

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Obaidul Hassan, C.J.
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafar Siddique

CIVIL APPEAL NO. 133 OF 2023

(From the judgement and order dated the 29th day of June 2022 passed by the High Court Division in First Miscellaneous Appeal No.309 of 2021).

Jahanara Begum and others	: Appellants
	-Versus-	
Hazi Nizamuddin and another	:	... Respondents
For the Appellants	:	Mr. A.M. Amin Uddin, Senior Advocate, with Mr. Mohammad Saiful Alam, Advocate, instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record
For Respondent No. 1	:	Mr. Md. Nurul Amin, Senior Advocate, instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record
Respondent No. 2	:	Not represented
Date of hearing and judgment	:	The 23 th day of January, 2024

JUDGMENT

M. Enayetur Rahim, J: This civil appeal is directed against the judgment and order dated 29.06.2022 passed by a Single Bench of the High Court Division in First Miscellaneous Appeal No.309 of 2021 allowing the appeal.

The facts, relevant for disposal of this civil appeal, in brief, are that the present appellants and respondent No.1 as petitioners filed Probate Case No.01 of 2018 before the learned Joint District Judge, 1st Court, Cumilla stating, *inter alia*, that their father late Alhaj Farid Uddin Ahmed died on 05.04.2018 after being executed a Will being No.CIII 01 dated 22.01.2014 in favour of his

all sons and daughters. In order to enforce the above will the petitioners executed an agreement on Non-Judicial stamp with a view to implement their father's wish and subsequently, filed the above case for Probate.

Eventually, on 02.06.2021 the present appellants as applicants filed an application for transposition of their positions as opposite party Nos.2-8 from the petitioner Nos.2-8 as they are not interested as per terms and conditions for the Will being No.CIII-01 dated 22.01.2014 and the learned Joint District Judge, 1st Court, Cumilla after hearing the said application allowed the same by order No.20 dated 13.06.2021.

In this backdrop of the case, the present appellants on 16.08.2021 filed an application under order 7, Rule 11 of the Code of Civil Procedure for rejection of the plaint stating that the present respondent No.1 making false statement filed the case and more than one-third property of their deceased father has been sought for probate. Ultimately, learned Joint District Judge, 1st Court, Cumilla on the ground of his jurisdiction sent the case record to the court of learned District Judge, Cumilla.

The learned District Judge, Cumilla after hearing the application under order 7, Rule 11 of the Code of Civil Procedure rejected the plaint on the ground that according to the provisions of Section 213 of the Succession Act, 1925 a Mohammedan cannot establish his right as executor or legatee.

Being aggrieved by the above verdict the present respondent No.1 preferred First Miscellaneous Appeal No.309 of 2021 before the High Court Division.

A Single Bench of the High Court Division after hearing the said appeal by the impugned judgment and order allowed the same and set aside the order passed by the court below.

Feeling aggrieved by the said judgment and order the present appellants have filed Civil Petition for Leave to Appeal No. 2942 of 2022. Accordingly, leave was granted on 06.08.2023. Hence, this appeal.

Mr. A.M. Aminuddin, learned Senior Advocate, appearing for the appellants made submissions in line with grounds upon which leave was granted. In addition the learned Advocate submits that it is statutory provision of law, a Muslim may dispose of his property by will is limited, in two way; first as regards the persons to whom the property may be bequeathed, and secondly, as regards the extent to which the property may be bequeathed but it transpires from the instant petition of the probate (plaint) that the alleged executor petitioner did not specify the extent of property to be bequeathed and also did not mention the name of the person(s) to whom the property will be bequeathed. So it is as clear as day light, the probate petition is apparently not in form, as such the learned District Judge, Cumilla dismissed the case summarily on point of maintainability but the court of appeal without considering such legal aspect allowed the appeal and gave direction to the District Judge, Cumilla to proceed with the probate case which has occasioned miscarriage of justice.

The learned Advocate further submits that the probate case was filed by the present respondent No. 1 by

impleading the present appellants as petitioner Nos. 2 to 8; subsequently upon an application by the present appellants, the petitioner Nos. 2 to 8 were transposed as opposite party Nos. 1 to 7 vide order No. 23 dated 13.06.2021 of probate case No. 1 of 2018, the present respondent No. 1, i.e. the petitioner No. 1 of the probate case did not challenge the said order of transposition in the superior court. So it is apparent that the petitioner No. 1 of the probate case by practicing fraud impleaded the present appellants as co-petitioner and tried to obtain an order of probate in favour of him by fraudulent way. As granting of probate is an equitable relief, so no one can get advantage of his own fraud, considering aspect such the learned District Judge, Cumilla dismissed the probate case summarily, but the High Court Division without considering the legal perspective of the matter allowed the appeal. The learned Advocate also submits that it reveals from the face of the plaint (petition) of the probate case it does not contain the essence required by law for filing a probate case to confirm a will executed by a Muslim, so apparently the probate case is not maintainable, accordingly the probate case should be buried at its inception; so no further time is consumed in a fruitless litigation and in such a situation the court may invoke its inherent power by taking recourse of section 151 of the Code of Civil Procedure, accordingly the dismissal order passed by the District Judge is just and proper but the High Court Division without considering the legal proposition allowed the appeal by the impugned

judgment and order which has occasioned miscarriage of justice.

Mr. Md. Nurul Amin, learned Senior Advocate, appearing for the respondents makes submissions supporting the impugned judgment and order of the High Court Division.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and order of the High Court Division as well as the judgment and order of learned District Judge and other materials as placed before us.

It transpires for the judgment and order passed by the learned District Judge, Cumilla, that he having considered the relevant provisions of law, i.e. section 57, 58 and 213 of the Succession Act, 1925 came to a definite finding that the said provision shall not apply to Will to the property of Mohammedan, rather those provisions are applicable only to the property of Hindu, Buddhist, Sikh or Jaina. However, the High Court Division without adverting to the said legal finding of the learned District Judge, most erroneously passed the impugned judgment holding that the controversy between the parties can only be resolved by taking evidence.

The provision of sections 57, 58 and 213 of the Succession Act, 1925 runs as follows:

“57. The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories of Bangladesh and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of January, 1927, to which those provisions are not applied by clauses (a) and (b):

Provided that marriage shall not revoke any such will or codicil.

58. (1) *The provisions of this Part shall not apply to testamentary succession to the Property of any Muslim nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.*

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of Bangladesh applicable to all cases of testamentary succession.

213. (1) *No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in Bangladesh has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.*

(2) This section shall not apply in the case of wills made by Muslims, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57. (Underlines supplied).

Section 117 of the Mohammedan Law provides as follows:

117. Bequests to heirs *A bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.*

A bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent.

Having considered the above provisions of law as well as the facts and circumstances of the present case, we have no hesitation to concur with the findings of the

learned District Judge, Cumilla, that the alleged probate case filed by the respondent is not maintainable.

Further, it also transpires from the plain reading of the plaint of the probate case that the respondent in fact seeks partition of his paternal property in the garb of issuing probate in favour of him.

It is now well settled that when on the face of the plaint, it is found that the suit is barred by any law or is foredoomed and if it is allowed to be proceeded with, it will amount to an abuse of the process of the Court, the Court is empowered to reject the plaint in exercising its inherent power.

When a suit is barred by any law, then question of taking evidence is redundant.

In the case of *Abdul Jalil and others vs. Islamic Bank Bangladesh Ltd. and others*, reported in *53 DLR (AD), 12* this Division has held that ".....as the ultimate result of the suit is as clear as daylight such a suit should be burried at its inception so that no further time is consumed in a fruitless litigation." Similar view also has been expressed by this Division in the cases of *Guinness Peat (Trading) Limited Vs. Md. Fazlur Rahman*, reported in *44 DLR (AD), 242*; *Rasheda Begum vs. M.M. Nurussafa and others*, reported in *24 BLD (AD) 223*.

The High Court Division without considering the pertinent legal issue that the provisions of Succession Act and Mohammedan law the probate case is not maintainable, passed the impugned judgment simply holding that without taking evidence, the dispute between the parties cannot be resolved, and as such committed serious error of law and the impugned judgment is liable to be set aside.

Accordingly, the appeal is allowed, without, any order as to costs.

The judgment and order dated 29.06.2022 passed by the High Court Division in F.M.A. No.309 of 2021 is set aside.

C. J.

J.

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J.