and she, by deed of hiba-bil-iwaz dated 30.04.1958, corresponding to 17 Baishakh, 1365 B.S, transferred the suit property to the plaintiff and further the plaintiff also acquired 10 decimals of land by way of Korfa Pattan from Jotindranath Sil and also acquired .47 acre of land by way of exchange from Belo Bewa and Sadibullah in lieu of .10 acre of land**

**and thus, the plaintiff became owner of the suit property but the same had been wrongly recorded in the name of the defendant which castes a cloud upon the title of the plaintiff.**

**The defendant contested the above suit by filling written statement denying material allegations made in the plaint contending, inter alia, that, Suborna, the mother of the plaintiff and the defendant, was the owner of the suit property and she decided to transfer the suit land to both of them in equal halves by way of sale but the plaintiff fraudulently procured a deed of hiba-bil-iwaz in his favour showing transfer of the entire suit land in his favour and thus, the above deed of hiba-bil-**

**iwaz is void and the plaintiff also did not acquire 0.10 acquire of land from Jatindra Nath Sil by way of Korfa Pattan dated 27 Kartik, 1352 B.S. and also not get 47 decimals of land by way of exchange from Belo Bewa and Sadibullah. The plaintiff and the defendant are co-sharers in the suit property in equal halves and Suborna, by inheritance, got the suit property and subsequently, she having been remarried, left her former place and thereafter, for her own necessity she had decided to sell the suit property and both the plaintiff and defendant agreed to purchase the same in equal shares and then the defendant, who is a illiterate person, asked the plaintiff**

though for taking necessary steps to get the sale deed registered but on the day of registration, the plaintiff himself did not go to the registry office but managed to get the suit land transferred in his name making the defendant understood that a sale deed had been executed and registered in their joint names and the record of rights also stand in their joint names in equal share and on that basis, the defendant also owned and possessed the suit property on payment of rents regularly. His further case is that his brother also inherited 0.10 acre of land out of 0.20 acre and subsequently, 7.85 acres of land including the said .20 acre of land was put in auction for

**failure of payment of rent by the tenant and then the father of the plaintiff and the defendant took "Korfa" Pattan of the same in the name of the plaintiff and the defendant and then the record of right was duly prepared in the name of the plaintiff and the defendant in equal halves and thus, the acquisition of 0.47 acre of land by the plaintiff, on the basis of exchange as claimed by the plaintiff, is also false and concocted and, as such, the suit is liable to be dismissed.**

**On conclusion of the trial, the Trial Court, considering the evidences and documents on record, dismissed the suit by the judgment and decree dated 24.01.1987.**

**Feeling aggrieved, by the judgment and decree of the Trial Court, the plaintiff as appellant preferred Title Appeal No.28 of 1987 before the learned District Judge, Noagoan. On transfer, the said appeal was heard by the learned Additional District Judge, Noagoan who by the judgment and decree dated 29-05-1990 dismissed the appeal and thereby affirmed the judgment and decree of the trial Court and decreed the suit.**

**Feeling aggrieved, by the judgment and decree dated 29-05-1990 passed by the learned Additional District Judge, Noagaon, the plaintiff as petitioner preferred Civil**

**Revision No.2495 of 1990 before the High Court Division and obtained the Rule.**

**In due course, a Single Bench of the High Court Division upon hearing the parties made the Rule absolute by the impugned judgment and order dated 08-05-2006 and thereby set aside the judgment and decree of the Courts below.**

**The defendant as petitioner herein feeling aggrieved by the impugned judgment and order dated 08-05-2006 of the High Court Division preferred Civil Petition for Leave to Appeal No.1509 of 2006 before this Division and obtained leave, which gave rise to the instant appeal.**

**Mr. Golam Robbani, the learned Advocate**

**appearing on behalf of the appellants submit that the High Court Division committed error in arriving at the finding that the Courts below dismissed the suit on misreading and misconstruction of evidence and on erroneous view of the provisions of sections 58, 65 and 73 of the Evidence Act and further the High Court Division without at all considering that in a suit for declaration of title, the onus lied upon the plaintiff to prove his title by producing evidence and the Courts below found that the plaintiff could not discharge his onus of declaration of title over the suit property. He further submits that the plaintiff over the suit land have been sought for declaration of title by the plaintiff on the basis of deed of hiba-bil-iwaz dated 30.04.1958 but he in his**

**deposition stated that he did neither go to Registry Office at the time of registration of the said deed nor he has given the Holy Quran to his mother as a consideration for the gift and he merely stated that he gave Tk.30/- to P.W.2 to purchase the Holy Quran whereas P.W.2 in his deposition could neither say the price of the Holly Quran alleged to have been given to him by the plaintiff nor could produce the receipt showing purchase of the Holly Quran and accordingly, the learned Courts below rightly found that the deed of Hiba-bil-iwaz has not been proved. He next submits that the High Court Division, on misreading the evidence on record erroneously held that the defendant, having admitted the existence of the said hiba-bil-iwaz deed, the plaintiff, in view of the**

provision of section 58 of the Evidence Act, was not required to prove said deed and the High Court Division also committed an error of law in not considering the fact that the land measuring an area 47 decimals of land purported to have acquired by the plaintiff on the basis of exchange with Belo Bewa and Sadibullah has not been proved in view of the fact that the plaintiff has neither produced any documents in support of the above exchange nor impleaded the heirs of the said Belo Bewa and Sadibullah in the suit. He finally submits that the Appellate Court being a final Court of facts found that the deed of Korfa Settlement is not an old one as written in 1352 B.S. and it has been written for purpose of the suit depriving the defendant from his legitimate share and even Jotindra

**Nath, the Vendor of the said deed has not brought before the Court to prove the execution of it and the High Court Division committed an error of law in holding that the deed has been executed by the Vendor placing reliance on the evidence of P.W.4 and committed serious illegality in making the Rule absolute and thereby set aside the judgments and decrees of the Courts below and, as such, the impugned judgment and order of the High Court Division is liable to be set aside. Hence, the instant appeal may kindly be allowed.**

**No one appear on behalf of the respondent.**

**We have heard Mr. Golam Robbani, the learned Advocate for the appellants. Perused the impugned judgment and order of the High**

**Court Division and other connected materials on record.**

**Ahead of entering into the merit of the appeal, it would be relatable to go through the grounds, for which, leave was granted to consider whether the provisions of sections 58, 65 and 73 of the Evidence Act were misread and misconstrued, in a suit for declaration of title onus lied upon the plaintiff to prove his title producing the original title deed through competent witnesses, both the Courts below concurrently rightly found that the plaintiff was not able to prove the title, the plaintiff himself admitted that he did not deliver the Holy Quran as consideration of the deed in question, rather, relied upon P.W.2 who has also failed to prove the same. Admittedly fact**

**is that the plaintiff was not present in the Registry Office at the time of registration of the deed of Heba Bil Ewaz dated 30/04/1958, claimed of 10 and 47 decimals purported were not proved by producing deed of title purchase from Bela Bewa and Sadibullah in the suit.**

**Now let us carefully scan the evidence on record, ascertain the facts and circumstances of the cases, and decisions of the three (03) Courts below, whether judgment and order of High Court Division is justified or erred which calls for interference by this Division.**

**Justice Mahmood in the case of Rahim Bakhsh Vs. Muhammad Hasan reported in (1889) ILR 11 All 1 observed concerning the nature and legal status of Hiba-bil-iwaz as follows:**

> "The fundamental conception of a Hiba-bil-iwaz in Muhammadan Law is, that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other."

**As such, all the formalities and requirements for a valid Muslim gift shall be performed for a transaction to become a Hiba-bil-iwaz.**

**Their lordships of the Privy Council in the case of Muhammad Abdul Ghani and Ors. vs. Fakhr Jahan Begam and Ors. reported in AIR 1922 PC 281 have adopted and approved of the**

**following three conditions necessary for a valid gift under Hanafi Muslim laws:**

> **"For a valid gift inter vivos under the Muhammadan law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus: "(a) Manifestation of the wish to give on the part of the donor; (6) the acceptance of the donee, either impliedly or expressly; and (e) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively." ("Muhammadan Law," by Syed Ameer Ali, 4th edition, vol. 1, p. 41.)"**

**The three essentials can be sum up as hereunder:**

> **'Declaration of the gift by the donor;**
>
> **acceptance of the gift by the donee and delivery of possession'.**

**One of the essentials of a valid gift under Muslim Law is delivery of possession. As in Hiba-bil-iwaz there involved two reciprocal gifts, the holy Quran the reciprocal gift, must be delivered to his mother Suborna Bewa by the respondent-plaintiff as prosecution witness (in short, PW). However, concerning this particular issue the PW-1 admitted in his examination in chief as well as cross examination respectively as follows:**

"… … … হেবাবিল এওয়াজ দলিল খানি কোরানের বিনিময়ে মহাদেবপুরে হইয়াছিল। বিনিময় দেওয়া হইয়াছিল। কোরান শরীফ আমি অন্যকে দিয়া রেজিঃ অফিসে দেওয়াইছি। আমি সেখানে উপস্থিত ছিলাম না … … … আমি রেজিষ্ট্রি অফিসে যাই নাই। আমি নিজে হাতে মায়েকে কোরান কিনে দেই নাই। কোরান কেনার জন্য টাকা দিয়ে ছিলাম অন্যের হাতে … … … ।"

**Hence, it creates serious doubt as to the veracity of consideration and execution as well as registration of the impugned Hiba-bil-iwaz deed. The plaintiff could produce the receipt showing purchase of the Holly Quran. The Trial and Appellate Court below found that the deed of Hiba-bil-iwaz has not been proved based on these pieces of evidences along with other findings.**

**It is found that the High Court Division arrived at a decision that the impugned deed of**

Hiba-bil-iwaz was an admitted one. However, on perusal of the pleadings or testimonies of the defendant witnesses we find no such admission. The original deed was not produced and Balam book from concerned Sub-registrar's office were not called for proving the deed in question. As such, we observed that this sort of findings of the High Court Division is perverse and as we are disapproved such views of the High Court Division in toto. Consequently, provisions of section 58 regarding facts admitted need not be proved, 65 Cases in which secondary evidence relating to documents may be given and 73 Comparison of signature, writing or seal with others, admitted or proved do not attract.

The respondent-plaintiff has contended the auction purchase and settlement claimed by the

**appellant-defendant on a careful scanning it is diaphanous that such purchase and settlement have not been proved. It is a settled principle of law that the plaintiff if attempts to establish assert, claim or plead something who must prove it appropriately. The same cannot be assumed from the defects or lacking of the defendant side. Here, in this case the plaintiff-respondent must prove his case solely and wholly and he is not allowed to stand to have a decree upon the lacuna of the defendant-appellant.**

**Though plaintiff has claimed the land of Belo Bibi and Sadibullah by way of exchange, however, no single scrap of paper ever been produced before the Court in support of the exchange. The Trial Court as well as Appellate**

Court disbelieved the Korfa deed on some findings. Finding of facts, whether concurrent or not, arrived at by the trial and lower appellate court is immune from interference in revision, except in certain well-defined circumstances such as non-consideration and misreading of material evidence affecting the merit of the case, or misconception, misapplication or misapprehension of law is a venerable and established principle of appreciation of evidence in our jurisdiction. The same has, as latest as, been reiterated by this Division in the case of Zul Haque Mondal (Md.) and Ors. vs. Md. Waned Ali and Ors. reported in 74 DLR(AD)(2022) 161 and in the case of Nazma Begum and other vs. Muksed Ali and others reported in LEX/BDAD/0036/2022.

**In the instant case, on conscientious searching into the judgments of the Trial Court and lower Appellate Court it become obvious to us that the Trial Court reached into the decision as to that the pivotal assertions of the plaintiffs that he owned the suit land through Hiba-bil-iwaz deed, Korfa deed and exchange with Belo Bibi and Sadibullah was disproved on the basis of proper appreciation of the evidences on record. The lower Appellate Court affirmed the same findings on apposite evaluation of the materials on record.**

**Our considered view is that High Court Division on misreading the evidence on record erroneously held that the defendant, having admitted the existence of the said Hiba-bil-iwaz deed, the Korfa deed is valid and the**

**respondent-plaintiff got some suit land with exchange from Belo Bibi and Sadibullah.**

**As such, this Division finds no non-consideration or misreading of the material evidence on record or an error in the decision occasioning failure of justice or such finding is found to have resulted from glaring misconception of law or misconception, misapplication or misapprehension of law in the judgments and decisions of the Courts below.**

**Rather, we find that the High Court Division committed error of law in disturbing the concurrent findings of facts arrived at by both the Courts below and on misreading of the evidence on record. Hence, we compelled to approve the submission of the learned Senior Counsel that the High Court Division gave**

**appalling discovery upon non-consideration of the findings of facts recorded by the Courts below.**

**Hence, we find merit in submissions of the learned Counsel for the appellants.**

**Accordingly, the appeal is allowed. No order as to costs. The impugned judgment and order of the High Court Division is set aside and that of the Trial Court is hereby restored.**

**J.**

**J.**

**J.**

**The 30th August, 2022**
**Hamid/B.R/*Words 2,919***