

## 14 SCOB [2020] HCD

### HIGH COURT DIVISION

First Appeal No. 443 of 2012 with  
Civil Rule No. 988(F) of 2012

**Feroza Begum and others**

.....Plaintiff-Appellants

-Versus-

Mr. Mostafa Niaz Mahmood, Advocate  
with

Mr. Md. Golam Noor, Advocate

.....For the defendant-respondents.

**Md. Nannu Mollah and others**

.....Defendant-Respondents.

Heard on 11.12.2018, 13.12.2018,  
17.12.2018,

Mr. Quamrul Haque Siddique, Advocate  
with

03.01.2019, 09.01.2019, 10.01.2019,  
17.01.2019, 30.01.2019, 13.02.2019,

Mr. Ranjit K. Barmon, Advocate

17.02.2019, 20.02.2019 and

.....For the plaintiff-appellants

Judgment on 12.03.2019.

**Present:**

**Mr. Justice A.K.M. Abdul Hakim**

**And**

**Justice Fatema Najib**

**Doctrine of past and closed transaction read with Sections 95 & 95A of the State Acquisition & Tenancy Act, 1950;**

**In the present case the Plaintiffs grandfather sold the suit property by registered saf-kabala deed dated 11.10.1963 and executed a deed of re-conveyance on that date with a condition of repurchase of the same within eight years period that is till 10.10.1971. The President's Order No.88 of 1972 came into effect on 03.08.1972 and following certain amendments therein by P.O No. 136 of 1972 and the condition giving right of repurchase having expired. The sale/transaction became past and closed transaction and the plaintiff was not entitled to get relief on the ground that the property was a mortgaged property. ... (Para 19)**

### JUDGMENT

**A.K.M. Abdul Hakim: J.**

1. This appeal is directed against the judgment and decree dated 16.10.2012 passed by the learned Joint District Judge, Second Court, Chandpur in Title Suit No. 47 of 2012 dismissing the suit.

2. Appellants as plaintiffs instituted Title Suit No. 15 of 2011 in the Joint District Judge, First Court, Chandpur which was subsequently renumbered as Title Suit No. 47 of 2012 impleading respondent No.1 as principal defendant and respondent Nos. 1-3 as defendants nos. 1-3 praying for a declaration that the Sale Deed No. 1206 dated 09.02.2011 is false, fraudulent, collusive and not binding upon the plaintiff. During pendency of the appeal Plaintiff-appellant No. 2 Md. Habibur Rahman died leaving behind the appellant Nos. 2(a)-2(c) as his legal heirs and they were substituted by order of this court on 10.05.2018.

3. The case of the plaintiff, in short, are that one Ason Ali was exclusive owner of 24 Decimals of land in Petty (C.S.) Khatian No. 163, plot No.  $\frac{290}{3620}$ , S.A. Khatian 1427 and 1642, plot No. 1062 area 23 decimal and plot No. 1062 area 01 decimal were finally recorded in the name of Ason Ali and others in respect of 1.53 decimal including 24 decimal; that while Ason Ali had been owing and possessing 24 decimal land of plot No.  $\frac{290}{3620}$  he took loan (Karja) of Tk. 800.00 from Yasin Matabbor mortgaging the said property and executed a Sale Deed No. 7534 dated 11.10.1963 and on the same day Yasin Matbor executed a registered agreement No. 7535; that is was stipulated in the agreement that Ason Ali will return Tk.800.00 within 8 years (within Magh 1370 BS- Poush 1378) in that case Yasin Matbor will execute reconveyance deed in favour of Ason Ali in respect of Suit 'KA' schedule; that thereafter Ason Ali transferred the said 24 decimal including other land to Rustom Ali, predecessors of the plaintiffs by registered Heba-bil-Ewaz Deed No. 668 dated 19.01.1965 but in the Heba Deed inadvertently Khatian No. 136 was recorded in place of Khatian No. 163, later on Ason Ali and Yasin Matbor died; that Yasin Matbor, before his death made Wasiatnama in favour of his First wife, Amirunnessa and son Fazal Haq declaring that if Rustom Ali son of Ason Ali return the loan money then they will return the mortgaged property; that plaintiff's predecessor requested the wife and son of Yasin Matbor to execute reconveyance deed accordingly upon receiving Tk. 800/- from Rustom Ali, Amirunnessa herself and on behalf of her minor sons and daughter and Fazal Haq executed registered Saf Kabala deed No. 381 dated 08.01.1969; that B.S. Khatian and D.P. Khatian No. 4736 prepared in the name of Rustom Ali; that there after Rustom Ali died leaving behind the plaintiff nos. 1-10 as wife, son and daughter, who inherited suit the 'KA' schedule land and the plaintiffs having been in possession and enjoyment of the property mutated their names by opening separate Khatian No. 104113 and by paying all kinds of Khajna; that although the defendant nos. 1-4 heirs of late Yasin Matbor, have no right, title and interest in the suit schedule land but the defendant nos. 1-4 as vendors executed registered Sale Deed No. 1206 dated 09.02.2011 in favour of Nannu Meah, defendant no. 1 in respect of land described in schedule 'KA' to the plaint; that defendant no. 1 threatened the plaintiffs on 10.02.2011 that he will dispossess the plaintiffs from the suit land; that the plaintiffs after obtaining certified of the said Sale Deed and being confirmed about the sale of the suit land, the plaintiff was constrained to file the present suit for the reliefs stated above.

4. Defendant No.1, Md. Nannu Mollah only contested the suit by filing written statement contending, inter alia, that the facts stated in the plaint are not correct. The defendant further stated that Ason Ali was the owner in possession of 24 decimal of land and through Deed of Agreement No. 7534-7535/63 both dated 11.10.1963 the land was Mortgaged to Yasin Matbor for a period of 8 year's which is admitted by the parties; that before completion of 8 year's period both vendor and vendee died and at the time of death Yasin Matabbor, had 2 wives, 3 sons and 3 daughters as legal heirs. Further case of the defendant is that Yasin Matbor died on 15.05.1964 and as per terms and conditions of the deed, Ason Ali did not take deed of reconveyance from Yasin Matbor, thus the land measuring 24 acres remains under ownership of Yasin Matbor and after his death his legal heirs inherited the property as per their shares; that Ason Ali died leaving behind 2 son's Rustam Ali, Momtaz Ghazi and five daughter's. Further case of the defendant no. 1 is that 2 son and 2 daughters of Yasin Matabbor got mutation in respect of 24 acres and on the strength of the mutation they transferred 0.1334 acres of land in favour of defendant no. 1 through registered deed No. 1206 dated 09.02.2011 and delivered possession; that Mafia Begum, daughter of Yasin Matbor by Second wife and Jamal Gazi son of Nuri Begum daughter of Yasin Matbor by First wife as

vendor sold way `0421 acres from B.S. plot No. 1051 by kabala No. 1367 dated 04.02.2011 infavour of defendant no. 1, who mutated his name in Miscellaneous Case No. 3079 of 2010-11; that defendant no. 1 while possessing ( `1334+`0421) = `1755 acres, sold `0550 acres to Md. Humayun Kabir Chowdhury by kabala No. 3308 dated 11.04.2011 and further sold `500 acres to Md. Abdul Baset Sarker by kabala No. 3309 dated 12.04.2011; that he also sold `0202 acres to Md. Khurshid Alam Mollah by kabala No. 4569 dated 24.05.2011, `0250 acres to Harun-or Rashid and Md. Jahangir Alam Khan by kabala No. 4568 dated 24.05.2011, sold `0250 acres to Mahbub Alam and Soheli Sultana and after the aforesaid transfers, the defendant no. 1 had no lands. The purchasers erected pucca constructions and boundaries with the knowledge of the plaintiff; that Fazlul Haq and Amirunnessa never got title and possession in the suit land and they had no right to execute sale deed dated 08.01.1969.

5. During pendency of the appeal the appellants filed an application for amendment of the plaint on 07.05.2018 stating that the plaintiff ought to have prayed for a declaration of title in respect of the suit land and it will not be possible for the plaintiffs to get proper relief in the suit if they did not prayed for declaration of title. It was further stated that the plaintiffs are not aware about the law and they do not know how and what relief have to be seek before the court. It was also stated that if the plaintiff prayed for declaration of title in that case there was a chance to decreed the suit by the trial court. Since the plaintiff have been able to prove their case. The learned Advocate for the appellants submits that the amendment is very much essential and it will not change the nature and character of the suit. Accordingly, the application was allowed and only prayer portion of the plaint was amended by the order dated 28.06.2018.

6. In the suit plaintiff examined 4 (four) witnesses and on the other hand, defendant examined 3 (three) witnesses to prove their respective cases.

7. From the plaintiff's side good number of documents was filed and same was marked as Exhibits-1-9 and defendant documents was also marked as Exhibit-ka to ja(1) to ja(5).

8. Learned Joint District Judge after considering the evidence and materials on record dismissed the suit on the findings that the plaintiff's suit for simple declaration without establishing his title to the suit land is not maintainable. Trial court further found that the plaintiff failed to prove the redemption and reconveyance.

9. The plaintiff being aggrieved and dissatisfied with the Judgment and Decree dated 16.10.2012, preferred the present appeal before this court.

10. Mr. Quamrul Haque Siddique, learned Senior Advocate with Mr. Ranjit K. Barmon, the learned Advocate appearing on behalf of the plaintiff-appellant submits that the heirs of Yasin Matbor paid Taka 800/- and they by kabala dated 08.01.1969 (Exhibit-9) re- conveyed the land to Md. Rustom Ali, son of Ason Ali Gazi. He further submits that the present contract for sale time is not essence of the contract but in contract for re- conveyance time is the essence of contract. He next submits that the trial court erroneously found that the heirs of Yasin Matbor was minor but infact the heirs of Yasin Matbor after attaining majority sold the land to Nannu Mollah, defendant no. 1 by kabala dated 09.02.2011 (Exhibit-2). He also submits that the heirs of Yasin Matbor returned the original sale deed (Exhibit-3) dated 11.10.1963 to the heirs of Ason Ali at the time of re- conveyance dated 08.01.1969 and delivered possession. Subsequently, suit land was recorded in the D.P. Khatian (Exhibit-5) and during pendency of the suit B.S. Khatian was finally published in the name of Rustom

Ali and he paid rent regularly. He lastly submits that Ason Ali was alive in 1969 when the re-conveyance deed was executed by Yasin Matbor in favour of Rustom Ali. In support of his submission learned Advocate for the appellant cited a decision reported in *11 DLR 169*.

11. On the other hand, Mr. Mostafa Niaz Mohammad, Senior Advocate with Mr. Md. Golam Noor, the learned Advocate appearing for the principal-defendant-respondent No.1 submits that the plaintiff originally filed the suit for simple declaration to the effect that the appellants kabala is false, fraudulent and without establishing his title to the suit land, thus the present suit is not maintainable and accordingly the trial court upon relying the decision reported in *61 DLR (AD) 116* rightly dismissed the suit. In the appeal the plaintiff filed an application for amendment of the plaint and same was allowed, by the said amendment the plaintiff amended only the prayer portion of the plaint. In this respect learned Advocate for the appellant strenuously argued that without amending the averments of the plaint, the above lacuna still subsists and amendment does not help them to get benefit for declaration of title in the suit land as per law.

12. He further submits that the plaintiff filed the suit for cancellation of Sale Deed No. 1206 (Exhibit-8) in the name of defendant No.1 executed by defendant Nos. 2-4. But defendant No. 1 also purchased the land of the suit khatian from the heirs of Yasin Matbor by sale deed No. 1367 dated 14.02.2011(Exhibit Kha). But in the suit plaintiff only prayed for cancellation of deed No. 1206 (Exhibit-8). Thus the suit is not maintainable due to partial claim for cancellation of deed no.1206 only. Learned Advocate next submits that the defendant No.1 after purchase of the suit land transfer his entire purchased land by 5 (five) registered kabalas being Exhibit-Ja(1) to Ja(5) in favour of Md. Humayun Kabir Chowdhury, Md. Abdul Baset Sarker, Md. Khorshed Alam Mollah, Md. Harun-or-Rashid and Mohammad Jahangir Alam, Mahbub Alam and Soheli Sultana respectively and the aforesaid purchasers are in possession of the suit land but the plaintiff did not implead them as party in the present suit. So, for by non-impleading of the aforesaid necessary parties, the present suit is bad for defect of parties.

13. He also submits that the plaintiff's grandfather Ason Ali sold .24 decimal of land to Yasin Ali, the predecessor of defendant Nos. 2-4 by registered saf-kabala No. 7534 dated 11.10.1963 (Exhibit-3) and the recital of the said deed clearly evident that it was an out and out sale deed. Subsequently, plaintiff's grandfather Ason Ali executed Heba-bil-Ewaz deed No. 668 dated 19.01.1965 (Exhibit-4) in favour of his son Rustom Ali Gazi, father of the plaintiff and transferred the suit land by schedule two of the said deed but after execution of the earlier sale deed dated 11.10.1963 (Exhibit-3) in favour of the Yasin Matbor, the vendor Asan Ali had no right, title interest and possession over the suit land and the said Heba-bil-Ewaz deed itself is void and it has got no value in the eye of law. Learned Advocate by referring cross-examination of P.W.1, strongly submits that it is crystal clear from the deposition of P.W.1 Habibur Rahman son of Rustom Ali, Yeasin Matbor had 2(two) wives and at the time of his death he left two wives, 3 sons and 3 daughters as his legal heirs and Rustom Ali father of P.W.1 died in the year 2007 and his Grandfather, Ason Ali died after liberation leaving 2 sons and 5 daughters. The deed of re-conveyance No. 381 dated 08.01.1969 (Exhibit-9) executed by the First wife, Amirunnessa and son Fazal heirs of late Yeasin Matobbor in favour of Rustom Ali but the P.W.1 admitted that at the time of death Yasin Matbor left 2 wives, 3 sons and 3 daughters as his legal heirs. So, the aforesaid two legal heirs of Yasin Madbor had no right to execute the re-conveyance deed for entire property of their predecessor in favour of Rustom Ali, at best they can execute reconveyance their portion or share.

14. It was further evident from cross-examination of P.W.1, Ason Ali died after independence and at the time of execution of re-conveyance deed (Exhibit-9) vendor of the original sale deed was still alive and Rustom Ali had no right to take re-conveyance deed from two heirs of Yasin Matbor, thus total transaction is illegal and void. He further submits that in the deposition of P.W.1, he admitted that Yasin Matbor did not execute written wasiatnama and even plaintiffs failed to examine any witness to prove existence of Wasiatnama.

15. Learned Advocate finally submits that Agreement for re-conveyance Deed No.7535 dated 11.10.1963 (Exhibit-3 (Ka) for a period of 8 (eight) years from Magh 1370 B.S to Poush, 1378 B.S which expired on 10.10.1971 and after that the transaction has become past and closed. Thus the plaintiffs can not take advantage of President's Order No. 88 of 1972. Since the State Acquisition and Tenancy Act 1951 was amended and section 95 has been incorporated by inserting by the President's Order No. 136 of 1972 with effect from 03.08.1972. Since the transaction was not alive at the relevant time as such the plaintiff is not entitled to get relief. In this respect learned Advocate refers the decisions reported in *32 DLR (AD) 233 and 16 BLT (AD) 55*.

16. Heard the learned Advocate of both the sides, perused the exhibits and the relevant provision of law.

17. In the present case, firstly we are to consider after expiry of the period stipulated in the Agreement for re-conveyance on 11.10.1971 whether the transaction has become past and closed transaction or whether the transaction was alive at the time of execution of Deed of re-conveyance dated 08.01.1969(Exhibit-9) as per Section 95A of the State Acquisition and Tenancy Act, 1951.

18. Primarily Mr. Quamrul Haque, Siddique, the learned Advocate submits that the sale in the present case had become a complete usufructuary mortgage within the meaning of Section 95A of the State Acquisition and Tenancy Act but after submission advanced by the learned Advocate for the defendant-respondents, Mr. Siddique did not press this submission. In reply Mr. Niaz, learned Advocate for the respondents submits Ason Ali made Heba-bil-Ewaz dated 19.01.1965(Exhibit-4) to his son Rustom Ali Ghazi, father of the plaintiff in respect of the suit property. But it appears from Saf Kabala dated 11.10.1963 (Exhibit-3) that the said property was earlier sold by the Ason Ali, grandfather of the plaintiffs to Yasin Madbor. So, no interest was remained for Ason Ali to execute the Heba-bil-Ewaz deed favour of his son, Rustom Ali, father of the plaintiff.

19. In the case in hand, the plaintiffs grandfather sold the suit property by registered saf-kabala deed dated 11.10.1963 (Exhibit-3) and executed a deed of re-conveyance on that date with a condition of repurchase of the same within eight years period that is till 10.10.1971. The President's Order No. 88 of 1972 came into effect on 03.08.1972 and following certain amendments therein by P.O No. 136 of 1972 and the condition giving right of repurchase having expired, the sale/transaction became past and closed transaction and the plaintiff was not entitled to get relief on the ground that the property was a mortgaged property.

20. It further appears that in the present case when the Deed of re-conveyance was executed on 08.01.1969(Exhibit-9) transaction was not alive when the President's Order No.88 of 1972 came into effect on 03.08.1972 (P.O. 136 of 1972). The doctrine of past and

closed applies in the case of a transaction by way of out and out sale with an agreement to reconvey which has been treated as a mortgage under Section 95A of the State Acquisition and Tenancy Act, 1951 and also which was not alive on 03.08.1972, the date of coming into effect of the President's Order No. 88 of 1972.

21. In this respect we can rely on the decisions reported in *32 DLR (AD) 233* which was subsequently followed in the decisions reported in *44 DLR (AD) 83*, *16 BLD (AD) 210* and *1 BLC (AD) 164*.

22. The learned Advocate for the appellant tried argue that in the case of a contract for the re-sale the time was an essence of the contract. In support of his submission he cited a decision reported in *11 DLR (1959) 169* it has been held- Time, when essence of the contract-conveyance and re-conveyance, distinction between. We are totally at per with the decision cited by the learned Advocate for the appellants. But the cited decision has no manner of application in the facts and circumstances of the present case.

23. Having considering the submission of the learned Advocate of both the sides, we find that the trial court on consideration of the material and evidence on record and relying on the decision of our Apex Court reported in *61 DLR (AD) 116* rightly decreed the suit. It is evident from the re-conveyance deed (Exhibti-9) the transaction was not alive when the P.O 88 of 1972 subsequently by P.O. 136 of 1972 came into effect on 03.08.1972 was embodied in section 95A of the State Acquisition and Tenancy Act 1951. Since the present transaction become past and closed transaction, the plaintiffs is not entitled to get any relief on the ground that the property was a mortgaged property.

24. Accordingly, we find no merit in his appeal. In the result, the appeal is dismissed without any order as to costs and the connected rule being Civil Rule No. 988 (F) of 2012 is disposed of.

25. Send down the Lower Court Records at once and a copy of the judgment be sent to the concerned court expeditiously.