Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.1528 OF 2021

Md. Abdul Motaleb Hawlader

..... Defendant-Petitioner.

-VERSUS-

Md. Shahadath Hossain being dead, his legal heirs:

Khairun Nessa and others.

..... Plaintiff-Opposite parties.

None appears

.....For the petitioner.

Ms. Syeda Nasrin with
Ms. Jannatul Islam Peya, Advocates

..... For the opposite parties.

Heard on 12.01.2025, 28.01.2025 and 29.01.2025.

Judgment on 05.02.2025

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 07.12.2020 passed by the learned Joint District Judge, 1st Court, Pirojpur in Title Appeal No.59 of 2016, disallowing the appeal and affirming the Judgment and

decree dated 31.05.2016 passed by the learned Senior Assistant Judge, Pirojpur in Title Suit No.134 of 1997 decreeing the suit in part 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 facts in brief for the disposal of Rule are that the opposite party, No. 1 as plaintiff, instituted the title suit No. 134 of 1997 before the Assistant Judge, Pirojpur, for partition of the land described in the schedule contending inter alia that the disputed land, along with other vast areas of land, originally belonged to the grandfather of the plaintiff namely Hatem Ali Hawlader who was also the predecessor of the defendant; that said Hatem Ali Holder had six sons, one daughter and two wives. During his lifetime, his elder son, Joynal Abedin, died in 1952, leaving behind the plaintiff. Since it happened before the amendment of the Muslim Family Law Ordinance in 1961, there was no chance for the plaintiff to succeed in his grandfather's property (Hatem Ali Hawlader) through his father (Joynal Abedin). But Hatem Ali Hawlader was a wise and kind man. He understood the difficulty, so he executed

a registered Wasiyatnama on 29.01.1952 and gave the scheduled land in favor of the plaintiff. Since then, he has been enjoying the peaceful possession and ownership of the land by paying revenue regularly and establishing dwelling houses, gardens, ponds, etc.

The suit was contested only by defendant Nos. 1(ka)-1(Ja) by filing a joint written statement denying all the material allegations along with the Wasiyatnama. They also pleaded that the suit is the defect of the parties and that the entire property of late Hatem Ali Hawlader has not been included in the schedule.

The learned Senior Assistant Judge, Pirojpur, framed necessary issues to determine the dispute involved between the parties.

Subsequently, the learned Senior Assistant Judge, Pirojpur, by the Judgment and decree dated 31.05.2016, decreed the suit.

Being aggrieved, the defendant-petitioner, as appellant, preferred Title Appeal No.59 of 2016 before the District Judge, Pirojpur. Eventually, the learned Joint District Judge, Pirojpur, by the Judgment and decree dated

07.12.2020, disallowed the appeal and affirmed the Judgment and decree of the trial Court.

Being aggrieved, the defendant-petitioner preferred this Civil Revision under section 115 (1) of the Code of Civil Procedure before this court and obtained the instant Rule.

No one appears on behalf of the petitioner.

Ms. Syada Nasrin, the learned advocate appearing for the opposite party, submits that there is no legal infirmity in the concurrent findings of the courts below. The defendant-petitioner could not show anything disproving the said Wasiyatnama and long-standing possession of the plaintiff in the suit land. So, the concurrent findings of the courts below do not suffer from any material illegality.

I have anxiously perused the impugned Judgment of the courts below and oral and documentary evidence on the records and grounds taken by the petitioner in the revisional application and the submission of the learned advocate for the opposite party. It manifests from the record the plaintiff side examined 3 PWs, and the defendant side examined 2 DWs and exhibited necessary documentary evidence to prove their respective cases. I

have very precisely examined each deposition and cross-examination of the witnesses and material evidence on record.

It appears that the Trial Court below while decreeing the suit, says that:-

> "অত্র মামলার বাদীর দাবী মতে, হাতেম আালী হাওলাদার পিতৃহীন বাদীর ভবিষ্যত জীবনের বিষয়টি উপলব্ধি করে তার স্থাবর, অস্থাবর বিষয় সম্পত্তি জীবিত ২ স্ত্রী, ৫ পুত্র ও ১ কন্যা এবং মৃত পুত্রের পুত্র অত্র বাদীর মধ্যে যুক্তিসংগত ভাবে ভাগ বন্টনের নিমিত্তে গত ২৯/০১/৫২ ইং তারিখে ১নং অছিয়তনামা সম্পাদন ও রেজিস্ট্রি করেন। বাদী তার দাবীর সমর্থনে প্রদর্শনী-৪ রুপে চিহ্নিত গত ২৯/০১/৫২ ইং তারিখে ১নং অছিয়তনামা আদালতে দাখিল করেছেন। প্রদর্শনী-৪ রুপে চিহ্নিত গত ২৯/০১/৫২ ইং অছিয়তনামা দৃষ্টে দেখা যায় যে, হাতেম আালী হাওলাদার তার দাফন কাফন ও ঋণ বাবদ ৫০০ টাকা এবং বাড়ীর চাকর চাকরানীর বেতন পরিশোধ অন্তে অবশিষ্ট সম্পত্তি হতে অছিয়তনামার (ক) তপছিলে বর্ণিত সাবেক ৫৪৭/৫৫৩ নং দাগের ১.৩২ একর $\frac{121}{2887}$ নং দাগের .৯৯ একর ৩১৪/৩১৫/৩১৬ নং দাগের .৩৩ একর, ৬৬ নং ৬৪ দাগের .১৭ একর, ১২৪/১২৫ নং দাগের .৩২ একর এবং $\frac{64}{2881}$ নং দাগের .১৭ একর একুনে ৩.৩০ একর ভূমি বাদী বরাবর হস্তান্তর করে। অছিয়তনামা দৃষ্ঠে আরো দেখা যায় যে, উক্ত অছিয়তনামার (খ) তপছিলে উল্লেখিত ২৩.৯৩ একর

ভুশি হাতেম আলী হাওলাদার তার জীবিত ৫ ছেলেকে সমান অংশে অছিয়তনামা মূলে হস্তান্তর করে।

মুসলিম আাইনের বিধান মতে, একজন মুসলিম তার দাফন কাফন ও ঋণ পরিশোধের পর তার অবশিষ্ট সম্পত্তির এক তৃতীয়াংশ সম্পত্তি তার ওয়ারিশ নহে এমন ব্যক্তিকে ওয়ারিশদের সম্মতি ছাড়া অছিয়তনামা মূলে হস্তান্তর করতে পারে।"

It further appears that in respect of possession of the suit property the trial court by examining the exhibits and witnesses says that:-

"অত্র মোকদ্দমায় বিবাদীপক্ষ গত ২৯/০১/৫২ ইং তারিখের ১নং অছিয়তনামা জাল মর্মে দাবী উত্থাপন করলেও সে দাবীর সমর্থনে কোন সাক্ষ্য আাদালতে উপস্থাপন করেনি।

দখলের প্রশ্নে দেখা যায় যে, বাদীর দাবী মতে অছিয়তকৃত ৩.৩০ একর ভূমি বাগান বাড়ী সৃজনে ও নাল জমি চাষাবাদের মাধ্যমে ভোগদখলে বিদ্যমান আছে। বাদী নালিশী ভূমিতে তার দখল প্রমানের জন্য PW-2 এর মৌখিক সাক্ষ্য ও প্রদর্শনী-৯ সিরিজ রূপে চিহ্নিত খাজনার দাখিলা আদালতে দাখিল করেছে। বিবাদীপক্ষের সাক্ষী DW-1 হাতেম আলীর বসত বাড়ী ভূমি বাদী দখল করে না মর্মে সাক্ষ্য প্রদান করলেও নালিশূ জমার কোন ভূমি বাদী বাগান বাড়ী সৃজনে ও নাল জমি চাষাবাদের মাধ্যমে দখল করে না সে মর্মে কোন সাক্ষ্য আাদালতে উপস্থাপন করেনি। অপরদিকে DW-2 তার জেরাতে বলেন যে, কাদের কোন কোন জায়গা খায় তা বলতে পারব না। হাতেম কাদেরকে কোথায় জমি দিয়েছে তা বলতে পারব না।

সুতরাং উপরোক্ত আালোচনার আলোকে আাদালতের সিদ্ধান্ত এই যে, বাদীর আরজির (ক) তপছিল বর্ণিত ভূমির মধ্যে ২.৮১ একর ভূমিতে এজমালী স্বত্ব, দখল, স্বার্থ ও অধিকার বিদ্যমান আাছে।

It further appears that though the appellate court did not discuss the evidence in its Judgment rather, after perusal of the appellate court's Judgment, it seems that the learned Judge of the appellate, while modifying the findings of the trial court, considered the evidence and other materials on record and says that the learned Judge of the trial court rightly found that:-

"বাদীর আারর্জির (ক) তপছিল বর্ণিত ভূমির মধ্যে ২.৮১ একর ভূমিতে এজমালী স্বত্ব, দখল, স্বার্থ ও অধিকার বিদ্যমান আাছে। কাজেই বিচার্য বিষয়-৪ আাংশিক বাদীপক্ষে নিস্পত্তি করা হল।"

It is to be noted that according to Muslim law, the testamentary document is called Wasiyatnama, which is declared lawful in the holy Quran. At the same time, the Prophet Mohammad(Sa.) says that power should not be exercised to the injury of the lawful heirs.

According to Sahih al-Bukhari, it is the duty of a Muslim who has anything bequest not to let two nights pass without writing a Wasiyatnama about it. Moreover, it

is essential to pay attention to the following terms of Wasiyatnama:-

(I) The person who makes a Wasiyatnama is called the Testator.

(II) The person or persons in whose favor the Wasiyatnama is created is called the Legatee.

(III) The subject matter of the will. It is the property to be distributed among the heirs and is called the legacy.

(IV) While executing the Wasiyatnama, the executor may appoint a person to execute the will according to its contents(after his death). In the absence of the appointment of the executor by the person who makes the Wasiyatnama, the court may appoint an administrator to execute the Wasiyatnama.

Wasiyatnama allows the Testator to help someone who is not entitled to inherit from him. Wasiyatnama can clarify the nature of joint accounts, those living in commensality, the appointment of guardians for one's children, and so on. In countries where the intestate

succession law is different from Muslim law, writing a Wasiyatnama is necessary. Moreover, Wasiyatnama includes bequests and legacies, instructions and admonishments, and rights assignments and no specific wording is essential to make a Wasiyatnama.

Muslim law requires no particular formalities for the creation of a Wasiyatnama. It may be made in writing, or oral, or even by gestures. In the case of a written Wasiyatnama, there should be two witnesses to the declaration of Wasiyatnama. However, the intention of the Testator must be unequivocal and unambiguous that the Wasiyatnama is to be executed after his death. Any expression that signifies the Testator's intention is sufficient to constitute a bequest. In the case of an oral Wasiyatnama, no specific number or class of witnesses is necessary for its validity. However, the following conditions need to be satisfied:-

I. Legator's intention to make a Wasiyatnama must be proved beyond doubt.

III. Terms of the Wasiyatnama must be proved

III. Wasiyatnama must be proved with the greatest possible exactness.

When the Testator fails to mention the quantity or amount of bequeathed property, regard may be given to the number or quantity owned by the Testator at the time of death. Wasiyatnama shall be executed after paying debts and funeral expenses.

Further, to confirm a Wasiyatnama executed, there is no essence required by law for filing a probate case by a Muslim. This view gets support from an unreported case of Jahanara Begum and others Vs. Hazi Nizamuddin and another, Civil Appeal No.133 of 20239(A.D.), wherein their Lordships of the Appellate Division says that:-

> "It transpires for the Judgment and order passed by the learned District Judge, Commilla, that he, having considered the relevant provision of law, i.e., sections 57, 58, and 213 of the Succession Act, 1925, came to a definite finding that the said provisions shall not apply to will to the property of Mohammadan, rather those

provisions are applicable only to the property of Hindu, Buddhist, Sikh or Jain. However, the High Court Division without adverting to the said legal finding of the learned District Judge, most erroneously passed the impugned Judgment holding that the controversy between the parties can only be resolved by taking evidence."

Further, in the instant case, the record shows that the defendants-petitioners neither challenged the Wasiyatnama nor denied execution and registration. Moreover, Wasiyatnama was never challenged before any court of law. It also appears that the Wasiyatnama has been a registered instrument for more than 30 years; therefore, it has presumptive value to be genuine and duly executed according to section 90 of the Evidence Act 1872. So long a registered instrument is not canceled and declared null and void by way of court declaration under section 39 of the Specific Relief Act. The registered instrument is binding upon the parties, moreover, Wasiyatnama.

Considering the above facts and circumstances and other materials and records, it appears that the appellate

court rightly and justifiedly affirmed the trial Court's findings and thereby disallowed the appeal. So, I do not find any legal infirmity and illegality in the concurrent findings of the court below.

In view of the above facts and circumstances, I do not find any merit in the Rule.

Resultantly, the Rule is Discharged with cost.

The impugned Judgment and decree dated 07.12.2020 passed by the learned Joint District Judge, 1st Court, Pirojpur in Title Appeal No.59 of 2016 is hereby affirmed.

Communicate the Judgment and send down Lower Court Records at once.

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(Md. Salim, J).

Rakib(ABO)