

3 SCOB [2015] HCD 68

High Court Division (Civil Revisional Jurisdiction)

Civil Revision No. 879 of 2006

Zila Mahila Bisayak Karmakorta
Mahila Bisayak Adhidaptar, Pabna, Police
Station and District- Pabna.

.....Petitioner.

Vs.

Principal, Mohila College, Ishuardi,
Police Station-Ishuardi, District- Pabna.

..... Opposite-Party.

Present:

Mr. Justice Md. Rais Uddin

Mr. Swapan Kumar Das, A.A.G.

..... for the petitioner.

Mr. Gazi Siddique Ahmed, Advocate.

..... for the opposite party.

Heard on 11.08.2015, 12.08.2015 and
Judgment on: 16.08.2015.

The appellate court being last and final court of fact will have to discuss and reassess the evidence on record independently while reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence to arrive at his own independent finding. The findings of the trial court should not be easily disturbed as a matter of course and before reversing the findings and decisions of the trial court the appellate court should think twice or more than twice. ... (Para 19)

Judgment

Md. Rais Uddin,J:

1. This Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 16.05.2005 passed by the learned Additional District Judge, 2nd Court, Pabna in Other Class Appeal No. 82 of 2002 allowing the appeal and reversing the judgment and decree dated 19.02.2002 passed by the learned Joint District Judge, 2nd Court, Pabna in Other Class Suit No. 405 of 1994 decreeing the suit, should not be set-aside.

2. The relevant fact giving rise to this Rule, in short, is that the petitioner as plaintiff instituted a suit praying for declaration of title in respect of the suit land contending, inter-alia, that the suit land and along with three storied building belonged to the Government as abandoned property under President order 16 of 1972 vide A/P Case No. 160 of 1973-1974 and it was permanently allotted by the Government to the Mohila Bisayak Adhidapter on 20.10.1979. The Ministry of Works handed over the delivery of possession to them (plaintiff) on 20.12.1979 for welfare of women of the locality. Thereafter, the plaintiff for the handicraft

and other purpose training of poor women constructed finished house in southern part of three storied building of allotted land. On the request of first lady of the then government a temporary office established for women college in the ground floor of western part of said allotted three storied building of the plaintiff and there was a talk that after finishing of college building at Naricha Mouza of an area of 09 bigha the said Mohila College office would transfer to that place from the place of plaintiff and on 28.12.1992 the defendant refused to transfer his temporary office from the suit land. Hence, the suit.

3. The defendant contested the suit by filing written statement denying the material allegations made in the plaint contending, inter-alia, that an application was filed on 15.11.1988 for establishment women college and upon which the Government formed an investigation committee and the said committee reported that no allotment was made in favour of plaintiff. The then president made commitment to establish Rawshan Ershad Mohila College on 28.08.1989 to the defendant in the suit land and upon which the Deputy Commissioner, Pabna issued a letter dated 28.10.1989 to the plaintiff and proposed for transferring their office from the suit land. Thereafter, Assistant Secretary, Ministry of Women Affairs issued a letter dated 13.10.1990 and directed the plaintiff to transfer their office from the suit land to Upazilla complex and also ordered to handover the possession of the same in favour of defendant. Thana Nirbahi Officer on 02.09.1992 directed the plaintiff to transfer his office in two rooms of Thana Parishad and the plaintiff did not comply the said order and filed this suit. The defendant college has been running since its establishment and the suit land owned by Muhammad Hossain and Nesab Ahmed and they constructed the three storied building. Md. Hossain died leaving one son Estiyak Hossain and the college established before construction of building and Nesab Ahmed gifted suit land to the college and Estiyak Ahmed also gifted his share to the college and suit land was not enlisted as abandoned property and plaintiff never got allotment of the suit land and in the circumstances prayed for dismissal of the suit.

4. At the trial, the plaintiff examined 1(one) witness and the defendant examined 3(three) witnesses in support of their respective cases.

5. The learned judge of the trial court after hearing the parties, considering the evidence and other materials on record decreed the suit by his judgment and decree dated 19.02.2002. Against the said judgment and decree the defendant preferred appeal before the learned District Judge, Pabna. On transfer it was heard and disposed of by the learned Additional District Judge, 2nd Court, Pabna who after hearing the parties and considering the materials on record allowed the appeal and set aside the judgment and decree of the trial court by his judgment and decree dated 16.05.2005.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and decree the plaintiff as petitioner moved this court and obtained the instant Rule.

7. Mr. Swapan Kumar Das, the learned Assistant Attorney General appearing for the petitioner has placed the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below and submits that the appellate court below erred in law in misreading the documents of the abandoned property filed by the plaintiff wherein clearly disclosed that suit land was enlisted as abandoned property and taken over possession by the government. He submits that the appellate court on misreading the cross-examination of D.W.1 and D.W.2 who admitted that suit land was allotted in favour of plaintiff by the government as abandoned property as such judgment of the appellate court is not sustainable

in law. He submits that the appellate court below misread and misconstrued the document filed by the plaintiff in respect of college building in Naricha Mouja and also misreading the evidence of D.W.1 and D.W.2 who admitted that original owners were Non-Bangolee. He further submits that the appellate court below has committed an error of law in disallowing the appeal relying the defendant case who are permissive temporary possession in respect of one room of the suit land with condition the defendant will vacate as soon as their building is ready in their permanent campus at Naricha Mouja. He lastly submits that the defendant earlier filed an application on 15.11.1988 to the plaintiff for one room for college office on temporary basis in the abandoned property and subsequently claimed the ownership by way of deed in the year 1998 during pendency of the suit which is not sustainable in law. In support of his contention he has referred the decision reported in: (1) 35 DLR(AD)182, (2) 11 DLR 316 and (3) 8 BLC(AD) 77.

8. Mr. Gazi Siddique Ahmed, the learned advocate appearing for the opposite party opposed the rule and submits that the appellate court being last and final court of facts on elaborate discussion of evidence and materials on record allowed the appeal and set aside the judgment and decree of the trial court and there is no misreading and non-consideration of the materials on record and as such there is no reason to interfere by this court in revision. He submits that the defendant college has been running in the suit land with name and fame in their own land obtained by two deeds of gift dated 09.12.1997 and 06.09.1998 and as such he prayed for discharged the rule. In support of his contention he has referred the decision reported in 55 DLR(AD)39.

9. In order to appreciate the submissions made by the learned advocates for the parties, I have gone through the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below very carefully.

10. Now the question calls for consideration whether the learned Judge of the court of appeal below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

11. On perusal of the record it appears that the plaintiff brought a suit for declaration of title claiming that the suit land on the basis of permanently allotted by government in favour of Mahila Bisayak Adhidaptar on 20.10.1979 as of abandoned property of the government and the Ministry of Works handed over the delivery of possession to the plaintiff on 20.12.1979 for the welfare of women of the locality and the plaintiff has been running their office in the suit land. The plaintiff has been enjoying and possessing the suit land for handicraft and training of poor women in the locality. The defendant claimed the suit land that they filed an application on 15.11.1988 for establishing the Women College upon which an investigating committee was formed. Thereafter, to establish Rawshan Ershad Mohila College the Deputy Commissioner, Pabna issued a letter on 28.10.1989 to the plaintiff for transferring their possession from the suit land. Thereafter, Assistant Secretary, Ministry of Women Affairs issued a letter on 13.10.1990 and also directed the plaintiff to transfer their office from the suit land to Upazilla Complex and directed to handover the possession in favour of the defendant.

12. It appears that the learned Judge of the trial court on elaborate discussions of the evidence, both, oral and documentary decreed the suit holding that the plaintiff has been proved his case by evidence and decreed the suit with the findings:

“ইহা প্রমানের জন্য বাদীপক্ষ নাঃ ভূমির সম্পর্কিত এ, পি, ১৬০/৭৩-৭৪ নং মোকদ্দমার নথি তলব করায় উক্ত নথি তলব করা হয়। তলবান্তে সংশ্লিষ্ট কার্যালয় হইতে নথিটি আদালতে উপস্থাপন করিয়াছে। তাহা পর্যালোচনা করিয়া দেখা যায় নাঃ সম্পত্তি ও তদুপরিস্থিত বিল্ডিং ২৩/১০/৭৯ ইং তাং ততকালীন রাষ্ট্রপতি মরহুম জিয়াউর রহমানের প্রতিশ্রুতি অনুযায়ী বাদী অফিস বরাবর স্বামী বন্দোবস্ত দেন এবং সে অনুযায়ী ১২/১২/৭৯ ইং তাং যুগ্ম সচিব, রাষ্ট্রপতি বিভাগ জেলা প্রশাসক, পাবনা বরাবর বরাদ্দ পত্র ইস্যুর নির্দেশ দেন। ২০/১২/৭৯ ইং তাং নাঃ ভূমি ও তদুপরিস্থিত বিল্ডিং বরাদ্দপূর্বক বাদী অফিস বরাবর দখল হস্তান্তর করে এবং ২৩/৭/৮০ ইং তাং ও ৮/১০/৮০ ইং তারিখে দখল হস্তান্তরিত হয়। উক্ত নাঃ ভূমির উপরিস্থিত বিল্ডিং-এ বাদী অফিস এখনও বিদ্যমান ডি, ডব্লিউ-১ আফরোজা বেগম জেরায় স্বীকার করিয়াছে। সুতরাং নাঃ ভূমি ও তদস্থিত বিল্ডিং পরিত্যক্ত সম্পত্তি হিসাবে শহীদ রাষ্ট্রপতি জিয়াউর রহমানের প্রতিশ্রুতি অনুযায়ী ততকালীন সরকার বাদী অফিস বরাবর স্বামী বন্দোবস্ত দিয়া দখল হস্তান্তর করে তাহা প্রমানিত। বাদী উক্ত ভূমির উপরিস্থিত দালালে দখলকার আছে তাহাও প্রমানিত।”

13. It appears that the learned Judge of the trial court decreed the suit with the specific findings that the suit land declared as abandoned property and allotted on 20.12.1979 and possession was delivered on 27.07.1980 and 08.10.1980 in favour of the plaintiff on the basis of record of A.P. Case No. 160 of 1973-1974 also on the basis of exhibits-1, 1(ka), 1(kha), 1(ga), exhibit-2, 2(ka) which admitted by D.W.1. It appears that D.W.1 in cross-examination stated that-

“এই বিল্ডিং-এ মোট ২৪/২৫ টি রুম আছে। বাকী রুমগুলির মধ্যে দোতলা ও তিন তলা বন্ধ ছিল কিন্তু ১ম তলার পশ্চিম দিকে ৬টি রুমে মহিলা অধিদপ্তরের অফিস ছিল। এই বিল্ডিং ১০ শতক জমির উপর। মহিলা অধিদপ্তরের অফিস কলেজ প্রতিষ্ঠার আগে হইতে এই অফিসটি কবে হইতে আছে বলতে পারব না। এখনও ৩ রুম গুলিতে ৩ অফিস আছে।” She further stated that-“৯/১২/৯৭ ও ৬/৯/৯৮ ইং তারিখের দলিল সম্পর্কে আমার ব্যক্তিগত জ্ঞান আছে। ২টি দলিলই দানপত্র। নেছার আহম্মেদ ও ইশতিয়াক আহম্মেদের নামীয় কোন কাগজ দাখিল করি নাই। এই মামলা চলাকালে দলিল ২টি করা হয়।”

14. On close scrutiny it appears that the learned Judge of the trial Court had considered the evidence and materials on record in details in coming to its findings. The appellate court without discussing the evidence had abruptly reversed the findings of facts arrived at by the trial court without controverting the findings and assessing the evidence independently which is not a proper judgment of reversal. It further appears that the learned Judge of the appellate court allowed the appeal on the basis of evidence and documents filed by the defendant, namely, exhibits-ka deed No. 4915 dated 19.12.1997, exhibits-kha-deed No. 4313 dated 06.09.1998, deed of gift by Estiyak Ahmed and Nesar Ahmed during pendency of the suit. The learned Judge of the appellate court without reversing the specific findings of the trial court allowed the appeal on the basis of defence version is not proper judgment of reversal.

15. Now certain provisions of law are required to be referred to for having a better understanding of Section 6 of P.O. 16 of 1972.

6: No person shall, except in accordance with the provisions of this Order or any rules made thereunder, transfer any abandoned property in any manner or create any charge or encumbrance on such property, and any transfer made or charge or encumbrance created in contravention of this Order shall be null and void.

16. From a reading of the above provisions of law I find a clear proposition of law that transfer by private individual any abandoned property in any manner in contravention of this order shall be null and void.

17. In the instant case, the suit property was declared as abandoned property enlisted in A.P. Case No. 160 of 1973-1974 and settled in favour of the plaintiff and delivered possession to them. During pendency of the suit it was transferred by two deeds and as such deed of transfer being deed No. 4915 dated 12.12.1997, deed No. 4313 dated 06.09.1998 in favour of defendant null and void under section 6 of P.O. 16 of 1972.

18. It further appears that defendant for taking the office room applied on 15.11.1988 as abandoned property and subsequently created 02 deeds during pendency of the suit is barred by principle of estoppel, as enunciated in section 115 of the Evidence Act stand in the way of defendant to show and claim by purchase or gift wherein earlier claimed by allotment of abandoned property.

19. By now it is settled that the appellate court being last and final court of fact will have to discuss and reassess the evidence on record independently while reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence to arrive at his own independent finding. The findings of the trial court should not be easily disturbed as a matter of course and before reversing the findings and decisions of the trial court the appellate court should think twice or more than twice. In the instant case, I am of the view that specific findings of the trial court have not been reversed by the appellate court exercising its power which is mandatory provisions of law under Order XLI rule 31 of the Code of Civil Procedure. It further appears that the foundation of the defendant claim by filing an application on 15.11.1988 and subsequently Deputy Commissioner, Pabna issued a letter on 28.10.1989 to evict the plaintiff from the abandoned property and establish Mahila College to fulfill the assurance of the then President Ershad. During pendency of the suit the defendant has changed the basis of ownership by deeds of gift. Furthermore, D.W.1 admitted that plaintiff has been possessing the suit property from earlier to defendant and the defendant has changed basis of claim by 2 deeds of gift dated 19.12.1997 and 06.09.1998 which is departed to their earlier stand cannot go together. This view find support in the decision reported in 35 DLR(AD)182 and 8BLC(AD)77, referred by the learned Assistant Attorney General, wherein their lordship held:

“Expediency is not an unknown phenomenon in the legal arena, but the principles of approbation and reapprobation are also equally well known. A party to a suit after taking an exact stand in his plaint or written statement cannot so readily be allowed to depart from it on the ground that his opponent admitted the position which was opposite to his stand, justice and expediency cannot go together.”

2) Hajarilal Mondal and others Vs. Md. Mozaffor Bepari and others, reported in 8BLC(AD)77, wherein their lordship held:

“In is a settled principle of law that the lower appellate court being final court of fact will have to discuss and reassess the evidence on record independently while either reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence on record and to arrive at his own independent finding. In the instant case we find that the specific findings of the trial court have not been reversed by the lower appellate court exercising its power under Order XLI rule 31 of the Code of Civil Procedure.”

20. I have gone through the decision cited by the learned advocate for the opposite party reported in 55 DLR(AD)39. I am respectful agreement with the principles enunciated therein. But the facts leading to that case is quite distinguishable to that of the instant case and therefore, to that effect I am also unable to accept his submissions.

21. In view of the discussions, decisions and reasons stated above, I am of the view that the judgment and decree passed by the lower appellate court cannot be sustained in law and are liable to be set aside. Thus, I find merit in the rule.

22. In the result, the Rule is made absolute. The judgment and decree dated 16.05.2005 passed by the learned Additional District Judge, in charge, 2nd Court, Pabna in Other Class Appeal No. 82 of 2002 are set aside and those of the trial court are restored and affirmed and the suit is thereby decreed. However, there will be no order as to costs.

23. The order of stay granted earlier by this Court stands vacated.

24. Let the Lower Court Records along with a copy of the judgment be sent to the court concerned at once.