

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Md. Emdadul Huq

Civil Revision No. 1113 Of 2013

Islami Baank Bangladesh Ltd.,

.....petitioner.

Al-haj Serajul Islam & others.

.....Opposite parties.

Mr. Abdul Baten, Advocate

For the petitioner.

Mr. Khijir Ahmed with

Mr. Faruque Hossain, &

Mr. Md. Taha Molla, Advocates

For the opposite party No. 2.

Mr. Md. Khalilur Rahman, Advocate.

For the opposite party No. 7.

Heard on: The 6th, 7th, 14th, 15th, 22nd, 23rd, 24th July and
11th, 14th, 15th, 16th September, and 27th
November, 2014

Judgment on : The 9th November, 2014

The Rule issued in this Civil Revision is about sustainability of the judgment and order dated 28-03-2013 by which the learned Additional District Judge, 2nd Court, Dhaka allowed Miscellaneous Appeal No. 108 of 2012 and thereby allowed Miscellaneous Case No. 27 of 2010 on setting aside the judgment of dismissal dated 15-03-2012 passed by the learned Judge (In-charge) of the 4th Artha Rin Adalat (**shortly the Adalat**) in that Miscellaneous Case instituted by the opposite party No. 1 and 2 as 3rd party (objectors) under Order 21 Rule 100 and 101 of the Code of Civil Procedure Code, 1908 (**shortly the Code, 1908**).

Objector's Case:

In the above noted Miscellaneous Case under Order 21 rule 100 and 101 of the Code, 1908 the objectors as 3rd party claim that Islami Bank, Bangladesh Ltd. Islampur Branch, Dhaka (**shortly the decree holder Bank**) instituted Artha Rin Suit No. 101 of 1993 in the Adalat to recover some overdue loan taken by opposite party No. 5 M/S Kariamati Library. Against that loan, opposite party No. 6 Fahima Noor mortgaged some land as guarantor. The decree holder Bank obtained a decree and put it to execution in Artha Jari Case No. 51 of 2000, and obtained a sale certificate under section 33(5) of the Artha Rin Adalat Ain, 2003 (**shortly the Ain, 2003**). Thereafter the decree holder Bank published a Tendar Notice for auction sale of the mortgaged land. Opposite party Nos. 4 and 5 auction purchased the land. After such purchase the decree holder Bank with the assistance of the Court staff, wrongly delivered possession of the 'Ka'land to the auction purchasers on 20-05-2010.

But the objectors, by virtue of two kabalas dated 17-01-1993 acquired the 'ka' schedule land. They had been in possession thereof and this land was not the subjectmatter of the decree. Because 'Kha' schedule land was mortgaged by the judgment debtor Fahima Noor and this land should have been delivered to the auction purchasers,.

So the objectors prayed for restitution of their possession of the 'ka' schedule land. In that application, the objectors have also stated asto how they acquired the 'ka' schedule land.

Case of the decree holder Bank:

The decree holder Bank in its written objection admits the fact of decree and execution thereof. But it denies the allegations of the objectors with regard to wrong delivery of the 'ka' schedule land. The Bank claims that the mortgaged land is part of the C.S and S.A plot No. 1894, subsequently recorded as R.S plot No. 6726 and also as Mohanogar Survey plot No. 10474 and this very land has been delivered to the auction purchaser on 19-11-2009.

With regard to the title aspect of the land so delivered, the decree holder Bank has stated as to how the mortgagor Fahima Noor acquired it by virtue of her kabala dated 25-11-1982 executed by Mojibar Rahman who had earlier purchased the case land in 1995 and 1977 from the S.A recorded tenant Mohabbat Ali and also from the heirs of Wahed Ali in 1979.

Case of transferee from auction purchaser:

Opposite party No. 7 of this Case, Humayun kabir has supported the case of the decree holder Bank. He claims that he, by a kabala dated 24-05-2010, purchased the 'kha' schedule land from the auction purchasers after delivery of possession in the execution case.

Proceedings and decision of the courts below:

During pendency of the said objection case, the Adalat caused a local investigation and, after hearing both sides, the Adalat dismissed the objection case by judgment dated 15-03-2012.

Against that judgment, the objectors preferred the Miscellaneous Appeal No. 108 of 2012. After contested hearing, the learned Additional District Judge passed the impugned judgment and reversed the decision of the Adalat and directed restore to possession of the 'Ka' schedule land to the objectors and further directed to deliver to the auction purchaser possession of the land as described in the kabala dated 25-10-1982 that was mortgaged by the Judgment-debtor-cum guarantor Fahima Noor.

Deliberation in Revision:

At the hearing of this Revision, Mr. Md. Abdul Baten, the learned advocate for the decree-holder Bank (petitioner), submits that the identity of the land in question is the main issue in this case and that the Adalat after causing a local investigation, became satisfied about the correctness of the identity of the objectors' land and also of the land delivered to the auction purchasers and thus legally and correctly dismissed the claim of the objectors.

Mr. Md. Khalilur Rahman, the learned advocate appearing for opposite party No.7 being the transferee from the auction purchaser, submits that the 3rd party objectors must prove their own case, namely their acquisition of the land as described in the 'Ka' schedule to the objection petition.

In support of his submission Mr. Rahman, the learned advocate refers to the case of Achi Meah @ Achior Rahman and others- Vs.-Bacha Meah and others, reported in 18 D.L.R.(1966), page-313.

Mr. Rahman, the learned advocate, next submits that according to Rule 774 clause- (a) (10) of the Civil Rules and Orders, an application under Order 21 Rule 100 of the Code, 1908 is to be registered as a Miscellaneous Case and that for proper adjudication of the dispute the court has to admit formal evidence adduced by both sides.

Mr. Rahman, the learned Advocate, next submits that the application of the objectors was correctly recorded as a Miscellaneous Case, but the courts below failed to admit any formal evidence and recorded their decision on the basis of insufficient documents.

Mr. Rahman, the learned advocate next draws my attention to an informal sketch map of the case land and other contiguous land and submits that for proper adjudication of the dispute the title documents containing description of the land claimed by the objectors and also of the land delivered to the auction purchasers should be admitted in evidence and these documents along with the official survey maps and the report obtained in the local investigation should be considered, but both the courts below failed to consider such documents, maps and report of the commissioner and therefore the case should be sent back on remand.

In reply Mr. Khijir Ahmed, the learned advocate, draws my attention to the purchase documents of the objectors and submits that

the schedules of the land described therein with reference to boundaries attract the 'Ka' schedule.

Mr. Ahmed, the learned advocate also draws my attention to a sketch map informally prepared by a surveyor.

Findings and Decision in Revision:

On perusal of the materials on record it appears that the dispute between the parties is with regard to the identity of the land claimed by the objectors and of the land that was delivered to the auction purchaser.

It is revealed from the judgment of the Adalat as the Executing Court that the said court dismissed the objection case mainly on the ground that the description of the boundary of holders of the purchase documents of the objectors and that of the mortgaged land (Kha schedule to objection petition) are different.

The said court also found that the learned Advocate Commissioner reported that the description of the kha schedule land i.e. the land mortgaged by Fahima Noor was not the same with the 'ka' schedule land as claimed by the objectors and that the land described in the purchase documents of the objectors was not the same with the 'ka' schedule land.

From the judgment of the appellate Court it appears that the said court only considered the identity of the land as described in the Tender Notice and as in the kabala dated 25-10-1982 being the document of purchase of the guarantor Fahima Noor.

The appellate Court recorded a finding that the land as notified in the Tender Notice was not delivered, and that the 'kha' schedule that was delivered to the auction purchasers was not the land as described in the said kabala.

It is revealed from the materials on record that the exact point of difference between the parties is whether the location of the land

mortgaged by the guarantor Fahima Noor is in the S.A plot No. 1894 or in S.A plot No. 1895.

It is noted that Fahima Noor's document of purchase dated 25-10-1982 contains a reference to both the plots i.e.1894 and 1895 with further reference to “মিউটেসিনে লিখিত ১৮৯৪ নং দাগের কাত ১০ (দশ) শতাংশ নাল জমি”. The boundary holders have also been described.

The aforesaid description was substantially followed in the mortgage deed dated 31-01-1988 executed by Fahima Noor. The mortgage deed contains description of the mortgaged land with reference to plot No. 1894 and 1895 and mutation plot No. 1895.

On the contrary the two kabalas dated 17-01-1983 filed by the objectors contain reference to only one plot, being No. 1894 with further reference to the boundary holders.

It appears that S.A plot No. 1894 was a bigger plot and has been split up into a number plots in the subsequent R.S and Mohanagar survey operations.

The purchase document, the mortgage document, and the purchase documents of the vendors do not contain any reference to the R.S. or Mohanagar plot numbers, which are subsequent developments.

For proper adjudication of the dispute, the identity of the lands claimed by both parties are to be ascertained with reference to –(1) boundaries as described in their respective purchase documents, (2) the boundaries in the purchase documents of their respective vendors and (3) the latest position with clear reference to C.S, S.A R.S and Mohanagar Survey maps.

The above aspects were not taken care of by the courts below. The learned Advocate Commissioner also did not make detailed reference to those aspects.

It is noted that in a proceeding under Order 21 rule 100 of the Code, 1908 formal evidence and a full trial may not be necessary in all cases. Because the said rule requires “investigation” of the claim of the third parties. Section 32 of the Ain, 2003 does not specify any complete procedure for disposal of the claim of a third party, rather it refers to the Code, 1908 and provides for compliance with some additional requirements.

In the present case the nature of the dispute requires formal evidence and a fresh local investigation.

Accordingly, I hold that the matter should be sent back on remand for proper adjudication.

In the result, the Rule is made absolute. The judgment and order dated 28-03-2013 passed by the learned Additional District Judge, 2nd Court, Dhaka in Miscellaneous Appeal No. 108 of 2012 and also the Judgment dated 15-03-2012 passed by the learned Judge of the 4th Artha Ain Adalat, Dhaka, in Artho Jari Case No. 51 of 2000 are here by set aside.

The learned Judge of the Artho Rin Adalat, 4th Court, Dhaka is directed to consider the kabalas filed by both sides with respect to their own purchase, and the documents of their vendors and to come to a proper decision about the identity of the two parcels of land as mentioned in objection /claim petition. The parties may be allowed reasonable opportunity to adduce evidence by producing their respective documents and the survey maps (S.A, R.S and Mohanagar) of the locality.

No order as to cost.

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

The parties may take back their respective documents (except the impugned judgments) by substituting photo copies.

Habib/B.0