IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present
Madam Justice Kashefa Hussain

Civil Revision No. 3269 of 2013

Alekjan Bibi and others
.....petitioners
-Versus-
Jabeda Bibi and others
------- Opposite parties
Mr. Md. Mostafa, Advocate
------ For the petitioners
Mr. Md. Abdur Rouf Sheikh with
Mr. Md. Sultan Mahmud, Advocates
------- For the Opposite Parties
Heard on: 15.11.2018, 27.11.2018,
03.12.2018 and
Judgment on 06.12.2018

Rule was issued calling upon the opposite party Nos. 1-8 to show cause as to why the Judgment and decree dated 10.09.2013 passed by the learned District Judge, Shariatpur in Title Appeal No.118 of 2010 reversing those dated 05.09.2010 passed by the learned Joint District Judge, 2nd Court, Shariatpur, in Title Suit No. 27 of 2007 should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The instant petitioners as plaintiff instituted Title Suit No. 34 of 2005 in the court of Senior Assistant Judge, Shariatpur now Joint District Judge, 2nd Court, Shariatpur which was subsequently renumbered as Title Suit No. 27 of 2007 for

declaration of title in the suit land described in 'Ka' schedule of the plaint and for declaration that the claim regarding possession in the name of the predecessor of defendant and the M.R.R. settlement is void and wrong, baseless and not binding upon the plaintiffs. Upon hearing the trial court decreed the suit by its judgment and decree dated 05.09.2010 in favour of the plaintiff. Being dissatisfied with the judgment and decree of the trial court the defendants in the suit filed Title Appeal No. 118 of 2010 in the court of District Judge, Shariatpur. Upon hearing, the District Judge Shariatpur allowed the appeal by its judgment decree dated 10.09.2013 and thereby reversed the judgment and decree passed by the trial court.

The plaintiff's case in short is that the suit land measuring an area of 17.03 acres appertaining to C.S. Khatian No. 164 and 26 belonged to Rajab Ali, Sabed Ali @ Somed Ali Mohat Ali, Wahed Ali, Antosha Bibi and others and C.S record was prepared in their names, that C.S. recorded tenant Antosha Bibi died leaving behind 4 sons namely Sabar Ali, Abed Ali, Mohat Ali and Wahed Ali; that Sabar Ali with amicable partition with his brothers used to possess 28 decimals of land of Plot No. 107 and 108 that Sabar Ali had no son and he being satisfied with the nursing of his wife transferred said 28 decimals of land along with other lands to his wife Banu Bibi by a deed of gift dated 02.08.1933 and delivered possession in her favour, that during

R.S. record said C.S. plot No. 107 and 108 was recorded in R.S. Plot No. 181, 182,183,184,185,186 and 187 in R.S. Khatian No. 41 but in the remarks column the name of predecessor of defendant Nos. 1-8 was recorded; that Baru Bibi while in possession of 2.20 acres of land her husband died and soon after Baru Bibi died leaving behind 4 daughters, namely Alekjan, Ayatunnessa, Chhutu Bibi and Moju Bibi. That Alekjan Bibi (plaintiff No. 1) transferred 12 decimals of land by a registered kabala deed being No. 3758 dated 20.10.1995 from plot No. 107, 108 in favour of Mahot Ali Fakir and delivered possession in his favour and remaining land remained in possession of plaintiff No. 1. That Ayatunnessa died leaving behind 4 sons namely Jalal Uddin Fakir, Nur Uddin Fakir, AlauddinFakir and Sonamia and daughter Ayna Bibi, that Jalaluddin Fakir and Nur Uddin Fakir and plaintiff Nos. 4 and 5 Alauddin Fakir died leaving behind wife Hazera and 4 sons plaintiff Nos. 6-9, that Sonamia died leaving behind wife Alekjan Bibi, 4 sons and 2 daughters plaintiff Nos. 10-15, that Tutu Bibi daughter of Sabar Ali died leaving behind 2 sons and 2 daughters plaintiff Nos. 16-20, that Jaju bibi died leaving behind 1 daughter Abeda Khatun, plaintiff No. 21 and Mahot Ali died leaving behind son plaintiff No. 22.

The further case of the plaintiffs is that the land measuring an area of 1.37 acres appertaining to C.S. plot No. 107 and 108 belonged to Gafur Ali Fakir and after his death each son of the

deceased obtained $27\frac{2}{5}$ decimals of land; Sabar Ali used to possess 28 decimals of land by amicable partition with his brothers; that the above land in R.S. operation has been recorded in R.S. plot No. 181, 187 that Rajab Ali used to possess the land of plot No. 181; that Somed Ali used to possess the land of plot No. 182 and 183, that Wahed Ali used to possess the land of plot No. 184 and 185, that Mahot Ali used to possess the land of plot No. 187. That during R.S. operation the name of Kafiluddin has been recorded in remarks column wrongly; that the share of Kafiluddin has been recorded in plot No. 183, that Kafil Uddin transferred the land of plot No. 182 to Sakim Ali, that Baru Bibi wife of Sabar Ali used to possess the land of plot No. 187 but wrongly same was recorded in the name of kafil Uddin, that Kafil Uddin and Naser extinguished there title by giving patta before R.S. operation which cast cloud on the title of the plaintiffs and therefore the plaintiffs were constrained to file the suit.

The defendants Nos. 1-8 contested the suit by filing written statement contending inter alia that the suit land measuring an area of 17.30 acres of C.S. Khatian No. 236 belonged to Sabar Ali and others. Sabar Ali used to possess 27 ½ decimals of land of plot No. 107/108 and 2.04 acres of land of other plots of C.S. Khatian No. 26. That Sabar Ali transferred 2.20 acres of land through registered gift deed dated 07.08.1933

to Baru Bibi @ Chhutu Baru but she did not possess 27 ½ decimals of land of C.S. plot No. 107/ 108 and 1.26 acres of other plot and thus she possessed 1.53 ½ acres of land with amicable settlement with other co-sharers regarding 86 ½ decimals of land of C.S. plot No. 44 and 57 decimals of land of plot No. 106. Baru Bibi did not possess in land in plot No. 107 and 108, that 10.46 acres of land was recorded in R.S khatian No. 41 out of 17.03 acres of C.S. Khatian No. 26. That 57 decimals of land of C.S. plot No. 106 was recorded in R.S. Khatian No. 41 of plot No. 166/168 in the name of Baru Bibi, that 2.89 acres of land of C.S. plot No. 54 /$\frac{54}{197}$/$\frac{44}{198}$ is same land and 1.90 acres of land was recorded in R.S. plot No. 90, that 86.00 decimals of land of C.S. plot No. 54 /$\frac{54}{197}$/$\frac{44}{198}$ was recorded in the name of Baru Bibi. In spite of that Baru Bibi managed to have recorded 1.90 acres of land in her name in possession column of plot No. 90. That land of C.S plot No. 44 has been recorded in R.S. plot No. 85 and 10 decimals of land has been recorded in the name of Baru Bibi instead of Sabar Ali. That Baru Bibi and her successor in interest transferred the land of various plots of R.S. Khatian to these defendants by various deeds. That recorded tenant Sabed @ Somed Ali Fakir was the owner in possession by way of amicable partition of plot No. 44/ 107/ 108/ 106/ 99/ 100/ 56 $\frac{54}{197}$ totaling 2.04 acres of land. That

after death of Saber Ali his share devolved upon his heirs, son Kafil Uddin Fakir and daughter Maju Bibi. That Kafil Uddin Fakir and Maju Bibi settled 9 decimals of land of plot No. 108 to Hakim Ali and the said land has been recorded in R.S. Khatian No. 42 bearing plot No. 122. In R.S. Khatian No. 141 the name of Kafil Uddin and Maju Bibi has been recorded in one group. Maju Bibi died leaving behind brother Kafil Uddin and her share devolved upon him. That Kafil Uddin by a registered deed of gift dated 20.08.1988 transferred 18 decimals of land of plot No. 187 in favour of defendant No. 1. He also transferred 6 decimals of land of plot No. 127 and 6 decimals of land of plot No. 183 to defendant No. 3 by a registered kabala deed dated 17.04.2009. That Kafil Uddin transferred 2 decimals of land to Abdul Jabbar Bhuiyan and Kafil Uddin while owner and in possession of 1.63 ½ acres of land including 2 decimals of land of plot No. 187 died leaving behind sons defendant Nos. 2-7, wife defendant No. 1 and 1 daughter defendant No. 8 and grandsons defendant Nos. 11, 9, 10, 12 and 13. That the plaintiffs claimed 28 decimals of land of plot No. 187 falsely and the plaintiffs have no right title in the suit land and hence the suit ought to be dismissed.

The plaintiffs in the suit in order to prove their case examined 3 witnesses and produced documents exhibit 1-4 while the defendants examined 3 witnesses and produced documents Exhibit ka-Chha.

Learned Advocate Mr. Md. Mostafa appeared for the petitioners while Mr. Md. Abdur Rouf Sheikh, Advocate along with Mr. Sultan Mahmud, Advocate represented the opposite parties.

Learned Advocate Mr. Md. Mostafa for the petitioner submits that the trial court correctly came upon its finding and decreed the suit but the appellate court during appeal upon misapplication of judicial mind reversed the judgment of the trial court upon wrong findings of facts and misappreciation of the law and therefore the judgment of the appellate court is not sustainable and ought to be set-aside for ends of justice.

Upon elaborating his submissions, he continues that the appellate court wrongly found that the দানপত্র (Heba deed) of the year 1933 executed by Sabar Ali in favour of his wife Baru Bibi comprising of 28 decimals along with other land is not sustainable. He submits that the trial court correctly found that the দানপত্র (Heba deed) was a valid deed being lawfully executed by Sabar Ali in favour of his wife. He further contends that the appellate court reversed the finding of the trial court regarding the দানপত্র (Heba deed) stating that there is no supporting evidences to prove the দানপত্র (Heba deed). In this context he contends that the appellate court failed to comprehend that the দানপত্র (Heba deed) in this case is an old document and persuades that section 90 of the Evidence Act 1872 provides that

documents more than 30 years old need not be proved since there is presumption of correctness as to documents more than 30 years old. He further submits that the appellate court overlooked a significant fact that during trial the DW did not deny the validity of the execution of the দানপত্র (Heba deed) of 1933. He further asserts that the trial court appropriately assessed the evidences of the witnesses but the appellate court wrongly found that the trial court did not assess the evidences and the appellate court upon misapplication of mind found that the suit is barred by limitation and continues that it failed to apply its judicial mind and failed to comprehend that the plaintiffs after gaining knowledge of the wrong record in the name of the plaintiffs came to learn that a cloud has been cast on their title and upon gaining knowledge of the wrong record they duly filed the suit within the statutory time and therefore the suit is not barred by limitation. He also contends that the appellate court relied upon some land receipts and such other documents upon its finding in favour of the defendant and further the appellate court did not appreciate the settled principle of law that records of right or whatsoever can only be used as evidences in support of claim of Title, but they are not evidences of title by themselves. He argues that in this case the দানপত্র being an old deed more than 30 years old is a valid deed in the eye of law and therefore no other document of rent receipt, mutation whatsoever can prevail over the old registered দানপত্র of the year 1933. He concludes his

submissions upon assertion that the trial court correctly decreed the suit but the appellate court upon misreading and non consideration of evidences and including that of the দানপত্র of the year 1933 arrived upon wrong findings and therefore the trial court judgment ought to be affirmed and the appellate court judgment ought to be set-aside and the Rule be made absolute for ends of justice.

On the other hand learned Advocate Mr. Md. Mostafa on behalf of the opposite parties argues that the appellate court correctly set-aside the judgment of the trial court and therefore the judgment of the appellate court does not call for interference. Upon elaborating his submissions he asserts that the appellate court correctly observed that the trial court did not assess the evidences properly with regard to the দানপত্র of year of 1933. He contends that on this issue also the appellate court correctly found that the custody of the দানপত্র was not proved since there was no supporting evidence or evidences to prove the দানপত্র. He further argues that the trial court wrongly ignored the receipts and other documents produced by the defendants but the appellate court upon appeal correctly drew support from the land receipts and other documents which are credible evidence to prove the title of the defendants. He also submits that the appellate court correctly found that possession has been proved to be with the defendants. He assails that the defendant instant

opposite parties are in possession of the suit land by amicable settlement. He next argues that the suit is barred by limitation since the possession of the suit land was within knowledge of the plaintiffs. He concludes his submissions upon assertion that the appellate court correctly found that the দানপত্র is not a valid দানপত্র and also correctly found the possession of the defendants and the suit being barred by limitation is not maintainable and therefore the Rule bears no merits and ought to be discharded for ends of justice.

Heard the learned Advocate from both sides, perused the materials on record including the judgments of the courts below. Upon perusal of the judgments and scrutiny into the records it appears that the predecessor of the plaintiff and the defendant is the same person and it is admitted that it was an ejmaili property. The দানপত্র dated 02.08.1933 executed by Sabar Ali one of the sons of the CS recorded owner in favour of his wife Baru Bibi comprised a total of 2.20 acres of land out of which the suit land in the instant case comprise of 28 decimals of land. The present plaintiffs are the heirs of Sabar Ali, and she is wife of the donee of the Heba Deed and the present defendants are the heirs of the other brothers of Sabar Ali. As it appears from the judgment the plaintiffs claim by way of the দানপত্র dated 02.08.1933 in favour of their predecessor while the defendants main claim to title is that there was an amicable settlement between the brothers, that

is Sabar Ali and his other brothers who are the predecessors of the defendants and the plaintiffs. Both the plaintiffs and the defendants claimed possession of the suit land. It appears from the record that the plaintiff at a juncture during the case also claimed an amicable settlement between the parties. But however, it is clear from the records that although amicable settlement has been claimed primarily by the defendant yet however there is nothing on record to show that amicable settlement was actually done. It is evident and admitted that the suit property arises out of an ejmali property which originally belonged to the CS recorded owner. Both the plaintiffs and the defendants are the heirs of the CS recorded owner. It is also evident that although it is an ejmali property yet there is nothing on record to indicate that the property was demarcated or divided by metes and bounds. Curiously enough both courts below failed to address this significant aspect and consequently overlooked or by passed this issue. My considered opinion is that in the absence of evidence of any amicable settlement a suit in its present form of this kind is not maintainable given that the parties whatsoever ought to have filed a partition suit and ought to have claimed Saham.

The appellate court upon misunderstanding the circumstances gave a wrong finding in favour of the defendant-appellant’s possession of the suit land. It is a settled principle of

law that with regard to ejmaili property, unless the property is divided by metes and bound all co-sharers shall be deemed to be in joint possession till final demarcation of the property and receiving of respective sahams by the co sharers.

Regarding the দানপত্র of the year 1933 I am inclined to disagree with the observation of the appellate court given that it is a principle of law according to the provisions of section 90 of the Evidence Act 1972 that regarding old documents more than 30 years old presumption of correctness may be made and no further proof is necessary to prove its validity. The court also failed to appreciate that the DWs did not at any stage deny the execution of the দানপত্র. Therefore with regard to the provisions of the Evidence Act 1872 and particularly given that the defendants did not make any specific denial regarding its validity, consequently I am of the considered finding that the দানপত্র of the year of 1933 was a valid document.

Regarding the appellate court's finding that the suit is barred by limitation it is my considered view that since the suit involves ejmaili property, under such circumstances partition suit is the correct resort, and partition suit may be filed at any time, although the present suit in its present form is not maintainable. Under the facts and circumstance and from the foregoing discussions made above I am inclined to dispose of this civil

revisional with observations and by setting aside both the judgments of the courts below.

In the result the Rule is disposed of upon observation that the present suit is not maintainable in its present form. Therefore, the Judgments of the courts below, those being the Judgment and Decree dated 05.09.2010 passed by the Joint District Judge, 2nd Court, Shariatpur in Title Suit No. 27 of 2007 and the Judgment and Decree passed by the Court of District Judge, Shariatpur in Title Appeal No. 118 of 2010 both are hereby set-aside. The parties are however at liberty to file a partition suit upon bringing all the proper and necessary parties and the property within the hotchpotch in accordance with law if they are so advised.

Send down the lower Court records at once.

Communicate the order at once.

Shokat (A.B.O)