IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CIVIL APPEAL NO.111 OF 2007

WITH

CIVIL APPEAL NO.112 OF 2007

(From the judgment and order dated 14.05.2005 passed by the High Court Division in Civil Revision Nos.1649 and 1650 of 2012)

Md. Mortuz Ali Karar (In both the cases)	..... **Appellant**
=VERSUS=	
Khatiza Banu and others (In both the cases)	..... **Respondents**
For the appellant (In both the cases)	**:Mr. Abdul Wadud Bhuiyan, Senior Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record**
For the Respondent Nos.1-5 (In both the cases)	**:Mr. Chowdhury Md. Zahangir, Advocate-on-Record**
For the respondent Nos.6-23 (In both the cases)	**:Not represented**
Date of hearing	**:The 25th May, 2022**
Judgment on	**:The 1st June, 2022**

J U D G M E N T

MD. NURUZZAMAN, J:

These two Civil Appeals, by leave, have arisen out of the judgment and order dated 14.05.2005 passed by a Single Bench of the High Court Division in Civil Revision Nos.1649 and 1650 of 2012 discharging both the Rules.

These 2(two) civil appeals are heard together and they are dealt with by this single judgment and order.

The plaintiff instituted Other Class Suit No.8 of 1994 in the Court of Assistant Judge, Nikli, Bajitpur, Kishoreganj for rectification of a document, declaration of title and confirmation of possession in the suit land described in the schedule of the plaint.

The defendant also brought Title Suit No.54 of 1995 in the same Court for

rectification of deed No.540 dated 29-02-1984 A.D.

Facts leading, to filing of these civil appeals, in short, are that the original owner of the suit land was Miazuddin Karar who died issueless. During his lifetime he was looked after by his nephew Didar Ali Karar and grandson Mortuj Ali Karar. Having obliged by their nursing and caretaking Miazuddin Karar gifted the suit land to the plaintiff by a registered hiba-bil-ewaj deed dated 29.02.1984 on receiving a copy of the Holy Quran and Tasbih and accordingly, possession of the suit land was delivered to the plaintiff. But in the first part of the Hiba-bil-Ewaz deed the name of the grandfather of the plaintiff was written wrongly instead of his father's name

while in the inner part of the hiba- bil-ewaj deed it was clearly mentioned that Mortuz Ali Karar was the grandson of Miazuddin Karar. Again at the heading (first part) of the deed, plot No.1595 was wrongly written in place of plot No.1596. Taking advantage of these errors, the defendants raised question as to the title of the plaintiff in the suit land. Hence the suit.

The defendant No.1 contested the suit by filing a written statement denying all the material allegations made in the plaint and contending, inter alia, that Miazuddin Karar did not gift the suit land to the plaintiff by the said Hiba-bil-ewaj deed. The said Hiba-bil-ewaj deed was a false one and created by false personification. The plaintiff has no right,

title and possession in the suit land. The defendant has been possessing the suit land after getting it as heirs of Miazuddin Karar. Hence, the plaintiffs' suit is liable to be dismissed with cost.

Both the suits were heard analogously by the trial Court and were disposed of by the common judgment dated 10.09.1996, decreed the Title Suit No.8 of 1994 and dismissed the Title Suit No.54 of 1994.

Being aggrieved, the party concerned preferred Title Appeal No.244 of 1996 and Title Appeal No.272 of 1996 before the District Judge, Kishoreganj. Eventually, on transfer, the Additional District Judge, First Court, Kishoreganj allowed both the appeals and dismissed Other Suit No.8 of 1994 and decreed

Other Suit No.54 of 1994.

Being aggrieved, the party concerned preferred the above mentioned Civil Revision Nos.1649 and 1650 of 2012 before the High Court Division and obtained Rules.

In due course, a Single Bench of the High Court Division upon hearing the parties discharged both the Rules by the impugned judgment and order dated 14.05.2005.

Feeling aggrieved, by the impugned judgment and order dated 14.05.2005 passed by the High Court Division, the plaintiff as leave petitioner preferred Civil Petition for Leave to Appeal Nos.1143 and 1144 of 2005 before this Division and obtained separate leave, which, gave, rise to the instant appeals.

Mr. Abdul Wadud Bhuiyan, the learned Senior Counsel appearing for the appellants in both the appeals, has submitted that the trial court, on the basis of evidence of P.ws.2 and 3, the scribe of the deed who supported P.W.1 on all material points in respect of execution of the Hiba-bil-ewaj deed and passing of valuable consideration having found that Miazuddin Karar executed the Hiba-bil-ewaz deed, the same is legal and the appellate Court without controverting the findings of facts having reversed the trial court's judgment and decree and the High Court Division without considering whether the judgment and decree of the appellate court was passed in accordance with the mandatory requirement of Order 41 Rule 31 of the

Code of Civil Procedure having upheld the same, the High Court Division committed an error of law in the exercise of revisional jurisdiction. He has further submitted that P.Ws.1 and 2 having testified in their testimonies that in the Hiba-bil-ewaz deed, the grand father's name of the plaintiff was written wrongly instead of his father's name and that at the heading of the deed, Plot No.1595 was written wrongly instead of Plot No.1596 and in the schedule of the deed plot No.1596 was written correctly and the trial Court relying on their evidence having decreed Title Suit No.8 of 1994 finding that in the first part of the Hiba-bil-ewaz deed 'Bajan Ali Karar' was written wrongly instead of 'Didar Ali Karar' (the

father's name of the recipient) and at the heading of the deed plot No.1595 was written wrongly instead of Plot No.1596 but the appellate Court without reversing the said findings on consideration of evidence reversed the judgment and decree of the trial Court and the High Court Division did not consider whether the above findings of the trial court have been reversed on consideration of evidence relied on by the trial Court and thus committed error of law in the exercise of revisional jurisdiction. He has next submitted that the P.W.1 in support of his plaint case testified that he has been possessing the suit land since the date of gift and the latest Survey Khatian has been prepared in his name as he was found on

possession. The P.W.4 corroborated the evidence of the P.W.1 as regard possession of the suit land by the plaintiff and the witnesses have been able to mention the boundary of the suit land but the lower appellate court misread their evidence regarding boundary and the High Court Division committed error of law in upholding the decision of the lower appellate Court and therefore, the judgment of the High Court Division is not sustainable in law. He has finally submitted that the P.W.1 in his deposition having stated that on coming to know recently about the mistake in the deed, he filed the suit on which point there was no cross-examination from the side of the defendant and the trial Court found

that Title Suit No.8 of 1994 was not barred by limitation but the appellate Court on the basis of conjecture and surmise, found that the suit was barred by limitation, which was based on no evidence and inconsistent with the evidence on record and the High Court Division did not consider the correctness or otherwise of the decision of the appellate Court below on this question of limitation and therefore, the judgment of the High Court Division cannot sustainable in law. Hence, the instant appeals may kindly be allowed.

Mr. Chowdhury Md. Zahangir, the learned Advocate-on-Record appearing on behalf of the respondent Nos.1-5 was not present at the time of hearing of the appeals.

We have heard Mr. Abdul Wadud Bhuiyan, the learned Senior Counsel for the appellants in both the appeals. Perused the impugned judgment and order of the High Court Division and other connected materials available on records.

Leave was granted in both the appeals to examine the submissions of the learned Advocate for the appellants and grounds set forth therein.

Now let us evaluate the evidence on record, circumstances of the cases, and decisions of the three (03) Courts below, whether judgment and order of High Court Division is justified or erred in facts and law which calls for interference by this Division.

The two pivotal questions involved in the instant appeals are that whether the claimed

Hiba-bil-iwaz was a valid one and whether the mistakes in the father's name of the plaintiff and plot no. in the heading of the impugned deed were bona fide.

Concerning the nature and legal status of Hiba-bil-iwaz famous Syed Mahmood J. in the case of Rahim Bakhsh Vs. Muhammad Hasan reported in (1889) ILR 11 All 1 observed as follows:

> **"The fundamental conception of a Hiba-bil-iwaz in Muhammadan Law is, that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor**

of one gift and the donee of the other."

As such, all the formalities and requirements for a valid gift shall be performed for a transaction to become a Hiba-bil-iwaz.

From the assertions of the PW's it is evident that possession of the suit land was handed over by the donor Miazuddin Karar to his grand nephew, the plaintiff. The same is too virtually manifested from the existence of the impugned Hiba-bil-iwaz deed and subsequent publishing of the record of rights in the plaintiff's name. Moreover, the scribe of the deed and attesting witnesses to the impugned Hiba-bil-ewaz deed too corroborated with the PW 1 that the claimed Hiba-bil-ewaz transaction

was duly happened. In such a situation, we too concur with learned Assistant Judge that the claimed Hiba-bil-iwaz transaction as well as the deed thereof are genuine and valid.

Consequently, we find merit in the submissions of the learned counsel for the appellants that the appellate court without controverting the findings of facts reversed the trial court's judgment and decree and the High Court Division too without properly appreciating the findings of the appellate court on the basis of evidences adduced upheld the same in a slipshod manner without assigning any reason and assessment of the oral and documentary evidences.

Next to examine is whether writing of Bajan Ali Karar as the name of the plaintiff's

father instead of Didar Ali Karar and deed plot no. 1595 instead of 1596 at the heading of the impugned deed were bona fide mistakes.

Admittedly as well as evidently the donee Mortuz Ali Karar's father's name was written as Bajan Ali Karar in the impugned deed. However, it was claimed by the plaintiff, evident from oral and documentary evidences and even admitted by the DW 1 in his cross examination that Mortuz Ali Karar's father's name is Didar Ali Karar, not Bajan Ali Karar; rather Bajan Ali Karar was the father of Didar Ali Karar. The same is too manifested from the Parcha (RS Khatian no.4426) that the plaintiff's father's name is Didar Ali Karar, in such backdrop, is it, would be believable to a simple man far to a prudential man that writing of the father's

name was a correct one, if not, how a Court can believe that writing of the father's name in deed in question was not wrong ?

As such, we too cannot disbelieve, rather, agree with the findings of the learned Assistant Judge that Bajan Ali Karar was wrongly written as the father's name of the plaintiff instead of Didar Ali Karar and the same was bonafide.

Again, evidently at the top of margin in the 1st page of the impugned deed, which is in part of recitals of the deed, number of the deed plot was written as 1595. However, in the schedule i.e. in the operative part of the deed it was 1596. Where there are inconsistencies between different parts of a deed there comes the application of the rules/principles of

interpretation of instruments. In this connection it is worth to put forward the observations of the case of Ex parte Dawes In Re : Moon referred in (1886) 17 Q. B.D. 275:

> **"It is to be construed by what appears on the face of it, and by nothing else. You may of course look at the state of circumstances which existed at the time when it was made, but in the present case that will not help us at all in the construction. The deed must be construed as it stands, and by reference to nothing else. "Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the**

recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

As in the present case both the recitals and the operative part are clear, but they are inconsistent with each other, hence, the operative part is to be preferred. As such, we have decided that the plot number of the impugned deed is 1596 and lettering 1595 as the deed plot number was a slip of pen and the error was bonafide.

On the other hand, DW 1 in his cross examination (in the year of 1996) acknowledged that Miazuddin Karar died 10 (ten) years ago. This means he died in the year of 1986. Later, DW 1 further admitted that he came to know about the existence of the impugned Hiba-bil-iwaz after 01 (one) year of his death, i.e. in the year of 1987. However, he filed his suit in the year of 1995. As such, it is certainly inferred that he filed his suit after 08 (eight) years of his knowledge. As per article 120 of the Limitation Act, 1908 the suit should be lodged within 06 (six) years of his knowledge. Consequently, his case became hopelessly barred by limitation for at least 02 (two) years.

On appreciation and sifting of evidences adduced in the trial court disbelieved the defendant's version of cases regarding their title and possession over the suit and we observed that appellate court without discarding the findings based on strong evidences reversed the judgment and decree of the trial court. Hence, the same as well as the later affirmation thereof, of the High Court Division are not tenable in the eye of law.

Hence, our considered view is that the High Court Division as well as the Court of appeal below made an error of laws and facts setting aside the judgment and order of the trial Court on the basis of erroneous findings, thus the same cannot be sustainable in law.

Accordingly, we find merit in submissions of the learned Counsel for the appellant. The reasons elaborated above we find that the impugned judgment and order of the High Court Division do call for interference.

In the result, these Civil Appeals are allowed without any order as to cost. The judgment and order of the High Court Division as well as judgment and decree of the Appellate Court are set aside and judgment and decree of the learned Assistant Judge is hereby restored.

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The 1st June, 2022
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