

10 SCOB [2018] HCD

**High Court Division
(Civil Revisional Jurisdiction)**

Civil Revision Case No. 2766 of 1998

**Hayetullah being dead his heirs
1(a) Monowara Begum and others**
..... Petitioners

Vs.

Abdul Khaleque and others
..... Opposite Parties

No one appears
.....For the Petitioners

Mr. Md. Mubarak Hossain with
Mr. Rajib Kanty Aich, Advocate
.....For the Opposite parties

Heard On: 10.05.2016 and 11.05.2016 and
Judgment on: 15.05.2016.

**Present:
Mr. Justice Khizir Ahmed Choudhury**

Evidence Act, 1872, Section 103:

In a civil proceeding both the parties have responsibility to prove their respective cases, although onus rests upon the plaintiff to prove his case but responsibility of the defendant is also there to substantiate his written statement's assertion as per section 103 of the Evidence Act. But the courts below shifted the responsibility to prove the case entirely upon the plaintiffs which cannot be sustained. ... (Para 22)

Judgment

Khizir Ahmed Choudhury, J:

1. This Rule has been issued calling upon the opposite parties to show cause as to why the judgment and decree dated 28.08.1997 passed by Additional District Judge, 3rd Court, Comilla in Title Appeal No.111 of 1996 affirming the Judgment and decree dated 27.05.1996 passed by learned Senior Assistant Judge Judge, Comilla Sadar in Title Suit No.20 of 1995 should not be set aside and or pass such other or further order or orders as this Court may deem fit and proper.

2. That case of the plaintiff in brief is that Moharam Ullah was owner in possession of the suit khatian No.207 measuring an area of 4.39 acres of land; before the C.S. operation started he died leaving behind one son Wazuddin and three daughters namely Joygun Bibi, Sonaban Bibi and Sahar Banu as his heirs and successors and they possessed and enjoyed their respective shares; in such a situation Sharbanu transferred 2nd schedule land to Aftab Ali by a sale deed dated 26.05.1924; In the C.S. record Wajuddin's name was recorded to the extent of 9 anna 12 gondas, Joygun and Sonaban Bibi to the extent of 3 gonda 4 anna each but Sharbanu's name was left out in C.S. Khatian as she transferred her share in the suit Khatian. Subsequently Joygun and Sonaban Bibi being owner in $\frac{1}{5}$ th share each acknowledging Sahar Bani as their sister transferred their respective shares to the added defendant Nos.37-50, but due to omission of the name of the Sahar Banu in C.S. Khatian, the defendant Nos.1-4 are claiming 2nd schedule land in the present survey

operation; In fact the predecessors of the plaintiff Nos.1-3 Azizullah and Md. Karim Baksh became owner in possession by purchasing .39 decimals of land in the 2nd schedule of the plaint by registered sale deed dated 11.04.1956 from Aftab Ali; S.A. record was prepared in the name of the plaintiffs vendors; Plaintiffs by dint of purchase and by inheritance have been possessing and enjoying the suit land growing seasonal crops therein for more than 12 years; mention may be made that Sahar Banu transferred her $\frac{1}{5}$ th share in the suit jote measuring .12 decimals of land to Samiruddin and Wajuddin by registered sale deed dated 26.05.1924 and in turn Samiruddin and Wajuddin sold the same land to Samiruddin, brother Kafiluddin by a registered sale deed dated 26.05.1924 and subsequently defendant no.1-4 purchased the same land from Kafiluddin acknowledging Shahar Banu as Moharam Ullah's Daughter and Wajuddin's sister; that due to omission of recording Shahar Banu's name in C.S. Khatian, the defendant Nos.1-2 are denying the title of the plaintiffs in suit land stating that Shahar Banu was not the daughter of Moharam Ullah, as such cloud has been cast upon the title of the plaintiff in suit land and hence the suit. Co-plaintiffs have also admitted the ownership of the plaintiff and asserted that through amicable partition among the co-sharers, the suit land fell into the exclusive saham and allotment of the plaintiff Nos.1-3 and the co-plaintiffs got saham beyond the schedule of the plaint.

3. Defendant Nos.1-4 contested the suit by filing a written statement denying material allegation made in the plaint and claimed that the suit is not maintainable in its present form and manner and barred by limitation; that the Wajuddin's name was recorded in suit khatian to the extent of 9 anna 12 gonda and his two sisters Joygun and Shaharbanu 3 annas 4 gonda each under superior land lords Aftabuddin and others and Gour Chandra Roy as they took oral settlement; Joygun Bibi and Sonaban Bibi transferred their shares by transferring it to their brother Wajuddin and others; Wajuddin being owner as above transferred some portion of his land to his own sons and some portion to different persons in different dates and while he was in possession of his remaining lands died leaving behind 4 sons in Wasimuddin, Afsaruddin, Noor Mohammad and Moharam Ali; Moharam Ullah was not owner and possessor of the suit Jote and he had no daughter namely Shahar Banu and Shahar Banu had no Saleable right to transfer to Altab Ali and that no deed was registered acknowledging as owner; Altab Ali had also no saleable rights and deed dated 11.04.1966, 26.05.1924 and 11.04.1954 are all false, fabricated and unenforceable and by dint of those deeds the vendees or their successors got no possession; the plaintiff has no locustandi to file the suit; the defendant being the owner in possession of the suit land have recorded their names in R.S. Khatian and paid rent accordingly.

4. Both the parties led oral and documentary evidence. Plaintiff examined 5 witness while the defendant examined 2 witness and one Nepal Chandra was examined as Court witness. The plaintiffs produced documentary evidence which were marked as Exts. 1,1A, 2-2A, 2B-2B1, 2-2C, 3, 4-4A while the defendant side produced documentary evidence which were marked Ext. A, B-B1.

5. After hearing, the trial Court dismissed the suit on the ground that plaintiffs failed to substantiate that Moharam Ullah was the owner of C.S. Khatian No.207 and Shahar Banu was one of the daughter of Moharam Ullah and there is no proof that Moharam Ullah ever paid any rent and the rent receipt submitted by the plaintiff Ext.2. there is no mention of area of the suit land, C.S. record has been prepared in the name of the predecessor of the defendant. Shahar Banu could not substantiate his title over the suit land and plaintiffs also

failed to prove their possession, conversely the defendants have proved their possession and title over the suit land.

6. In the appeal the plaintiffs-appellants by filling an application under order 41 Rule 27 of the Code of Civil Procedure prayed for considering certain documents as additional evidence. The appellate Court concurred with the findings of the trial Court and further held that the application for additional evidence, by which the appellant has submitted certified copies of the registered deeds are not relevant for adjudication of the dispute.

7. No one appears on behalf of the petitioners when the matter is called on for hearing.

8. Mr. Md. Mubarak Hossain and Mr. Rajib Kanty Aich, learned advocates appeared for the opposite parties. Mr. Mobarak Hossain submits that the suit land is not specified in the plaint, only C.S. khatian has been mentioned but the subsequent khatians prepared in various stages have not been mentioned and as such in the absence of specification, the suit is barred under order 7 Rule 3 of the Code of Civil Procedure. He further submits that the plaintiffs could not prove their possession in the suit land and in a suit for declaration of title without proving title and possession of the plaintiff simple suit for declaration is not maintainable without prayer for recovery of khas possession. Mr. Mubarak further contended that the appellate Court disallowed the application filed by the plaintiff under order 41 Rule 27 of the Code of Civil Procedure rightly and reasonably finding no substance therein. He further submits that both the Courts below concurrently found that the plaintiffs could not substantiate their title and possession in the suit land, rather title and possession of the defendants have been found and as such concurrent finding of facts arrived at by the Courts below cannot be disturbed in the revisional application.

9. I have perused the evidence both oral and documentary adduced and produced by the parties and other materials kept in the record. From the rival contention it appears that the plaintiffs claimed that Moharam Ullah was jote tenant under the admitted owner Aftab Uddin and others who died leaving behind one son and 3 daughters namely Wazuddin, Joygun Bibi, Sonaban Bibi and Shahar Banu and on the death of Moharam Ullah said son and daughters inherited their respective shares. Conversely, defendants' case is that Wazuddin and his two sisters namely Joygun Bibi and Sonaban Bibi took settlement of the suit land from original landlord Aftabuddin and others and accordingly in the C.S. khatian No.207 their names have been duly recorded as tenant under the landlord. So it is very pertinent to ascertain who was tenant under the original landlord. In order to substantiate their claims, the plaintiffs submitted deed of sale dated 26.05.1924, exhibit-2 executed by Shaheban Bibi wherein it is stated that Moharam Ullah was tenant in the suit land. In the Certified copy of the sale deed dated 28.01.1924 it is also averred that Moharam Ullah was the owner of the suit land and on his death his daughters inherited and sold portion of the land of C.S. khatian No.207. The contention of the defendants are that Wazuddin and his two sister Joygun Bibi and Sonaban Bibi orally took settlement of the suit land from Aftabuddin and others and consequently their names were recorded in the C.S. khatian namely khatian No.207 and so it is proved that Wazuddin and two sisters actually took jote settlement. On perusal of aforesaid evidence it is apparent that the sale deeds submitted by the plaintiffs are very old and ancient document wherein Moharam Ullah was mentioned as tenant and as such evidentiary value of those documents cannot be denied and those are to be relied upon in comparison

to C.S. khatian which bears only presumptive value and as such it is certain that Moharam Ullah was tenant under the landlord and Shahor Banu was also one of his daughter. In the case of Lutful Karim and others Vs Shahidullah and others reported in 3 MLR AD 215, it is held that ***“Admittedly the documents are old documents of 50 years back and there is no evidence that the defendants willfully suppressed the said documents from production in court. The broad fact remains that the Trial Court also accepted the certified copies of the kabalas.”***

10. It further appears that in the S.A. record suit land has been recorded in the name of Md. Azizullah and others under khatian No.316. Said Azizullah and others are successive transferees from Shahar Banu. On the other hand remaining land of the C.S. khatian No.207 has been recorded under khatian No.313, in the name of the defendants wherefrom it can be inferred that the land claimed by the plaintiffs by successive purchase from Shahar Banu is distinct and clearly identified. Although S.A. records does not provide conclusive evidence regarding title but it is conclusive as regards preparation and revision under Section 144A of the State Acquisition and Tenancy Act. In the case of Samsul Haque and others reported in 4 BLC page 178 it is held that,

“Admittedly, both the SA Khatians as well as RS khatians in respect of the suit land stand in the names of the predecessors-in-interest of the plaintiff-opposite parties and also in some of their names. It is true that the SA records, in view of section 19(3) of the State Acquisition and Tenancy Act, do not provide conclusive evidence as regards title but it provides conclusive evidence as regards their preparation and revision. But entries in the SA records; in my opinion, provide a prima facie evidence as regards title.”

11. Although C.S. record of right carries a presumption regarding ownership but evidentiary value of record of right are always rebuttable presumption and in the event of conflict between the old record of right and recent record of right, recent record of right would prevail in as much as presumption of the record of right loses its weight with the passage of time. In the case of Fatema Khatun vs Fazil Miah reported in 21 BLD 14 it is held that,

“The presumption attached to the State Acquisition Record of Right under section 144A of State Acquisition and Tenancy Act could not be rebutted by plaintiff though rebuttable evidences. In the event of conflict between old Record of Right and recent Record of Right, recent Record of Right would prevail in as much as presumption of Record of Right loses its weight with the passage of time and entry in the subsequent Khatian would be mere acceptable than the entry in the earlier Khatian. Support for this proposition of law is sought to be drawn from Abdul Hamid and others Vs. Abul Hossain Mir being dead his heirs Abdus Sobhan Mir and others, 35 DLR (HCD)295.”

12. Following the above analogy being consistently followed, it is apparent that presumption of C.S record has been merged with S.A record and the instant case S.A record has been prepared in the name of the predecessor of the plaintiffs which carries weight and evidentiary value as record of right has been prepared relying upon the title deed of the plaintiff. Another vital feature of the case is that land under C.S khatian No.207 has been recorded under more then one khatian during S.A record wherein the defendants are claiming land under S.A khatian No.313 and the plaintiffs are claiming 0.39 acres land under S.A khatian No.316 and admittedly defendants asserted that they have no claim in the land under khatian No.316. From the above scenarios it is crystal

clear that the suit land claimed by the plaintiff is distinct and beyond the claim of the defendants. D.W-1 in cross-examination stated that “৪.৩৯ শতক সম্পত্তি নিয়ে আমাদের নামে ৩১৩ নং এস.এ খতিয়ান হয় তাহাতে ২/২^১ একর সম্পত্তি আছে” “৩১৩ এস.এ খতিয়ানের বহির্ভূত সম্পত্তি দখলও করি নাই, খাজনাও দেই নাই”। **D.W-2 Md. Abdul Awal stated that** “নালিশা দাগের ভিন্ন অংশে ভিন্ন খতিয়ানে বাদিরা কিছু দখল করে” “বাদিদের জায়গা নালিশা দাগে ভিন্ন খতিয়ানে আও পাকিস্তানের A ওলে জরিপ হয়েছে তথায় বাদিগনের বাবা/জেঠাদের নাম হয়েছে। বাদির প্রদর্শিত ৩১৬ এস.এ খতিয়ানে বাদির বাবা/জেঠাদের নাম আছে। এছাড়া বাদিদের আর কোনও খতিয়ান নাই।” admittedly the plaintiffs are claiming land under khatian No.316 but both the courts below failed to notice that vital aspect of the case and erroneously held that the plaintiffs failed to prove title in the suit land.

13. Both the plaintiffs and the defendants produced rent receipts in support of their respective claims, rent receipt submitted by the plaintiffs were marked Ext.4A wherein khatian No.316 has been mentioned. On the other hand the defendants submitted rent receipts out of which 3 are payment of rent purportedly to the original landlord Exts. B-B1 and B-2 and some rent receipt evidencing payment of rent to the government which were marked as Exts. B(B)-B(8). So far the rent receipt regarding the payment of rent to the government these are public documents and from those rent receipts both the parties tried to show that they have been paying rent to the government in respect of their respective shares. Regarding Exts. B, B1-B2 are concerned, those are private document and the trial Court without following the procedure admitted those documents as exhibits which cannot be relied upon and those documents have no evidentially value.

14. P.W.1 Md. Hayetullah in his evidence elaborately stated all relevant facts and supported plaintiff case. P.W.2 Abdul Wahab stated that he can recognize the suit land and since his coming of age have found plaintiffs’ possession in the suit land. P.W.3 Abdul Khaleque also stated that he has seen the plaintiffs having possessed the suit land. P.W.4 Haji Abdul Ali Mollah who is the son of Altab Ali, the vendor of the suit land also stated that his father transferred the suit land to Azizullah and Karim Box by Ext.2B. P.W.5 Md. Sirajul Islam stated that Shahar Banu is his grandmother and Shahar Banu has got other sisters namely Sona Banu and Joygun Bibi. He further stated that Mohoram Ullah is the father of his grandmother and his grandmother succeeded property. One Nepal Chandra as deposed C.W.1 by producing volume of registered sale deed dated 22.03.1984.

15. D.W.1 Md. Habibullah stated that Aftabuddin, Gour Chandra and others were the original owners of the suit land which is not disputed by either of the parties. He denied Sahar Banu as the daughter of Mohoram Ullah but he stated to have claimed land under khatian No.313 and beyond that khatian he has no claim. He further stated that apart from khatian No.313 there is another khatian being khatian No.316 regarding which he has no knowledge. He claimed that his grandfather Wazuddin had two sisters and they took oral settlement of the suit land but he was not present at the relevant time. D.W.2 Md. Abdul Awal stated that he can identify the suit land which is in possession of the defendants but he mentioned that plaintiffs are in possession in other part of the suit plot. He denied Shahar Banu as daughter of Mohoram Ullah, but he admitted that plaintiffs land has been recorded in separate khatian being khatian No.316. He stated that Azizullah and others possessed 0.1 acres of land and thereafter the heirs of the recorded owners possessed the suit land. D.W.3 Abdul Kashem stated that suit land is being possessed by Habibullah and others, he disclosed in cross-examination that he does not know the boundary or owner of the nearby plots and he could not also disclose the biggest and smallest plots in the suit land.

16. From examination of the oral evidence of the parties it appears that plaintiff has got a distinct khatian being khatian No. 316 where the defendants have no claim, rather the specific claim of the defendants are that they have possessed land of khatian No.313. Besides, on perusal of the documentary evidence it appears that Shahar Banu transferred 1/5th share of C.S. khatian No.207 on 26.05.1924 to Altab Ali who transferred the same to Azizullah and others, predecessor of the plaintiff vide registered deed of sale dated 11.04.1956 and those documents being old and ancient its authenticity cannot be discarded altogether; rather the averments should be relied upon as the old document has got a sanctity of its own. It further appears that defendants have purchased certain portion of land from C.S. khatian No.207 by which the plaintiff intended to prove that the defendant's predecessors were aware about the title of the plaintiffs' predecessor in the suit land. One important aspect is that Altab Ali is the brother of original land lord Aftab Ali and aforesaid Shahar Banu transferred 1/5 share from khatian No.207 to Altab Ali by sale deed dated 26.05.1924.

17. Learned advocate for the opposite parties submits that suit land is not identified in the plaint. Upon perusal of the schedule of the plaint it appears that plaintiffs mentioned C.S. khatian No.207 along with suit plots. At the time of hearing plaintiff produced S.A. Khatian No.316 Ext.1A wherefrom it is evident that 59 decimals of land has been recorded in the said khatian. P.W.1 also claimed that plaintiffs are the owners of the khatian No.316. Order 7 Rule 3 of the Code of Civil Procedure reads as follows:

"Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers".

18. So from the description of the schedule of the plaint as well as the oral evidence suit land can be sufficiently identified which is under khatian No.316.

19. Regarding submission of the learned advocate for the opposite party that plaintiffs have no possession in the suit land and in the absence of prayer for recovery of khas possession the suit cannot be maintained it is evident that P.Ws. have substantiated their claim of title over the suit land as well as their possession. Further, D.W.2 admitted possession of the plaintiff in the land under Khatian No.316. Since the khatians are distinct and altogether different and since defendants have no claim in khatian No.316, the possession of plaintiff in khatian No.316 cannot be denied, rather plaintiffs possession in the suit land is well established.

20. Regarding further submission of the learned advocate of the appellants that revisional Court cannot reassess the evidence arrived at by the Courts below, it is also fairly settled that if there is misreading, non-reading and non-consideration of evidence, then the Revisional Court can reassess the evidence in its true perspective. In the instant case it is found that both the Courts below found that the trial Court failed to consider and evaluate the evidence of the parties in its true perspective and as such those findings cannot be relied upon.

21. The Appellate Court should have considered the additional evidence as the documents filed with the application has bearing over the matter. In the instant case apart from the contents of the additional evidence the right, title and possession has been established from other evidence. Sale deed exhibit Nos. 2 and 2A executed by Saban Bibi whereby she transferred the suit land to Altab Ali which are very old document whose evidential value and veracity cannot be discarded outright. Further, Altab Ali transferred the suit land to the

predecessor of the plaintiff by sale deed dated 11.04.1966 exhibit 2B which is also an old document whose evidentiary value cannot be discarded altogether. The trial Court ought to have relied upon those documents. The appellate Court also missed the evidentiary value of those documents.

22. In a civil proceeding both the parties have responsibility to prove their respective cases, although onus rests upon the plaintiff to prove his case but responsibility of the defendant is also there to substantiate his written statement's assertion as per section 103 of the Evidence Act. But the courts below shifted the responsibility to prove the case entirely upon the plaintiffs which cannot be sustained.

23. In the facts and circumstances I find merit in the rule. In the result, the rule is made absolute without any order as to costs. The judgment and decree of both the Courts below are set aside. The suit is decreed. Right, title and interest of the plaintiffs in the suit land is hereby declared.

24. No order as to cost.

25. Let a copy of this judgment be sent to the concerned Court.

26. Send down the lower Court's records.