6 SCOB [2016] HCD 112

High Court Division
F.A. No. 112 of 2011 with
Civil Rule 362(F)/2011

Md. Sadek Hossain and others.
..... Defendant-appellants.

Versus

Most. Azmeri Begum and others.
..... Respondents.

Mr. A.J. Mohammad Ali with
Mr. Md. Muniruzzaman with
Mr. Md. Nuruzzaman with
Md. Ashikur Reza Chowdhury and
Ms. Bilkis Jahan, Advocates.
..... For the defendant-appellants.
Mr. Md. Khalilur Rahman with
Mr. Md. Mizanur Rahman, Advocates.
.....For the respondents.

Heard on 22.10.2014, 23.10.2014,
27.10.2014 and
Judgment on 29.10.2014 and 09.11.2014.

Present:
Mr. Justice Nozrul Islam Chowdhury
And
Madam Justice Kashefa Hussain

Evidence Act, 1872
Section 115:
From a close reading of Section 115 of the Evidence Act ..., it is quite clear that the legislature does not allow a person from retracting or denying anything that which he might intentionally have said or done either verbally or by action or by omission and the consequence of which might have led some other person to rely on such as true or act upon such belief. This is as we find is clearly barred under the law. It is also significant to note that the bar is not confined to a particular type or class of suits but it applies to 'any' suit or proceeding be it Civil or Criminal whatever may be the nature, class or category of the suit or proceeding. It is evident from perusal of the same that Section 115 in no way distinguishes or otherwise makes any distinction between Civil and Criminal Proceedings. From the language of Section 115 itself it is evident that it applies to all proceedings. ...(Para 20)

Judgment

Kashefa Hussain, J:

1. This appeal is directed at the instance of the defendant-appellants against judgment and decree dated 11.01.2011 passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No.284 of 2009 decreeing the suit.

2. The facts relevant for disposal of the appeal in brief are that, the plaintiff-respondents filed Title Suit No.164 of 2001 subsequently renumbered as Title Suit No.284 of 2009 seeking (a) declaration for Title to the effect that in the 'ka' schedule property they are owners of kha(1) and kha(2) of the schedule, (b) that they are in possession of kha(1) and

kha(2) of the schedule property and the ga schedule be partitioned from kha(1) and kha(2) of the 'ka' schedule (C) give a preliminary decree to the effect, that if the kha(1) and kha(2) from the 'ka' schedule property is not partitioned from out of amicable settlement then that an Advocate Commissioner be appointed for the purpose of preparing saham in their favour in accordance with law and the preliminary decree and subsequently the final decree and (D) to give declaration to the effect that the deed as described in the 'gha' schedule was fraudulently, collusively, unlawfully changed and the 'gha' schedule deed be corrected and that the plaintiff's father's name be added as purchaser No.2 in the said deed and that the defendant No.37 be directed to amend the said volume.

3. That the plaintiff's case in short inter alia, is that the 'ka' schedule property comprising of kha(1), kha(2) and 'ga' was purchased by the plaintiff's father Amir Hossain and his brother Sheikh Siraj Miah through a registered sub-kabala deed No.2881 dated 22.06.1945. That though the property was bought by the plaintiff's father Amir Hossain and his uncle Siraj Miah, but the S.A. record was prepared in the name of their grandfather Abdul Gafur, the reason being that they were a joint family living together. That the entire property comprising of 0.0468 acres was jointly in equal proportions owned and possessed by Amir Hossain and Siraj Miah. In such circumstances, the plaintiff's uncle Siraj Miah died a bachelor. That after his death, his portion of the property was inherited by his father Abdur Gafur and mother Rehatun Bibi and after their death the property in accordance with the Muslim Farayez Law devolved upon the plaintiff's father Amir Hossain and their other brother Mokter Hossain and others. That the plaintiff's father by purchase owned 0.0234 acres and by inheritance as warish of his father owned 0.006824 amounting to total of 0.03024 acres of land and that subsequently an amicable partition was reached between the co-sharers, that is the father of the plaintiffs and the other co-sharers and out of the total of the 'ka' schedule land the kha(1) schedule comprising of 0.0219 acres of land on the west side and the kha(2) property situated in the schedule of east side consisting of 0.0093 acres comprising a total of 0.0312 acres of land were owned and possessed by the plaintiff's father and the land comprising Schedule 'ga' which is situated between kha(1) and kha(2) came to the share of the defendant's father Mokter Hossain, that is the younger brother of Amir Hossain and the deceased brother Siraj Miah. Subsequently after the death of Amir Hossain, the plaintiffs inherited the property of Amir Hossain in the kha(1) and kha(2) schedule of the property described in the 'ka' schedule and accordingly in pursuance of Namjari in the Government Revenue Office they also duly paid taxes and were in possession of the property. That they are in possession of the entire property comprising of 'kha'(1) and kha(2), but Namjari was done only of 0.028 acres of land. In the kha(1) schedule they constructed building and also obtained necessary utilities like electricity, gas line etc and has partly rented out the property and been living there ever since. That in the 'kha' schedule land the plaintiffs put up a boundary wall and are in possession thereof with the objective of construction there in future. That though the S.A. record and municipal holding mistakenly remained in the name of Abdul Gafur it did not cast any cloud upon the Title of the plaintiffs. That while the plaintiffs were in peaceful possession of kha(1) and the suit land comprising of kha(2) of the land, the defendants upon wrong and misinformation to the authorities and without any knowledge of the plaintiffs recorded 0.0078 acres of land in the kha(2) schedule in the D.P. khatian No.69 in present dag No.522 and thereby added it up with the 'Ga' schedule land belonging to the defendants and consequently got recorded the same in the name of the defendants through collusion, fraud and illegality. That after the wrong recording subsequently the plaintiffs filed Objection Case No.19 in 1999 and on 15.04.1999 during hearing of the objection case the defendants collusively produced a forged, void certified copy of the deed No.2881 of 1945 described in the schedule 'gha' and for the first time

claimed that in the said deed described in the schedule 'gha', Sheikh Siraj Miah was the only purchaser of the suit land and the name of the plaintiff's father Amir Hossain was not there. On the other hand, the plaintiffs by dint of inheritance produced the original copy of the said deed and upon review and scrutiny into both the deeds the settlement Court decided that the deed was actually executed in the name of two persons and brought the here to before baseless and unlawfully recorded land in the name of the plaintiffs bringing it within the D.P. khatian No.44 of the plaintiffs. Against this order the defendants filed Appeal No.1480 of 1999 before the appeal officer and the appeal officer affirmed the earlier decision by the settlement office. That after loosing their case in the settlement cases the defendants filed review case under Sections 42 and 44 and against the decision under Section 42 and 44 the plaintiffs filed Writ Petition No.2175 of 2002 before the High Court Division and pursuant to filing of the Writ Petition further hearing of the petition was stayed and the writ petition was pending in the High Court Division. That the plaintiffs for the first time on 15.04.1999 came to know that the name of Siraj Miah only appeared in the certified copy of the deed as described in the 'gha' schedule and which has resulted through collusion, fraud and illegality. That upon examination into the copy of the deed it appeared that in several places of the deed it is written "Bfe¡l¡ c¢mm Nq£a¡ " meaning that not one person but more than one person had purchased the land and were parties to the deed. That actually the names of both the brothers i.e. the plaintiff's father Amir Hossain and Sheikh Siraj Miah were in the deed described in the 'gha' schedule and the property was equally divided between the two brothers as being in possession and ownership thereof, but due to collusion with the concerned officer in the office of the defendant No.37, the defendants had resorting to fraudulence and illegality changed, altered and enlisted the names in the deed and thus obtained certified copy of the deed through utter illegality and the said certified copy are therefore not binding upon the plaintiffs. That the defendants had tried to take advantage of the fact that the property had not been partitioned by metes and bounds. But that the plaintiffs had repeatedly requested the defendants for partition of the 'ka' schedule property according to their respective saham, but the defendants refused to do so and hence owing to the facts and circumstances inter alia others compelled the plaintiffs to file the Title Suit.

4. The defendants in the Title Suit filed a written statement where in they inter alia stated that the suit land was correctly recorded in the name of Abdul Gafur in the S.A. record. They contended in the written statement that the suit land was actually purchased by the grandfather of the plaintiffs and the defendants namely Abdul Gafur, but that he had purchased the land in Benami in the name of his two sons Amir Hossain and Siraj Miah. That the subsequent S.A. record only proves that the suit land was actually purchased by Abdul Gafur with his own money and in his own interests. That though the sub-kabala deed No.2881 dated 22.06.1945 was executed, but it was never acted upon and in the S.A. record the name of Abdul Gafur was correctly recorded. That Siraj Miah had subsequently died a bachelor and while Abdul Gafur was still alive he had equally divided the property described in the deed between his two surviving sons, the predecessor of the plaintiffs Amir Hossain and the predecessors of the defendants Mokter Hossain and subsequently their heirs have been residing there accordingly by constructing building being in possession of the their respective properties. That the defendants apart from the property in the 'Ga' schedule are also in possession of the property in schedule 'kha'2 and to that effect they erected a boundary wall and also put up a signboard. The plaintiff's claim that they are in possession of 'kha'2 schedule of the property by erecting boundary wall is untrue. That the defendants themselves are in possession of both 'kha'2 and 'ga' schedules of the property. That the plaintiffs claimed that in the R.S. record the name of Amir Hossain was enlisted in accordance with law being in possession of 0.0238 acres in khatian No.15 dag No.345. That

in the Dhaka City Survey the R.S. was wrongly recorded in the name of one Bashir Miah and as a result 0.0130 acres of land was recorded in the name of Mokter Hossain in khatian No.69 in dag No.345. That if the R.S. record was correctly prepared then a total of 0.0483 acres of land would have been recorded in the dag No.345 and the defendant's share in khatian No.69 dag No.345 would have been recorded as 0.0322. That in the D.P. khatian the shares of the plaintiffs and the defendants were equally divided and recorded showing 0.0234 acres of land for each property as per their possession. That in the year 1994, one Sirajul Islam upon trespassing into the vacant land in possession of the defendants constructed a 'Ww 01' and that pursuant to such unlawful trespassing the defendants as petitioners filed Case No.1277 of 1994 under Section 145 of the Code of Criminal Procedure before the C.M.M. Court, Dhaka. In that criminal proceeding the possession of the defendants-petitioners was established and the law enforcing agencies also evicted the trespassers from the property. That the plaintiff No. 2, being also P.W.1 in the Title Suit Abul Hossain had deposed before the C.M.M. Court on 17.09.1995 admitting title and possession of the defendants in the disputed land that is the kha(2) schedule and therefore the plaintiffs are now barred by the doctrine of estoppel being barred from claiming any title or possession over the said land. That the plaintiff's father Amir Hossain had never raised any objection to the fact that the S.A. record was prepared in the name of his father Abdul Gafur. That although the sub-kabala deed No.2881 of 1945 was executed in the year 1945, yet no namjari was ever done and neither the S.A. record, R.S. record nor the D.P. khatian was prepared in the name of the purchasers named in the deed. That the plaintiffs of the present suit were never in possession of the 'kha'(2) property in the 'ka' schedule. That the defendants have upon equal proportion of the property been in possession of their share for over the last 37 years as successors of their predecessors. That the plaintiffs had never before claimed any title on the basis of the sub-kabala deed No.2881 of 1945 nor have they ever raised any objection to the S.A. record or the R.S. record. That even when the 'kha'2 schedule property was illegally occupied by a trespasser named Sirajul Islam, even then the plaintiffs themselves had never taken any steps to dispossess them. Rather the plaintiff No.2 who is also P.W.1 in the Title Suit had deposed in favour of the defendants in the Criminal Case No.1277 of 1994 in the C.M.M Court and the deposition of plaintiff No.2 in that proceeding and by dint of the D.P. khatian and following the report and the observation of the Appeal Officer under Section 42 admitted the possession of the defendants. That although the settlement officer upheld the decision given by the officer under Rule 31 yet the Settlement Officer in the application made by the defendants under Rule 42 admitted the possession of the defendants. That being aggrieved by the judgment under Rule 42, the defendants made an application under Rule 44, for fresh hearing and in pursuance the designated Appeal Officer gave judgment in favour of the defendants establishing their possession and Title to the disputed kha(2) of the schedule land. That the plaintiff's filed a Writ Petition before the High Court Division but since against the application under Section 44, but since the judgment in the application under Section 44 was passed before the Order of High Court Division, consequently the judgment by the Appeal Officer in still in force and persuaded that therefore the defendant's, Title and Position in the suit land in the 'kha'2 schedule has been established and prayed for dismissal of the suit.

5. Having taken up the suit for hearing for disposal of the suit, the Trial Court framed 6(six) issues 3(three) witnesses on behalf of the plaintiffs gave their deposition while 3 witnesses deposed on behalf of the defendants. Exhibit Nos.1-10 series was produced by the plaintiffs-respondents while Exbt. L--a was produced as exhibits by the defendant-appellants.

6. Mr. A.J. Mohammad Ali with Mr. Md. Muniruzzaman, Learned Advocates appeared on behalf of the defendant-appellants while Mr. Md. Khalilur Rahman with Mr. Md. Mizanur Rahman, learned Advocates appeared on behalf of the respondents to resist the appeal.

7. Mr. A.J. Mohammad Ali, the learned Advocate appearing on behalf of the defendant-appellants submits that the sub-kabala deed No.2881 of 1945 was a 'Benami' transaction and Abdul Gafur had purchased the property in Benami in the name of his two sons Amir Hossain and Siraj Miah. The learned Advocate submits that apart from the sub-kabala deed of 1945, there is nothing else on subsequent records to show that the property was actually bought by Amir Hossain and Siraj Miah in their own interest and out of their own money. He argues that this is more palpable from the subsequent S.A. record, R.S. record and the D.P. khatian since none of the records can show Title of the plaintiffs and considering that no 'Namgari' was ever done and that even the municipal holding is in the name of Abdul Gafur. He contends that the plaintiffs are barred by the Doctrine of estoppel given that P.W. in the Title Suit that is plaintiff No.2 had earlier deposed in a criminal miscellaneous proceeding that the appellants were in possession of the suit land and that they were also the owners of the suit land. The learned Advocate further persuades that the plaintiffs even after the criminal miscellaneous case or while the suit land was illegally occupied by a third person never took any initiative or steps to file a suit nor did they claim their title in any other way and that the defendant-appellants have been in continuous possession for over 37 years to which possession the plaintiffs had never objected to and therefore the suit land rightfully belongs to the appellants and that they are the lawful owners of the property. He persists that since no objection was ever raised by them for so many years, they are therefore completely barred by the Doctrine of Estoppel from bringing the present suit and barred from claiming any title to the disputed land and he asserts that being in possession for 37 years, the defendant-appellant can also claim their right by way of adverse possession since the plaintiffs never objected to their possession till long after the lapse of the 12 years of statutory time prescribed for raising any objections against such possession. He further argues that the defendant-appellants are also supported by the Municipal Tax receipts, rent-receipts etc. produced by them in Court and marked as exhibits thereto. The learned Advocate for the defendant-appellants in support of his assertion of the suf-kabala deed No. 2881 dated 22.06.1945 being a 'Benami' transaction placed his reliance upon a decision of our Apex Court in the case of Bina Rani and another –Vs- Shantosh Chandra Dey reported in 21 BLD (AD) 2001 where certain criteria's have been laid out as determinant ingredients of a Benami Transaction and which is quoted below:-

> "Benami Transaction- considerations in determining benami transactions (i) the source from which the purchase money came, (2) the nature and possession of the disputed property, after the purchase, (3) the motive for giving the transaction a benami colour, (4) the position of the parties and the relationships between the claimant and the alleged benamder, (5) the custody of the title deeds and (6) the conduct of the parties concerned in dealing with the property after the purchase."

8. The learned Advocate insisted that at least a few of the determinants as prescribed in this decision are applicable in their case with particular reference to No.2, No.3 and No.6 of the six determinants.

9. On the other hand, Mr. Md. Khalilur Rahman, the learned Advocate appearing on behalf of the respondents asserts that the sub-kabala deed No.2881 of 1945 was purchased by two brothers Amir Hossain and Siraj Miah and it was not a benami transaction made by

Abdul Gafur. He stressed on the point that Amir Hossain and Siraj Miah had purchased the property out of their own money from their own earnings. He also submits that at the time of purchase they were grown men having attained the age of majority, the subsequent S.A. record was named after Abdul Gafur, only since the property was not divided by metes and bounds because of the fact that they were an 'joint undivided' family. He also tries to persuade that a registered kabala is a stronger evidence of Title and shall prevail over all records of rights. In this context he refers to a decision of this Court reported in 32 DLR page 252 in the case of Sultanuddin Chowdhury –Vs- Government of the People's Republic of Bangladesh and others and extract from which is quoted below:-

> "A registered kabala is an evidence of title which will prevail over the other records of rights as such until and unless such kabala is cancelled on a specific allegation of fraud by any civil court in an appropriate civil suit."

10. Regarding the D.P. khatian, the learned Advocate for the respondent submits that the appellants had done it in collusion with some of the concerned officials belonging to the authorities. He also contends that the plaintiffs are not at all barred by the Doctrine of estoppel and asserts that P.W.1 in the Title Suit had never deposed in favour of the appellants in any Criminal proceedings in 1994 of 1945 and therefore the plaintiffs being barred by the Doctrine of estoppel, does not arise at all. He persists that the claim of deposition by P.W.2 in the criminal proceeding is false and concocted, devoid of any factual basis. The learned Advocate for the respondent also contends that the appellants cannot claim Title by way of adverse possession since claim of adverse possession cannot be brought is not maintainable in a partition Suit. In this context he cited a decision of our Apex Court reported in 14 MLR (AD) 2009 in the case of Probir Kumar Rakshit –Vs- Abdus Sabur and others.

11. He further persuades that the property being not divided by "metes and bounds" it was not a partition as such and the "aposh bonthonnama" "আপোষ বন্টননামা " does not bear much relevance since the property was not legally partitioned by metes and bounds. Drawing attention to the appellant's claim of the execution of the deed No.2881 of 1945 being a Benami Transaction by Abdul Gafur in the name of his two sons Amir Hossain and the subsequently deceased son Seraj Miah he submits that Abdul Gafur was an "ordinary villager only", living in his village who could not afford to buy property and therefore the question of him buying any property in the city could not even arise. Furthermore, against the claim of the transaction being a 'Benami' one and the two sons of Abdul Gafur namely Amir Hossain and Seraj Miah being Benamders only, the learned Advocate for the respondents asserts that it is an absurd story conjured up by the defendants and which also led them to conjure up a fake and fraudulent deed in the name of Seraj Miah only. He tries to reason out that to create a Benami Transaction certain ingredients have to be present to constitute actually such a transaction. In this context the learned Advocate for the respondents cited a decision of our Apex Court in the case of Mosharraf Hossain Chowdhury and others –Vs- Md. Jahurul Islam Chowdury and others reported in 61 DLR (AD) 2009 where the ingredients constituting a Benami Transaction has been laid out and is reproduced below:-

> "Benami Transaction-Circumstances that constitute benami-In deciding question of benami in respect of a transaction matters or factors generally taken into consideration are source of the purchase money, custody of the deed, possession of the property, motive for benami transaction, subsequent conduct of the person who said to have made the benami transaction and the intention of the person as regard the transfer claimed to be benami and subsequent dealing with the property by the person who is claiming transaction as benami."

12. The learned Advocate assails that none of these determinants as set in the decision cited above are applicable in the defendant's case, since the defendants failed to satisfy the determinant ingredients necessary to constitute a Benami Transaction.

13. Regarding the defendant-appellant's assertion that the respondents are barred by the Doctrine of estoppel from bringing any suit since they had earlier in a Criminal proceeding in the year 1994 under Section 145 of the Criminal Procedure Code deposed in favour of the appellant-respondents, as such deposing that the appellants were in possession of the suit land, the learned Advocate asserted that the claim of deposition given by P.W.1 is false and also argues that given that if P.W.1 had deposed in the appellant's favour yet such deposition in a Criminal case shall bear no relevance or applicability in a Civil Suit. In this context he cited a decision of the Appellate Division reported in 1983 BLD (AD) 334 in the case of Akhtar Hossain Sharif and others –Vs- V. Munshi Akkas Hossain and others.

14. We have heard the learned Advocates from both sides, perused the documents and other materials on record including the judgment of the Trial Court (Upon examination it appears that apart from the sub-kabala deed of 1945, the subsequent S.A. record, R.S. record and D.P. khatian do not speak of any Title in the plaintiff's favour and to their claim in the Suit land).

15. We have carefully considered the submissions and argument regarding the 'Benami 'transaction and we have perused the judgments which have been relied upon by both the appellants and the respondents respectively. We have read two judgments one in the case of reported in 21 BLD(AD) 2000 relied upon by the appellants and we have also perused the judgment in the case of reported in 61 DLR(AD) 2009 page-137 and which has been relied upon the by the respondents. After perusal of both the judgments which have set out some common principles for determination of the ingredients of a Benami transaction we have found that at least some of the ingredients of a benami transaction are discernible in the case before us.

16. Our considered view is that in the present case to find out whether the transaction was Benami or not, we cannot consider the sub-kabala deed of 1945 in an isolated manner, rather we feel it imperative to take subsequent events and documents on record into consideration including the conduct of the parties. In this context it is quite obvious that apart from and except for the sub-kabala deed of 1945 and some documents evidencing payment of some taxes and utility bills etc being paid by the plaintiff-respondents, the subsequent S.A. record, D.P. khatian and municipal holdings all being recorded in the name of Abdul Gafur, we do not find much tangible evidence in support of the plaintiff-respondents claim that Amir Hossain and Siraj Miah had purchased the property out of their own money. Therefore, taxes having been paid by both parties, under the circumstances these documents cannot lend much support in favour of the plaintiffs claim to possession and Title of the Suit land and it is also revealed from the records that taxes like municipal holdings etc produced as exhibits by the appellants were also paid by the appellants. Therefore, under the circumstances it is only logical and reasonable to hold that if Amir Hossain and Siraj Miah had actually purchased the property from their own money it is highly improbable that they allowed the S.A. record to remain in their father's name and given that the subsequent R.S. record and the D.P. khatian also do not show or help much to prove the plaintiff's claim. Further there is nothing much on record to show that the plaintiff-respondents had ever taken any initiative to rectify any these above mentioned records particularly the S.A. Record. Regarding the deposition in the

criminal proceeding of 1994 made by the plaintiff No.2 that is P.W. 1 in Title Suit, we cannot rely on the deposition of the P.W.1, nor can we accept the submission of the learned Advocate for the respondents that P.W.1 had 'never' deposed in favour of the appellants, given that we have found from exhibit 'ত' that he had actually deposed in the Criminal proceeding and as is revealed upon scrutiny into the records apart from exhibit 'ত' there are also other exhibits which bear direct relevance to the issue before us and appear as documentary evidences in support of the defendant-appellant's claim. Those are the exhibit 'চ'(cha) that is the report of the Motijheel Police Station dated 24.10.1995 and exhibit 'gha' (ঘ) the judgment and order passed in the Petition Case No.1277 of 1994 wherefrom we have quoted from the third line of the 'আদেশ নামা' which is as follows :- 'স্বাক্ষীগণ প্রত্যেকেই জানাইয়াছেন বিরোধীয় সম্পত্তি বাদী পক্ষের দখলে .' The বাদী that is plaintiffs in the Petition Case No.1277 of 1994 is of course the defendant-appellants in the case before us. These exhibits only corroborate and validate the defendant-appellant's claim that they are in possession of the disputed kha(2) schedule land and also establish the fact that plaintiff No.2 had actually deposed in the criminal proceeding in 1994. Besides, there is also exhibit Uma (ঙ) that is the judgment and order in Criminal Revision Case passed by the Magistrate upholding the order passed in Petition Case No.1277 of 1994. These above mentioned exhibits are relevant so far in relation to their claim of 'possession' is concerned.

17. Taking all the documents including the exhibits and the facts and circumstances into consideration, we cannot ignore a vital fact and which fact the defendant-appellants had repeatedly asserted before us and which we also are in agreement that even after the alleged trespassing and illegal occupation by a third person the plaintiffs had never tried to make any attempt or had never taken any initiative or interest to file a suit or to do anything else to establish their claim to Title, ownership and possession over the suit land and therefore their case falls under the Doctrine of estoppel, since the plaintiff-respondents are now barred and estopped from making any further claims over the suit property. Therefore the plaintiffs trying to come up after a lapse of so many years is a futile exercise on their part not having any legal basis and their case definitely falls under the Doctrine of estoppel.

18. Upon going back to the arguments, we ponder over the assertion of the learned Advocate for the respondents that "findings" of a Criminal Court are not binding upon a Civil Court and therefore the question of being estopped does not arise. In support of his assertion, the learned Advocate for the respondent had also cited a decision of our Appellate Division in the case of Aktar Hossain Sharif and others –Vs- V. Munshi Aktar Hossain and others reported in 1983 BLD (AD) where the principle cited from para 20 of the judgment is as quoted underneath :-

> (b) "Findings of the criminal court are not binding on the civil courts-An order under section 145 Cr.P.C. cannot be treated as substantive evidence of possession."

19. Well, it is a general principle of law that findings of a Criminal Court are not binding as such upon Civil Courts and we are in respectful agreement with the principle laid down by our Apex Court. But it is significant to the note that in the case cited by the respondents, as is evident from the judgment their Lordships in that case there were dealing with the question of "findings" of a Criminal Court and furthermore, the issue of estoppel was not involved in that case. But in the case before us, we are concerned about the "deposition" given by the P.W.2 and not with 'findings' of any Court. Upon distinguishing there two aspects we are able to determine that "deposition" belongs to the category of evidence and not findings and the legal implications of the two are distinct from each other. Their Lordships in the Appellate

Division in the case referred to above, were not dealing and did not consider the issue of evidence at any stage of the judgment. In that case they were concerned with the 'findings' only. Here we are concerned with an evidence given in a Criminal Case. Upon the issue of deciding whether 'evidence' of a person in a Criminal proceeding may be taken into consideration in a Civil Suit and whether a person may be estopped in a later Civil suit we must scrutinize the relevant law and that is the Evidence Act, 1872 from which for our purpose Section 115 of the Evidence Act is applicable and which is quoted below:-

> 115. Estoppel—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thins."

20. From a close reading of Section 115 of the Evidence Act as quoted above, it is quite clear that the legislature does not allow a person from retracting or denying anything that which he might intentionally have said or done either verbally or by action or by omission and the consequence of which might have led some other person to rely on such as true or act upon such belief. This is as we find is clearly barred under the law. It is also significant to note that the bar is not confined to a particular type or class of suits but it applies to 'any' suit or proceeding be it Civil or Criminal whatever may be the nature, class or category of the suit or proceeding. It is evident from perusal of the same that Section 115 in no way distinguishes or otherwise makes any distinction between Civil and Criminal Proceedings. From the language of Section 115 itself it is evident that it applies to all proceedings.

21. Regarding the plaintiff-respondent's assertion that the appellants cannot claim 'adverse possession' in a partition suit since the property is not yet divided by 'metes and bounds' and by drawing our attention to the decision of our Apex Court in this context cited by them in the case of Probir Kumar Rakshit –Vs- Abdus Salam and others reported in 14 MLR AD (2009) where the principle set out in para 120 of the judgment is reported below :-

> "It is in conformity with the well settled principle of law that possession of one co-sharer is in point of law the possession of all co-sharers. Similar view is also taken in the case of Rajenda Nath Saha –Vs- Sonaullah, 42 DLR 393 that an amicable arrangement for separate possession of joint lands amongst the co-sharers by itself does not amount to partition by metes and bounds so as to convert the joint title and possession of the co-sharers into exclusive title and possession. In other words, possession of any co-sharer in any joint land will not confer any title by adverse possession. When the property belongs to several co-sharers, possession of one co-sharer in such property cannot confer exclusive title inasmuch as such possession by one co-sharer cannot be taken to be adverse possession. "

22. While we are in respectful agreement with the principle of the above decision of our Apex Court and which is binding upon us that in a partition suit possession by itself or a plea of adverse possession by itself does not say much in favour of the party claiming such adverse possession, but at the same time we would like to remind the learned Advocate that in the instant case, the claim is accompanied inter alia by the Doctrine of Estoppel and which factor we have considered above and we are in no position to depart from the statutory provision of law as provided under Section 115 of the Evidence Act, 1872. Here in this case, it is not only the claim of adverse possession in an isolated manner, but other factors

including the depositions of the witnesses, the documents and materials on record which need our attention and scrutiny for arriving at our findings.

23. The respondents had also submitted and also cited a decision to support their assertion that the suf-kabala deed shall prevail over the S.A. record. Our view it that generally the suf-kabala deed would prevail over the S.A. record but we have to distinguish the fact that in the case in hand the execution and the existence of the suf-kabala deed is not in question. The appellants have not denied the fact that the suf-kabala deed was executed. There is no dispute as to the existence of the suf-kabala deed. Our anxiety here is the intention behind the execution of the deed and this 'intention' we cannot decipher by looking into the sub-kabala deed alone and therefore to find whether the Transaction in the Deed No.2881 of 1995 was a "Benami" Transaction we cannot look into the sub-kabala deed in an isolated manner, rather we have to take all other relevant factors into our consideration and which we have already discussed above.

24. We have take the depositions of the witnesses including the other exhibits and the other documents and materials on record into our reckoning and which is a vital aspect in aid of arriving at our decision. Upon examination, it transpires that the plaintiff's witnesses could not at any stage of the case actually show any material document or proof as to who had actually paid the consideration for the purchase of the suit land in 1945, given that the plaintiff's claim is that the money was paid by their father Amir Hossain and their deceased uncle Siraj Miah who had purchased the land for their interest only. While the defendants' claim is that Abdul Gafur, the common grandfather of the plaintiffs and defendants had paid the money and executed a 'Benami' transaction only in the name of his two sons, but that in reality the purchase was for his own interest. But regarding the contention of paying taxes, from the documents we find that both parties had paid municipal holding taxes, rent receipts etc. exhibited before the Court therefore, we have tried to deduce actual facts from the depositions of the witnesses.

25. It appears from the records that P.W.1 has upon cross-examination admitted at one stage that his grandfather Abdul Gafur while alive used to pay taxes in his own name. P.W.1 at one stage in his deposition stated " আমার দাদার জীবনকালে এই ভূমির খাজনা আমার দাদার নামে আদায় হয়েছে। " He also stated elsewhere " **আব্দুল গফুর নালিশা ভূমির পৌর** কর দিতেন। " This statement appears not at all in conformity with their, that is, the plaintiff's persistent claim that their father Amir Hossain and Seraj Miah had purchased the land by themselves and for themselves. Because our anxiety arises from the fact that it is very unconvincing that if they Amir Hossain and Siraj Miah did purchase the land for themselves with their own money, then we can hardly find any reason for Abdul Gafur paying any taxes and being an undivided joint family is hardly a reasonable explanation for it. Regarding the R.S. record the P.W.1 admits in his re-examination " আমাদের প্রাপ্য অংশ অনুযায়ী আর,এস, রেকর্ড হয়েছে। " This admission also bears direct relevance to the case. P.W.1 also in his deposition denies having entered into any partition agreement at all. There appears to be in discrepancies and inconsistencies in this assertion considering that upon perusal of the plaint we find that in several places in the plaint, the plaintiffs have admitted to an " আপোষ বন্টন " an amicable partition between the parties. Further P.W.1 at one stage in his deposition stated "তবে শুনেছি আমার দাদা দুধ বেচাকেনা করতো । জায়গা-জমি বেচাকেনা করে খেত " Now this statement of the P.W.1particularly the second part is quite significant and revealing that Abdul Gafur, the grandfather of the plaintiffs and defendants was himself engaged in the business of sale and purchase of land and is an interesting revelation particularly with regard to the plaintiffs submissions where they have

been persistently claiming that Abdul Gafur was an ordinary villager only, without any means to purchase property.

26. Taking the above depositions and upon consideration of other factors placed before us, we can safely arrive upon the conclusion that Abdul Gafur himself was actually also involved in the sale and purchase of land. We feel that contrary to the respondent's submission that Abdul Gafur was only an ordinary villager and could not afford to buy property, it may be reasonably concluded that any person engaged in a business that involves buying and selling of land can also afford to buy land and that is actually the case in the present case. We have also found discrepancies in the plaint itself, at the beginning of the plaint the plaintiffs had stated that the S.A. khatian was 'mistakenly' recorded in Abdul Gafur's name while elsewhere they have stated that since they were an "ejmaily joint family", the S.A. record was consequently recorded in their grandfather Abdul Gafur's name.

27. As is apparent P.W.1 in his deposition had outright denied having been a witness in the Criminal proceedings of 1994 in favour of the plaintiffs. We regret to hold that this denial of his is not acceptable at all, considering the other documents which have been produced as exhibits in the Title Suit; namely the police report, judgment and order of the Court which we have discussed elsewhere in this judgment and therefore it is unnecessary and superfluous to dwell upon this issue any more, Keeping in view all the documents on record our finding is that P.W.1 had actually deposed in the Criminal case and his denial of being a witness tantamounts to a blatantly untrue statement to which he is now taking resort to achieve his own objective.

28. On the other hand, the D.W.1 deposed upon cross-examination that the certified copy of the deed of 1945 carries the name of Siraj Miah only, but simultaneously he also admits that the original deed bears the names of two persons. Therefore from his deposition, we may adduce that he is speaking the truth and that his deposition may be safely relied upon.

29. Regarding the depositions of the other D.Ws though they may not be as crystal clear as daylight yet over-all we did not find any major discrepancies which could adversely affect the case of the defendant-appellants.

30. The plaintiffs had claimed that their father Amir Hossain and their uncle Siraj Miah had attained the age of 'majority' in the year 1945 while the defendant-appellants claimed that Amir Hossain and Siraj Miah were minors at that time. As is apparent from the records, on this issue neither parties have been able to produce any substantial proof. Our view is that to prove age by any document was not possible in that era, given that the date goes back to the year 1945 when documents like birth certificates etc where unknown to people of these parts at the relevant time and we shall leave it at that.

31. From our perusal of the judgment of the Trial Court it transpires that the Trial Court did not frame any issues on the plaintiff's claim and prayer in the plaint for declaration inter alia that the deed in the 'gha' schedule is fraudulent, collusive and unlawfully changed. It appears from the records and from the submissions of the plaintiff that they had at every juncture of the case quite vehemently raised the allegation of 'fraud' including praying for a declaration in prayer 'gha' of their plaint that the volume of the deed was changed fraudulently and collusively etc inter alia other prayer.

32. We find that the Trial Court ought to have engaged itself upon this issue and whether the name was actually 'fraudulently' erased from the deed being essentially a disputed matter of fact; the proof or disproof of such depends upon adducing of evidence. But the Trial Court in this case did not frame it as an issue and no depositions were made or evidence adduced upon this particular issue at all in the Title Suit. It is also revealed from the judgment of the Trial Court that the Trial Court could not at any point in its findings arrive at any definite conclusion as to how the name of Amir Hossain got erased. The Trial Court observes in its judgment " উপরোক্ত ঘটনার পর্যালোচনায় দেখা যায়, নাঃ দলিলের ভলিউমে কৌশলে আমির হোসেন এর নাম বাদ গিয়াছে বা মুছিয়া ফেলিয়াছে. " From this particular observation. In the judgment it is obvious that the Trial Court could not arrive at a definite conclusion as to how the name got erased from the deed. " নাম বাদ গিয়াছে বা মুছিয়া ফেলিয়াছে " this observation itself speaks of the Trial Court's uncertainty and inconclusiveness regarding the claim of forgery and collusion in respect of the volume of the deed and left it at that. Therefore, since the Trial Court for reasons best known to itself did not frame any issue at all on this prayer of the plaintiff-respondents, we do not feel necessary to dwell upon it.

33. Upon summing up the whole case, it is our considered view that the plaintiffs have at every juncture raised allegations of fraud and collusion against the defendant-appellant starting from challenging the certified copy of the suf-kabala deed itself, the D.P. khatian and even the Criminal Case of 1994. But as is obvious from the records, they have hopelessly failed to prove any of these allegations. As the old Latin maxim goes *"Actori incumbit onus probandi"*, the English translation of which stands thus :-

The burden of proof lies on the plaintiff. But in the instant case the plaintiffs have hopelessly failed to prove their allegations and therefore our finding is that having failed to establish their claim they are not legally entitled to any relief of any sort whatsoever. But the Trial Court however, has upon inter alia, misconception and mis-reading of evidences arrived at an incorrect finding and fallaciously decreed the suit in favour of the plaintiff-respondent and which resulted in an unlawful judgment and decree.

34. Consequently taking all the facts and circumstances into consideration and after perusal of the records and the materials placed before us, we are inclined to conclude that the suf-kabala deed No.2881 dated 22.06.45 executed by the predecessors of the plaintiffs was actually a Benami Transaction in favour of Abdul Gafur and the defendant-appellant are in lawful possession of the schedule property. Therefore, we find substance in this appeal and the appeal is hereby allowed.

35. In the result, the appeal is allowed and the impugned judgment and decree dated 11.01.2011 passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No.284 of 2009 decreeing the suit is hereby set-aside.

36. The connected Rule being Civil Rule No.362(F)/11 is also hereby disposed of accordingly without any order as to costs.

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

38. Send down the Lower Court's Record along with a copy of this judgment to the Court below immediately for information and necessary action.