

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No.2758 of 2006

Md. Jahir Uddin and others

... Petitioners

-Versus-

Md. Molin Ali and others

... Opposite parties

Mr. A. B. Roy Chowdhury, Advocate

... for the petitioners

Opposite parties are not represented

Judgment on 31.3.2011

This Rule at the instance of plaintiff-respondents was issued on an application under section 115 (1) of the Code of Civil Procedure to examine the legality of judgment and decree dated 15.5.2006 passed by the First Court of Joint District Judge, Gaibandha in Other Appeal No.40 of 2005 allowing the same and thereby reversing those dated 23.11.2004 passed by the Senior Assistant Judge, Gobindaganj, Gaibandha in Other Class Suit No.8 of 1997 decreeing the suit.

Facts leading to this civil revision are that the petitioners instituted Other Class Suit No.8 of 1997 before the Assistant Judge, Gobindaganj, Gaibandha for declaration of title and recovery of possession over the suit land with a further declaration that two deeds being No.7374 dated 22.5.1967 and No.2494 dated 10.2.1969 are illegal, collusive and not binding upon them. Their case, in brief, is that

the suit land originally belonged to the landlord Mrinal Kanti Ghosh Chowdhury. A company named Bagda Firm Ltd. represented by its Managing Director, Anil Chakraborty was a tenant therein under the landlord. Subsequently the suit land vested in Government and was published in khas khatian. The Government under a policy of rehabilitation of the refugees migrated from India, allotted 4.00 acres of land to the plaintiffs' predecessors, namely, Farek Uddin and Forman Ali in L.A. Case No.98/52-53. Each of them got 2.00 acres of land. Accordingly R.S. Khatian Nos.173 and 174 in respect of the suit land were published in their names. They were in possession of the same through their *bargadar*, Meher Mondal. After their death plaintiff Nos.1-4 inherited the property of Farek Uddin and plaintiff No.5 inherited the property left out by Forman Ali. They were possessing the suit land in the same manner through the same *bargadar*. The defendants dispossessed the plaintiffs therefrom on 10.1.1993 disclosing that they had purchased the land from the said Meher Mondal, who had acquired right and title over the same on the basis of the deeds in question. The plaintiffs initially filed an application to the Deputy Commissioner, Gaibandha for eviction of the defendants. In that event, defendant Nos.1-5 (herein opposite party Nos.8-12) brought Title Suit No.98 of 1994, which was dismissed for default on 16.5.1995. Thereafter the plaintiffs asked them to vacate the suit land on 15.2.1996 and getting no result were constrained to institute the suit. Their predecessors-in-interest had never transferred the suit land to the said Meher Mondal, and the deeds in question were forged and created documents.

Opposite party Nos.1-7 as defendants Nos.6-12 entered appearance and contested the suit by filing a joint written statement contending *inter alia*, that Farek Uddin, since deceased had sold 2.00 acres of land to Meher Mondal by deed No.7374 dated 22.5.1967. Subsequently he (Meher Mondal) transferred 1.50 acres of land out of the said 2.00 acres to their predecessor-in-interest Shafayetulla Akond by an exchange deed being No.791 dated 27.1.1973. While in possession of the said 1.50 acres of land, the said Shafayetulla Akond died leaving behind the said opposite parties and their sister Sayera Khatun, who inherited the said land. The defendants did not dispossess the plaintiffs from the suit land on 10.1.1993 as alleged. Meher Mondal purchased the suit land by the aforesaid sale deed No.7374 dated 22.5.1967 from Farek Uddin and by sale deed No.2494 dated 10.2.1969 from Farman Ali. He (Meher Mondal) was never a *borgadar* under Farek Uddin. Their further case is that the R. S. khatian of the suit land was published in the name of Gandola Sheikh, which was the nick name of Meher Mondal.

On the aforesaid pleadings, the trial Court framed the issues and proceeded with trial. The plaintiffs in order to prove their case cited three witnesses, namely, plaintiff No.1 Md. Jahir Uddin as P.W.1, one Abdul Khaleque as P.W.2 and Mafiz Uddin as P.W.3 and adduced in evidence the R.S. Khatian Nos.173 and 174 marked exhibit-1 series; a letter issued from office of the Deputy Commissioner, Gaibandha marked exhibit-2; order of dismissal passed in Other Suit No.98 of

1994, plaint and written statements in that suit marked exhibit-3 series; seven rent receipts of the suit land marked exhibit-4 series, and some other documents including the deeds in question those were marked as exhibit-4,5 and 6 series.

Defendant Nos.6-12 (herein opposite Party Nos.1-7) cited three witnesses, namely, defendant No.12 Sukur Ali as D.W.1, one Younus Ali Mondal as D.W.2 and Lokeman Ali Akond as D.W.3. They adduced in evidence the original sale deed No.7374 dated 22.5.1967 marked exhibit-Ka; exchange deed No.791 dated 27.1.1973 marked exhibit-Kha, sale deed No.5619 dated 1.4.1974 marked exhibit-Ga, and R.S. Khatian No.174 marked exhibit-Gha.

The learned Assistant Judge, Gabindaganj after conclusion of trial decreed the suit for recovery of possession by his judgment and decree dated 23.11.2004 declaring deed No.7374 dated 22.5.1967 to be a forged one, and deed No.2494 dated 10.2.1969 to be not in existence. Opposite Party Nos.1-7 preferred Other Appeal No.40 of 2005 before the District Judge, Gaibandha against the said judgment and decree dated 23.11.2004. The Joint District Judge, First Court, Gaibandha ultimately heard the appeal and allowed the same by his judgment and decree dated 15.5.2006, which has been challenged in the instant civil revision.

Mr. A. B. Roy Chowdhury, learned Advocate appearing for the petitioners submits that the trial Court on sifting evidence of both the sides arrived at findings on each and every issues involved, and held

that the deed in question dated 22.5.1967 is a forged document and that the predecessors-in-interest to the plaintiffs were in possession of the suit land. After their death, the plaintiffs were in possession thereof until their dispossession. But the learned Judge of the lower appellate Court, without reversing the findings of the trial Court allowed the appeal, and passed the impugned judgment in total non-consideration and misreading of the plaintiffs' evidence, and therefore, it is incumbent on this Court to consider the same and to arrive at a correct decision. On the scope of a revisional Court to consider/reconsider evidence, the learned Advocate refers to the case of Hossain Ahmed Chowdury and others Vs. Nurul Amin reported in 47 DLR (AD) 162, wherein their lordships of the Appellate Division held that if there is misreading and non-consideration of material evidence, then it is incumbent on the revisional Court to consider the same and to arrive at a proper finding on the material evidence and to finally dispose of the case.

I have examined the evidence on records and gone through the judgments of the Courts below. It appears that the trial Judge decreed the suit on the grounds, amongst others:

(a) that deed No.2494 is a usufructuary mortgage deed executed by one Ahmed Hossain in favour of one Wahedzzaman. It is not a deed in the name of Meher Mondal and not executed or registered on 10.2.1969. Therefore, there is no existence of any sale deed being No.2494 dated 10.2.1969 executed by Forman Ali. Contesting defendant Nos. 6-12 also did not claim his (Forman Ali's) land, and as such it has been proved that the plaintiffs were in possession over the land of Forman Ali;

(b) that exchange deed No.791 dated 27.1.1973 (exhibit-Kha) shows that Meher Mondal sold 1.50 acres of land to the predecessors-in-interest to defendant Nos.6-12, and deed No.5619 dated 1.4.1974 (exhibit-Ga) shows that Meher Mondal sold 2.00 acres of land to the predecessors of defendant Nos.1-5, which is absurd because there is only one deed of the contesting defendants showing alleged sale of 2.00 acres of land in favour of Meher Mondal;

(c) that the defendants claimed their land from Meher Mondal, who allegedly got it by deed No.7374 dated 22.5.1967, but they failed to produce any khatian or rent receipt in their favour. On the other hand, the plaintiffs produced two R. S. Khatians in their predecessors' names (vide exhibit-1 series) and seven rent receipts showing payment of rent against the suit land (vide exhibit-4 series);

(d) that there is no reference whether any permission obtained from the Government for subsequent transfer of the land and in absence of any such permission, the transfer, if any, would be void;

(e) that all of the plaintiffs' witnesses supported their case. Out of them P.Ws.2 and 3 are old men, who deposed in support of the possession of Farek Uddin and Forman Ali, and after their death supported the possession of the plaintiffs.

(f) that the thump impressions of vendor appearing on different pages of the sale deed dated 22.5.1967 are not same and the said deed appears to be a forged one.

On the other hand, the learned Joint District Judge allowed the appeal mainly on the grounds:

(a) that R.S. Khatian of the suit land was published in the name of Gandola Shaikh. According to the defendants, the said Gandola Shaikh and Meher Mondal was same person. Admittedly the R.S. Khatians were not prepared in the names of the plaintiffs' predecessors;

(b) that the defendants could prove that the plaintiffs' predecessors had transferred the land to the predecessor of the defendants and left for Mahiganj, and thereafter the said Meher Mondal possessed the suit land as his own;

(c) that the evidence of the plaintiffs' witnesses are contradictory to each other inasmuch as the plaintiffs claimed that their predecessors-in-interest Farek and Forman inducted Meher Mondal into the suit land as a *borgadar*. But P.W.2 Abdul Khaleque stated in his deposition that after the death of Farek and Forman, plaintiffs were in possession of the suit land;

(d) that the plaintiffs failed to show any written instrument to prove that Meher Mondal was a *borgadar* in the suit land, and also failed to prove their dispossession therefrom;

(e) that the suit was barred by limitation.

It appears from exhibit-1 series that R.S. Khatian Nos.173 and 174 were published in names of Farek Uddin and Forman Ali. In both the Khatians their father's name was mentioned as Gandola Akond. Therefore the finding of the lower appellate Court that R.S. Khatians

were not published in the names of the predecessors to the plaintiffs, is not based on evidence. Exhibit-3 series show that a suit instituted earlier by Opposite Party Nos.8-12 was dismissed in presence of the present petitioners, who were defendants therein. Exhibit-4 series show payment of rents against the suit land appertaining to both Khatian Nos.173 and 174 were made by Farek Uddin and Forman Ali. The said documentary evidence were not considered by the lower appellant Court. Admittedly, the land was allotted to the predecessors-in-interest to the plaintiffs by the Government in 1952-53. At that time, there was no legal requirement of any written instrument for induction of a *borgadar* in a land, and this is not yet a practice in our rural area even after The Land Reform Ordinance, 1984 came in force. Therefore, the reasoning for not believing Meher Mondal as a *borgadar* as given in the impugned judgment is not tenable.

It further appears from the plaint that the plaintiffs were dispossessed from the suit land on 10.1.1993; that they filed application to the Deputy Commissioner for eviction of the defendants and concerned section of his (Deputy Commissioner's) office issued letter asking for police force to conduct the eviction; that at one stage opposite party Nos.8-12 instituted Other Class Suit No.98 of 1994; that the said suit was dismissed for default on 16.5.1995; that the plaintiffs asked the defendants on 15.2.1996 to vacate the suit land, and ultimately instituted the suit on 16.1.1997 for declaration of title and recovery of possession just after four years and six days of their



dispossession from the suit land. Articles 120 and 142 of the Limitation Act provide six years for institution of a declaratory suit, and twelve years to file a suit for recovery of possession. Therefore, the present suit was clearly within time. The trial Court also framed an issue on limitation and decided it in favour of the plaintiffs. The defendants in their memo of appeal did not take any ground on limitation. In such a case, the lower appellate Court committed error of law in raising and deciding the issue of limitation.

On perusal of the oral evidence, it appears that P.W.1 fully supported the prosecution case and disclosed nothing adverse in spite of exhaustive cross-examination. He clearly stated that they were in possession over the suit land, and the defendants dispossessed them on 10.1.1993. On recall he stated that the father's name of their predecessors was Mohar Ali alias Gandola Shaikh. In cross-examination he stated that his father did not permanently settle at Mahiganj. His father died in 1975 and his uncle Forman Ali died in 1977. P.W.2 stated that the defendants forcefully evicted the plaintiffs from the suit property, and that Meher Mondal was their *borgadar*. In cross-examination he stated that the dispossession took place 10/12 years back. This P.W.2 was examined on 13.10.2004, and therefore he correctly indicated the time of dispossession. P.W.3 also deposed that the defendants in collusion with Meher Mondal had evicted the plaintiffs. In view of the above discussion it is clear that the plaintiffs proved their dispossession from the suit land, which is a basic requirement in a suit

for recovery of possession. The Court in arriving at a finding of fact should give emphasis on documentary evidence and consider oral evidence in proper perspective. An isolated part of oral evidence should not be given much emphasis ignoring the documentary evidence on the same fact. In that view of the matter, the finding of the appellate Court that the plaintiffs failed to prove their dispossession from the suit land, is not correct. Moreover, it is apparent on the face of record that the lower appellate Court in passing the impugned judgment did not avert the findings of the trial Court.

For all the reasons stated above, I find substance in the submissions of the learned Advocate for the petitioners and the Rule merits consideration.

In the result, the Rule is made absolute. The impugned judgment and decree dated 15.5.2006 (decree signed on 22.5.2006) passed by the Joint District Judge, First Court, Gaibandha in Other Appeal No.40 of 2005 is hereby set aside and those dated 23.11.2004 passed by the Assistant Judge, Gobindaganj, Gaibandha in Other Class Suit No. 8 of 1997 is maintained.

Send down the lower Court records.