IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Emdadul Huq

Civil Revision No. 5851of 2007

Md. Atar Ali
.....Petitioner.

-Versus-

Seraj Miah and another
.....Opposite parties.

Mr. Sirajul Islam Bhuiyan, Advocate.
..... For the petitioner.

Mr. M. A. Salam, Advocate.
..... For the opposite parties.

Heard on : The 3rd, 5th, 16th February, 3rd March, 13th and 15th April, 2014.
Judgment on : The 8th May, 2014.

The Rule issued in this Civil Revision is about sustainability of the judgment and decree dated 27-05-2007 by which the learned Additional District Judge, 1st Court, Dhaka dismissed Title Appeal No. 174 of 1998 and thereby affirmed those dated 16-04-1998 passed by the learned Senior Assistant Judge, 2nd Additional Court, Dhaka dismissing Title Suit No. 84 of 1997 instituted for declaration of title to 25 ½ decimals of land and for recovery of khas possession thereof.

Case of Petitioner-plaintiff:

Petitioner-plaintiff Atar Ali claims that the suit plot being C.S. plot No. 181 measuring 36 decimals along with the land of C.S khatian No. 35 measuring 3.48 acres originally belonged to the C.S. recorded tenant Asakullah who, during his lifetime, orally gifted the entire suit plot to his only son Abdul Gafur. The three

daughters of Asakullah being Rahela and two others never possessed the suit plot nor did they object to the said oral gift to Abdul Gafur.

After the death of Abdul Gafur, his four sons being plaintiff's grandfather Nowab Mia, Abed Mia, Yousuf Mia, Yukub Mia and the children of a pre-deceassion son Sona Mia used to possess the land of the entire jote. The three daughters of Gafur never possessed or claimed their shares in the suit holding.

Accordingly the S.A record was prepared in the names of the said 4(four) sons and grandchildren of Abdul Gafur. There was an amicable partition among the S.A. recorded tenants. The suit plot No. 181 fell in the share of two brothers Nowab and Yusuf who used to possess the eastern 18 decimals and the western 18 decimals respectively.

Out of that western 18 decimals Nowab Mia, by registered deed of exchange of 1962, transferred a small portion measuring 26 cubit × 5 cubit i.e. about ¾ (three fourth) decimal to a neighbor named Maleka Bibi so that she could use that portion as an exit path to the neighboring road from her homestead on the contiguous plot No. 180. In the exchange deed, Maleka specifically admitted that Nowab Mia was in possession of the contiguous eastern side of the path i.e. the western part of the suit plot No.181. accordingly Maleka and her son Asadullah Master used that path.

The predecessor of defendant Nos. 1-12 being Sowdagor used to live at a distance of about 300 yards from plot No. 180. He wanted to shift his house on plot No.180. So Sawdagar and the said Maleka and her son Asadullah executed an exchange deed in 1963 and thus Sawdagar got from Maleka and others plot no 180 and the said path. In this exchange deed, Sawdagor also admitted the aforesaid possession of Nowab. Subsequently Sawdagar's son Ala Uddin (defendant No.2) purchased some land in the non-disputed contiguous plot Nos. 185 and 186 and constructed a

house on those two plots and also on plot No. 180 and all the defendants have been using the said exit path.

Nowab Mia's brother Yousuf sold his share i.e. the remaining eastern 18 cents of the suit plot by a kabala dated 09-04-1963 to one Ibrahim who sold the same to one Awalad @ Awal by kabala dated 02-07-1963. Later on this Awlad @ Awal sold the same to Nowab Mia by Kabala dated 16-03-1981.

Thus Nowab Mia acquired a total of 17.25+18 = 35'25 decimals of the suit plot by way of inheritance-cum-amicable partition and purchase. During his exclusive possession, Nowab Mia sold 16 decimals out of that land to his grand son being the plaintiff by kabala dated 14-01-1985. By a subsequent deed of Hiba-bil-Ewaz dated 03-10-1988 Nowab Mia transferred the remaining 19 decimals to the plaintiff and defendant No. 13 being a son of Nowab Mia. Thus plaintiff acquired the suit land measuring 25½ decimals in the suit plot.

However, at one stage, Nowab Mia's two brothers Yousuf and Yakub started demanding some land in the suit plot although they had no subsisting interest. So plaintiff's grand father Nowab Mia, to avoid future complication, obtained kabala dated 19-07-1988 executed by the said Yousuf and Yakub in the benami of the plaintiff and defendant No.13.

The defendants, being the children of Sawdagor, obtained from Yukub a collusive kabala dated 01-10-1988 and threatened possession of the plaintiff and defendant No. 13. So they jointly filed Other Class Suit No. 181 of 1988 against the defendants for permanent injunction and obtained an order of ad interim injunction. But violating that injunction the defendants dispossessed the plaintiff from the suit land on 16-11-1988. So plaintiff filed Miscellaneous Case No.55 of 1988 for violation of the injunction. Ultimately the said suit and also the appeal were dismissed on the ground that the plaintiffs were out of possession.

So plaintiff filed the present suit for his portion being 25½ decimals.

Case of Opposite party-Defendants:

Defendant Nos. 1-3 and No. 12, in their joint written statement, contend that the suit is not maintainable and that it is barred by limitation and bad for defect of party.

However they admit that the suit plot originally belonged to Asak Ullah and that he died leaving one son Abdul Gafur and three daughters being Rahela and two others. They have not denied the existence of Nawab, Yusuf and others as the children of Gafur and also the standing of plaintiff as the grand son of Nowab.

But they deny plaintiff's claim with regard to the oral gift by Asakullah to his son Abdul Gafur and acquisition of plaintiff's title and possession of the suit land and dispossession therefrom.

The defendants claim the suit land as the grandchildren of Rahela being one of the three daughters of the original owner Asakullah. They claim that Rahela was given in marriage in the same village and that she inherited the entire suit plot from Asak Ullah and used to live in the house constructed on that plot.

Rahela died leaving one son Sowdagor and daughter Julekha. By virtue of an amicable partition, Sowdagor obtained the suit plot. The defendants, as the heirs of Sowdagor have been in possession and title thereof.

Proceedings and decisions of the courts below:

In contested the trial, plaintiff produced oral and documentary evidence through four witnesses. His documents have been marked as Exhibits-1 to 10 exhibit-11 (series) and Exhibits-12 to 15.

The defendants produced oral and documentary evidence through 3 witnesses. Their documents have been marked as Exhibit-A, A(1) and B, being the certified copies of the judgment

and decree passed in the earlier suit for permanent injunction instituted by plaintiff and the appeal arising therefrom.

After dismissal of the instant suit by the trial court, plaintiff preferred the appeal, wherein plaintiff filed two applications, one for amendment of the schedule to the plaint with regard to the length the eastern side of the suit land and the other for accepting the certified copy of the R.S khatian No. 86 as additional evidence. Both the applications were allowed by order dated 16-05-2007 and the said R.S khatian was admitted in evidence. But the khatian was not formally marked as an Exhibit and the amendment was not recorded in the plaint.

After contested hearing, the appellate court by the impugned judgment and decree, dismissed the appeal and affirmed the judgment of dismissal passed by the trial court.

In dismissing the suit, both the courts below have recorded concurrent decision about failure of the plaintiff to prove his possession and dispossession.

But the courts below recorded opposite findings on other issues namely on limitation, identity of the suit land and also on title. The appellate court did not record any decision on the issue of defect of party.

Deliberation, findings and decision in Revision:

Against the concurrent decision of dismissal of the suit, the plaintiff petitioner has taken the grounds inter alia that the courts below failed to consider material documentary and oral evidence and misread some of the evidence on record and also committed error of law.

The learned Advocates for both sides made lengthy submission on the issues involved in this Revision.

In the course of hearing on this Revision, the petitioner (plaintiff) has filed the certified copy of the C.S. map (Annexure-A) of the mouja and another copy of that map (Annexure-B) prepared in 1969-70.

These maps were filed to show the location of the suit plot being C.S plot No.181 and that of non suit plot Nos. 180, 185 and the exit path connecting the contiguous plots to the neighboring road, as pleaded by the plaintiff-petitioner in the plait.

In consideration of the above, the relevant issues involved in the dispute are discussed in the following paragraphs under proper headings.

Issue of res judicata with regard to possession:

This issue should be considered at first. Because plaintiff and his paternal uncle (defendant No.13) previously filed a suit for permanent injunction against the same defendants over the entire suit plot, but that suit and appeal were dismissed.

Mr. Sirajul Islam Bhuyian, the learned Advocate for the plaintiff petitioner, submits that the earlier suit and the appeal were dismissed only on the ground that filing of the Violation Miscellaneous Case proved that the plaintiffs of that suit were out of possession and therefore the issues of title, possession and dispossession and the time factors with regard to possession and dispossession were not considered or decided in the earlier suit.

In reply, Mr. M.A. Salam the learned Advocate for the opposite party-defendants, submits that the issue of possession has been decided against the plaintiff in the earlier suit and appeal, and therefore the same issue can not be re-opened in the this suit.

On perusal of the judgment of the trial court delivered in the present suit it is revealed that the trial court neither considered the judgments passed in the earlier suit or the appeal, nor did it record any finding on the issue of res judicata with regard to possession.

However the appellate court briefly discussed the contents of the Exhibit-A, A(1) and B, being the judgments passed in the earlier suit and the earlier appeal, and concluded that "*Exhibit-A series and B has proved that the plaintiff had no possession over the suit land before 16-11-1988"*.

I have gone through the Judgment of dismissal dated 24-08-1989 (Exhibit-A) passed by the trial court in the earlier suit being Title Suit No. 181 of 1988 and also the judgment dated 29-09-1994 (Exhibit-B) passed in the resultant Title Appeal No. 2431 of 1989 affirming the said Judgment of the trial court.

These two judgments (Exhibit-A and B) show that the plaintiffs of the earlier suit claimed that their possession over the entire suit plot measuring 36 decimals was threatened by the defendants on 01-11-1988. In their respective pleadings both the parties made fundamentally similar claims with regard to their respective title and possession as made in the present suit.

Exhibit-A and B further show that no finding was recorded in those proceeding by the trial court or by the appellate court with regard to the possession situation before filing of the earlier suit i.e. asto whether or not plaintiff was ever in possession before 16-11-1988, the alleged date of dispossession or as to how long defendants were in possession. The said courts recorded findings only with regard to the situation as found at the time of trial.

It is noted that the appellate court recorded a finding that Nowab (plaintiff's grandfather) and his brother were in possession but did not record any finding as to when and how the defendants took over possession from Nowab and his brothers.

It appears that the said courts refused to grant permanent injunction basically for two reasons, namely that both sides were co-sharers and plaintiffs were out of possession as proved by the Violation Miscellaneous Case.

Thus it is evident that, in the instant case, the appellate court misread the Judgments passed in the earlier suit and appeal and arrived at an erroneous finding that those judgments "*proved that plaintiff had no possession over the suit land before 16-11-1988*".

It is noted that the trial court did not at all consider the earlier Judgments.

It follows that the decision in the earlier suit and appeal will not operate as res judicata on the issue of plaintiff's claim about his possession before 16-11-1988 and his alleged dispossession on that date. So, the evidence led by the parties in the instant suit need to be considered on those issues and others related issues.

Issue of Defect of Party:

The trial court decided this issue in favour of the plaintiff on the reasoning that the defendant has neither specifically stated in his written statement asto which necessary party was left out nor have they adduced any evidence on the matter.

The appellate court did not record any finding on this issue.

At the hearing of this Revision this issue was not agitated by any of the learned Advocates.

On perusal of the materials on record, I agree with the above reasoning and finding of the trial court and hold that the suit does not suffer from the detect of party.

Issue of Identity of the suit land:

The trial court calculated the area of the suit land as being 162.48 decimals on the basis of the length of the four sides including 910 feet on the eastern side and found that the said area is much more than the 25½ decimals as claimed by the plaintiff.

The appellate court however found the suit land as unspecified from different a angle and recorded its finding as follows:

> *"……on the perusal of Exhibit-9, 10 and 12 it has proved that the plaintiff Atar Ali has purchased 35 decimals lands from the plot No.181. But the plaintiff claimed 25½ decimals lands from the plot No. 188. This 25½ decimals land is not specified and identified".*

On this issue, Mr. Bhyian, the learned Advocate for the petitioner plaintiff, submits that the trial court failed to consider that the suit land has been sufficiently described with reference to boundaries on all the four sides and therefore such description is sufficient to identify the land.

Mr. Bhuyian next submits that the figure 910 feet shown as the length of the eastern side was a printing error in the original plaint and it has been corrected in the appeal by amending the plaint by way of substituting the figure '110' feet and it was allowed by the appellate court by its order dated 16-05-2007.

Mr. Bhuyian, the learned advocate, next submits that the appellate court failed to consider the exact quantum of plaintiff's claim as stated in the schedule and in para 9 and 10 of the plaint wherein the plaintiff has specifically stated that he is entitled to 25½ decimals and not the entire plot measuring 35 decimals and that the remaining 9½ decimals was acquired by defendant No.13, being son of Nowab Ali.

Mr. M.A. Salam, the learned advocate for the defendant opposite parties, submits that, irrespective of plaintiff's claim to 25½ or 35 decimals he is not entitled to any land because the defendants have acquired the entire suit plot.

On perusal of the materials on records I hold that description of the suit land is specific for the following reasons:

a. The area of the suit land has been stated in schedule to the plaint as being 25½ decimals with reference to C.S., S.A. and R.S. khatian and plot numbers with further description of the length of all the four sides and also to the contiguous boundaries. The defendants have not denied the description as made in the plaint. The record of the appellate court shows that the length of the eastern side '910' feet, as stated in the original plaint, was amended by the appellate court by order dated 16-05-2007. However this amendment was not recorded by the office of that court in the schedule to the plaint. This clerical omission does not affect the legality of the amendment allowed by a judicial order by the appellate court.

b. The appellate court failed to consider the exact quantum of claim of the plaintiff (appellant) namely 25½ decimals and not 35 decimals. The statements made in para 9 and 10 of the plaint and also in the schedule to the plaint sufficiently describe plaintiff's claim.

Issues of Title, possession and dispossession:

Findings of the courts below: On these issues the courts below recorded findings significantly different to each other. So their findings are separately presented below.

The trial court recorded findings as follows (*the words in italics are quoted and underlines added by me):*

> (1) *"the plaintiff side could not submit any document to show that Yusuf Ali and Nawab Ali had been owning and possessing the property".*
>
> (2*) "the plaintiff side did not submit any evidence to prove that the property was recorded solely in the name of Nawab Mia".*
>
> (3) "*As such the title of the plaintiff over the suit property is not clear so long as he does not get the property partitioned with other co-sharers of the suit jote*".
>
> (4) there are inconsistencies in the statements of P.W.1, P.W.2 and P.W.3 about the date of the alleged dispossession and thereat of dispossession and therefore their testimony was not credible.

About **the title aspect, the appellate court** took a view different to that of the trial court, as evident form its findings quoted below (*underlines added by me)*:

> *(a) "The defendants are the heirs of Rahela khatun. Rahela khatun is the daughter of C.S. tenant Asak Ullah Munshi. So Rahela khatun was the co-sharer of the suit land".*
>
> *(b) "After perusal (of) the evidences of the documents submitted herein it appears that plaintiff appellant*

could not prove his right title and interest over the suit land".

About **possession and dispossession, the appellate court** recorded the following findings (the *words in italics are quoted and underlines are added*):

(c) the two earlier Judgments Exhibit-A and Exhibit-B show that the earlier suit and the appeal were dismissed on the ground that "*the plaintiff Atar Ali had no exclusive possession*";

(d) the alleged dispossession on 16-11-1988 is not proved because "*Exhibit-A series and B prove that the plaintiff had not possession over the suit land before 16-11-1988*".

(e) "*Exhibit-12 has proved that Yusuf Mia and Yakub Mia possessed the land plot No. 181 C.S. khatian No. 35*".

Deliberation: Mr. Sirajul Islam Bhuyian, the learned Advocate for the petitioner (plaintiff), submits that the courts below failed to consider the following documentary and oral evidence with regard to plaintiff's title, possession and dispossession:

(1) The S.A record (Exhibit-2) proves the oral gift by Asakullah to his only son Gafur, because that record was prepared only in the names of the fours sons and grandchildren of Gafur and the names of Rahela and of the other daughters of Askullah or their heirs were excluded.

(2) Exhibts-3 and 4, being the two exchange deeds of 1962 and 1963, prove that Sawdagar the father of defendant No. 1 and 2 and Sadagar's predecessor-in-interest Maleka had admitted the possession of Nowab over the western part of the suit plot.

(3) Exhibit-14, being the kabala dated 28-01-1979, prove that defendant Nos. 1 and 2 themselves and their brother Askar, being predecessor of defendant Nos. 3-12 admitted the possession of Nowab over the western part of the suit plot.

(4) Exhibit-5-7 being the various kabalas that led to the purchase of eastern 18 decimals of the suit plot by Nowab from the sucessors-in-interest of his brother Yusuf.

(5) The R.S. khatian No. 86 (admitted in evidence in appeal) and the mutation khatian No.1 23/1 (Exhibit-8) were solely prepared only in the name of Nowab pursuant to the above purchases and these documents prove the exclusive possession of Nowab.

(6) Exhibits-9 and 10 prove acquisition of the suit land measuring 25½ decimals by plaintiff from Nowab and Exhibt-11(series) being the D.C.R. and Rent receipt prove the mutation obtained and rent paid by the plaintiff.

(7) D.W.2, stated that before the defendants, the plaintiff's grandfather Nawab and plaintiff used to possess the suit land by cultivating IRRI paddy and that defendants' father Sawdagar had acquired the present homestead land located on a plot contiguous to the suit plot before the whirlpool (ঘুর্ণিঝড়) of 1969.

(8) D.W.3 stated that that defendants' present house is to the contiguous north of the suit plot, that previously defendants' house was at a distance of 300 to 400 yards and and that IRRI paddy was cultivated in the locality under the

irrigation project of Halim, and that this Halim died last year and Hashem (P.W.4) is the nephew of Halim.

(9) Both D.W.2 and 3 stated about the existence of a halat or an exit path way from the homestead of the defendant along side the contiguous suit land.

(10) In line with D.W.2 and 3, Hashem P.W.4 stated that plaintiff and his grandfather Nowab used to grow IRRI paddy on the suit land before dispossession by the defendants.

Mr. Bhuyian, the learned Advocate, next submits that S.A. and R.S. records and the rent receipts are evidence of possession and that according to section 144A of the State Acquisition and Tenancy Act, 1950 (**shortly the Act, 1950**) the S.A. and R.S. records are to be presumed as correct until rebutted by better evidence.

In support of his above submission Mr. Bhuyian refers to the cases of *Dayal Chandra Mondal vs. Assistant Custodian of Vested and Non Resisdent Property (50 DLR (1998) page-186) and the case of Erfan Ali vs. Jonal Abden (35 DLR(AD) (1983) page-216*.

Mr. Bhuiyan next submits that since the defendants themselves and their father Sawdagar and their predecessor-in-interest Maleka admitted possession of Nowab, being the plaintiff's grandfather-and-predecessor-in-interest, the defendants are estopped from denying such possession as enunciated in the case of *Bazlur Rahuman and others vs. Sadu Mia others (45 DLR (1983-page-391*).

Mr. Bhuyian next submits that exclusive possession of the plaintiff has been proved and therefore it must be protected and

that other people can not jump over the exclusive possession on the claim of being a co-sharer as enunciated in the case of *Ahmad Miaji and others vs. Eakub Ali and others (12 DLR (1960) page-708.*

In reply Mr. M. A. Salam, the learned Advocate for the opposite party defendants, submits that the courts below recorded concurrent decision on the questions of fact with regard to failure of the plaintiff to prove the alleged oral gift by Asakullah to his son Abdul Gafur and plaintiff's possession and dispossession and therefore no interference is necessary in this Revision. .

Mr. Salam, the learned Advocate, further submits that both the courts below recorded concurrent findings that defendants are co-sharers and that possession of one co-sharers is the joint of possession of other co-sharers and that remedy of plaintiff lies in a partition suit and therefore the present suit is not maintainable.

In support of his submission Mr. Salam, the learned advocate refers *to the case of Arjun Chandra Kapali and another –Vs.-Jogendra Chandra Kapali Chowdhury and others, reported in 13 D.L.R.(1961), page-565 and the case of Abdul Jalil Sikdar and others-Vs.-Khorshed Ali Dakua and others, reported in 27 DLR (Appl.Div.) (1975) page-143*.

Findings in Revision on title, possession and dispossession: Both sides claim their title on the basis of some undocumented facts that allegedly happened either in the life time of their common predecessor Asak Uallah or after his death.

But plaintiff, as a descendant of 5th generation, could not produce any credible evidence, whether oral or documentary, to prove their claim on the oral gift by Asakullah to his son Abdul Gafur. However plaintiff relies on the S.A. record and the subsequent transfer documents and the R.S. record and also on oral evidence on record about plaintiff's possession.

Similarly defendants, as descendants of the 3rd and 4th generation of Asak Ullah, could not produce any evidence to

prove their claim that their predecessor-in-interest Rahela alone, as one of the three daughters of Asakullah, inherited or otherwise acquired the suit plot.

The S.A. (Exhibit-2) was prepared in the names of the four sons of the said Gafur, being plaintiff's grandfather Nawab and his three brothers and the children of the 5th son Sona Mia (predeceased). The names of Rahela and her sisters as daughters of Asakullah or their heirs were excluded from the S.A record.

But such exclusion by itself does not prove the oral gift alleged by the plaintiff, nor does it prove that the interest of Rahela and her sisters were extinguished. The S.A. record however proves that the recorded tenants are successors-in-interest of the C.S. tenant Asak Ullah.

The R.S record khatian No.86, admitted as evidence in appeal but not marked as Exhibit, shows that it was prepared only in the name of Nowab. This document also does not prove the fact of oral gift as alleged by the plaintiff.

According to section 144A of the Act, 1950 entries in the finally published S.A. record (Exhibit-2) and R.S. record are presumed to be correct until rebutted by reliable evidence. This view is supported by the observations made in the case of *Dayal Chandra Mandol and others vs. Assistant Custodian of vested and Non resident Property and others (50 DLR (1996) page-186, para-20.*

But the entries in these documents are partly correct and do not establish exclusive title of plaintiff's predecessor Nowab Mia or of the latter's brother Yusuf and others in the present scenario. Simply because the original owner and C.S. tenant Asakullah admittedly died leaving one son Gafur and three daughter's including Rahela and there is no reliable evidence that these daughters or their heirs lost their interest.

It is in evidence that defendants are the heirs of Rahela. So defendants, as heirs of Rahela, are co-sharers and are entitled to claim their due share inherited from Rahela.

On the other hand, the defendants in their written statements have not denied the status of Nawab Mia as the son of Gafur being the admitted son of the C.S tenant Asakullah. Moreover the S.A. and R.S. record show that Nowab was one of the sons of Gafur.

The sale deeds (Exhibits-5-7) show that Yousuf being another son of Gafur, transferred his interest in the suit plot to one Ibrahim leading to the purchase thereof by Nowab.

The sale deed dated 14-01-1985 (exhibit-9) and deed of hiba bil ewaz dated 03-10-1988 (exhibit-10) show that Nawab Mia transferred 25½ decimals of the suit plot to the plaintiff. Thus S.A. and R.S. records and Exhibits-5 to 7 and Exhibit-9 and 10 prove plaintiff's standing at least as a co-sharer in the suit holding.

The appellate court erroneously held that *"plaintiff could not prove his right title and interest over the suit land"* and erroneously discarded plaintiff's status as a co-sharer. The appellate court failed to consider the pleadings of the parties and the material evidence on record namely the S.A and R.S records and the transfer documents as mentioned above.

The trial court correctly held that although the exclusive title of Nawab Mia and hence of the plaintiff was not proved, yet plaintiff is a co-sharer and that plaintiff's entitlement to the exact quantum of land can be decided in a properly framed partition suit.

But the finding of the trial court to the effect that a partition suit is the only remedy available to the plaintiff is not legally correct and it has been discussed in the later part of this Judgment.

Findings in Revision on possession and dispossession: On these issues the trial court, in its judgment, made scanty reference to only three documents produced by the plaintiff, namely the S.A. record (Exhibit-2) and only two transfer documents

(Exhibits-9 and 10) i.e. the deed of hiba bil ewaj dated 03-01-1988 and the kabala dated 14-01-1985, both executed by Nawab in favour plaintiff.

The trial court made scanty reference to the statements of P.W.2,3, and 4 and disbelieved the alleged dispossession on the reasoning that there was discrepancy in their statement about the date of the alleged threat of dispossession and the actual date of dispossession.

The trial court did not at all consider the other material evidence, namely Exhibits-3 to 8 and Exhibit-11 (series) and 14, produced by the plaintiff, or the statements of P.W.2-4 as a whole or any statement of the D.W's.

The appellate court however, presented a summery of the statements of the P.W's and D.W.'s and also made reference to the various documents but only to the extent that those documents were admitted in evidence as Exhibits.

But the appellate court did not discuss the contents or the legal consequence of those documents, except a brief reference to the three documents by which plaintiff claims to have acquired the suit land. The appellate court referred to Exhibit-9, 10 and 12 only with regard to identity of the suit land and erroneously concluded that the suit land was not specific.

By now, it is a settled principle of law that non-consideration and misreading of material evidence by the courts below is a valid ground for interference in a Civil Revision under section 115(1) of the Code of Civil Procedure, 1908.

On perusal of the materials on record, it appears that Mr. Sirajul Islam Buhyian the learned Advocate for the plaintiff (petitioner), correctly pointed out that **both the court's below totally failed to consider martial documentary and oral evidence with regard to possession and dispossession of the plaintiff. These are as follows:**

(1) Exhibt-3, the registered exchange deed dated 03-03-1962 shows that one Maleka acquired from plaintiff's grandfather Nowab Ali a path measuring 26 cubits × 5 cubits in the western part of the suit plot No.181 and she admitted that Nawab was in possession of the eastern side of the path i.e. the western part of the suit plot.

(2) Exhibit-4, the registered exchange deed dated 11-02-1963, shows that Sawdagar, being the father of defendant No.1 and 2 and grandfather of defendant Nos. 3-11, acquired from the said Maleka and her sons plot No.180 along with the aforesaid path of 26 cubits ×5 cubits located in suit plot No. 181 and Sawdagar also specifically admitted possession of Nawab in the eastern side of the path as admitted by Maleka.

(3) Exhibit-14, being a registered kabala dated 28-01-1979, shows that defendant No.1 himself (Seraj Mia) and his brother Askar, predecessor of defendant Nos. 3-12, purchased 20 decimals of land out 40 decimals of the non-suit plot No.185 and that they have admitted the possession of plaintiff's grandfather Nawab in the contiguous south of plot No.185 so purchased.

The above mentioned three documents clearly prove that the defendants themselves and their predecessor Sawdagor admitted possession of Nowab in the eastern part of the suit plot during the period from 1962 to 1979.

I agree with Mr. Bhuiyan the learned Advocate, that estoppel binds not only the person whose acts constitute estoppel but also his heirs who claim through that person.

Accordingly I hold that the defendants are estopped form denying possession of Nowab. This finding is supported by the

principle laid down in the case of Bazlur Rahman and others vs. Sadu Mia and others (45 DLR(1983) page-391, para-5, as follows (*underlines added*):

> "*Plaintiff is claiming interest in the property not independent of his father but by inheritance through his father and if his father had accepted the title of the defendants as tenants of the property No. 2 his father would be estopped from challenging the title of his landlord, and if his father would be estopped the plaintiff would also be bound by the said estoppel as estoppel binds heirs (Ref. 942 IC 535)".*

The description of the land transferred by the aforementioned three documents (Exhibits- 3, 4 and 14) show that the location of plot Nos. 180 and 185 is to the north of the suit plot No.181 and that Nowab was in possession of the western part of the suit plot No.181.

The above location is further proved by the witnesses of the defendants namely D.W.2 and 3 who admitted that the suit plot is to the south of the homestead land of the defendants and that defendants' predecessor Sawdagar had his original home at some distance from the suit plot and that Sawdagar shifted his house to the present location some time before the whirl pool of 1968/1969 and that there is an exit path from defendant's house. Such statements are consistent with the aforesaid two deeds of exchange of Maleka and Sawdagar executed in the year in 1962 and 1963 respectively.

The above location of the suit plot is further supported by the mauja map (Annexure-A and B) filed in this court.

Exclusive possession of Nowab is further supported by the R.S. record and mutation khatian Exhibit-8.

Apart from the above documentary and oral evidence, the courts below totally failed to consider the material oral evidence of the witnesses with regard to possession and dispossession of the plaintiff as mentioned below:

D.W.2, aged 55, categorically stated in cross-examination that defendants possess the suit land by raising a tinshsed on part of the suit land since one or two years before 1988 and that defendants cultivate vegetable on the remaining part and that before such cultivation, the plaintiff Atar Ali and his grandfather Nowab used to grow IRRI paddy on the suit land.

D.W.3, aged 47, admitted that IRRI paddy is grown in the area for the last 30-35 years, and that one Halim used to run an IRRI project and that Hashem (P.W.4) was the nephew of Halim.

The said Hashem as P.W.4 stated that he himself used to run the irrigation project in the area and that Atar Ali (plaintiff) used to possess the suit land before his dispossession about 10 years back form the date of his deposition in 1998.

P.W.2 stated about plaintiff's dispossession on 16-11-1988. However in cross-examination he stated about defendant's threat of dispossession on 16-11-1988.

P.W.3, son of Abed being son of Gafur Munshi son of Asakullah, stated that his two paternal uncles, Yusuf and Nowab used to possess the suit plot by "informal partition" and that later on Yusuf sold his share to Ibrahim and that finally Nowab purchased it and plaintiff acquired the suit land form Nowab but dispossessed by the defendants in the later part of 1988.

Thus the material documentary and oral evidence as discussed above lead me to conclude that plaintiff's grandfather Nowab was in possession of the western 17.25 decimals (other than the exit path) upto 1981 and then he acquired the remaining 18 decimals of the eastern part from the successor-in-interest of his brother Yusuf and after Nowab, the plaintiff acquired possession of the suit land by virtue of the transfer deeds of 1985 and 1988 (Exhibit-9 and 10).

It is noted that Exhibit-12 being the kabala dated 12-07-1988 shows that Yusuf and Yakub, the two brothers of Nowab,

purportedly transferred the entire suit plot to plaintiff and his paternal uncle (defendant No.13). On the basis of this document, the appellate court recorded a finding that Yusuf and Yakub were in possession.

This kabala (Exhibit-12) is to be considered with other evidence particularly the kabala dated 30-04-1963 (exhibit-5) by which Yousuf had already transferred his share of 18 cents in the eastern side of the suit plot to one Ibrahim.

There is nothing record to show that Yusuf, after the said transfer in 1963, continued possession in any portion of the plot or that the other brother Yakub ever possessed any portion of the plot. In fact, possession of Yakub is no body's case, rather the defendants deny the possession of all the children of Gafur i.e. Yusuf , Yakub, Nowab etc.

Thus the evidence on record as a whole prove that plaintiff got the kabala dated 19-07-1988 (Exhibit-12) executed by Yousuf and Yakub to avoid future complication. This document does not reflect the reality on the ground about plaintiff's possession. The appellate court evidently failed to consider the pleadings and material evidence on record, particularly Exhibit-5 and misread Exhibit-12.

With regard to dispossession, P.W's 1-4 specifically stated that plaintiff was dispossessed in 1988. D.W.2 in his cross-examination corroborated the P.W's as stated above. The testimony of these witness are credible evidence.

The evidence considered as a whole prove that plaintiff was dispossessed by the defendants in 1988.

Issues of limitation, maintainability and relieves:

The trial court decided the issue of limitation in favour of the plaintiff on the reasoning that the suit was filed within 12 years from the date of the alleged dispassion on 16-11-1988.

But the appellate court separately considered the two relieves prayed for by the plaintiff and recorded its findings that

the suit was filed after 6 years 10 days from the alleged date of dispossession on 16-11-1988, and *that "the suit for declaration is barred by limitation"* and that *"the prayer for recovery of khas possession is not barred by law of limitation"*.

Mr. Sirajul Islam Bhuyan, the learned Advocate for the petitioner plaintiff submits that the appellate court committed an error of law in that the two relieves sought for by the plaintiff cannot be separately considered for deciding the issue of limitation and that limitation is to be reckoned from 16-11-1988 on which plaintiff was dispossessed.

Mr. M. A. Salam, the learned advocate for the defendant opposite parties, supports the decision of the appellate court.

The Limitation Act, 1908 does not specifically provide for the limitation period for a suit in which two relieves, namely declaration of title and recovery of khas possession, are sought for.

Article 142 of the Schedule to the Limitation Act specifies a limitation period of 12 years for recovery of khas possession.

Article 120 specifies 6 years as the limitation for instituting suits for which no specific period is prescribed. This Article is generally resorted to in filing a suit for declaration.

In deciding the issues of maintainability limitation and the relieves prayed for by plaintiff, section 8 of the Specific Relief Act, needs to considered, which runs as follows:

> "*8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure*".

The expression "entitled to the possession" as occurring in section 8 means that for getting the relief of recovery of possession the plaintiff has to establish his entitlement or right to possess. Such entitlement or right may be in the form of establishing the title or other forum of right to possession, e.g lease hold right.

I have found that, plaintiff's predecessor Nowab was a co-sharer in possession since at least 1962 and after him plaintiff has been a co-sharer since 1985 and plaintiff had been in possession of the suit land before his dispossession in 1988. So, plaintiff's possession was the continuation of the possession of his predecessor that was admitted by the defendants in 1979 and also by their predecessors in 1962 and 1963. No doubt plaintiff has a right to continue it, and therefore he is entitled to recovery of possession under section-8 as quoted above.

Defendants deny plaintiff's title or any other right. So the relief of recovery of possession can not be effectively granted without a declaration about plaintiff's standing as a co-sharer. The two reliefs namely declaration about plaintiff's standing as co-sharer and recovery of his possession are inseparable.

The fact that plaintiff's exact quantum of land can not be decided does not deprive him from getting the relief under section 8. Simply because he could establish his right to possess as a co-sharer having a long record of possession.

Accordingly I hold that the suit as framed is maintainable.

The appellate court committed an error of law in splitting up the two limitation periods for the two relieves. The instant suit having been filed within 12 years form the alleged date of dispossession in 1988 it is within the limitation period as prescribed by Article 142.

The trial court erroneously held that the plaintiff's only remedy lies in a partition suit. I agree with the submission of Mr. Bhuyian the learned Advocate for the plaintiff petitioner that, on the claim of being a co-sharer, a person having no possession can not dispossess another co-sharer in possession. Such action will lead to anarchy and total disorder in the society. The remedy of such claimant lies in a partition suit or other appropriate legal remedy, but never by dispossessing a co-sharer in possession.

The above view is supported by the following observation made in the case of Ahmed Miaji and others vs. Eakub ali Munskhi and others (12 DLR(1960) Page-708, para-5).

> *"It is no doubt true that the finding of both the Courts below is that there was no partition by netes and bounds amongst the co-sharers but that does not justify that one co-sharer in exclusive possession of specific plot of land should be dispossessed by another co-sharer. If any such co sharer is dispossessed from his specific land certainly he has got the right to recover possession of the land he was dispossessed. If anybody is aggrieved by such exclusive possession of a portion of joint land let him go to the partition suit for his remedy but so long that is not done then the possession of the co sharer of the specific land must be respected subject to the determination of their question of title".*

The observations made by the Appellate Division in the case of *Abdul Jalil Sikdar and others vs. Khorshed Ali and others (27 DLR (App. Div.) (1975) page-145*, para-10, with regard to "ouster" and "adverse possession" among co-sharers, as pointed out by Mr. M.A. Salam the learned Advocate for the defendant opposite parties, are not applicable to the present case.

Similarly the facts of the case *of Arjunchandra Kapali and another vs. Jagandra Chandra Kapali and others (13 DLR (1961) Page-565*) as pointed out by Mr. Salam the learned Advocate are totally different to the present case and that case is not applicable to the present scenario.

Decision:

In consideration of my findings on the issues discussed above I hold that the impugned judgments and decree passed by both the courts below are to be set aside, and that the suit is to be decreed.

In the result, the Rule is made absolute with the following directions;

a) The judgment and order dated 27-05-2007 (decree signed on 30-06-2007) passed by the learned Additional

District Judge, 1st Court, Dhaka in Title Appeal No. 84 of 1997 is hereby set aside.

b) Judgment and order dated 16-04-1998 (decree signed on 23-04-1988) passed by the learned Assistant Judge, 2nd Additional Court, Dhaka in Title Suit No. 84 of 1997 is also set aside.

c) Title suit No. 84 of 1997 is hereby decreed to the effect that the plaintiff is declared to be a co-sharer of the holding, and that he is entitled to recover khas possession of the suit land, as described in the schedule to the plaint.

d) The trial court is directed to record amendment in the schedule to plaint by deleting the figure '910' and by substituting the figure '110' as allowed the appellate court by order dated 16-05-2007.

e) The defendants are directed to make over possession of the suit land within 60 (sixty) days after the receipt of copy of this judgment and order failing which plaintiff shall get possession of the suit land through court in accordance with law.

No order asto cost.

Send down the copy of the judgment along with the lower court record to the said court.

The plaintiff-petitioner is permitted to take back the maps (Annexure-A and B) by substituting attested photo copy of the same.

Habib/B.0.