

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**PRESENT:**

**Mr. Justice Hasan Foez Siddique**

**Mr. Justice Md. Nuruzzaman**

**Mr. Justice Obaidul Hassan**

**CIVIL APPEAL NO.02 OF 2012.**

(From the judgment and order dated 12.02.2009 passed by the High Court Division in Civil Revision No.3795 of 2003.)

Zahid Hossain being dead his heirs-  
Nadim Hossain and another :

Appellants.

**=Versus=**

Syed Fazlul Kader being dead his heirs-  
Halima Kader and others :

Respondents.

For the Appellants : Mr. Md. Asaduzzaman, Advocate  
instructed by Mr. Syed Mahbubur Rahman,  
Advocate-on-Record.

For Respondent No.2 : Mr. A.M. Aminuddin, Senior Advocate  
with Mr. Qumrul Haque Siddique,  
Advocate instructed by Mr. Mohammad  
Abdul Hai, Advocate-on-Record.

***Date of hearing on : 19.01.2021 & 20.01.2021.***

***Date of judgment on : 26.01.2021.***

**J U D G M E N T**

**Hasan Foez Siddique, J:** This appeal is directed against the judgment and order dated 12.02.2009 passed by the High Court Division in Civil Revision No.3795 of 2003 affirming the judgment and decree dated 02.06.2003 passed by the learned Additional District Judge, Fifth Court, Chittagong in Other Appeal No.187 of 1997 affirming those dated 25.03.1997 passed by the then learned Subordinate Judge, Second Court, Chittagong in Other Suit No.127 of 1993.

The plaintiff-respondents instituted Title Suit No.37 of 1979 in the Third Court of the then Subordinate Judge, Chittagong, impleading the defendants praying for declaration of title and recovery of khas possession

of the suit land. The plaintiff's case, in short, was that the suit land originally belonged to one Ramzan Ali, who died leaving two sons, Abdul Wahab alias Thanda Miah and Gura Miah as his legal heirs. Gura Miah died leaving one son, Md. Yusuf. Thanda Miah died leaving one son Fazlul Haque as their respective heirs. Md. Yusuf sold his share of the suit land to Fazlul Haque by a deed of sale dated 19.06.1978 and, thus, Fazlul Haque became the sole owner of the entire suit property. The R.S. and P.S. Khatians in respect of the suit land were correctly prepared and published in the name of Fazlul Haque. He executed and registered deeds of sale dated 20.07.1978, 24.07.1978, 27.07.1978 and 28.07.1978 in respect of the suit land to the plaintiffs. They mutated their names and accordingly Mutation Khatian No.285/1 was opened. Prior to such purchase, the plaintiffs had published a notice in a daily newspaper. On 25.12.1978, the defendants forcibly dispossessed the plaintiffs from the suit land and made barbed wire fencing surrounding the same. The plaintiffs requested the defendants to restore possession of the suit land but of no avail. Thus, they were compelled to file the suit.

Defendant No.1 contested the suit by filing a written statement contending that the suit land originally belonged to Ramzan Ali who died leaving behind three sons, Kala Miah, Abdul Wahab alias Thanda Miah and Gura Miah. Abdul Wahab died leaving behind his only son Fazlul Haque. Gura Miah died leaving his only son Md. Yusuf. Kala Miah, Fazlul Haque and Md. Yusuf sold the suit land to the father of defendant Nos.1 to 4, late Zakir Hossain, the then Governor of erstwhile East Pakistan by a registered deed of sale dated 24.06.1960. Zakir Hossain went to possession of the same. Zakir Hossain died leaving the defendants Nos.1 to 4 who

have been possessing the suit land. At the time of the alleged sale to the plaintiffs their vendor had no subsisting right, title, interest and possession in the suit land. The suit should be dismissed.

The trial Court decreed the suit. The defendant No.1 preferred appeal which was dismissed. Then, the defendant No.1 filed civil revisional application in the High Court Division and obtained Rule. The High Court Division, by the impugned judgment and order, discharged the Rule.

Thus, the defendants have preferred this appeal upon getting leave.

Mr. Md. Asaduzzaman, learned Advocate appearing for the appellant, submits that the plaintiffs filed the instant suit for declaration of their title and recovery of khas possession so it was the duty of the plaintiffs to prove that they acquired valid title on the basis of their title deeds and was in possession till the date of dispossession. But the plaintiffs have hopelessly failed to prove their title as well as possession and the story of dispossession, the learned Courts below committed error of law in decreeing the suit. He submits that the predecessor of the defendant Nos.1-4 purchased the suit land on the basis of a sale deed dated 20.06.1960 from the admitted owners and title of the admitted owners was divested to predecessor-in-interest of the defendants on 20.06.1960 so the plaintiffs' vendor have had no subsisting interest to transfer the suit land to the plaintiffs, the learned Courts below erred in law in decreeing the suit.

Mr. A.M. Aminuddin, learned Senior Counsel with Mr. Qumrul Haque Siddique, learned Advocate appearing for the respondent No.2, submits that the deed executed on 20.06.1960 and registered on 24.06.1960 of the defendants had not been acted upon and the same was mere paper

transaction since the defendants' predecessor, after purchasing the suit land, did not mutate his name in the Khatian and in subsequent survey operation the same was recorded in the name of the predecessor-in-interest of the plaintiffs, and the defendants were not in possession till the date of dispossession of the plaintiffs. Mr. Siddique submits that as per provision of 144A of the State Acquisition and Tenancy Act the record of right has got a presumptive value like presumption under Section 103(B) of Bengal Tenancy Act and that since the subsequent survey operation the suit land was recorded in the name of the predecessor-in-interest of the plaintiffs and they paid rent, it is to be presumed that the plaintiffs were in possession till the date of dispossession, the learned Courts below rightly decreed the suit. He submits that at the time of purchasing the suit land, the plaintiffs published an advertisement in the daily newspaper stating about the story of proposed sale of the suit land but the defendants did not raise any objection which indicated that the defendants had no interest in the suit land.

Admittedly, the suit land originally belonged to Ramzan Ali. It is the case of the plaintiffs that Ramzan Ali died leaving two sons. The contesting defendants stated that Ramzan Ali had three sons who transferred the suit land to Zakir Hossain by a deed dated 24.06.1960. It is the simple case of the plaintiffs that the said deed was not acted upon. It is the case of the plaintiffs that they purchased the suit land on 20.07.1978 and 28.07.1978 and defendants dispossessed them from the suit land on 25.12.1978. That is, admittedly, the defendants have been possessing the suit land. It is not disputed that the defendants' sale deed dated 24.04.1960 is a valid document and the same was duly stamped, executed and registered. The

Court admitted the said deed in evidence without objection. Since the defendants have been possessing the suit land acting upon the said kabala deed, it is difficult to say that the defendants predecessor after purchase did not take any step pursuant to the said deed. Since the defendants have been possessing the suit land acquiring title in the same on the basis of the deed dated 24.06.1960, the submission of the plaintiffs that the kabala deed dated 24.06.1960 had not been acted upon is not acceptable. Using the deed, they performed something, so it cannot be said that the deed has yet to be acted upon.

The submission of Mr. Siddique is that since is revisional survey operation the suit land was recorded in the name of the plaintiffs' predecessor and they have been paying rent to the Government which has got a presumptive value as to possession, so it is to be presumed that the plaintiffs' predecessors were in possession at the time of transfer by them to the plaintiffs on 20.07.1978. The presumption as regards the entries in the R.S. Khatian so attached under Section 144A of the State Acquisition and Tenancy Act is rebuttable by leading evidence from the side of the person questioning correctness of entry made therein. [Govt. Vs. AKM Abdul Hye and others, 56 DLR(AD)53]

In order to succeed, the plaintiffs must prove that they are the persons entitled to get possession and that they had possession before the defendants took over possession. The plaintiffs did not examine any witness who executed their kabala deeds of 1978 to establish that they were in possession at the time of transfer of the suit land. The plaintiffs claimed that their predecessors were in possession through a “চৰা”, namely,

Abul Hossain. He had not been examined to substantiate such claim.

P.W.1 in his cross-examination said “২৫/১২/১৯৭৮ইং তারিখে বিবাদীগণ কাঁটাতার দিয়া আমাদের নালিশী জমি ঘিরে ফেলেছে। আমি সেই সময় উপস্থিত ছিলাম না। নালিশী জমি বিবাদীগণের বাড়ী ভিটার সংলগ্ন এবং এই সুযোগে তারা নালিশী জমি কাটা তার দিয়ে ঘিরে ফেলেছে।”

(emphasis supplied). That is, at the time of alleged dispossession, P.W.1, who is plaintiff No.1 and son of plaintiff No.2, was not present. He also admitted that the suit land is the contiguous land of the “bhiti” of the defendants. It is unlikely that the defendants’ predecessor, who was the Governor of the East Pakistan, after purchasing the suit land on 24.06.1960 would not take over possession of the suit land which is contiguous to his “bhiti”. P.W.1 in his cross-examination further said, “এই জমি আমরা খরিদের পূর্বে তাতে ফজলুল হকের দখল ছিল।” To substantiate such claim they did not examine Fazlul Haque to prove the possession of Fazlul Haque. In his cross-examination, he further said, “এই সম্পত্তি সংক্রান্ত বিজ্ঞ ২য় সহকারী জজ আদালতে নিষেধাজ্ঞার জন্য অন্য একটি মোকদ্দমা করিয়াছিলাম ও তা খারিজ হয়েছে।” That is, before filing the instant suit, they filed suit for permanent injunction and lost. In his cross-examination he further said, “জাহিদ হোসেন আমাকে নালিশী জমি থেকে বেদখল করিয়াছে, ২৫/১২/১৯৭৮ ইং তারিখের বিবাদী জাহিদ হোসেন আমাকে বেদখল করেছে। সেই সময় আমি উপস্থিত ছিলাম না, সেই সময় আমার চাষা আবুল হোসেন উপস্থিত ছিল।”

We have already found that Abul Hossain had not been examined. P.W.2, Syed Jamal Ahmed in his evidence said, “বাদীগণ দখলে থাকা কালে ১৯৭৮ ইং সনের ডিসেম্বর মাসের কাঁটা তারের বেড়া দিয়া তাদের বাউভারীর ভিতরে নিয়া যায়।” That is, the suit land is situated within the boundary of the defendants, surrounded by barbed wire fencing. In his cross-examination he said, “নালিশী জায়গায় আমি সর্ব প্রথম ১৯৭৮ ইং সনে খরিদের পর গেছি।” He further said, “কাঁটা তারের বেড়া দেওয়ার সময়

আমি উপস্থিত ছিলাম না।” From the evidence of the witnesses of the plaintiffs, it appears that they went to the disputed land for the first time in 1978. They had no knowledge about the possession of the suit land before 1978. The learned Courts below while making conclusion as to title, possession and then dispossession failed to consider evidence quoted above. The learned Courts below forgot the cardinal principle that in a suit for declaration of title and recovery of possession on the strength of title, the plaintiffs can succeed on establishing their title to the scheduled property and they cannot succeed on the weakness of the case put forward by the defendants. Only weakness of the defendants is that they failed to mutate their names in the khatian and paid rent which did not extinguish their title.

From the evidence discussion and quoted above, it appears that the plaintiffs have hopelessly failed to prove their possession till the date of alleged dispossession in the suit land and that their predecessors were in possession of the suit land before their alleged purchases. The defendants have been possessing the suit land on the basis of their deed dated 24.06.1960.

The plaintiffs traced their title in the suit land through their vendor who had no saleable interest after execution and registration of the deed by their predecessor on 24.06.1960. We are of the view that the defendants' deed was acted upon and that since the plaintiffs hopelessly failed to prove their possession and dispossession, they are not entitled to get relief for declaration of their title as well as recovery of possession in the suit land, the learned Courts below committed an error of law in decreeing the suit.

Accordingly, we find merit in the instant appeal.

Thus, the appeal is allowed without any order as to costs.. The judgment and decree passed by the learned Courts below are hereby set aside.

**J.**

**J.**

**J.**

**The 26<sup>th</sup> January, 2021.**

M.N.S./words-2075/