

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:
Mr. Justice Md. Miftah Uddin Choudhury

CIVIL REVISION NO.963 OF 2007

In the matter of:

An application under Section 115(1) of
the Code of Civil Procedure.

And

Abu Jaher Biswas and others

... Petitioners

-Versus-

Mofazzal Hossain and others

... Opposite parties

Mr. Ahmed Nowshed Jamil, with

Mr. H. M. Borhan, Advocates

... For the petitioners.

Mr. Abul Kalam Mainuddin, Advocate

... For the opposite party

Nos.1-3.

Heard on 03.10.2013, 23.01.2014,

26.01.2014 and 06.03.2014.

Judgment on 10.04.2014.

At the instance of the plaintiffs this Rule
arises out of the judgment and decree dated
04.01.2007, passed by the learned Additional
District Judge, Fourth Court, Khulna, in Title
Appeal No.203 of 2003, reversing those dated

31.05.2003, passed by the learned Senior Assistant Judge, Domoria, Khulna, in Title Suit No.105 of 2001.

That Sudebi Bairagee, wife of late Kesto Das Bairage @ Krisna Das Bairage and Keturam Kirtania, son of late Ratikanta Bairage as plaintiff Nos.1 and 2 respectively instituted Title Suit No.498 of 1977 in the First Court of Munsif, Khulna for declaration of their title in respect of 2.18 acres of land out of the suit land as well as for partition of the suit land by making proper demarcation of their 2.18 acres of land. Subsequently the names of the said two plaintiffs were struck off since they transferred their share to the plaintiff Nos.3-18 subsequently added as party. Ultimately the suit was transferred to the Court of learned Senior Assistant Judge, Domoria, Khulna and renumbered as Title Suit No.105 of 2001.

The plaint of the plaintiffs in brief that the suit land alongwith other lands belonged to Babu Kali Prosonna Chattopadday and others in their mourasi maliki right. They had been enjoying and possessing the same by granting settlement to tenants as well as by keeping it under their khas

possession. Adjacent to their land in C.S. Plot Nos.1201 and 1121 situated in the bank of Athar Baki river some land was created by gradual silting forming some char land. The said Char land was contiguous to the land of C.S. Plot No.394, 395, 397 is eastern side. Out of that land Krishna Das Adhikari took settlement of 0.42 acres of land of plot No.1201 by furnishing a kabuliyat dated 17.12.1935, Full Mohon Barai took settlement of further 0.42 acres from the said plot No.1201 by furnishing kabuliyat dated 19.09.1936. Subsequently the defendant No.1 Mofazzal Hossain became owner of 0.42 acres of land of Krishna Das by way of transfer. Kesto Das Bairagee by furnishing a registered kabuliyat dated 08.12.1936 took settlement of 0.84 acres of land out of the land of another Plot No.1121 and 0.15 acres of land from the land of Plot No.396, in total he took settlement of 0.99 acres of land by the said kabuliyat. Kesto Das Bairagee on 03.09.1938 took settlement of further 0.42 acres of land from the land of both plot Nos.1201 and 1121. Kesto Das died leaving behind his wife Sudebi Bairagee as his heir and successor. The plaintiffs by way of transfer became owners of

entire property of Kesto Das. At the time of death of Kesto Das he had no wife named as Anarothi and had no son named Dhakur Das Bairagee. By the deed allegedly executed by Dhakur Das Bairagee the defendant No.17 Full Mia and defendant No.18 Md. Ali Sheikh did not accrue any right, title and possession over the suit land. The said char land settled by the aforesaid kabuliyat measuring 2.10 acres was increased up to an area of 3.63 acres due to gradual silting up. The said 3.63 acres of land was recorded in S.A. Plot Nos.1135, 1136 and 1137 under S.A. Khatian Nos.411, 412 and 413. Kesto Das Bairagee had been enjoying and possessing 2.18 acres of land but that was not recorded in his name. That 0.15 acres of land settled by the kabuliyat dated 18.12.1936 was recorded in his name. The kabala No.763 dated 16.06.1978 allegedly executed by Dhakur Das Bairagee in favour of the defendant Nos.17 and 18 is false and forged. Kesto Das had two wives named Basonta and Sudebi and he has no wife named Anarothi or no son by Anarothi named Dhakur Das Bairagee. Against the said deed a criminal case was instituted in which the defendant Nos.17 and 18 were convicted with sentence to suffer imprisonment for

two years and to pay fine. Against such sentence an appeal is pending before the learned Additional Sessions Judge. Kesto Das @ Krishna Das Bairagee on 10.04.1974 transferred 0.99 acre of land to Sudebi Bairagee and Kitoram Kirtania. Subsequently Keturam Kirtania on 12.07.1979 transferred 0.42 acre of land to Habibur Rahman and others (present plaintiffs) and handed over possession. Sudebi Bairagee transferred $0.25\frac{1}{2}$ acre of land to Full Mia (defendant No.17) and others for which the plaintiff No.3 Habibur Rahman instituted Miscellaneous Case No.146 of 1979 for pre-emption which was allowed. On behalf of her two minor sons Horidas Bairagee and Keshob Bairagee, Sudebi Bairagee, wife of Kesto Das alongwith Kesto Das's daughter Sabitree Bairagee on 04.12.1990 transferred 1.46 acres of land to the plaintiff Nos.3-7. By way of transfer and pre-emption the plaintiffs became owners of $2.33\frac{1}{2}$ acres of land. In the suit land the plaintiffs have got their residence in a part. They claimed demarcation of the same with the defendants but being denied they compelled to institute the suit.

The defendant No.1 Mofazzal Hossain and the defendant Nos.17 Full Miah and 18 Sheikh Md. Ali by filing two separate written statements contested the suit. The defendant No.1 stated in brief, that 1.06 acres of land of C.S. Plot No.131, under C.S. Khatian No.394 admittedly belonged to Kali Prosonna and others and out of that land by kabuliyat No.5948 dated 17.12.1935 Krisno Das Adhikari took settlement of 0.42 acre of land. The said landlord on receipt of kabuliyat dated 19.09.1936 granted settlement of 0.42 acre of land from the land of C.S. Plot No.1201 with Ful Mohon @ Full Mon Barai @ Full Mohon Biswas. Krisno Das and Balaram were two full brothers and by earning of their joint family Krishno Das took settlement in his name. Krisno Das died leaving behind two sons Jadob and Sattendra Adhikari. Jadob died leaving behind two sons Pobitra and Sadai and widow Suvodra. Balaram died leaving behind three sons named Kalipada, Druba and Niren. That 0.42 acre of land of Plot No.1201 settled by kabuliyat No.5948/35 was increased up to an area of 1.9 acres by gradual siltation in its eastern side and that was recorded in S.A. Khatian No.411 in the names of Jadob and Sattendra. Full Mohon and Bizabor were

full brothers and by the earning of their joint family they took settlement of the land by kabuliyat No.4901/36 dated 19.09.1936 in the name of Full Mohon alone, but both the brothers had right and title in the said land. Full Mohon died leaving behind two sons named Chitta Ranjan and Mokunda Biswas. That 0.42 acre of land of Plot No.1201 settled by the kabuliyat No.4909/36 was increased up to an area of 1.10 acres by gradual siltation in its eastern side and the same was properly recorded in the names of Bizabor Mohon, Chitta Ranjan and Mukunda in S.A. record. The said land was listed as vested property and Darbesh Sheikh and Shahjahan Sheikh took lease of the same. After death of Jadob Adhikari, owner of 4 anas share of the land of S.A. Khatian No.411, his wife Suvodra Adhikari on behalf of her minor two sons Pabitra and Sadai Adhikari on 29.04.1970 sold $0.49\frac{1}{2}$ acre of land to Sattendra Nath Adhikari by way of sale and Sattendra Nath subsequently sold the same to the defendant No.1 on 15.07.1973. Kalipad on 13.01.1970 sold 0.33 acre of land alongwith 0.3 acres of land of another holding to Druba and Niren. The said Druba and Niren sold 0.99 acre of land to defendant No.1. By Mutation

Case No.40 of 1975-76 the defendant No.1 mutated the same in his name. Mukunda Barai @ Mukunda Biswas on 05.03.1977 transferred $0.27\frac{1}{2}$ acre of land to defendant No.1 Muhitunnessa. Kesto Das died leaving behind two wives the plaintiff No.1 Sudebi Bairagee and another Anarathi alongwith his son Dhakur Das by Anarathi and two daughters Sabitri and Ahalla by Sudebi. Dhakur Das on 16.03.1978 sold 0.55 acre of land to defendant No.17 Full Miah and defendant No.18 Md. Ali Sheikh. Regarding that land they instituted Title Suit No.136 of 1984 in the Second Court of Sub-ordinate Judge, Khulna which was subsequently transferred to the Third Court of Sub-ordinate Judge, Khulna and renumbered as Title Suit No.14 of 1994. The said suit was decreed. Kesto Das on 20.04.1974 transferred 0.99 acre of land to the plaintiffs. The plaintiff No.2 Keturam Kirtania on 12.07.1979 sold his land to added plaintiff No.3 Habibur Rahman. Against which the plaintiff No.1 instituted the pre-emption suit and obtained an order of pre-emption. Kesto Das Bairagee did not get any practical possession rather his land was under water. WAPDA acquired some land and the defendant No.1 got compensation for such acquisition. The

plaintiffs have got no right, title and possession over the suit land, hence the suit is liable to be dismissed.

In their joint written statements the defendant No.17 Full Miah and defendant No.18 Sheikh Md. Ali stated that Kesto Das @ Krishno Bairagee was owner and possessor of entire 0.55 acre of land appertains to C.S. Plot No.1137 under C.S. Khatian No.264. The said land was recorded in the name of Kesto Das in S.A. Khatian No.413. Kesto Das had two wives named Anarathi and Sudebi, one son Dhakur Das, two daughters Sabitri and Ahalla. He died leaving behind one wife Sudebi and one son Dhakur Das as his heirs and successors. Out of the suit land Dhakur Das on 16.06.1978 transferred 0.55 acre of land alongwith other lands, in total 1.09 acres, to them. Regarding the said land they instituted Title Suit No.136 of 1984 which was subsequently renumbered as Title Suit No.14 of 1994 on its transfer to other Court and the same was decreed on 15.11.1994. By the Kabuliyat dated 08.12.1936 Kesto Das took settlement of 0.15 acre of land of Plot No.396 under C.S. Khatian No.131 and 0.84 acre of land of C.S. Plot No.1121 under C.S. Khatian No.2/3/7, in total 0.99 acre of

land and on 20.04.1974 transferred the same to Sudebi Bairagee and Keturam Kirtania. During Settlement Survey Operation the C.S. Plot numbers have not been changed. The land of C.S. Plot No.1121 and S.A. Plot No.1137 are not same. On 28.07.1979 Sudebi Bairagee transferred $0.25\frac{1}{2}$ acre from the land of plot No.1137 to them and they executed a deed of reconveyance in favour of Sudebi, and as such by Preemption Miscellaneous Case No.146 of 1979 the plaintiff Habibur Rahman did not accrue any right, title and possession. For WAPDA 0.43 acre of land was acquired and they (defendant Nos.17 and 18) got compensation for such acquisition and they have been possessing remaining 0.12 acre of land. They were convicted on the allegation that the Deed No.763 dated 16.03.1978 executed by Dhakur Das Bairagee is forged and against that conviction Criminal Appeal No.17 of 1988 had been preferred which was allowed. Moreover, in the said case it was decided that by the Kabala dated 20.04.1974 Keturam and Sudebi did not accrue any right or title and from them the plaintiffs also did not accrue any right or title. The plaintiffs have no right, title

and possession over the suit land, and hence the suit is liable to be dismissed.

After hearing the parties, the learned Senior Assistant Judge, Sadar, Khulna by judgment and decree dated 29.10.1998 dismissed the suit finding that the plaintiffs failed to prove their case beyond reasonable doubt, on the other side the claim of the defendants is also apparently weak, the plaintiffs are not entitled to get any benefit for such weakness of the defendants. Against the said judgment and decree the plaintiffs preferred Title Appeal No.341 of 1998 before the learned District Judge, Khulna. On transfer the said appeal was heard by the learned Sub-ordinate Judge, First Court, Khulna who by judgment and decree dated 11.06.2001 allowed the appeal and on setting aside the judgment and decree passed by the learned Assistant Judge sent back the suit on remand for hearing afresh and to decide the suit as per the observation made by him. The said Appellate Court observed that the suit is not barred by limitation and the Trial court did not discuss the evidences on record properly.

After sending back the suit on remand on transfer to the Court of Assistant Judge, Domoria,

Khulna the suit was renumbered as Title Suit No.105 of 2001 and some amendment was made in the pleadings of the parties.

The learned Assistant Judge, Domoria, Khulna after hearing the parties and on discussion of the evidences on record by judgment and decree dated 31.05.2003 decreed the suit in preliminary form only in respect of 1.85 acres of land in favour of the plaintiffs finding their right, title and possession over the same. Against the said preliminary decree the plaintiffs and the contesting defendant Nos.17 and 18 did not prefer any appeal, but only the defendant No.1 Mofazzal preferred Title Appeal No.203 of 2003, in the Court of District Judge, Khulna. On transfer the said appeal was heard by the learned Additional District Judge, Fourth Court, Khulna who by the impugned judgment and decree dated 04.01.2007 allowed the appeal and set aside the judgment and preliminary decree passed by the Assistant Judge.

Hence, the plaintiffs as petitioners preferred this revision and obtained the Rule.

Mr. Ahmed Nowshed Jamil, learned Advocate, appearing for the petitioners submits that the

Appellate Court committed illegality in finding that the plaintiffs failed to prove that Kesto Das Bairagee took settlement of 1.26 acre of land by furnishing kabuliyat. The WAPDA for which some of the land was acquired was added as party but did not come forward to contest the suit but without considering that aspect the impugned judgment was illegally passed on misinterpretation or non consideration of the evidences on record. In arriving into its decision the Appellate Court did not discuss the evidences on record and without discussion of the evidences on record on surmise and conjectures allowed the appeal and dismissed the suit. He further submits that such judgment can not be treated as a judgment of reversal as per the provision of law provides in Order 41 Rule 31 of the Code of Civil Procedure which occasioned failure of justice, and hence impugned judgment is liable to be set aside.

In reply of his such argument Mr. Abul Kalam Mainuddin, learned Advocate, appearing for the opposite party Nos.1-3 submits, that the Trial Court in decreeing the suit in favour of the plaintiffs in respect of 0.84 acres of land committed illegality

and that decree was passed without any basis and without mentioning any number of any plot in which the decreetal land is situated, but the Appellate Court on proper discussion of the materials on record rightly allowed the appeal and dismissed the suit.

After hearing the learned Advocates I have gone through the above mentioned four judgments, two by the Trial Court and two by the Appellate Court. On perusal of the said judgments it appears that the Trial Court in its first judgment passed in 1998 did not properly discuss the evidences on record rather passed its judgment on surmises and conjectures like a hypothesis. In that judgment the Trial Court did not at all consider the claims of the parties though some of the claims of the plaintiffs were admitted by the contesting defendants. However, on appeal the said judgment was set aside by the Appellate Court and the suit was sent back on remand to the Trial Court to hearing afresh after amendment of the pleadings. The Trial Court on consideration of the materials on record decreed the suit in preliminary form only in respect of 0.84 acre of land. Against that judgment and decree the contesting defendant

Nos.17 and 18 and the plaintiffs did not prefer any appeal or cross objection. Only the defendant No.1 Mofazzal Hossain who allegedly succeeded the land settled by the admitted landlords in favour of Kesto Das Bairagee as per claim of the plaintiffs or Krishno Das Adhikari as per claim of the defendants in a different plot being C.S. Plot No.1201 and as per the said claim Krishno Das only took settlement 0.42 acre of the same plot. Accept that 0.42 acre the defendant No.1 did not claim any title in any way in any other part of the suit land. On consideration of the materials on record, particularly the kabuliat and the kabala, as well as the order of the pre-emption case and the aforementioned Criminal Case the learned Assistant Judge, Domoria, Khulna found plaintiff's right, title and possession only in respect of 0.84 acre of land and as it claimed by the plaintiffs. In the plaint, the plaintiffs clearly claimed about settlement of specific area of land from respective specific plots. But on perusal of the judgment of the Appellate Court passed for the second time it appears that the learned Additional District Judge, third Court, Khulna disposed up the appeal like a

criminal case. The learned Additional District Judge also found that the plaintiffs failed to prove their case beyond reasonable doubt. Such finding to decide a Civil Appeal or suit is apparently unnatural. His judgment appears to me as nothing but reproduction of the judgment passed by the Assistant Judge, Khulna in 1998 in the instant suit. On reading the said judgment I find that the same can not be treated as a judgment of reversal as per the provision of law provided in the Code of Civil Procedure. The defendants did not deny the entire claim of the plaintiffs as they claimed by way of settlement and successive transfer, but the Appellate Court without considering the documents of title of the plaintiffs dismissed the suit as a whole, meaning that the plaintiffs have no right, title ad possession in any part of the suit land. The basis of such judgment is nothing but that the Assistant Judge decreed the suit in favour of the plaintiffs in respect of only 0.84 acre of land without mentioning any plot number or khatian number. But finding of the learned Additional District Judge is apparently illegal because the learned Assistant Judge arrived into his decision on

consideration and discussion of the materials on record and the suit was not decreed finally. The suit as being a suit of partition as well as for declaration of title was decreed preliminarily and to make it as final the Advocate Commissioner should specify shares of the plaintiffs or it may be specified amicably between the parties before drawing up the final decree. Before drawing up the final decree finding of the learned Additional District Judge is not sustainable.

Hence, this Rule is hereby made absolute. The judgment and decree dated 04.01.2007, passed by the learned Additional District Judge, Fourth Court, Khulna, in Title Appeal No.203 of 2003, is hereby set aside and the judgment and decree dated 31.05.2003, passed by the learned Senior Assistant Judge, Domoria, Khulna, in Title Suit No.105 of 2001, is hereby restored.

However, there is no order as to costs.

Send down the lower Court's records immediately

MASUD
B.O.