In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 1581 of 2015

IN THE MATTER OF :
An application under section 115(1) of the Code of Civil Procedure

-And-

In the Matter of:
Shamola Khatun and others
... Defendant-Petitioners

-Versus-

Md. Monzil Miah and others
... Plaintiff-Opposite Parties

Mr. Mainul Islam, Advocate
... For the petitioners

Mr. Md. Faruque Ahammed, Advocate with
Mr. Kawsar Ahmed, Advocate
... For the Opposite Party No.1

Judgment on: 05.03.2026

Md. Riaz Uddin Khan, J-

At the instance of the defendants Rule was issued asking the plaintiff-opposite party No.1 to show cause as to why the impugned judgment and decree dated 04.05.2015 (decree signed on 10.05.2015) passed by the 1st Court of Additional District Judge, Cumilla in Title Appeal No.186 of 2012 dismissing the appeal and thereby affirming the judgment and decree dated 21.05.2012 passed by the Senior Assistant Judge, Sadar, Cumilla in Title Suit No.130 of 2009 decreeing the suit should not be set aside and/or such other or further

order or orders passed as to this Court may deem fit and appropriate.

At the time of issuance of Rule all further proceedings of Title Execution Case No.07 of 2012 pending in the court of Senior Assistant Judge, Sadar, Cumilla was stayed for a period of 06 (six) months initially which was extended time to time.

Facts in a nutshell for disposal of this Rule is that opposite party No.1, Monzil Mia as plaintiff on 13.05.2008 filed the Title Suit No.700 of 2008 in the court of Assistant Judge, Chandina, Cumilla against the present petitioner as the principal defendants for declaration that the deed of exchange as described in the schedule-1 in the plaint is fake, fraudulent, null and void and the plaintiff also prayed for recovery of khas possession of the land as described in schedule-2 in the original plaint. The suit was then transferred on 21.05.2009 to the court of Senior Assistant Judge, Sadar, Cumilla which was renumbered as Title Suit No. 130 of 2009.

On the other hand two of the defendants of this case namely Abdus Salam and Abdul Khair filed Title Suit No.1404 of 2008 on 08.10.2008 in the court of Joint District Judge, Cumilla where form the suit was transferred to the court of Senior Assistant Judge, Sadar, Cumilla and the suit was for declaration that the deed of exchange is out and out sale deed and further declaration that they are the owner of the land as described in schedule-2 by purchase.

The facts of the Title Suit No.130 of 2009 is that the plaintiff was leaving on the land as described in schedule-2 which is part and parcel of previous plot No.565 and present plot No.791 whereas the defendants are the owners of plot No.569 whereupon the defendant lived in. Plaintiff claimed that Khalek and Malek were in charge of looking all the affairs of the plaintiff while he went on abroad 20 years back. Khalek and Malek, relatives of the defendant-petitioners were the plaintiff's confidential and faithful friends and on their advice the plaintiff purchased 12 decimals of land from Abdus Sobhan, predecessor of the defendant-petitioners earlier from suit plot No.569. Again on negotiation of Khalek and Malek the plaintiff-opposite party was agreed to exchange his homestead as described in 2nd schedule of the plaint with another 12 decimals of land of plot No.569 owned by the defendant contiguous to his earlier purchased 12 decimals land. A registered deed of exchange being No.7567 dated 26.04.2005 was executed by them as per negotiation amongst them. Accordingly on the following day the handing over and taking over of the exchanged property took place and then the plaintiff amalgamated his 12 decimals land which he got by way of exchange with his earlier purchased 12 decimals by removing the boundary between the two plots and was possessing the total 24 decimals of land by cultivating sugar cane. Subsequently, the relationship of the plaintiff became bitter with Khalek and Malek causing suspicion in the mind of the plaintiff, he obtained certificate copy of the impugned exchange deed and found that though he got 12 decimals of land by way of deed of exchange the

defendant-petitioner in collusion with khalek and Malek mentioned only 6.50 decimals of land in the 3rd schedule of the plaint instead of 12 decimals mentioned in the 5th schedule in the deed of exchange. The land of 3rd schedule is in the possession of the pro-forma defendant No.4. Thereafter on 05.11.2008 the defendant dispossessed the plaintiff from 12 decimals land of 5th schedule, hence the suit for declaration that the deed of exchange is void and also for recovery of possession of his land.

The defendant-petitioners entered appearance in the suit and contested it by filing a joint written statement stating inter alia that the impugned deed of exchange is an out and out sale deed. The defendant-petitioners purchased 2nd schedule land of the plaint from the plaintiff-opposite party on the payment of taka 320,000/= as consideration money. The plaintiff and his friends Khalek and Malek advised to make a deed of exchange instead of a deed of sale for the purchased of avoiding excess registration fee. In fact, there was no handing over of 12 decimals of land of plot No.569 at all. The defendants have further stated in the written statement that they have reconstructed the residential accommodation left by the plaintiff of the 2nd schedule and further erected two tin shed houses at the cost of taka 150,000/- from their own fund and they prayed for dismissal of the suit with cost.

The trial court heard both the suits analogously and on perusal of the pleadings and evidence on record decreed the Title Suit no.130 of 2009 while dismissed Title Suit no.1404 of 2008. The

defendant-petitioners preferred Title Appeal No.186 of 2012 against the decree of Title Suit no.130 of 2009 which has also been dismissed by the Additional District Judge, 1st Court, Cumilla vide his impugned judgment and decree dated 04.05.2015.

Being aggrieved by and dissatisfied with the said judgment and decree dated 04.05.2015 passed by the appellate court below the defendant-petitioners filed the instant civil revision before this Court and obtained Rule and order of stay as stated at the very outset.

Mr. Md. Mainul Islam, the learned advocate appearing for the defendant-petitioner submits that the plaintiff-opposite party No.1 in his plaint clearly stated that he got possession of 12 decimals of land from plot No.569 and admittedly the defendants are owner of those 12 decimals of land. Hence there is no defect in the title of the defendants of the schedule land as described in 2nd schedule. The learned advocate then taken this Court to the plaint and depositions of the plaintiff-opposite party No.1 and submits that from the statement of the plaint it can be said that by way of exchange the plaintiff-opposite party got 12 decimals of land from plot No.569 whereas the defendant-petitioner got 2nd schedule land. By way of admission of the plaintiff in his plaint and deposition supporting his plaint case, handing over and taking over possession of exchanged land, the exchange deed has been acted upon. For the reason of any subsequent event, if any, the plaintiff has other relief like as rectification of deed as claimed by the plaintiff

inserting 12 decimals of land but suit for cancellation of the impugned deed of exchange is not maintainable at all.

The learned advocate next submits that the relief under section 119 of the Transfer of Property Act, 1882 is discretionary relief which can only be given in a case of defect of title of the party. In the instant case on perusal of the plaint as a whole couple with the depositions of the plaintiff there is no case that title of the defendant-petitioner was defective to the properties given by them, rather it was admitted that Abdus Sobhan who was owner of the 24 decimals land in plot No.569 out of which he himself sold out 12 decimals to the plaintiff earlier and his admitted heirs defendant-petitioners handed over remaining 12 decimals land to the plaintiff-opposite party by way of exchange, hence, section 119 of the Transfer of Property Act has no manner of application in the case. The learned advocate finally submits that admittedly the defendant-petitioner got homestead from plaintiff and now they are living there and in case of eviction they will have no alternative but to stand in the street.

Per contra Mr. Md. Faruque Ahammed, the learned advocate appearing for the opposite party submits that both the courts below concurrently found that neither the plaintiff nor the defendants had any intention to exchange the land describe in the impugned deed. Both the courts below also found that the plaintiff was dispossessed from the land he got possession after the execution of the deed of exchange. The learned advocate

then submits that the deed of exchange does not contain the 5th schedule land in the suit and thus no title passed to the plaintiff with respect thereto and so the question of possession and dispossession thereof is not material for purpose of the instant suit and besides that in the written statement and in his deposition DW-1 said that the defendant did not deliver possession thereof to the plaintiff. Mr. Ahammed finally submits that in the present case the section 119 of the Transfer of Property Act is squarely applicable as no title has been passed through the deed of exchange.

I have heard the arguments advanced at the bar, perused the revisional application, lower court records including the plaint, writer statements, depositions, exhibited documents and both the judgments passed by the courts below.

The question raised at the bar, whether in the facts as stated above the suit under section 119 of the Transfer of Property Act, 1882 is maintainable declaring the deed of exchange void and/or cancellation of the deed. To decide such question let us examine the Section 119 which reads as follows-

> **119. Right of party deprived of thing received in exchange**-If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him

> or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

The term "exchange" has been defined in section 118 of the Act as "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange'." In other words, an exchange is a mutual transfer between two persons of the ownership of properties, but neither thing or both things can be money.

From plain reading of section 119 of the Act it is crystal clear that on the completion of the transaction of exchange, right and title to the property becomes vested in the parties and a party to the exchange when deprived of the thing(s) received in exchange has remedy under this section. The deprived party gets a right to sue for recovery of possession. Not only that, if a party is deprived of the property which he got in exchange, he will be entitled under this section 119 to compensation or to the return of the property in dispute transferred by him to the other party. If any loss is sustained by one party due to any factual or legal flaw in title to land, each would be liable for any loss sustained by the other. However, provision of section 119 applicable so long as property remains in hands of person to whom it had been given in

exchange and not after he has parted with same in favour of third person with consideration. But if the loss is “personal” and not “running with land” the provisions of 119 of the Act is not applicable. In every exchange there is warranty of title. Where part is lost, the whole exchange is to be avoided or compensation is to be recovered. But an equivalent portion alone cannot be recovered back. These are the principles settled by the superior Courts of this subcontinent including ours especially in the case of Sahera Khatun and another Vs. Anwara Khatun and others reported in 44 DLR (AD) 86.

In the instant case it is noticed that the plaintiff got 6.50 decimals land from 3rd schedule instead of 12 decimals from 5th schedule by the disputed deed of exchange whereas the plaintiff handed over the building and land of 2nd schedule to the defendant. As such title of 12 decimals land as described in 5th schedule has not been passed to the plaintiff by the disputed deed of exchange. From the pleadings and depositions of both the parties it is evident that the 3rd schedule land as mentioned in the deed of exchange was not intended to be exchanged by either party. In such view of the matter the plaintiff-opposite party rightly filed the instant suit and the courts below rightly decreed the suit cancelling the deed of exchange and recovery of possession of the land of 2nd schedule which is handed over to the defendant-petitioner. The plaintiff claimed that he was ousted from the 12 decimals land of 5th schedule by the defendant and the defendant did not deny it. No doubt, the plaintiff could also filed the suit for

compensation and/or for rectification of the deed of exchange as admittedly the defendant was the owner of 12 decimals land of 5th schedule but that does not mean the present suit is not maintainable as there is no bar in the eye of law. It is the liberty of the deprived party to choose the forum in accordance with law which means if it is not barred by any law either expressly or impliedly. In my view, the instant suit is maintainable in its present form.

It appears from the judgment of the trial court that the learned judge elaborately discussed the evidence on record including the pleadings and depositions of both the parties and finally came to the conclusion that a fraud has been committed in the deed of exchange inserting 3rd schedule land instead of 5th schedule land as described in the plaint and as such the condition of the deed of exchange has been breached. The trial court also found that neither party had any intention to exchange the land of 3rd schedule and the trial court finally held that in the above facts the deed of exchange should be canceled. The trial court on the other hand after discussing the evidence on record clearly found that the claim by the defendants that the deed of exchange was an out and out sale has not been proved.

It further appears from the judgment of the appellate court below that the learned Judge also elaborately discussed the pleadings case and also the depositions of the PWs and DWs and assessed the evidence on record independently and unequivocally concurred with the findings of the trial court. The

appellate court is the final court of facts and its findings on facts should not be interfered with in revision except in certain well-defined circumstances such as non-consideration and misreading of material evidence affecting the merit of the case, misconception, misapplication or misapprehension of law,i.e. error of law and in the present suit since both the Courts below after threadbare discussion assessing the evidence on record both oral and documentary concurrently found that the plaintiff successfully proved his case, sitting in revision the concurrent findings of fact should not be interfered with as there is no misreading or non-consideration of the evidences on record. The learned advocate for the defendant-petitioners has also did not claim that there is any misreading or non-consideration of evidence on record. In such view of the matter sitting in a revisional jurisdiction this Court should not interfere with the concurrent findings of the facts of courts below.

In the facts and circumstances and the points of law as discussed above, I find no merits in the instant Rule which is destined to fail.

In the result the Rule is **discharged** with cost.

The order of stay granted earlier by this Court stands vacated.

Sent down the lower court records and communicate the judgment and order at once.

Ziaul Karim
Bench Officer