

Present:

Mr. Justice Nozrul Islam Chowdhury

and

Mr. Justice Mohammad Ullah

Civil Revision No. 4196 of 2010

Mrs. Sufia Khatun and others

.....Plaintiffs-Respondents-Petitioners

-Versus-

Md. Shahbuddin and another

.....Defendants-Appellants-Opposite Parties.

Mr. Lutfor Rahman Mandal, Advocate with

Ms. Feodora Rahman Pretty, Advocate

.....For the Petitioners.

None appears

..... For the Opposite Parties.

Hearing on 21.1.2013, 22.1.2013 and 19.2.2013

Judgment on 26.2.2013

Mohammad Ullah, J.

On an application under section 115(1) of the Code of Civil Procedure this Rule, at the instance of the plaintiff-petitioners was issued calling upon the defendant-opposite parties to show cause as to why the impugned judgment and decree dated 15.07.2010 passed by the learned Additional District Judge, 2nd Court, Dhaka in Title Appeal No. 438 of 2008 reversing those dated 30.10.2008 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No. 251 of 2003 should not be set aside and/or such other or further order or orders passed as to this Court may seem and proper.

Necessary facts for the purpose of disposal of the rule are briefly stated below:

The predecessor of the petitioner Nos. 1-3 Afazuddin and the petitioner No.4 Md. Riazul Haque Khan as plaintiffs on 6.9.2003 instituted Title Suit No. 251 of 2003 in the Court of Joint District Judge, 1st Court, Dhaka impleading the opposite parties as defendants praying a decree for declaration of title and recovery of khas possession on the averments that the suit land being C.S. Khatian No. 138, Plot No. 55 of Mouza-Bhater, Police Station-Gulshan, Dhaka measuring an area of 6 decimals belonged to Karim Kha, who died leaving behind 5 (five) sons namely Samir Kha, Mohammad Kha, Ainuddi Kha, Jainuddin Kha and Jamir Kha. Jamir Kha died leaving behind 2 sons Habibullah and Aminuddin. Shamir Kha died leaving 3 sons Afzuddin, Riazuddin and Shahabuddin and 2 daughters Jamila Khatun and Ayesha Khatun and 2 wives Alladi Bibi and Ator Banu. Plaintiffs and Ayesha Khatun were born in the womb of Ator Banu. Sahabuddin and Jamila Khatun were born in the womb of Alladi Bibi. Ayesha Khatun while possessing the suit land including other land as her ancestral share, died leaving her husband Omar Ali and 2 brothers, the plaintiffs and mother Ator Banu. Then Omar Ali amicably had been possessing the suit land including other land as the share of his wife Ayesha Khatun. During the life time of Ayesha Khatun there was a talk she would transfer her share to the plaintiffs but after the death of Ayesha Khatun her husband Omar Ali sold her share to

the defendants by a registered deed No. 2358 dated 15.02.1966. But the defendants did not get possession of the suit land. Thereafter, a salish took place in the locality over the matter and the defendants transferred $20\frac{1}{2}$ decimals of land including 6 decimals of suit land to the plaintiffs by a registered Heba-Bil-Ewaz deed No. 4559 dated 09.04.1969 but the plaintiffs had possessed the suit land before execution of the deed dated 15.02.1966. Suit land was mutated to the plaintiffs name and in the R.S. Khatian the name of the plaintiffs had been recorded duly. Defendants instituted Title Suit No. 94 of 1999 against the plaintiffs for cancelation of said Heba-Bil- Ewaz deed No. 4559 dated 09.04.1969 which was dismissed on contest and against which Title Appeal No. 745 of 1999 was preferred and the same was also dismissed on 8.5.2000. Thereafter the defendants forcibly dispossessed the plaintiffs from the suit land on 23.06.2002 and entered therein and hence the suit.

The defendant Nos. 1 and 2 entered appearance and contested the suit by filing a joint written statement denying most of the averments of the plaint stating inter alia that the suit is not maintainable in its present form, there is no cause of action for filing of the suit, and the suit was also barred by law of limitation. Further case of the defendants are that they purchased $31\frac{1}{2}$ decimals of land from 28 plots of C.S. Khatian No. 138 by a registered deed No. 2358 dated 15.02.1966 from Omar Ali, the husband of Ayesha Khatun and out of the decision of a Salish, the

defendants gifted $20\frac{1}{2}$ decimals of land to the plaintiffs by a registered deed No. 4559 dated 09.04.1969. Defendants got 11 decimals of land under C.S Plot No. 55 by inheritance and purchase, and they had been possessing their homestead for last 50 years and the plaintiffs also possessing their homestead for last 20/25 years. Defendants never sold out 6 decimals of suit land to the plaintiffs and did not dispossess them from the suit land on 23.06.2002 and hence the suit is liable to be dismissed.

The learned Joint District Judge, 1st Court, Dhaka on the pleading of the parties framed as many as 4 (four) issues to determine the suit.

At the trial the plaintiffs examined as many as 5 P.Ws. and the defendants examined in all 2 D.Ws. and both the parties exhibited a series of documents including their registered deeds to prove their respective cases. The learned Joint District Judge decreed the suit by his judgment dated 30.11.2008 holding that the plaintiffs having been able to prove their title as well as possession and dispossession in the suit land.

The unsuccessful defendants, thereupon, preferred Title Appeal No. 438 of 2008 before the learned District Judge, Dhaka. Eventually the said appeal was transmitted to the 2nd Court of Additional District Judge, Dhaka for disposal who by the impugned judgment and decree dated 15.07.2010 allowed the appeal and set-aside the judgment and decree of the trial court below holding that without partition the suit is not

maintainable and the plaintiffs failed to prove their possession in the suit land and dispossession thereof.

Being aggrieved by the aforesaid judgment and decree dated 15.07.2010 the plaintiffs as petitioners have come before this Court and obtained the present Rule.

Mr. Md. Lutfor Rahman Mandal, learned Advocate appearing with Ms. Feodora Rahman Pretty on behalf of the petitioners having placed the evidence of both the sides and other materials on record including the judgment of two courts below submits that the impugned judgment of the court of appeal below is not a proper judgment of reversal as the court of appeal below without adverting the material findings of the trial court most illegally without applying its judicial mind set-aside the judgment and decree of the trial court holding that the plaintiffs failed to prove their possession in the suit land and dispossession thereof and as such the impugned judgment and decree of the appellate court should be set-aside.

The learned Advocate for the petitioners submits further that the court of appeal below made a perverse finding that without partition the plaintiffs cannot get decree for declaration of title and recovery of possession, which has arrived at beyond material evidence on record, as the plaintiffs had possessed the suit land with specific boundaries since 1966.

The learned Advocate for the petitioners next submits that the court of appeal below as a final court of fact without discussing all the P.Ws. allowed the appeal and thereby dismissed the suit of the plaintiffs which has occasioned a failure of justice.

The learned Advocate for the petitioners lastly submits that the appellate court was not justified in disturbing the finding of fact of the trial court and thus the decision of the appellate court's below should be set-aside and the judgment of the trial court should be restored.

None appears for the opposite parties although notices have been served upon them.

Now, to deal with the contentions raised by the learned Advocate for the petitioners we feel it necessary to decide first whether the plaintiff-petitioners have been succeeded to prove their case by adducing evidence both oral and documentary. For coming to appropriate decision about sustainability of the impugned judgment and decree, we need to assess and examine whether the impugned judgment and decree suffer from any error of law of which resulting in an error in the impugned decision occasioning failure of justice. In doing so we also thought it proper to examine the evidence on record as the appellate court below did not discuss all the evidence produced by the parties of the suit.

P.W-1 Md. Riajul Haque Khan, stated that they got the suit land along with other land from the defendants and had been possessing the

same. The defendants transferred the suit land to the plaintiffs by a Heba-Bil-Ewaz deed dated 9.4.1969 and delivered possession thereof in favour of them and they got possession of the suit land from plot No. 55. The defendants forcibly disposed them on 23.06.2002 from the suit properties.

P.W-2 Omar Ali, stated that he got the suit land along with other land as an inheritor of his wife Ayesha Khatun and sold out the suit land along with other land to the defendants in the year 1966 and subsequently the defendant No.1 and his wife, defendant No. 2 transferred $20 \frac{1}{2}$ decimals of land including the suit land to the plaintiffs by a registered Heba-Bil-Ewaz deed dated 09.04.1969. This P.W-2 stated that the plaintiffs were dispossessed from the suit land on 23.6.2002 by the defendants. He deposed that he was a judge.

P.W-3 Jamal Uddin, stated that the defendants transferred the suit land to the plaintiffs by a Heba-Bil-Ewaz deed and the plaintiffs possessed the suit land but later on 23.06.2002 they were dispossessed from the suit land by the defendants. This P.W-3 also stated that the plaintiffs had possessed the suit land with specific boundary thereof.

P.W-4 Halim Bhayan, stated that he was a tenant of the plaintiffs and the defendants dispossessed the plaintiffs from the suit property on 23.06.2002.

P.W-5 Md. Habibur Rahman, an Advocate commissioner stated that he made an investigation over the suit land and prepared sketch map

of the suit land and identified thereof and submitted report to the court and the defendants raised objection about his report.

D.W-1 stated in cross-examination that “আমার পিতা যখন মারা যায় তখন আমার সৎ বোন আয়শা খাতুন তাহার share প্রাপ্ত হয়। আমার বোন আয়শা ৫৫দাগের সম্পত্তিতে মালিক থাকে।”

..... “ ওমর আলীর কাছ থেকে যে সম্পত্তি খরিদ করি উহা বাদীদের দান করিয়া দেই।”

But D.W-2 stated in cross-examination that he did not know whether the land owned by Ayesha Khatun was transferred to the plaintiffs.

We have heard the learned Advocate for the petitioners, perused the evidence on record including the judgment of the two courts below and exhibited documents produced by both the contending parties, wherefrom it transpires that the trial court below having found plaintiffs title, possession and dispossession in the suit land decreed the suit but the court of appeal below without controverting the findings of the trial court below allowed the appeal and thereby dismissed the suit of the plaintiffs on the finding that without partition the plaintiffs cannot get a decree for declaration of title and recovery of possession in the suit land, which is based on misreading and non-consideration of the material evidence on record. It appears that the appellate court below as a final court of fact did not discuss, assess and analyse all the plaintiffs’ witnesses and came to a

wrong conclusion that without partition the plaintiffs are not entitled to get decree for declaration of title and recovery of possession in the suit land which is contrary to the evidence on record. When the plaintiffs succeeded to prove their possession in the suit land before their dispossession by giving oral and documentary evidence and the defendants did not deny the transfer of land from plot No. 55 to the plaintiffs by a Heba-Bil-Ewaz deed dated 09.04.1969 (exhibit-6) in such a situation the defendants cannot claim title over the suit land. We have also noticed that the defendants earlier filed Title Suit No. 94 of 1999 against this plaintiffs for cancelation of registered Heba-Bil-Ewaz deed dated 09.04.1969 (exhibit-6) executed by the defendants of the instant suit in favour of the plaintiffs and the suit was dismissed on contest (exhibit-10) and the appeal was preferred which was also dismissed(exhibit-11) but the judgment of the said appellate court was not challenged by the defendants of the present suit in any higher forum. It appears that the court of appeal below failed to notice the testimony of D.W. 1 who stated that they transferred $20\frac{1}{2}$ decimals of land to the plaintiffs by a Heba-Bil-Ewaz deed dated 9.4.1969 (Exhibit-6), which clearly supported the plaintiffs' case and thus the plaintiffs' case has been substantiated by the evidence of the defendants side.

It is necessary to mention here that the appellate court in its judgment held that:

“Therefore I do not take any exception but to form an opinion in favour of the plaintiff's title”

It means the defendants have no title over the suit land and as such plaintiffs title had been found concurrently by both the courts below.

When all the P.Ws. consistently corroborated each other and succeeded to prove the possession and dispossession of the plaintiffs in the suit land in such a situation the plaintiffs are entitled to get decree for declaration of title and recovery of possession of the suit land. Since the suit land is properly demarcated and the same is substantiated by the report of the Advocate Commissioner and other evidence, in such a situation prayer for partition is not necessary and thus the suit is very much maintainable in its present form. We have already found that the plaintiff's witnesses succeeded to prove the possession of plaintiffs in the suit land before their dispossession. But the appellate court committed an error of law resulting in an error in the decision occasioning failure of justice in reversing the judgment and decree of the trial court without considering the material evidence and without adverting to the finding of the trial court below.

From the evidence on record and the exhibited documents we find substance in the submission of the learned Advocate for the petitioners.

In the result, the Rule is made absolute, however without any order as to costs.

The judgment and decree dated 15.07.2010 passed by the learned Additional District Judge, 2nd Court, Dhaka in Title Appeal No.438 of 2008 is hereby set-aside and the judgment and decree dated 30.10.2008 passed by the learned Joint District Judge, 1st Court, Dhaka in Title suit No. 251 of 2003 is hereby affirmed.

Communicate this judgment and order at once to the court concerned for information and necessary action.

Send back the lower court's record immediately.

Nozrul Islam Chowdhury, J.

I agree.