

Present:

**Mr. Justice Md. Nuruzzaman
And
Mr. Justice Md. Khasruzzaman**

First Appeal No. 288 of 1998.

Md. Mofazzal Hossain and others

.....Appellants.

-Versus-

Bangladesh, represented by the Deputy
Commissioner, Gazipur

.....Respondent.

Mr. A.B.M. Matiur Rahman, Advocate

.....For the Appellants.

Abdus Salam Mondol, D.A.G with

Mrs. Saheda Khanom, A.A.G

.....For the respondent.

Judgment on 16.07. 2018.

Md. Khasruzzaman, J:

This first appeal has been preferred against the judgment and decree dated 25.01.1998 (decree drawn and signed on 01.02.1998) passed by the learned Sub ordinate Judge, 1st Court, Gazipur in Title Suit No. 10 of 1996 dismissing the suit.

The appellants as plaintiffs instituted Title Suit No. 10 of 1996 in the 1st Court of Sub-ordinate Judge, Gazipur impleading the respondent as

defendant praying for declaration of title of the suit land which is described in the schedule to the plaint.

The case of the plaintiffs in short is as follows:

The suit land along with other lands originally belonged to Samir Sheikh, accordingly C.S. Khatian No. 59 was prepared in his name; Samir Sheikh transferred 2.31 acres of land to Daulat Khan and Aziz Bepari vide registered deed No. 7733 dated 23.12.1927 (exhibit No. 11) and they got 1.1550 acres of land each. Daulat Khan died leaving behind 3 sons namely (1) Md. Intaz Ali, (2) Md. Abbas Ali and (3) Md. Amzad Ali as his heirs and they had been in possession the suit land including other lands. Thereafter, they transferred the suit land to Hafizuddin through a registered deed being No. 1011 dated 28.01.1944 (exhibit No. 12) who in his turn transferred the said land to Shahar Ali, Mohar Ali and Rahom Ali by a registered deed being No.12371 dated 16.12.1947 (exhibit No. 13), and S.A. record was prepared in the name of Hafizuddin including Md. Shahar Ali, Mohar Ali and Rahom Ali. Then Md. Shahar Ali transferred 11 decimals of land to Md. Nurul Islam vide registered deed No. 7631 dated 15.12.1981 (exhibit No. 8) and Rahom Ali also transferred 11 decimals of land to Md. Nurul Islam vide registered deed No. 7632 dated 15.12.1981 (exhibit No. 9), and thus Md. Nurul Islam became the owner of 22 decimals of land, and he mutated his name, and paid rent to the

Government. After that the said Md. Nurul Islam sold 22 decimals of land to the plaintiffs vide registered deed No. 1807 dated 09.03.1995 (exhibit No. 10), and after purchasing the same, the plaintiff No. 1 went to the local *Tahshil* Office on 02.01.1996, and then he came to know that the said land was recorded in the name of the Government as *khas* land, and thus the plaintiffs instituted the present suit for declaration of title.

The defendant contested the suit by filing written statement contending *inter alia* that the suit is not maintainable in its present form and manner, the same is barred by law of limitation and also bad for defect of parties, and the plaintiffs are not entitled to get any relief under section 42 of the Specific Relief Act, and as such, the same is liable to be dismissed.

Their further case, in short, is that the suit land is a government *khas* land and *Mawna bazar* has been established on the suit land and the land is not mutated in the name of the plaintiffs, and the Government has been maintaining and possessing the same by giving lease every year as *Mawna Chowrasta Government Bazar*. It is also stated that 2.31 acres of land in C.S. Khatian No. 59 corresponding to C.S. Plot Nos. 344, 345, 349 and 354 were converted in R.S. Khatian No. 1 corresponding to R.S. Plot Nos. 1905, 1906, 1912 and 1913 which were recorded in the name of the government as *Khas* land which was rightly recorded in the name of the

government. The *Mawna Chowrasta Bazar* is situated on the suit land and they have been possessing and maintaining the same by giving lease, and the plaintiffs have no right, title and possession over the suit land but by creating some false documents, the plaintiffs instituted the present suit only to grab the government property, and as such, they are not entitled to get any relief in the present suit, hence, the suit is liable to be dismissed.

The learned Sub-ordinate Judge upon considering the pleadings of the parties framed the following issues:

1. Whether the suit is maintainable in its present form and manner ?
2. Whether the suit is barred by law of limitation ?
3. Whether the suit is bad for defect of parties ?
4. Whether the suit property is properly valued and court fee is paid correctly ?
5. Whether the plaintiffs have right, title, possession and interest in the suit land ?
6. Whether there is any relief that the plaintiffs are entitled to ?

The plaintiffs in support of their claim adduced 6 witnesses and produced some documents which were marked as exhibit Nos. 1, 2, 3, 3(ka), 3(kha) and 8-13.

On the other hand, defendant side in support of their pleadings adduced only 01 (one) witness, Md. Ibrahim Kazi, *Tahsilder* as D.W-1 and also submitted some documents in support of their case which were marked as exhibit No. Ka, draft copy of S.A. khatian No. 180; exhibit No. Ka(1), draft copy of R.S. Khatian No.1; and exhibit No. 'Kha', photostate copy of the design of the Roads and Highways Department, Gazipur.

The appellants filed two applications under Order 41 rule 27 and Order 18 rule 17 of the Code of Civil Procedure before this Court, which were allowed and subsequently, P.W-1 on recall and P.W-6 came before this Court and they were examined, and cross-examined by the learned Deputy Attorney General on 08.05.2018.

Now, we are describing the examination-in-chief and cross examination of the P.Ws and D.W. in short.

P.W-1, Md. Mofazzal Hossain, in his examination-in-chief stated that he is the plaintiff No.1 and other plaintiffs are his brothers, he deposed on his behalf and on behalf of other plaintiffs. The suit land is situated at Molaid Mouja under C.S. Khatian No. 59 and Samir Sheikh was the owner of 2.31 acres of land and he sold entire 2.31 acres along with other lands to Daulat Kha and Aziz Bepari in the year 1927. He submitted photocopy of the certified copy of the said deed in the Court and also submitted certified copy of C.S. khatian No. 59 which was

marked as exhibit No.1. Daulat Kha died leaving behind 3 sons namely, Md. Intaz Ali, Md. Abbas Ali and Md. Amzad Ali as his heirs and thereafter, they sold their share to Hafizuddin vide registered deed No. 1011 dated 28.01.1944. Hafizuddin transferred the land to Shahar Ali, Mohar Ali and Raham Ali vide a registered deed being No.12371 dated 16.02.1947. He submitted the certified copies of the said two deeds before the Court. He also submitted S.A. Khatian No. 180, which was recorded in the names of Hafizuddin along with Shahar Ali, Mohar Ali and Raham Ali, the same was marked as Exhibit No.2.

Thereafter, Md. Shahar Ali and Raham Ali transferred (11+11=) 22 decimals of land to Md. Nurul Islam vide two registered deeds being Nos. 7631 and 7632 dated 15.12.1981 and he submitted the original deeds being Nos. 7631 and 7632 dated 15.12.1981 and the same were exhibited and marked as exhibit Nos. 8 and 9 respectively. Md. Nurul Islam after purchasing the same mutated his name and paid taxes to the government; D.C.R. and rent receipt were submitted and exhibited as exhibit No. 3 series. He also submitted the draft copy of the mutation *Porcha* of *Tahsil* Office. Thereafter, said Nurul Islam transferred the suit land to the plaintiffs and possession was handed over to them. He submitted the original deed No. 1807 dated 09.03.1995 and draft copy of the R.S. record which was wrongly prepared in the name of the government. After

purchasing the said land, he went to the local *Tahsil* office to pay the rent to the government and he, for the first time on 02.01.1996, came to know that R.S. record was wrongly prepared in the name of the government. Accordingly, he filed the present suit praying for title of the land.

In his cross-examination he stated that the plaint was written according to his direction and he deposed on behalf of all the plaintiffs and hence, other plaintiffs will not depose before the Court. Shahar Ali, Mohar Ali and Nurul Islam were not in the list of proposed witnesses, out of them Md. Shahar Ali had already died. The plaintiff denied the suggestions given by the defendant and in his denial he said that he did not mention the boundary of the land and did not submit any objection against the R.S. record, and he also stated that no road cross over the suit land, and the documents submitted by him were not forged and the *bazar* was not situated on the suit land.

On recall P.W. 1, Md. Mofazzal Hossain, in his examination-in-chief stated that he earlier filed the certified copies of the following 3 (three) deeds of his predecessors in interest before the trial Court and on that day he again identified and presented them before the High Court Division. He also mentioned the names of the vendors and vendees and the date of registration of the said deeds, which are namely- (1) deed No. 7733 dated 23.12.1927, vendor: Samir Sheikh and vendees: Daulat Kha

and Aziz Bepari, (2) deed No. 1011 dated 28.01.1944, vendors: heirs of Daulat Kha namely- Intaz Ali, Md. Abbas Ali and Md. Amzad Ali, and vendee: Hafizuddin, and (3) deed No. 12371 dated 16.12.1947 vendor: Hafizuddin and vendees: Shahar Ali, Mahar Ali and Raham Ali. He further stated that he earlier submitted the following 3 (three) original deeds before the trial Court which were not exhibited and marked as exhibited documents but he again presented them and exhibited the said 3 (three) original deeds before the High Court Division, which are namely- (1) deed No. 7631 dated 15.12.1981, vendor: Shahar Ali and vendee: Md. Nurul Islam, (2) deed No.7632 dated 15.12.1981, vendor: Md. Raham Ali and vendee: Md. Nurul Islam, and (3) deed No. 1807 dated 09.03.1995, vendor: Md. Nurul Islam and vendees: Md. Mofazzal Hossain and others (plaintiffs) which were marked as exhibit Nos. 8, 9 and 10 respectively.

P.W-2, Md. Tamizuddin, in his examination-in-chief stated that he knew the suit land and the plaintiffs, and the land situated at Molaid Mouja. Mofazzal Hossain, Shakawat Hossain, Tofazzal Hossain and Akbor Hossain are in possession of the suit land and he also stated the boundary of the land. In his cross-examination he stated that the plaintiffs and they have been residing in the same village and he has a timber shop at *Mawna Chowrasta Bazar*. The suit land is situated at the East side of Dhaka Mymensingh High Way. He denied the suggestions given by the

defendant and in his denial he stated that the government is not the owner of the land and he also denied that he deposed falsely as he is familiar to the plaintiffs.

P.W-3, Md. Abdul Motaleb, in his examination-in-chief stated that he knew the plaintiffs and the disputed land and it's situated at *Molaid Mouza*, and Mofazzal Hossain has been in possession of the land, and the quantum of the land is 22 decimals. In his cross-examination he stated that he resides $1\frac{1}{2}$ kilometers away from the house of the plaintiffs and he denied the suggestions given by the defendant.

P.W-4, Md. Mafizuddin, in his examination-in-chief has stated that he knows the land and the plaintiffs, and the suit land is situated at *Molaid Mouza*, and the plaintiffs are in possession of the land measuring an area of 22 decimals. In his cross-examination he has also stated that he is residing one mile away from the house of the plaintiffs and he does not know the plot number of the land, and he also denied the suggestion that he deposed falsely.

P.W-5, Chand Mia, in his examination-in-chief has stated as like as the deposition of P.W-4, and in his cross-examination he has stated that the distance of his house from the house of the plaintiffs is 500 yards, the plot numbers of the lands are 344 and 345 but he failed to state the plot numbers of C.S. and R.S. of the land. He denied the suggestions that the

suit land is a government property and he has deposed falsely before this Court.

P.W-6, Josna Begum, Assistant Record Keeper, District Record Room, Gazipur, in her examination-in-chief stated that she brought 3 (three) balam books (of deeds) Nos. 13, 63 and 105. Then she has stated that deed No. 7733 dated 23.12.1927 has been written at page Nos. 48-49 of balam book No. 63. In the said deed Sreejukto Daulat Kha and Sreejukto Aziz Bepari were the purchasers / vendees and Sree Sheikh Samir was the vendor and it was registered at Joydebpur Sub-Registry Office, District-Gazipur. She exhibited the certified copy of the aforesaid deed No. 7733 dated 23.12.1927 as exhibit No.11. She further stated that deed No. 1011 dated 28.01.1944 has been written at page Nos. 195-197 in volume No.13, and Intaz Kha, Abbas Kha and Amzad Kha were the vendors and Md. Hafizuddin was the vendee of the said deed. She also stated that the deed number of the certified copy and the names of the vendee and vendors are in the said volume book and said certified copy was delivered from the Gazipur Registry Office on 23.03.1998 and she exhibited the certified copy of deed No. 1011 dated 28.01.1944 as exhibit No.12.

She also stated that the registered deed No. 12371 dated 16.12.1947 has been written at page Nos. 286-288 in volume book No. 105 and

vendees of the said deed are Mahor Ali, Shahar Ali and Raham Ali and vendor of the deed is Hafizuddin Bepari, and it was registered at Joydebpur Sub-Registry Office, District: Gazipur, and the names of the vendees and vendor are present in the balam book, and the deed number is present in the said book, and the same was exhibited and marked as exhibit No.13.

In her cross-examination she stated that she has been working at Joydebpur Sub-Registry Office as an Assistant Record Keeper. She did not bring her identity card but on the basis of the office order she came before this Court. She did not tally with the contents of certified copies of the deeds with the volume books. She denied the suggestions given by the defendant.

On the other hand, D.W-1, Md. Ibrahim Kazi, *Tahsilder* of the Talihati Union Land Office, in his examination-in-chief stated that the suit land is situated at Molaid Mouza under Mawna Chowrasta bazar and he physically inspected the land and Dhaka Mymensingh High way that crossed through the half portion of the land and the remaining portion of the land was recorded in the name of the government in khas Khatian No.1. The government collected rent by leasing out the same. Total 2.31 acres of land in R.S. Plot Nos. 1905, 1906, 1912 and 1913 were recorded in Khas Khatian No.1.

He denied the suggestions given by the plaintiff side and in his denial he stated that S.A. record was not correctly published in the name of the predecessor of the plaintiffs, and there was no bazar and road in the suit land. He produced attested S.A. Khatian No. 180 and R.S. khatian No.1, which were marked as exhibit Nos. Ka and Ka (1) respectively. He also submitted a photocopy of a map of Roads and Highways Division, Gazipur which was marked as exhibit No. 'Kha'.

In his cross-examination he stated that he has been working Talihati Union Land Office since 08.09.1997. He denied the suggestions given by the plaintiff side and he admitted that C.S. khatian No. 59 was recorded in the name of Samir Sheikh but S.A. khatian No.180 was wrongly recorded in the name of Hafizuddin and others. He also stated that *Mawna Chowrasta Bazar* is situated in two Mouzas, and half of the bazar is on the road and remaining half portion is under Mulaid Mouza. On behalf of its proof he could submit the map of the suit land. He denied the suggestions that R.S. record was prepared wrongly in the name of the government and the government has no possession over the suit land.

The learned Sub-Ordinate Judge, 1st Court, Gazipur, considering the pleadings, P.Ws, D.W and the exhibited documents submitted by the parties, dismissed the suit on 25.01.1998.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree, the plaintiffs as appellants filed the instant first appeal before this Court.

Mr. A.B.M. Matiur Rahman, the learned Advocate appearing on behalf of the appellants, submits that plaintiff No.1 was examined as P.W-1 and he submitted the photocopy of the deeds of his predecessor, which were not marked as exhibited documents by the Court below. Accordingly, he filed two applications before this Court, which were allowed and thereafter, on recall P.W-1 was examined and P.W-6 also came before this Court with balam books of the deeds, and thereafter, the plaintiffs have proved their chain of the title by exhibiting the deeds of their predecessor.

He further submits that D.W-1 in his examination-in-chief stated that half portion of the land has been crossed by Dhaka Maymensingh Highway Road, and in support of his submission he submitted a photocopy of the design of the Roads and Highways Department, which is beyond pleadings as a result the same has no value at all, and accordingly, the findings of the trial Court that the suit land possibly acquired by the Roads and Highways Department has no manner of application as the defendant side failed to show any document in support of their acquisition whether there is any land acquisition case number, any

notice in respect of acquisition, etc. which could prove that the suit land had been acquired, and as such the trial court had made out a third case, which is beyond the pleadings of the defendant side, and the Court cannot go beyond the pleadings of either party.

He also submits that all the P.Ws in their deposition clearly stated that the plaintiffs have been in possession in the suit land and the defendant side did not cross examined the P.Ws as to their possession. So, it is admitted that the plaintiffs have been in possession of the suit land.

On the other hand, Mr. Abdus Salam Mondol, the learned Deputy Attorney General, appearing on behalf of the respondent, submits that the plaintiffs have totally failed to prove their title and the predecessor of the plaintiffs lastly paid land development tax for the year 1393-94 B.S on 27.04.1988, and thereafter they have not yet paid any tax to the government, and after purchasing the lands they have not yet mutated their names in the record of right, and they purchased the government's lands, and the alleged deed is a mere paper transaction, and the government has been possessing the same.

He also submits that the plaintiffs purchased the land from one Md. Nurul Islam, who is still alive but he was not examined and as such, the present deed has not been proved by examining its vendor.

Heard the learned Advocate for the appellants and the learned Deputy Attorney General, perused the memo of appeal and the impugned judgment and decree, and all material documents on records.

Considering the exhibited documents the learned Sub-ordinate Judge dismissed the suit and observed that plaintiffs did not submit / prove any original deed of their vendor's predecessors before the trial Court and they did not give any explanation why they had failed to submit the same, and the heirs of Samir Sheikh, Daulat Kha, Aziz Bepari, Hafiz Uddin, Intaz Kha and others did not come before the trial Court to prove the chain of the title of the suit land. Further the S.A. record was prepared in the name of Hafizuddin, Md. Shahar Ali, Mohar Ali and Rahom Ali but the name of Aziz Bepari was not recorded, and the plaintiffs failed to give any satisfactory explanation about that omission, moreover, the predecessor of the plaintiffs did not pay rent to the government. The plaintiffs purchased the suit land from Md. Nurul Islam but they did not prove the said deed. Considering the deposition of D.W- 1 and exhibit No. Ka (1), map of the Roads and Highways Department, the learned Sub-ordinate Judge came into a decision that the suit property was possibly acquired by the Roads and High Ways Department and the plaintiffs failed to make out a clear case that the land had not been acquired by the government.

It appears from exhibit No. 1 that C.S. Khatian No. 59, under Mulaid Mouza, Police Station: Kapatia, District: Gazipur measuring an area of 2.31 acres of land was recorded in the name of Shamir Sheikh; and exhibit No. 2 shows that S.A. Khatian No. 180, corresponding to C.S. Khatian No. 59, exhibit No. 1, was prepared in the names of (1) Hafizuddin Bepary son of Kalim Sheikh, (2) Mahar Ali, (3) Shahar Ali, and (4) Raham Ali, are sons of Sayed Ali measuring an area of 2.31 acres of land. It further appears from exhibit No. 11 that Shamir Sheikh being owner through C.S. record transferred 2.31 acres of land including other lands to Daulat Kha and Aziz Bepary through registered deed being No. 7733 dated 23.12.1927 and they got 1.1550 acres of land each; and exhibit No. 12 shows that 1) Intaj Ali, (2) Md. Abbas Ali, and (3) Md. Amzad Ali, all sons of late Daulat Khan transferred 1.155 acres of land to Hafiz uddin through registered deed No. 1011 dated 28.01.1944; exhibit No. 13 shows that said Hafiz uddin (Bepary) transferred 1.155 acres of land to (1) Shahar Ali, (2) Mahar Ali, and (3) Raham Ali through registered deed being No. 12371 dated 16.12.1947.

It further appears from exhibit Nos. 8 and 9 that said Md. Shahar Ali and Md. Raham Ali transferred 11 decimals of land each i.e. in total (11 + 11=) 22 decimals of suit land to Md. Nurul Islam son of late Flight Sergent Alauddin Ahmed through two separate registered deeds being (1)

deed No. 7631 dated 15.12.1981, exhibit No. 8, and (2) deed No. 7632 dated 15.12.1981, exhibit No. 9; and exhibit No. 10 shows that Md. Nurul Islam transferred said 22 decimals of land to the plaintiffs namely- (1) Md. Mofazzal Hossain, (2) Md. Shakhawat Hossain, (3) Md. Tofazzal Hossain, and (4) Md. Akbor Hossain, all sons of Md. Sabbat Ali, vide registered deed being No. 1807 dated 09.03.1995.

It further appears from the records and the statements of P.W. 1 and P.W. 6 that P.W. 6 brought 3 (three) balam books being Nos. 13, 63 and 65 of deeds being Nos. 7733 dated 23.12.1927, deed No. 1011 dated 28.01.1944 and deed No. 12371 dated 16.12.1947 respectively. P.W. 1 earlier submitted the aforesaid 3 (three) deeds before the trial Court, which were not exhibited as the document were certified copies of the original deeds. Then P.W. 1 again identified and presented the certified copies of the said original 3 (three) deeds in the High Court Division and P.W. 6 brought the volume books of the said 3 (three) deeds containing the names of the vendors and vendees and the plot numbers of the deeds, and on comparing the names of the vendors and the vendees, and the plot numbers of the deeds with the volume books found correct, and P.W. 6 also categorically stated the page numbers of each volume book on which pages the aforesaid three deeds have been written and the name of Sub registry office where those were registered, and then she exhibited the

certified copies of the 3 (three) following deeds being Nos. (1) Deed No. 7733 dated 23.12.1927, vendees: (1) Sreejukto Daulat Kha, (2) Sreejukto Ajit Bepary, Vendor: Sree Sheikh Shamir Sheikh, exhibit No. 11, (2) Deed No. 1011 dated 28.01.1944, Vendee: Md. Hafizuddin Bepary, Vendors: (1) Ennas Kha, (2) Abbas Kha and (3) Amzot Kha, exhibit No. 12, and (3) Deed No. 12371 dated 16.12.1947 Vendees: (1) Mohar Ali, (2) Shahar Ali, (3) Raham Ali Vendor: Hafizuddin Bepary, exhibit No. 13.

It further appears that P.W. 1 submitted the original deeds being Nos. (1) deed No. 7631 dated 15.12.1981, vendor: Shahar Ali and vendee: Md. Nurul Islam, (2) deed No. 7632 dated 15.12.1981, vendor: Raham Ali and vendee: Md. Nurul Islam, and (3) deed No. 1807 dated 09.03.1995, vendor: Md. Nurul Islam and vendees: Md. Mofazzal Hossain and his 3 (three) brothers who are the plaintiffs of the suit. Md. Mofazzal Hossain was examined as P.W. 1 when the aforesaid 3 (three) deeds were presented before the trial Court by him. But, unfortunately those were not exhibited. On recall P.W. 1 was examined and he again presented the said original 3 (three) deeds before the High Court Division and those were marked as exhibit Nos. 8, 9 and 10 respectively.

The trial Court dismissed the suit amongst other observations one of them is that the plaintiffs failed to prove the chain of title of the suit

land. We have already discussed on this point, and now, we are describing the chain of title of the suit land in a nutshell way to make it clear.

The suit land originally belonged to Samir Sheikh and 2.31 acres of land in C.S. Khatian No. 59 (exhibit No. 1) was prepared in his name. He transferred 2.31 acres of land to Daulat Kha and Aziz Bepari through registered deed No. 7733 dated 23.12.1927 (exhibit No. 11) and they got 1.550 acres of land each. The heirs of Daulat Kha namely- (1) Md. Ennas Kha, (2) Abbas Kha and (3) Azmot Kha transferred 1.550 acres of land to Hafizuddin Bepari through registered deed No. 1011 dated 28.01.1944 (exhibit No. 12). Thereafter, Hafizuddin Bepari transferred 1.1550 acres of land to (1) Mahar Ali, (2) Shahar Mollic, and (3) Raham Ali all sons of Sayed Ali Fakir through registered deed No. 12371 dated 16.12.1947 (exhibit No. 13). Then, Md. Shahar Mollic transferred 11 decimals of land to Md. Nurul Islam through registered deed No. 7631 dated 15.12.1981 (exhibit No. 8) and Md. Raham Ali transferred 11 decimals of land to Md. Nurul Islam through registered deed No. 7632 dated 15.12.1981 (exhibit No. 9), and Md. Nurul Islam transferred 22 decimals of land to the plaintiffs through registered deed No. 1807 dated 09.03.1995 (exhibit No. 10). On those exhibited registered deeds proved the chain of the title of the suit land.

It further appears from exhibit No.1 that C.S. khatian No.59 was recorded in the name of Samir Sheikh in Plot Nos. 344, 345, 349 and 354 and the class of the land has been stated as *Chala* and the total land has been mentioned 2.31 acres, and exhibit No.2 shows that S.A. Khatian No.180 was recorded in the names of Hafizuddin, Md. Shahar Ali, Mohar Ali and Rahom Ali, and the class of the land has been mentioned as *Chala*. Accordingly, C.S and S.A. *Porcha* clearly show that the class of the land is *Chala* class land, and there is no existence of road in the C.S Khatian No. 59 corresponding to S.A Khatian No. 180 that has crossed the disputed land. It further appears from exhibit No. Ka(1) that the draft copy of R.S. khatian which was recorded in the name of the government in Plot Nos. 1905, 1906, 1912 and 1913 measuring an area of 2.31 acres, which is corresponding to S.A. Khatian No. 180 and the class of the land of R.S. record has also been mentioned as *Chala*. The defendant side claimed that the suit land is the government property and the same was recorded as *Khas* khatian, but in the R.S. record, the said land was recorded as *Chala* class land, Road or *bazar* is situated on the suit land has not been mentioned in the R.S. record.

The predecessor of the plaintiff Md. Nurul Islam mutated his land through Miscellaneous Case No. 165 / 1985-86 and paid taxes including development taxes to the government which were exhibited and marked

as exhibit Nos. 3, 3 (Ka) and 3 (Kha) dated 09.12.1985, 24.04.1988 and 09.12.1985 respectively. Thus, the findings of the trial Court that the predecessor-in-interest did not pay rent to the government is not correct.

It appears that the plaintiffs in their pleadings stated that his predecessor, Md. Nurul Islam, handed over the possession of the suit land with specific boundary and P.W. 1 stated that they have been in possession by developing the suit land which has been supported by the rest P.Ws, and defendant did not cross examine the P.Ws on the point of their possession, so, the plaintiffs have proved that they have been in possession of the suit land.

The trial Court observed that S.A. record was not prepared in the name of Aziz Bepari and the plaintiffs failed to give any satisfactory reply about that omission. Now, we are discussing on this point. C.S. recorded tenant Shamir Sheikh transferred 2.31 acres of land to Daulat Kha and Aziz Bepari and they got 1.1550 acres of land each, and the predecessors of the plaintiffs' purchased the land from the heirs of Daulat Kha and they sold 1.1550 acres of land to Hafizuddin and he transferred the land to Shahar Ali and others and they sold the land to Md. Nurul Islam and this way only 22 decimals was purchased by the plaintiffs out of 1.1550 acres of land. Accordingly, said omission does not affect the merit of the suit.

The sole defendant government in their written statement neither claimed that the suit land was acquired nor disclosed the same in their defence case but the learned Subordinate Judge opined that the suit property was possibly acquired by the Roads and High ways Department which is violation of the settled principle of law as per Order 6 rule 7 of the Code of Civil Procedure that either of the parties cannot raise any new ground of claim or contain any allegation of fact inconsistent with the pleadings of them. It was not the case of the defendant that the suit land was acquired by the government for the Roads and High Ways Department. Defendant without amendment of pleading introduced a new fact in his deposition and the learned judge accepted the departure from the pleading and made out a third case that the suit property was possibly acquired by the Roads and High Ways Department which is beyond the pleading of the defendant. Moreover, the burden of proof of this fact lies upon the government, which they failed, but the trial Court shifted the burden upon the plaintiffs which is not permissible. Using the word “possibly” indicates that the trial Court was not sure as to acquisition of the land that means its judgment was passed on surmise and conjecture.

Considering the facts of the case and the discussions made above the plaintiffs have proved their case by adducing oral and documentary evidences. Accordingly, we find merit of the appeal, and the judgment of

the trial Court is wrong as the findings of the facts of the trial Court are not based on material evidences on record, rather it was on mere surmise and conjectures.

Accordingly, we find substance of the submissions of the learned Advocate for the appellants.

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

The judgment and decree dated 25.01.1998 (decree signed on 01.02.1998) passed by the learned Sub-ordinate Judge, 1st Court, Gazipur in Title Suit No. 10 of 1996 is hereby set-aside and the suit is decreed, and the plaintiffs have title in respect of 22 (twenty two) decimals of land as described in the schedule of the plaint.

Send down the lower Courts' records.

Communicate the order.

Md. Nuruzzaman, J:

I agree.